Justice Sandra Day O'Connor on Clay

On October 4, 1996, the Honorable Sandra Day O'Connor, associate justice of the Supreme Court of the United States, received the Henry Clay Medallion from the Henry Clay Memorial Foundation in Lexington. She also served as a National Advisor to the Henry Clay Center for Statesmanship.

During her 1996 visit to Kentucky, Justice O'Connor spoke of Henry Clay's career at a dinner in her honor at the Governor's Mansion in Frankfort, Kentucky. The following is an excerpt of her speech.

As I look back over his long and distinguished career, I am struck by the observation that Clay did just about everything there is to do in Washington except be president.

He was … an indispensable man. His career skipped across the entire surface of American political waters, and we still feel the ripples of his actions today.

Clay's career in national politics effectively touched down first in the House of Representatives, where he was elected Speaker in 1811 by a two-to-one margin at his first session. Before Clay's tenure, the Speaker's duties were largely ministerial and had little influence over the course of House politics. Clay, however, used his position as Speaker to appoint committee chairs who saw eye-to-eye with him and who would implement his political agenda. Thus, Clay was largely responsible for increasing the responsibilities – and the accompanying power – of the position of Speaker of the House.

As Speaker of the House, Clay also used his influence to push through Congress the Missouri Compromise of 1820, which postponed for many years the confrontation on the issue of slavery in the territories.

In 1825, Clay moved from the legislative to the executive branch of the government to serve as secretary of state under President John Quincy Adams. As secretary, Clay was responsible for drafting the instructions for the American delegates dispatched to Panama for the Pan-American Conference in 1826…. Clay later considered these instructions to be one of his greatest accomplishments while in the president's cabinet.

In 1831, Clay moved back to the Congress as a senator. It is here that the repercussions of Clay's actions are most evident, as he more than once helped to avert confrontations that might have precipitated the Civil War at a time when the Union was not strong enough to withstand the secession of the Southern states.

But a closer look at Clay's career reveals that he played a part in influencing another branch of the American government particularly important to me, the Supreme Court.

In one respect, I should not have been surprised. Clay was, after all, a lawyer. Before his admission to the Virginia bar, Clay studied law under George Wythe, who had also trained John Marshall. Having the same teacher as one of the greatest United States chief justices could not have hurt Clay's chances at making his mark there. And Clay used his training to his advantage. He practiced briefly with Robert

Brooke, a former Virginia governor, before heading through the Cumberland Gap to hang out his shingle in Lexington, Kentucky.

Clay did not confine his practice to the Bluegrass State. He appeared before the Supreme Court no fewer than four times prior to becoming Speaker of the House in 1811. His years in Washington as a representative, as secretary of state, and finally as a senator were marked by numerous appearances before the High Court. He often argued with – and against – Daniel Webster, another prominent Washington lawyer and politician. The two of them came to be known as 'the Ajax and the Achilles of the Bar.'

Some of the cases Clay argued continue to be cited as precedent today.

In Osborn v. United States , Clay argued on behalf of the Bank of the United States, which was a nationwide bank chartered by Congress. Clay challenged the constitutionality of an Ohio tax levied upon the bank and sought an injunction to force the state's auditor to return the improperly seized taxes. The Supreme Court agreed with Clay and ordered the auditor to return the taxes. In doing so, the Court found that the Eleventh Amendment – which bars lawsuits against the states – did not apply to the state auditor. Osborn is still relevant today: It has been cited twenty six times since I took the bench in 1981 and was cited just last term by Justice David Souter in a dissent. Nor is Osborn the only case argued by Clay to be cited in recent times.

Clay also argued on behalf of a Kentucky creditor who sought to collect a debt from a person who declared bankruptcy under New York law. In that case, Ogden v. Saunders , the Court concluded that the New York bankruptcy law was constitutional, so that the debtor was no longer liable to the Kentucky creditor. The case has been cited 86 times since it was decided, three times since I came on the bench.

Other cases Clay argued are just as important for what they did not decide. For example, in Groves v. Slaughter , a Mississippi resident bought slaves from a trader but refused to pay him. The resident claimed that Mississippi's constitution prohibited ' all slave trading after May 1, 1833, and that he had purchased the slaves after that date. The Mississippi constitution, he concluded, rendered the trader's claim unenforceable. Clay disagreed with the resident, claiming that the state constitutional provision at issue lacked the force of law until the Mississippi legislature enacted implementing legislation. The Supreme Court agreed with Clay.

What I find most interesting about this case is what the Court did not decide. The Court did not hold that slaves were property that could be transported and traded in any state or territory without regard to an individual state's constitutional provisions. In fact, this is what the Court would decide sixteen years later in the infamous Dred Scott decision, a decision that is thought to have hastened the Civil War. By not reaching this issue in Groves, the Court provided the nation with a reprieve from the consequences of its unhappy decision in Dred Scott.

Clay's advocacy before the Court also launched a new chapter in the Court's decision-making process in Green v. Biddle . When Green, a Kentucky landowner, sued to remove Biddle, a trespasser, from his land, Biddle invoked two Kentucky laws that would have required Green to pay Biddle for certain improvements he had made to the land. Green responded that the state laws were unconstitutional. Green noted that under an interstate compact between Kentucky and Virginia, the Bluegrass State had promised to follow Virginia land law. Virginia land law did not give trespassers like Biddle the right to compensation for improvements; Green claimed that the Kentucky laws invoked by Biddle conflicted

with Virginia law and were therefore unconstitutional. Biddle's attorneys did not appear to argue his case, and the Supreme Court found in Green's favor.

Henry Clay, as amicus curiae – which is Latin for 'friend of the Court' – asked the Supreme Court to rehear the case so that Biddle could have his day in court. The Supreme Court granted Clay's request. On Biddle's behalf, Clay argued that Virginia could not dictate which laws Kentucky enacted and that the Kentucky laws were therefore constitutional. In a split decision the Court reaffirmed its original decision and again struck down the Kentucky laws.

Even though he did not prevail in Green v. Biddle, Clay was the very first person to appear as amicus curiae before the Supreme Court. Such 'friends of the Court' appear in most of the cases our Court hears today, although they no longer ask the Court to rehear cases. The 'friends' who appear today usually file briefs calling our attention to points of law, policy considerations, or other points of view that the parties themselves have not discussed. These amicus briefs invaluably aid our decision-making process and often influence either the result or the reasoning of our opinions. As a result of his appearance in Green, Clay was largely responsible for inaugurating an institution that has since shaped much of this Court's jurisprudence.

Yet, Henry Clay's contributions to the Supreme Court ripple far beyond his skills as an advocate. As a senator, Clay had a great influence in selecting the Court's personnel.

Clay also came close to serving as an associate justice. On August 25, 1828, while President Adams was in the midst of a bitter presidential campaign against Andrew Jackson, Justice Robert Trimble died. In an effort to fill the position while he still had the authority to do so, Adams first offered it to Charles Hammond, an Ohio lawyer. When Hammond declined, Adams turned to Clay. Clay also declined and urged Adams to nominate his long-time friend and fellow Kentuckian John J. Crittenden for the position.

But that is not to say that Clay's personality, or his name, did not have a profound impact on presidents, members of this Court, or their ancestors. Abraham Lincoln was one of Clay's greatest admirers. The young Lincoln campaigned for Clay during Clay's second bid for the presidency in 1832. Lincoln's respect for Clay lasted long after Clay's death in 1852. During the summer of 1858, when Lincoln campaigned against and debated with Stephen Douglas in a race for the Senate, Lincoln described Clay as his 'beau-ideal of a statesman.' Justice John Marshall Harlan also deeply respected Clay. Justice Harlan served on the Court nearly forty years, from 1877 until his death in 1911. The Kentuckian is best known for his dissent in Plessy v. Ferguson, where he stated that "our Constitution is color-blind." Justice Harlan's father was one of Clay's best friends, and justice Harlan named one of his sons after Clay. Even my own family tree is not immune from Clay's powerful influence. My grandfather was born in Vermont in 1844. His name? Henry Clay Day.

Given all of these accomplishments and accolades, Clay's career truly did dance across the waters of American history, and the impacts he made in the institutions he touched were many and profound. Their ripples are still felt today.

During his last term as a senator, just two years before his death in 1852, Clay said: "The Constitution of the United States was made not merely for the generation that then existed, but for posterity-unlimited, undefined, endless, perpetual posterity." Henry Clay did not act solely for his generation. Without Henry Clay there might not have been any amicus appearances in the United States, nor a Compromise Tariff,

nor a Compromise of 1850; the Civil War might have started earlier and the outcome of that war might have been different. Henry Clay acted for posterity's sake. And for that, I am grateful.