

# TENNESSEE BAR JOURNAL

OCTOBER 2008 | VOLUME 44, NO. 10

A portrait of Chief Justice James L. Barker, a middle-aged man with glasses, wearing a black judicial robe over a white shirt and a red patterned tie. He is smiling and has his right hand resting on a black leather chair. The background features the Tennessee state seal and the state flag.

## **BRAVO, Justice Barker!**

**This Retiring Chief Justice Didn't  
Make a Stand-up Comic, but the  
Judicial Gig Has Been Good, Too**

**ALSO: Justice Janice Holder is State's  
First Woman Chief Justice**

**Ethics and Management of E-Discovery**

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*“Courage often wears black robes. ... It takes courage to sustain and strengthen the rule of law.”*

## Courage and the Rule of Law: Adams, Brock and O’Connor

Perhaps the most widely cited expression of the principle of the rule of law was drafted by none other than President John Adams when he penned the Constitution of the Commonwealth of Massachusetts. In mapping out separation of powers in the Massachusetts constitution, he wrote,

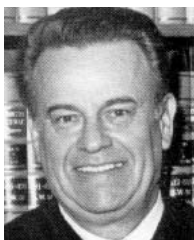
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: **to the end it may be a government of laws and not of men.** (Emphasis added.)

— *Massachusetts Constitution, Part I, Article XXX (1780)*

John Adams’s commitment to the rule of law, however, was much more than just a matter of theory and political prescience. As a lawyer, the most vivid example of his courage and commitment was his defense of British soldiers in the so-called Boston Massacre of 1770. Against all odds, against the interest of his reputation and political fortunes, and at risk to his family’s security, Adams agreed to defend British soldiers who were arrested on criminal charges for killing five civilians in a Boston street confrontation. The British soldiers had trouble finding any legal counsel, but because they believed the soldiers deserved a fair trial, lawyers John Adams, Josiah Quincy II, and Robert Auchmuty agreed to defend the soldiers. Six soldiers were acquitted, and two were found guilty.

Courage often wears black robes. Most of us, I suspect, have had courtroom experiences that we will never forget. I will never forget one of the first oral arguments I ever attended in the Tennessee Supreme Court. The case involved a sewage lagoon built by a West Tennessee city into which raw sewage was piped. Instead of the sewage settling to the bottom of the lagoon, it stayed on the top and made life absolutely miserable for all of the neighbors in the area. As I watched the oral argument unfold, I could see the justices’ frustration building, especially on the faces of Justices Robert Cooper and Ray Brock. After hearing a litany of excuses for why the city couldn’t abate the nuisance and after hearing repeated pleas from plaintiffs’ counsel telling the Court that the city needed this and the city needed that, we were all suddenly jolted by the thunderous sound of the palm of Justice Brock’s thick hand pounding on the dais. He exclaimed, “What you really need is a Chancellor with some guts!” A unanimous opinion was quickly issued in which Justice Cooper took only four pages to dispatch with the city’s arguments and to order the city to make things right. Justice Brock is remembered by many for his famous death penalty dissent in *State v. Dicks*, 615 S.W.2nd 126 (Tenn. 1981), but every time I think about the rule of law or remember Justice Brock, I will

*continued on page 31*



Justice Ray Brock

think about his exclamation on judicial courage back in 1981 as his hand slammed against the beautiful woodwork.

On Oct. 27, former U.S. Supreme Court Justice Sandra


Day O'Connor will be visiting Tennessee to speak to the Tennessee Supreme Court Historical Society dinner. I can only imagine the courage it took for her, having grown up on the Lazy B Cattle Ranch in Duncan, Ariz., to leave that Arizona ranch and attend Radford, Stanford University and Stanford Law School. As a Supreme Court justice, she never shied away from the tough issues, often casting the deciding vote in critical cases. Examples of those cases include *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in which she wrote a concurring opinion in

which she refused to explicitly overrule *Roe v. Wade*, *McConnell v. FEC*, 540 U.S. 93 (2003) in which she cast the deciding vote upholding the McCain-Finegold Campaign Finance Bill regulating soft money contributions, and *Grutter v. Bolinger*, 539 U.S. 306 (2003) in which she carefully delineated the constitutional borderline between the competing values of diversity and equal protection.

Since retiring, Justice O'Connor has been a staunch advocate for judicial independence and for judicial merit selection. She has published an op-ed column in the *Wall Street Journal* titled "The Threat to Judicial Independence."

The Tennessee Bar Association is sponsoring a Rule of Law Conference that will also be held on Oct. 27. Chief Justice Janice Holder is keynoting the conference. Justice Mark Martin from the North Carolina Supreme Court will be our discussion leader. This conference is

for business leaders, labor leaders, journalists, clergy, and community leaders from many diverse walks of life. The purpose of the conference is to build support for the rule of law and an independent judiciary. As I have talked with business leaders and bar leaders around the state about the rule of law, I have discovered that the rule of law means many different things to Tennesseans. Sooner or later, though, almost everyone says that one of the essential ingredients is courage. I couldn't agree more.

I am sure that if John Adams, Ray Brock, and Sandra Day O'Connor could have a discussion on the legal issues of our day, there would be much over which they would disagree. But I am sure that they would all agree that it takes courage to sustain and strengthen the rule of law. They sure set fine examples. 

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