

GWEN IFILL: Justices Breyer and O'Connor, thank you so much for joining us.

Justice O'Connor, you've written a great deal about the independence of the federal judiciary and your concerns it is not as independent as it could be. It seems that the courts have become targets from the left and the right. Why do you think that is?

SANDRA DAY O'CONNOR, Former Supreme Court Justice: In my lifetime, I have not seen so much criticism of judges, and it comes about both at the federal level and at the state level. It's all over the United States. I'm not sure why it's so intense right now.

It's focused on a number of decisions that some find troubling, and it has gelled into a kind of general accusation about "activist judges" who legislate from the bench, and there are many efforts being made at the state and federal levels to try to control that.

Protections for the minority

GWEN IFILL: I want to talk to you some more about activist judges, but I also want to ask Justice Breyer this question about this notion of having an independent judiciary. Why is that important?

STEPHEN BREYER, Supreme Court Justice: That's a good question. An independent judiciary, why did Hamilton and the other founders want it? The reason that they wanted it was because they'd written a special kind of Constitution. The main thought -- the main thought behind the document -- is that people will themselves democratically decide what kind of rules they want to govern themselves. That's...

GWEN IFILL: You're holding a copy of the Constitution right there.

STEPHEN BREYER: ... a working document. We have a working document here. And the idea of it is democracy; that's the basic idea.

But it's a certain kind of democracy. It's a democracy that protects basic human rights. It protects equality. It protects a rule of law, tries to see no one gets too much power. In other words, it also protects minorities from being oppressed by majorities, all kinds of minorities.

So Hamilton thinks that the basic protection for you, for me, for anyone who is a citizen of the United States, when they find themselves in the minority, the best protection against oppression, action taken outside the Constitution, is to have the judges decide whether that's so or not so, not because judges are any brighter -- they're not; we have no secret source of wisdom -- but because judges are appointed to be neutral politically. They are appointed to be unbiased. They are given, in other words, a degree of independence.

GWEN IFILL: Picking up on that point, I want to ask Justice O'Connor about something you once said in a talk. You said that part of the reason for judges to exist, the judicial branch, is to make the other two branches really angry.

SANDRA DAY O'CONNOR: Well, no. I think I said, if judges are doing their job...

GWEN IFILL: Right.

SANDRA DAY O'CONNOR: ... in playing out the role that the framers of the Constitution envisioned, that occasionally they'll make the other branches really, really angry. And I suppose that's true.

GWEN IFILL: Is it true?

SANDRA DAY O'CONNOR: Well, I think we've seen some examples of that. And the father of our Constitution was James Madison. He basically developed the scheme. And he thought that an independent judiciary was an impenetrable bulwark against wrongful assumptions of power by the other two branches.

Now, that may be putting it a little strongly, but certainly Madison and the other framers believed very strongly in the need for an independent judiciary when they created a system of government with three branches and with a written Constitution guaranteeing certain rights for the citizens.

Now, how else can they be enforced? Because the majoritarian branches of government, the Congress, can easily pass laws if the support is there that might withdraw certain constitutional rights. Now, how else can that be protected?

A system to right wrongs

GWEN IFILL: You know, Justice Breyer, you are obviously still a sitting justice, so you're constrained in some of your answers, but this whole issue of judicial activism that Justice O'Connor just referred to, some people say it's judicial restraint, some people say it's ignoring congressional intent. Is it in the eye of the beholder judicial activism?

STEPHEN BREYER: Well, on the particular criticism, I'll leave it to other people to say. I can say, from my point of view, we're always subject to criticism. Judges are always subject to criticism, and we should be. Why not?

The very reason we have written opinions is to say in those opinions what our real reason for the decision is. Why? In large part so that people can read it, understand it, and criticize it. It's also, I think, healthy for us to listen to the criticisms, for them to be evaluated, for people to try to understand, work out what's right, what's wrong, and good can come of that.

SANDRA DAY O'CONNOR: And are judges always right? Certainly not. Judges can be wrong, make erroneous decisions.

STEPHEN BREYER: And they do.

SANDRA DAY O'CONNOR: They do. And that's why we have...

STEPHEN BREYER: I mean, we're not always on the same side.

SANDRA DAY O'CONNOR: And that's why we have a system of appeals from lower court decisions at both the state and federal level. Now, it's a little harder to appeal when it's a Supreme Court decision, and that's when vocal critics come out. And that's all right. We have a First Amendment guaranteeing free speech. And people have that right.

GWEN IFILL: Does the constitution afford you a pretty thick skin on this?

SANDRA DAY O'CONNOR: Indeed. It needs to. And we understand that. You know, on issues that come before the courts, there are two sides, and one side is going to lose. And they're not happy about losing.

GWEN IFILL: But what happens when people say, "We're going to strip you of the power"? "We're going to impeach" -- mass impeachments I think was one term that some people were using for a while. Do you just ignore that? Do you just soldier on?

SANDRA DAY O'CONNOR: The concern that I have had recently is proposals to retaliate against judges for certain decisions. Now, that is not protection of the role of an independent judiciary.

It's fine to criticize, but if there's going to be some kind of retaliation against judges for carrying out their duties, that's something else. And that does worry me. There have been proposals to cut budgets in retaliation, to strip federal courts of jurisdiction entirely over certain classes or categories of cases. Congress has that power, but that doesn't seem to me to be in keeping with our notions of judicial independence.

History of disagreements

GWEN IFILL: Is there enough accountability to act as a counterweight for that independence which you assert?

STEPHEN BREYER: That's an awfully good question. If people think that judges are deciding things politically and not according to law, there's no reason that they should be independent. If people see that the court -- in fact, my court, this court, which has the most open, the most contentious cases, probably the 80 most open cases every year out of 8 million in the entire country -- of course we disagree sometimes.

The nature of the issue is that. Of course people feel strongly. My goodness, they feel strongly. But why wouldn't they? And people on one side, outside that room, are going to think the other side is wrong. That's the nature of the issue; that's the nature of the country.

You say, "Well, under those circumstances, do you want an independent judiciary?" I say, "I'll tell you." There are times when people didn't follow the court.

I like to go back to the 1830s when Andrew Jackson was told by this court, "The Cherokee Indians own land in northern Georgia." You see, they'd found gold there, and the Georgians grabbed it all. Andrew Jackson said, according to rumor, "John Marshall made his decision; now, let him enforce it." And Jackson sent the troops to throw the Indians out, not to enforce the law.

Now, I can remember -- I think you're too young -- but I can remember in my childhood Governor Orval Faubus being told by nine judges in this court, all signed the opinion, "You will integrate the schools in the South because this document, the Constitution, says equal protection of the law, and segregation is not."

And Orval Faubus said, "No." He said, "I have the state militia. You can have 900 judges. I have the militia." Now, President Eisenhower sent troops, the airborne divisions, and they went there, and they took those black children by the hand, and they walked into the school.

Now, that, to me, is a great victory for the rule of law and a necessary one, because if you think of Bush v. Gore, and you think of abortion decisions, and you think of school prayer, take your choice. They are enormously contentious, enormously.

And half the country thinks we're wrong on this, and the other one thinks we're right, and we're not in agreement. And they're very hard issues, very hard, but I haven't seen any paratroopers. I didn't see in any of those cases a need for the state militia, the federal militia. There were not bullets; there were not guns in the streets.

People in the United States of America have learned over 200 years that it's in their interest to follow the legal decisions even when they disagree.

Rebuffing threats to the judiciary

GWEN IFILL: If that's the best definition I've ever heard about the independence and the value of an independent judiciary, then what are your concerns, Justice O'Connor, about the threats to that and what can be done?

SANDRA DAY O'CONNOR: Well, we need to preserve it, for the reasons explained. And it isn't just the integration decision, which was so crucial, and which many people in the country disagreed with at the time.

Look at the situation with President Nixon, when some of his aides were accused of criminal offenses. And the court ordered President Nixon to give the audiotapes of his conversations in his office with these aides, and the president said, "No. I have executive privilege. You can't have them."

That went to court. And the U.S. Supreme Court, including at least three members appointed by President Nixon, unanimously ruled they had to be turned over. Now, that's another example of inter-branch conflict that was resolved in the courts, and not with unanimity around the country about what should be done, but look again how important it was. Four days later, President Nixon resigned.

GWEN IFILL: I think about the Terri Schiavo case, as well.

SANDRA DAY O'CONNOR: More recently. And there, Congress enacted a special law for one case requiring federal review in the federal courts of that state court decision in one case. Now, that's very unusual to have legislation requiring federal review in one particular case.

And the federal courts did their job and said there was no basis to overturn the state court decision. And that, in turn, was greatly criticized by some in Congress as being outrageous and calling for mass impeachments of the judges. I mean, this is disturbing, when there is retaliation proposed against judges for doing their job.

GWEN IFILL: Justice O'Connor and Justice Breyer, it's been a pleasure. Thank you.

SANDRA DAY O'CONNOR: Thank you, Gwen.

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HEADLINE: A Look Inside the U.S. Supreme Court

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HIGHLIGHT:

A look inside the United States Supreme Court and the minds of those who serve on the bench through conversations with Justice Stephen Breyer and retired Justice Sandra Day O'Connor.

BODY:

CHARLIE ROSE: Welcome to the broadcast. Tonight, a look inside the United States Supreme Court and the minds of those who serve on the bench. We'll talk to Justice Stephen Breyer and retired Justice Sandra Day O'Connor.

(BEGIN VIDEO CLIP)

SANDRA DAY O'CONNOR, FORMER JUSTICE, SUPREME COURT: We need fair and impartial courts, in which people can litigate even difficult issues, where passions run deep. If they have to be settled, you want them settled by judges who are fair and impartial.

CHARLIE ROSE: And the former associate justice of the Supreme Court feels like we are drifting towards circumstance where's that's not the reality.

SANDRA DAY O'CONNOR: Yes, I'm concerned that there is too much discussion out there about so-called activist judges, and proposals in Congress and in state legislatures to somehow punish a judge that the majority decides is activist.

STEPHEN BREYER, JUSTICE, SUPREME COURT: You see why we feel strongly about the question of judicial independence. We feel strongly because it took America 200 years and a civil war and 80 years of racial segregation and all kinds of ups and downs eventually to reach the kind of country where people will accept decisions, even if those decisions they believe are wrong -- and maybe they are wrong, because judges are human beings. They don't always right -- they're not always right. And, yet, they realize that a rule of law is superior to a rule of force.

(END VIDEO CLIP)

CHARLIE ROSE: Sandra Day O'Connor and Stephen Breyer for the hour, next.

CHARLIE ROSE: Tonight, two justices of the United States Supreme Court talk candidly about the state of the judiciary. Last week, I went to the Supreme Court to talk to Justice Stephen Breyer and retired Justice Sandra Day O'Connor.

Justice O'Connor was appointed by President Reagan in 1981, becoming the first woman ever to serve on the Supreme Court. She retired earlier this year. The daughter of an Arizona cattle rancher, she brought a pragmatic Western temperament to the bench. Many times in her career, she cast a critical fifth vote. She was so often the decisive swing vote that some have called her a majority of one.

In 1994, Justice O'Connor was joined on the bench by Justice Stephen Breyer, who was appointed by President Clinton. Justice Breyer has emerged as an ideological counterweight to Justice Antonin Scalia. Prior to his appointment, he sat on the 1st Circuit Court of Appeals and taught at Harvard Law School.

The occasion for our conversation is a conference on the independence of the judiciary taking place this week at the Georgetown University Law Center. The justices spoke of their shared concerns about the independence of the judiciary at both the federal and state levels. And here is that conversation.

(BEGIN VIDEOTAPE)

CHARLIE ROSE: I'm pleased to have the two of them here, because they were friends on the court. Maybe all the justices are friend with each other, but somehow, as I read, there was something about the relationship between the two of you.

SANDRA DAY O'CONNOR: We had a number of mutual interests that made it fun to...

CHARLIE ROSE: But beyond the idea of just philosophy...

SANDRA DAY O'CONNOR: Right, exactly.

CHARLIE ROSE: When you were counting to five...

SANDRA DAY O'CONNOR: He'd be counting to 10.

(CROSSTALK)

SANDRA DAY O'CONNOR: And Justice Breyer and I are actually co-chairing a conference that is co-sponsored by Georgetown University and the American Law Institute on the subject of judicial -- the state of the judiciary. Where are we today? And what are our concerns?

CHARLIE ROSE: Why should we be interested in that?

SANDRA DAY O'CONNOR: I think every American should be pretty interested in that. One of the things that I always felt strongly about as I visited other countries was the sense of basic ultimate security I felt as a citizen of the United States, security that I finally realized came from the system of government we have, which provides at the end of the day -- if there's any question -- an independent judiciary that can resolve issues. And that is an amazing source of comfort. And not every country in the world is blessed with that great benefit.

CHARLIE ROSE: How independent is our judiciary?

SANDRA DAY O'CONNOR: I think they're pretty independent. But judges these days are under attack both at the national and the state level -- in legislative halls, in the press, and I think even the public today.

CHARLIE ROSE: The public has, you think, is critical of the judicial system in a sort of growing way?

STEPHEN BREYER: There's no problem insofar as people criticize decisions and criticize judges. They should. The problem is this: That, as I put it -- I think a good illustration -- what do people think of the judiciary as an institution has nothing to do with individuals. It has nothing to do with particular judges. It does have to do with what they see the role of judges as in America.

About five years ago, a lot of complex polling was done, and -- asking people questions designed to get at their attitude, is a judge a person, a man or a woman, who basically is fair, who basically tries to apply the law and the facts, however the case comes out, or is a judge really a politician in a robe? And about two-thirds said the first, and about one-third said the second.

CHARLIE ROSE: Politician in a robe.

STEPHEN BREYER: Yes. Now, if you look at the numbers today, the same kind of things, that's my characterization of very complicated questions, but if I look at the same kind of survey that was done about a year ago, the number that says the second has grown up towards the -- more towards the half mark.

Now, I think that's a problem for two reasons. The first is it isn't true, in my experience. Of course, there are disagreements among judges, and of course I wouldn't say that I or any other judge always is perfect, and I wouldn't say that all judges are perfect, by any means. But the basic job is the job on which 99 percent of judges agree -- it is applying the law, it is applying the law and finding the facts and being fair. That's my experience.

That's true on the Supreme Court, where we have the most difficult cases, very difficult. And it's true, by and large, throughout the system, which is not perfect. But that's the direction.

And the second reason it's a bad thing, I think, that these results are that ultimately, John Marshall explained something very well. He says the people made the Constitution and they can unmake it. And if judges are politicians in robes, and that's what they think, there's no reason for them to be independent.

And if the public thinks that judges shouldn't be independent, ultimately, in the long run, they won't be. And if they're not, what happens to fairness in America? What happens to the protection of basic liberties? What happens to the minority that's unpopular? How do we enforce a Constitution that's a Constitution of limited power and maximum freedom? What would you...

SANDRA DAY O'CONNOR: That gets to the heart of the matter. Why do we care about having fair and impartial judges to begin with it? We care because the Constitution, through its Bill of Rights and other provisions, gives certain fundamental rights to our citizens, and sometimes those rights are infringed by the other branches of government, knowingly or unknowingly. It can happen. And judicial review under the standards imposed by the Constitution is just critical to the preservation of those fundamental rights. Sometimes a majority, through enactments in a legislative body, can infringe on that right, some of those rights.

CHARLIE ROSE: Here is one thing that both of you know has happened a lot, and certainly recently -- and you have spoken about this -- it is that presidents, and especially in a party in power, who select judicial -- members of the federal judiciary, view that as their legacy, and they're subject to all kinds of new, perhaps, involvement in the selection process. Does that worry you?

SANDRA DAY O'CONNOR: Well, that gets to the whole question of how do we select our judges, and is that a concern under the constitutional scheme we have? The provisions are very simple: Federal judges, including members of the Supreme Court, are nominated by the president and require confirmation with the advice and consent of the

Senate. And there are no limits based - - set on what the Senate wants to require in deciding whether to confirm a nomination, and there are no limits in the Constitution about what a president wants to consider in selecting someone for a nomination. So that's where the political branches have an important role in the selection process of federal judges.

You know, state judges are selected according to provisions of law in each state.

CHARLIE ROSE: And frequently elected.

SANDRA DAY O'CONNOR: A majority are elected in popular elections for limited terms.

CHARLIE ROSE: But let me go back -- is it the Supreme Court that we worry about, or is it the entire federal judiciary -- court of appeals, district courts?

SANDRA DAY O'CONNOR: I worry about them all. But at the national level, there's more focus on Supreme Court appointments than there is to appointments to the district courts or the courts of appeals.

CHARLIE ROSE: And it's become much more controversial, much more bitter since -- since...

SANDRA DAY O'CONNOR: Since television.

CHARLIE ROSE: ... Judge Bork...

SANDRA DAY O'CONNOR: Since television coverage. That's what did it.

STEPHEN BREYER: We don't always agree, necessarily, exactly, on everything, and so I want to give the short answer to your question. Does it bother me that the president and the -- with the advice and consent of the Senate -- may reach out and try to have a legacy and appoint a judge who shares their basic philosophy. Does that bother me? No, that does not bother me.

CHARLIE ROSE: Because that's the way it has always been.

STEPHEN BREYER: That's the way not only it's always been, it's the way it has been foreseen. And the reason is not how you select a person. So far, public opinion in the United States, to which presidents are sensitive, to which members of Congress are sensitive, beneath all else is a view of most Americans that whoever that president appoints, he should be a good judge. And being a good judge means he tries to follow the law.

CHARLIE ROSE: So you're saying rather than looking at competency, they're looking at ideology.

STEPHEN BREYER: Well, presidents have often tried to appoint judges to the Supreme Court who they thought would decide every case in their favor.

CHARLIE ROSE: Much to their surprise, it didn't work what they.

STEPHEN BREYER: Correct. It sure didn't. And Theodore Roosevelt appointed Oliver Wendell Holmes, two months later or two -- shortly thereafter he went the wrong way from Roosevelt's point of view, in a famous anti-trust case, and Roosevelt said, "I could find a judge with more backbone carved out of a banana." He was annoyed. Well, that's what presidents find.

Now, if they want a person who in the very most general terms shares their view of the nature of democracy in America and what the country is like, they may be more successful. But they'll be surprised there, too, sometimes. So that's not what I think we're talking about.

CHARLIE ROSE: And you can't stop that.

STEPHEN BREYER: No, no, and nor do I think you should. The reason I think you shouldn't is we have life tenure in part because time goes on. You have different presidents of different views. You may have Supreme Court justices of different philosophical cast. That's good in a country of 300 million people, where people disagree every day. It's good that there should be a general divergence of general philosophy. Not about applying law to facts, and you might come out differently in very open issues.

But this isn't really where the problem of independence shows up. If I had to pick one example, I would say it's in state courts at the moment, where judges who are running for office are having to raise campaign funds of sometimes several million dollars. Now, that I think is a problem.

CHARLIE ROSE: Because the person who can raise the most money might win? Is that the idea?

STEPHEN BREYER: It's not just that.

SANDRA DAY O'CONNOR: Well, who gives the money?

CHARLIE ROSE: What influence do they have.

SANDRA DAY O'CONNOR: The money is typically given in these state judicial races, political races, by the very lawyers who appear before the judges.

CHARLIE ROSE: Conflict of interest.

SANDRA DAY O'CONNOR: That can't be a good system. It cannot be a good system.

CHARLIE ROSE: What would you do about it?

SANDRA DAY O'CONNOR: Well, I would go to a Missouri-type plan for selecting judges -- initial appointments from a list made up by a bipartisan commission, given to a governor to select from people recommended from the list. Give them a limited term.

Now, many Missouri-type plans provide for periodic retention elections, so that the public, the voters, if someone is appointed the voters don't like, they can vote them out later on. But the idea of fundamentally electing in partisan elections the judges for a state court I find troubling.

CHARLIE ROSE: Do you find troubling that certain interest groups have a veto over the selection of judges?

SANDRA DAY O'CONNOR: No, any group's entitled to express their opinions, but I think it's the whole process of political campaigns, campaign contributions, for judge, for heaven's sake, somebody who's supposed to be fair and impartial.

CHARLIE ROSE: OK, but that's only at the state courts. So the big problem is at the state level, not at the federal level.

SANDRA DAY O'CONNOR: Well, I think there's a problem at the federal level, with attacks on judges. We're not immune. In fact, I've become very concerned at the federal level. Probably you also have heard claims that judges are acting as legislators, that they're activists.

CHARLIE ROSE: Right.

SANDRA DAY O'CONNOR: Not acting judiciously, they're activists.

CHARLIE ROSE: They're expanding the nature of the Constitution...

SANDRA DAY O'CONNOR: Exactly.

CHARLIE ROSE: ... rather than a literal reading of the Constitution.

SANDRA DAY O'CONNOR: They're legislating from the bench and that sort of thing, and there's a lot of that rhetoric at the federal level today, a great deal of it.

CHARLIE ROSE: But that comes from members of the court who speak out on those things, do they not? I mean, that's the source of a lot of the debate.

SANDRA DAY O'CONNOR: No, it's coming from members of Congress, and others who agree with them, that judges have become more activist in the sense of not following the law and Constitution in deciding cases. That's the accusation.

CHARLIE ROSE: And you're here to say...

SANDRA DAY O'CONNOR: And it troubles me.

CHARLIE ROSE: ... that it troubles you because it weakens the credibility with this kind of discussion.

SANDRA DAY O'CONNOR: No, it troubles me when it is followed by threats to carry out actions by way of retribution against judges who may reach decisions that the speakers don't like.

CHARLIE ROSE: What retribution do you have against a federal judge?

SANDRA DAY O'CONNOR: Well, let me give you examples of some of the resolutions pending in Congress.

CHARLIE ROSE: All right.

SANDRA DAY O'CONNOR: There are resolutions pending to establish an inspector general for federal judges, to have them inspect all the judges' activities and report to Congress, so that they can see what action needs to be taken.

CHARLIE ROSE: Does that in any way violate the separation of powers?

SANDRA DAY O'CONNOR: Well, it's a concern, I think. This is a -- something that has never happened before and one wonders whether it's warranted.

There is legislation pending to impeach any federal judge who would cite a foreign judgment in an opinion of the judge. That seems to me very much trying to tell the judge what to do, how to think.

CHARLIE ROSE: That's become a big issue recently in the public discourse...

SANDRA DAY O'CONNOR: In public discourse.

CHARLIE ROSE: Right.

SANDRA DAY O'CONNOR: There are resolutions to strip the federal courts of jurisdiction over whole classes of cases. Nothing to do with the Pledge of Allegiance, nothing to do with abortion, nothing to do with marriage. And apparently out of fear that somehow the courts will be involved in issues concerning gay marriage, perhaps. I don't know.

And there are other resolutions pending that suggest that economic retribution should be enacted by depriving courts of funds for their operation.

CHARLIE ROSE: How did we come to this?

SANDRA DAY O'CONNOR: How did we? We came to it because there were legislators who found objectionable some court decisions, whether they were from state or federal courts.

CHARLIE ROSE: But courts have been a subject of controversy. I mean, the Warren court was criticized...

SANDRA DAY O'CONNOR: Yes, yes.

CHARLIE ROSE: ... frequently by conservatives and right-wing forces.

STEPHEN BREYER: That's why I think in the history of the country, courts have been more popular, less popular, it's up and it's down. And we've survived.

CHARLIE ROSE: Different times...

STEPHEN BREYER: We've survived. And moreover, everyone has the right to criticize the court.

SANDRA DAY O'CONNOR: Sure.

STEPHEN BREYER: And moreover, Congress has a right to pass all kinds of things if they feel that's called for.

CHARLIE ROSE: That's their purpose.

STEPHEN BREYER: That's correct. And so basically, the most I think that the judges and the lawyers and others who are interested in courts can say is let's think about this. Remember that the institution itself has proved valuable for people in America. Try to understand what courts really do, and then draw your conclusions on the basis of knowledge.

And that's why what we're doing at this conference is, actually, we're doing a lot of listening. What we hope to do is to get people who aren't judges and who are not lawyers, but who are interested in government in America, to think about courts, to understand the problem, and then to try to help us or to help others understand how to proceed.

Now, you're going to say this is just such an obvious kind of anodyne thing to say, but it's truthful. That you say, why aren't they teaching civics in so many high schools? How many people sit down and read the Constitution? It's very short. On Constitution Day -- which I think...

CHARLIE ROSE: But that's just a fundamental question about the nature of education today, rather than...

STEPHEN BREYER: Right, but that's related...

CHARLIE ROSE: ... the (inaudible) of the courts.

STEPHEN BREYER: ... because if people don't understand when they're 14 years old how the city, the town, the democracy, how it works, have some idea of that, they won't participate as they get older. They won't be able to evaluate.

CHARLIE ROSE: I don't know what that has to do with the present argument, for this following reason -- it seems -- I mean, that's an issue that is -- is part of American history for a long time. How do you have an informed citizenry?

STEPHEN BREYER: Yes.

CHARLIE ROSE: And it begins with education at the lowest level.

STEPHEN BREYER: Yes.

CHARLIE ROSE: And we may fail on that, for better or worse, in comparison to other countries who have a higher sense A., of participation, number one, and it is argued that the more informed citizens are, the more they want to vote.

STEPHEN BREYER: Yes.

CHARLIE ROSE: Whether that's true, you know, from country to country, I don't know. The idea of an informed citizenry, about the courts, about the legislature, about the judicial and the executive is not a new issue.

STEPHEN BREYER: I'm in a job where we decide the most open questions.

CHARLIE ROSE: And the most...

STEPHEN BREYER: Forty percent...

CHARLIE ROSE: Controversial questions in American life, because where do you go in the end for a decision that people respect.

STEPHEN BREYER: Fine. We decide open, difficult questions of law that are controversial. How many people know that 40 percent of the time we're unanimous? How many people know that the 5-4 decisions that everyone writes about are taken altogether about 20 percent or so, and it's not the same five and the same four. How many know that we sit in that conference room discussing even such controversial

matters as the law of abortion or school prayer, or even Bush versus Gore, and we don't raise our voices. I've never heard...

CHARLIE ROSE: There is a civilized discourse, and you talk about the most controversial things.

STEPHEN BREYER: It's more than civilized discourse. It's a discourse where people are trying in good faith on both sides of the difficult question to work out a solution as a matter of law.

Now, I ask that question because to be able to answer that, to be able to know about it, you have to know what courts are like. You have to know the mind-run of things. You have to know the basic job of the judge, and then you begin to understand that these tremendously controversial things are but a tiny, tiny fraction of what the basic job is.

And maybe once people better understand what it is that judges do, they will be able to put in perspective the claims that a judge is this or that. And then maybe we won't see 40 percent to 50 percent of the public saying a judge is a politician in robes.

SANDRA DAY O'CONNOR: But we're still seeing legislators at both the state and national levels get very exercised about so-called activist judges.

CHARLIE ROSE: Is it...

SANDRA DAY O'CONNOR: And I'm not sure....

CHARLIE ROSE: That mostly comes from the conservative side of the American political spectrum, rather than the liberal side.

SANDRA DAY O'CONNOR: I guess it can come from both, but I think right now, you're right. And there are a series of decisions over some years that have not been popular with large segments of society, starting with Roe against Wade in the 1970s. The American public has never really resolved that issue.

CHARLIE ROSE: Well, people would campaign saying that Miranda was coddling criminals.

SANDRA DAY O'CONNOR: Yes.

CHARLIE ROSE: As you remember.

SANDRA DAY O'CONNOR: Right. And there was very much disagreement over the juvenile death penalty, because a good many states still had laws on the books whereby someone under the age of 18 could be sentenced to death for a murder. And when the

Supreme Court a year ago declared that unconstitutional under the cruel and unusual punishment clause, there was a great hue and cry in some quarters about that.

CHARLIE ROSE: Let me make sure I understand your -- which is -- you seem to have a real passion about this.

SANDRA DAY O'CONNOR: I do care about it.

CHARLIE ROSE: And it's a thing you've speaking out since you left of the bench.

SANDRA DAY O'CONNOR: Indeed, indeed. My main concern is that judges be allowed to function and to try to render fair and impartial decisions in cases, without the fear of retribution for a case that turns out to be unpopular.

CHARLIE ROSE: And the retribution is now manifest in the kinds of legislation that's being proposed.

SANDRA DAY O'CONNOR: Exactly. And let's look at state-level situations, too. The states are not immune from it either, even though a majority have judicial elections.

In the state of South Dakota, there is a proposition on the ballot popularly known as jail for judges. And it's to amend that state's constitution in such a way that judges could be either fined civilly or sent to jail for some supposedly erroneous decision.

CHARLIE ROSE: Let me understand this -- do you blame the media in part for this?

SANDRA DAY O'CONNOR: I don't necessarily blame the media for it. I'm just telling you that it is evident across this country today, that there is a lot of concern about judicial, quote, "activism," unquote.

CHARLIE ROSE: OK, fair enough, but I would argue that -- I mean, hooray for you for speaking out.

SANDRA DAY O'CONNOR: Right.

CHARLIE ROSE: But it has been part of the history of the court here, for example, you know, not to grant interviews, not to make speeches except within very defined areas...

SANDRA DAY O'CONNOR: Except in areas affecting the judiciary.

CHARLIE ROSE: That's always been a subject...

SANDRA DAY O'CONNOR: Yes. Correct. And I think this is an area affecting the judiciary.

CHARLIE ROSE: Because there is the threat...

SANDRA DAY O'CONNOR: Exactly.

CHARLIE ROSE: ... against members of the judiciary.

SANDRA DAY O'CONNOR: Exactly.

CHARLIE ROSE: So what you want to do is education -- raise the profile of what you see as the threat to an independent judiciary.

SANDRA DAY O'CONNOR: Exactly. And let people understand better and talk about what the role of the judge really is.

We need fair and impartial courts, in which people can litigate even difficult issues, where passions run deep. If they have to be settled, you want them settled by judges who are fair and impartial.

CHARLIE ROSE: And the former associate justice of the Supreme Court feels like we are drifting towards circumstances where that's not the reality.

SANDRA DAY O'CONNOR: Yes, I'm concerned that there's too much discussion out there about so-called activist judges, and proposals in Congress and in state legislatures to somehow punish a judge that the majority decides is activist.

CHARLIE ROSE: It's come to this, too, that judges are red meat in politics for people running for public office.

SANDRA DAY O'CONNOR: Yes, yes, that's right. And the result has been some increase in physical assaults against judges. I mean, that alarms me, too. That isn't the climate in which we want judges to function.

CHARLIE ROSE: But the only answer, you're suggesting, is raising the profile of the public discussion and making people more aware of this, because if they're concerned, because they will appreciate what the law means and what independence means.

SANDRA DAY O'CONNOR: Exactly, exactly.

CHARLIE ROSE: Because we now know -- if you look at the critical questions of Roe versus Wade and other issues like that, essential to some of the basic political debates in the country, too.

SANDRA DAY O'CONNOR: Yes, we had -- yes.

STEPHEN BREYER: There is something about Roe versus Wade that interests me and Bush v Gore and school prayer, it is related to a book you suggested I read, which was

having to do with the Cherokee Indians in 1834. That's an interesting event. The Cherokee Indians were...

(CROSSTALK)

STEPHEN BREYER: They were thrown out of their reservation by the federal troops and they went off to Oklahoma. The reason that came about -- this court, John Marshall, said that the land in Georgia where the Cherokees lived belongs to them. Andrew Jackson, supposedly, said -- and he said things like this -- John Marshall's decision, let him enforce it. And he sent troops to do the opposite.

CHARLIE ROSE: Because the executive enforces the...

STEPHEN BREYER: Correct.

SANDRA DAY O'CONNOR: Right.

STEPHEN BREYER: And those troops sent the Indians, after a lot of complication, to Oklahoma.

Now, think about 130 years later. We saw in a case called Cooper and Aaron, nine judges say -- Governor Faubus, you may remember...

CHARLIE ROSE: Orval Faubus.

STEPHEN BREYER: He was standing in the school house door in Arkansas, it was a white school, and he said I am not going to obey the law as laid down by these judges. I am going to stop the black children from going into the white school. And it took a president of the United States, Dwight Eisenhower, to overcome that force.

CHARLIE ROSE: By sending federal troops to Arkansas.

STEPHEN BREYER: Paratroopers. Paratroopers took the black children by the hand and walked into the school. Now, remember those controversies, and then think of the controversies of abortion, Roe v. Wade, whatever you want, Bush v. Gore.

And now no one remarks on what is actually remarkable, that the tremendous strong emotions involved in those disputes, and the openness and difficulty of the issues where, of course, people did divide because they saw it differently -- emotion, division, uncertainty, and yet, there were no troops. No troops are necessary. And there is no fighting in the streets of America, and we see that every day in this court. We see people of every race, every religion, every point of view, and they in America, 300 million of them, decide to resolve their disputes in courts of law, and not in the streets with sticks and stones.

Now, you see why we feel strongly about the question of judicial independence. We feel strongly because it took America 200 years and a civil war and 80 years of racial segregation and all kinds of ups and downs eventually to reach the kind of country where people will accept decisions, even if those decisions they believe are wrong -- and maybe they are wrong, because judges are human beings. They don't always right -- they're not always right. And yet they realize that a rule of law is superior to a rule of force.

Now, that's why we feel strongly about, in my case, not a particular piece of legislation, and not a particular statement by a particular official. Those are, in a sense, water off my back. But I feel very strongly, very strongly if we are coming into a world where half the country thinks that judges are politicians in robes -- they are not. That is not their job. They don't do it. That isn't what our nature is. And if that's the general view, all kinds of bad things can flow from that, and that's what I worry about.

CHARLIE ROSE: The next step of losing -- the judges lose their reputation, then what follows soon is the American public has no -- gives no credibility and no confidence in the court.

SANDRA DAY O'CONNOR: No confidence, and that would be a tragedy.

STEPHEN BREYER: That would be a tragedy.

CHARLIE ROSE: But we're on that road if we don't do something.

SANDRA DAY O'CONNOR: We're on that track if we don't engage in this debate and if we aren't concerned about it. When you see proposals in Congress to strip courts of jurisdiction over whole classes of cases -- I'm not for enlarging the jurisdiction of federal courts -- but to strip courts of jurisdiction based on subject matter seems to me a strange step to take in this nation, where the framers of the Constitution took such pains to try to create and protect an independent judiciary. And threats to curtail the budgets of the courts by way of retribution, threats to impeach a judge who cites certain authorities in an opinion -- I mean, these are amazing propositions.

CHARLIE ROSE: Is it your sense that many judges and many people feel strongly about this and worry about this, that this is a kind of concern that is growing?

SANDRA DAY O'CONNOR: I think it is a growing concern for judges. I trust that some lawyers are concerned, because lawyers have a close relationship to the courts since they're on both sides of every issue. But I don't think that the American public has focused much on the concerns that we're talking about today.

CHARLIE ROSE: Part of that is the media's responsibility.

SANDRA DAY O'CONNOR: Perhaps.

CHARLIE ROSE: I mean, that's what public education -- a lot of it comes from the media, doesn't it?

SANDRA DAY O'CONNOR: Right.

CHARLIE ROSE: And people, serious people coming together at the conference to talk about it and the media...

SANDRA DAY O'CONNOR: Yes.

CHARLIE ROSE: You can't speak about this because the issue may come back, but the Terri Schiavo case...

SANDRA DAY O'CONNOR: Yes.

CHARLIE ROSE: Tell me why you worry about that.

SANDRA DAY O'CONNOR: That was a case in Florida dealing with the tragic young woman who lost consciousness but was still -- her body was still functioning, and it went on for years, and the question became when part of her family wanted to remove the life support system, whether that was allowable or whether the court should intervene and keep her on the life support system that had functioned for a number of years to keep her alive, although the brain was perhaps not living.

So this issue went to the Florida courts, and they ruled that the life support could be withdrawn, that her function, her brain function was such that that was the standard met under Florida law. And her parents, I believe, were the interveners who opposed that...

CHARLIE ROSE: Right, right.

SANDRA DAY O'CONNOR: ... and they sought legislation in Florida to change the result and failed to get it, and they then went to members of Congress, who passed a special law in Congress. They got the support to do it, to require federal court review of the state holdings. And that was most unusual, because it was a law for a specific case only, for that case. And it required the federal courts to then review what the state court had done.

At the end of the day, the federal trial court found no basis upon which to overturn the state court findings, and, therefore, left them in place. And then the federal law provided for appeal to the court of appeals, and then petition to this court, all of which happened.

But it was under the glare of a great deal of publicity and media attention, I'm afraid.

CHARLIE ROSE: On a different kind of thing, there are a lot of people who think that Bush versus Gore or Gore versus Bush -- which I can never remember which is was -- was a political decision, not a judicial decision.

SANDRA DAY O'CONNOR: Many people still say that. There were legal issues in the case involving the application of federal law in the presidential election process. And this court, in a very short span of time, ended up deciding two different cases arising out of that conflict. And there was, needless to say, a great deal of media attention.

CHARLIE ROSE: Well, the conclusion is that once the court made that decision, it determined who would be the next president of the United States, that the court made the decision as to who would be the next president.

SANDRA DAY O'CONNOR: Well, you could characterize it that way, I guess. I don't. It made a decision on the process that was followed in Florida and found fault with it, and the result of that process was that the Florida electoral determination about the outcome of the election stood. And that was that Bush had won the election. It was not overturned by this court.

CHARLIE ROSE: Right.

SANDRA DAY O'CONNOR: I thought it was perhaps of some interest that there were three recounts of the ballots in the disputed counties after that. Each of them funded by media sources....

CHARLIE ROSE: Right. "The Miami Herald" in one example.

SANDRA DAY O'CONNOR: Three recounts. And in not one of those recounts would the result have changed. So maybe that should allay some concerns on that score.

CHARLIE ROSE: But there was -- there is also -- I mean, it seems to me to be fair to point out this. I mean, it is sometimes said that judges, too, read election results, and they, too, know beyond the law where the country stands.

SANDRA DAY O'CONNOR: Well, I'm sure judges do understand that. But that is not to say that decisions are governed by that understanding.

CHARLIE ROSE: Right.

I mean, you said to me, if we understood probably the way the process worked here, how serious people who may be as different as you, say, and Antonin Scalia, with a different view of the law, but with the love for the country and respect for law, are in a room, we would be amazed at the way the dialogue, it might not become heated but it would be with the earnest sense of how do we reach a result?

STEPHEN BREYER: I think that's true. If you look -- who is a judge? It's a person who has been to law school.

CHARLIE ROSE: Is that necessary?

STEPHEN BREYER: Law school -- not necessary but normal. In law school, people learn about law. They realize that it's mostly a fixed body of rules, but there are places where's it's uncertain.

Lawyers, when they practice law, try to take those uncertainties and work them to the advantage of their clients, and judges learn how to do that when they're lawyers.

And now, a person who has been in law school, who has been a lawyer, who understands the nature of fixed rules and where there are uncertainties, takes an oath to follow the law and the Constitution of the United States.

Why would such a person, made a judge of the court, do anything other than try to do his best to resolve those uncertainties in accordance with systems and procedures that he's learned and practiced? It's a very different thing to say there are a few instances that are very open, very controversial, very difficult, and I think that judge was wrong. Say it! You may be right. But it's quite different from saying...

CHARLIE ROSE: Well, in fact, you say it in your opinions.

SANDRA DAY O'CONNOR: Exactly.

STEPHEN BREYER: Of course, of course. What is a problem is if you begin to think that that's the ordinary case of lawyers and law and judges. Normally, what happens in this vast system is there are people who are called judges, hear cases, who try to decide them fairly. And now you say, well, that's all obvious, I don't like what judges do anyway. Fine. Understand what you're saying against a background of how the judiciary and the government of the United States was meant to work and does work, much more than people think.

If I -- you say, what about the media? Well, you know, nobody likes the media like nobody likes judges.

CHARLIE ROSE: No, no, we're much worse than you are. I promise you, you're much higher than we are.

STEPHEN BREYER: But there is -- the media is interested in an audience, and for whatever set of reasons, it's more interesting to people to learn what goes wrong with something than what goes right.

CHARLIE ROSE: Well, this is a case where something has gone wrong with something. We're talking about a case where something has gone wrong with something, are we not?

SANDRA DAY O'CONNOR: I think so.

CHARLIE ROSE: That's what I understand. And I think you have said, you have literally taken this on you to raise the red flag and say, credibility and the respect for the judiciary is something we cannot afford to lose.

SANDRA DAY O'CONNOR: That's right.

CHARLIE ROSE: And if devalue it by saying we're going to threaten, punish, buy...

SANDRA DAY O'CONNOR: Right.

CHARLIE ROSE: Then we've lost all.

SANDRA DAY O'CONNOR: I think so so.

CHARLIE ROSE: Because you take the controversial things in American life -- sometimes they were -- take Richard Nixon's case, the impeachment case. Once the court spoke, the nation understood, and it wasn't too soon thereafter -- go ahead.

SANDRA DAY O'CONNOR: The framers of the Constitution felt so strongly about the need in a constitutional democracy to have an independent judiciary that they went to enormous pains to try to ensure it. And when you read what James Madison wrote, what Alexander Hamilton wrote in "The Federalist Papers," it was crystal clear that they put that as a primary value. And we mustn't lose that in our anxiety over results in some specific case.

CHARLIE ROSE: You -- I'm also intrigued by the -- both of you have this reputation, pragmatist. It is said that that's something you share. Do you agree with that? And are you proud of that?

SANDRA DAY O'CONNOR: Well, I'm just a cow girl from a cattle ranch...

CHARLIE ROSE: Yes, I know. Yes, I know.

SANDRA DAY O'CONNOR: ... in the southwest, and we had to solve practical problems out there, so that's probably true.

CHARLIE ROSE: And your father Harry Day said that you could change a tire if you were on the way...

SANDRA DAY O'CONNOR: Whatever it was.

CHARLIE ROSE: That's what you said in your book.

SANDRA DAY O'CONNOR: Well, it said I did do that.

CHARLIE ROSE: Exactly.

SANDRA DAY O'CONNOR: He didn't tell me. He was waiting for lunch.

CHARLIE ROSE: Exactly. But what does that mean? I'm a cow girl and that's what -- I mean, you lived on a ranch, you grew up on a ranch, you wrote about...

SANDRA DAY O'CONNOR: Means you're given problems, you try to solve them...

CHARLIE ROSE: Solve them.

SANDRA DAY O'CONNOR: In a way that works.

CHARLIE ROSE: Pragmatist.

SANDRA DAY O'CONNOR: Yes.

CHARLIE ROSE: Problem solver.

SANDRA DAY O'CONNOR: Yes.

STEPHEN BREYER: Put James Madison in the room -- I know he can't answer, but...

CHARLIE ROSE: I would like that.

STEPHEN BREYER: Yes, of course. And you say, well, did you and your colleagues when you wrote that Constitution write some words on a piece of paper that you intended to prove workable over time, or did you want some kind of frozen system that would be incapable of governing a country of 300 million people 200 years later? I have no doubt what his answer is.

CHARLIE ROSE: What would it be?

STEPHEN BREYER: Practical. These are practical people, who were working -- were writing a document that they hoped would produce a nation that would last more than 200 years, as we have, and you can't do that with changes over time unless you take the values -- which are permanent in that document -- and apply them to a world that's continuously changing.

And so when I think of practical, I think, well, that's what we do. That's what we try to do.

Am I always right? No. Do I think I'm right? Yes, otherwise why would I do it? But I mean...

CHARLIE ROSE: Was he always right?

STEPHEN BREYER: No.

SANDRA DAY O'CONNOR: We disagreed now and then.

STEPHEN BREYER: That's right.

CHARLIE ROSE: But you, actually, in your judicial career, you were not part of the dissent very often, I mean, were you? You were the person who found the five. You were there. Seeking to put together a majority.

SANDRA DAY O'CONNOR: I don't know, I was just trying to address the cases as they came. And they did.

CHARLIE ROSE: But you became the person that was...

SANDRA DAY O'CONNOR: Well, that's the media pitch.

CHARLIE ROSE: It's not the media. I mean, that's reality, is it not?

SANDRA DAY O'CONNOR: Well, I can't answer that. I did the best I could with the cases that came my way.

CHARLIE ROSE: But you were admired and spoken of with great sense, that thank God there is Sandra Day O'Connor there, you know, who was seeking to build a consensus.

SANDRA DAY O'CONNOR: Well, it's better to have more agreement than less.

CHARLIE ROSE: And to find five, is what it is.

SANDRA DAY O'CONNOR: Five.

CHARLIE ROSE: Somebody once said what is the best thing that a Supreme Court justice can do..

SANDRA DAY O'CONNOR: Five.

CHARLIE ROSE: Learn to count, count to five.

SANDRA DAY O'CONNOR: Yes, count five.

CHARLIE ROSE: I don't remember who said that.

STEPHEN BREYER: Bill Brennan.

CHARLIE ROSE: Who said that?

SANDRA DAY O'CONNOR: Bill Brennan, I think.

CHARLIE ROSE: Justice Brennan.

STEPHEN BREYER: Yes.

CHARLIE ROSE: Who was very much before a consensus judge, yes?

SANDRA DAY O'CONNOR: Uh-huh.

CHARLIE ROSE: We're all fascinated by this whole thing of the relationship, too. Do judges come to the Supreme Court -- and you were there long enough to say -- how did you change? I mean...

SANDRA DAY O'CONNOR: I don't know that I changed that much. But when I came to the court, I had had very little experience with the issues coming before the federal courts. I'd served in the state court system, and the issues coming to this court were somewhat different and very diverse, and I had to address many of them for the first time. I didn't have occasion to do all those issues as a state court judge, and I'm not sure I changed as much as learning on the job as I went along.

CHARLIE ROSE: You have also -- and you can speak to this -- you know, you have -- women in the law -- there's a recent piece in "The New York Times," I think it was, that there are less young women as Supreme Court clerks than there have been, and you had the most.

SANDRA DAY O'CONNOR: This term. This term.

STEPHEN BREYER: I've had more women than men, I think.

CHARLIE ROSE: But this is what, terrible?

SANDRA DAY O'CONNOR: Oh, I was very surprised by the statistic. It is one that, in the years I was here, grew in percentages of women clerks. It grew substantially. Last term, it was about 40 percent were women.

CHARLIE ROSE: Yes.

SANDRA DAY O'CONNOR: And I thought that was great. Now, it's dropped to what, 20 or less this term?

CHARLIE ROSE: Whatever the story was.

SANDRA DAY O'CONNOR: Whatever the figure is.

CHARLIE ROSE: Why is that, do you know?

SANDRA DAY O'CONNOR: I just don't know. It happened because the nine justices didn't select as many women this term.

CHARLIE ROSE: There could be more next time, it could be just this particular year.

SANDRA DAY O'CONNOR: I hope so. I don't think they have gender...

CHARLIE ROSE: Nobody looks at gender, right.

SANDRA DAY O'CONNOR: ... specific goals, but I hope it's just a one-time event.

CHARLIE ROSE: There is this thing that you and I have talked about on television before, it is this notion of the idea of original intent, literal intent, originalism -- whatever the term is -- versus something that you have articulated, almost as a response to that, believing that the Constitution was a living document that was to set structure for democracy to work. I'm not saying it well, but you can help me.

STEPHEN BREYER: No, that -- that's true. I think probably all judges -- including all on this court, and it sometimes comes as a surprise to people -- they have an open question and they look to the text, the language, the history. They look to the traditions. They look to the precedent. They look to the values or purposes of the clause of the Constitution or the statute, and they look to consequences.

Some judges don't want to look to the last two very often. They look at history, text, language, precedent. And I probably and some others probably spend more time focusing on purposes, values and consequences, and I put myself in the latter category.

And the reason, of course, is I think that probably it's quite obvious that those who wrote the Commerce Clause didn't know about television.

CHARLIE ROSE: No.

STEPHEN BREYER: They didn't know about the Internet. Nor did the ones who wrote the First Amendment. And so we have to work out today how the value that they wanted in that First Amendment would apply in a world of Internet. And what do you do with privacy? And how do you deal with those difficult questions?

I don't think you can answer those questions simply by looking to precedent and text and so forth. Very often, you have to take the very difficult path of trying to work out the nature of those values and apply it to the modern problem in light of what's likely to happen.

Now, I don't think that's a subjective view. I think it's an objective view. I think an opinion that reflects that approach tries to be transparent. And others are free to criticize my view. And I'm not advocating my view -- though, of course, I believe that that's --

you know, I think that's a correct approach. It's not original with me by any means, judges have done that for years.

There are other approaches, and ultimately people read opinions, they look at them, they evaluate them in the academy, they have to work with them, and will learn from the criticism and the efforts of the judge.

SANDRA DAY O'CONNOR: And the genius of the Constitution, really, was that it was couched in such broad, general language that it could survive more than 200 years. It prohibited in the -- amendments to the Constitution, it prohibits unreasonable searches and seizures.

Now, when that was written, we didn't have DNA testing. We didn't have the ability to test for alcohol content of blood or even for fingerprint evidence. So those things came later, and they have to be adapted into the term "reasonable."

The same for the Eighth Amendment, cruel and unusual punishment. What was done when the Constitution was drafted is not what's done today, and you have to look at the circumstances today in light of those changes.

CHARLIE ROSE: And what do you say when people constantly say we have to recognize the intent of the framers? Since we can't know the intent of the framers.

SANDRA DAY O'CONNOR: Yes, we do.

STEPHEN BREYER: We do.

CHARLIE ROSE: We do?

STEPHEN BREYER: Of course we do.

SANDRA DAY O'CONNOR: They intended to prohibit unreasonable searches and seizures.

CHARLIE ROSE: All right, fair enough, and they can be defined as it was in terms of the...

SANDRA DAY O'CONNOR: Of course.

STEPHEN BREYER: I'd say of course you recognize the intent of the framers in terms of what they were basically intending. If you try to recognize how did they feel about the Internet, the answer is they didn't know about the Internet. They wanted to protect free speech and they left it up to future generations to see how that would apply to the Internet.

CHARLIE ROSE: So you have got this conference coming up...

SANDRA DAY O'CONNOR: Yes.

CHARLIE ROSE: Hoping it would give profile to the issues that you see and you see, and a lot of concerned people see.

SANDRA DAY O'CONNOR: Right, right.

CHARLIE ROSE: Because all of us want to have confidence in the judicial branch. Is it only about judges?

STEPHEN BREYER: No, I mean, it's about the judicial system, but it's also about what problems people who use the courts have with the judges. I want to know what they think about the problem of the judiciary -- the business community, the public interest community, the people who use the court's system...

SANDRA DAY O'CONNOR: And the electorate.

STEPHEN BREYER: Right, what do the citizens think of the judges? It's not just what the judges are thinking.

CHARLIE ROSE: Now, what do you think somebody might -- what criticism that you would think legitimate might come out of this?

STEPHEN BREYER: That it's too expensive.

SANDRA DAY O'CONNOR: Too slow.

CHARLIE ROSE: Too slow?

STEPHEN BREYER: Too slow. That the average person doesn't know enough about where to go and how to help deal with his problems or her problems, or what does it mean? How can you make the judicial system, in the current jargon but truthful, consumer friendly?

We have a job to do for citizens, and what are they thinking about the job we're doing?

I mean, I'm going to sit there, and I know Justice O'Connor will, and I think the chief justice is coming to part of it, and we're going to listen. And I think we hope people will discuss this problem of judicial independence, but that's only one of them. And the problems of the courts in respect to serving the public, that's another important part. And we'll listen.

CHARLIE ROSE: You mentioned, I think, citizens. I mean, what do you think they'll say?

SANDRA DAY O'CONNOR: Well, I think some of them will tell us that litigation is too (inaudible)...

CHARLIE ROSE: Exactly right, I mean, there's a whole body politic against that.

SANDRA DAY O'CONNOR: Not available.

STEPHEN BREYER: And they're right.

CHARLIE ROSE: And that we're a litigious society and...

SANDRA DAY O'CONNOR: That's right. And they're correct about that. We've got a real problem.

CHARLIE ROSE: And you hope comes out of this is essentially, as we have said here before, some greater understanding, not only on the part of the public. Perhaps on the part of the people who are part of the judiciary...

SANDRA DAY O'CONNOR: Indeed, indeed.

CHARLIE ROSE: That if you know more about how people feel about that...

SANDRA DAY O'CONNOR: Right. Yes.

CHARLIE ROSE: When was the last time we had this kind of self-searching by the court?

SANDRA DAY O'CONNOR: I can't remember one.

STEPHEN BREYER: Well, there were two famous instances...

SANDRA DAY O'CONNOR: Oh, 50 years ago...

STEPHEN BREYER: Roscoe Pound...

SANDRA DAY O'CONNOR: ... Roscoe Pound.

STEPHEN BREYER: And they tried to do that in the '70s, there was...

SANDRA DAY O'CONNOR: Roscoe Pound.

(CROSSTALK)

CHARLIE ROSE: What did Roscoe Pound do?

SANDRA DAY O'CONNOR: There was a conference and they talked about the state of the judiciary and the needs from the public perspective and so on. And it made a difference. It caused some changes.

STEPHEN BREYER: And the chief justice, Warren Berger, had a similar kind of update of that conference about 30 years ago.

SANDRA DAY O'CONNOR: He did. He did.

STEPHEN BREYER: And there were useful things suggested at that.

CHARLIE ROSE: But the court, I would assume the court -- I mean, chief justice runs the court, fair enough? I mean, I did all those interviews with William Rehnquist, and that's what he told me he did.

SANDRA DAY O'CONNOR: Well, he chairs all of the proceedings.

CHARLIE ROSE: He manages the court, right.

SANDRA DAY O'CONNOR: He's in charge of the administration of our court.

CHARLIE ROSE: Is it different today because we have computers and because we have a much better way of, you know, technology is...

SANDRA DAY O'CONNOR: But those are tools. The basic function is the same.

CHARLIE ROSE: I want to say that I'm going to come to this conference, and I think you both have raised important issues, and I thank you for joining me for this program, which will run days before the conference.

SANDRA DAY O'CONNOR: Thank you.

CHARLIE ROSE: Thank you very much.

My thanks to retired Justice Sandra Day O'Connor and Associate Judge Stephen Breyer for a fascinating conversation about America and its legal system.

Thank you for joining us. We'll see you next time.

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