

IN MEMORY OF
WILLIAM H. REHNQUIST
A TRIBUTE TO CHIEF JUSTICE
WILLIAM H. REHNQUIST

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Over the past 230 years, the United States has had forty-three Presidents but just seventeen Chief Justices. For thirty-three years, fourteen years as an Associate Justice and nineteen as Chief Justice, William Hubbs Rehnquist changed the landscape of American law. As Chief, he was the leader of a Court majority that often adopted positions that he had staked out in dissenting opinions as an Associate Justice.

Most public figures in Washington closely read the daily newspapers in search of their names. Not William Rehnquist. When I clerked for the Chief during the 1988 Term, *The Wall Street Journal* and *The New York Times* wrote opposing editorials about one of his opinions. I went to his office and asked him if he wanted to read the editorials. His response was telling: “Reading the newspapers to grade Supreme Court opinions is like predicting who will win a baseball game in the first inning.”

In his spare time, the Chief was an accomplished historian; he authored four well-received books, including one on the impeachment trials of Justice Samuel Chase and President Andrew Johnson and another on the disputed election of 1876.¹ As an historian, I’m sure the Chief would say that it’s too early to evaluate his tenure on the Supreme Court. But, at this point, the views of his colleagues on the Court are instructive.

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1. WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004); WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (2000); WILLIAM H. REHNQUIST, THE SUPREME COURT (rev. ed. 2001).

Justice Thurgood Marshall called William Rehnquist “a great Chief Justice.”² In 1987, Justice Brennan said that the new Chief has “just been a breath of fresh air. He’s meticulously fair in assigning opinions. I can’t begin to tell you how much better all of us feel . . . and how fond all of us are of him personally.”³ When he died, Justice Ruth Bader Ginsburg said that the Chief was “the fairest, most efficient boss I have ever had. The Chief fostered a spirit of collegiality among the nine of us, perhaps unparalleled in the Court’s history.”⁴ And, Justice John Paul Stevens, the Justice who served with him the longest, said that “William Rehnquist’s independent, impartial, and dedicated leadership of the Supreme Court has been an inspiration to those of us privileged to serve with him—and to the entire Nation as well.”⁵

The Chief was a self-made man. He was born on October 1, 1924. He grew up during the Great Depression in Shorewood, Wisconsin. His father was a first-generation Swedish-American. His mother, who spoke five languages, worked as a translator for several companies. He was Midwestern in sound and style: solid, direct, plain-spoken, and without pretense. He had little interest in the limelight. He appeared shy when he spoke to a large group, and he did not like a fuss to be made about him. He preferred quiet times with his family and friends over the Washington social whirl. He did not wear fancy clothes (preferring comfort), save for the gold bars he had embroidered to his judicial robes after seeing the costume of the Lord Chancellor in the Gilbert & Sullivan operetta, *Iolanthe*.

After graduating from public high school, the future Chief Justice spent three years in the military during World War II as a weather observer in North Africa. Years later, he remained a student of weather patterns. He famously held oral argument at the Court when the rest of the federal government had a snow day. He used his G.I. benefits to attend Stanford, where he majored in political science and ran the breakfast program in the Stanford dining hall. He then took a test that indicated he might have some aptitude for law. That test certainly was right. He graduated at the top of his Stanford Law School class. In a closet in his chambers, he kept the most meticulous set of law school notebooks imaginable, with case after case carefully summarized and analyzed.

The future Chief Justice clerked for Associate Justice Robert Jackson, whom he revered.⁶ When the Chief was a law clerk, the Supreme Court

2. Stuart Taylor, Jr., *The Rehnquist Court*, NAT’L J., May 21, 2005, at 1532.

3. *Id.*

4. Press Release, Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist (Sept. 4, 2005), http://www.supremecourtus.gov/publicinfo/press/pr_09-04-05b.html.

5. *Id.*

6. On the Chief’s office wall was a signed photo of Justice Jackson, inscribed, “With the friendship and esteem of Robert Jackson.” The Chief signed photos to his own clerks with that same inscription.

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decided *Youngstown Sheet & Tube Co. v. Sawyer*,⁷ in which Justice Jackson wrote his famous concurring opinion on separation of powers, and first heard argument in *Brown v. Board of Education*⁸—a decision William Rehnquist cited favorably as an Associate Justice in thirty-four cases⁹ and many more times as Chief.

William Rehnquist spent sixteen years in private law practice in Phoenix, representing clients in all sorts of cases, from the humdrum to the complex, in trials and appeals. For much of that time, his name was on his small firm's door. He was both bemused and concerned by the growth of the modern law firm, with hundreds of lawyers in many offices. He could not understand how a law firm could spend hundreds of hours on a motion for summary judgment without wasting the client's money.

Because of his background in practice, he was interested in the practical consequences of Supreme Court decisions. He believed that a shorter opinion was better than a treatise, that clear rules were better than confusing multipart tests, and that explanatory footnotes would provide fodder for the relitigation of issues. Although he surely could turn a phrase, his opinions were not written for the press or law professors, but for the judges and lawyers who would rely on them. He often emphasized the importance of having practicing lawyers on the federal bench.¹⁰

Fate or luck play an important part in every life. In 1968, William Rehnquist purchased a home in the Colorado mountains. Somewhat frustrated by his law practice, he took his family for a summer of picking fruit beside migrant farm workers.¹¹ By November, after a close election, Richard Nixon was elected president, and the rest is history. If Richard Nixon had not won that election, William Rehnquist likely would have remained anonymous, but he surely would have lived a full and happy life.

In his first five terms on the Supreme Court, William Rehnquist was a dissenter. He wrote twenty-four lone dissents among his total of seventy-two dissents, an average of almost thirteen per term.¹² His contrariness earned him the moniker the "Lone Ranger," and his clerks presented him with a Lone Ranger doll, which sat on the mantel in his office for many years. By 1988,

7. 343 U.S. 579 (1952).

8. 347 U.S. 483 (1954).

9. See *Hearings Before the S. Comm. on the Judiciary on the Nomination of William Hubbs Rehnquist To Be Chief Justice of the United States*, 99th Cong., 2d Sess. 303-05 (1986) (statement of Senator Hatch, Member, Senate Committee on the Judiciary).

10. See, e.g., WILLIAM REHNQUIST, 2001 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-3 (2002), available at <http://www.uscourts.gov/ttb/jan02ttb/jan02.html>.

11. See Charles Lane, *Rehnquist Eulogies Look Beyond Bench*, WASH. POST, Sept. 8, 2005, at A3.

12. See generally *The Supreme Court 1975 Term*, 90 HARV. L. REV. 56 (1976); *The Supreme Court 1974 Term*, 89 HARV. L. REV. 47 (1975); *The Supreme Court 1973 Term*, 88 HARV. L. REV. 41 (1974); *The Supreme Court 1972 Term*, 87 HARV. L. REV. 55 (1973); *The Supreme Court 1971 Term*, 86 HARV. L. REV. 50 (1972).

when I clerked for him, the doll was gone.

As the Court's composition changed during the 1980s, Rehnquist dissents became less frequent. During the 1985 Term, his last as an Associate Justice, he dissented alone only once. He wrote many of the key decisions of the Burger Court, and his role was such that the Rehnquist Court may well have begun before his 1986 appointment as Chief Justice—if not in name at least in spirit.

Some Justices rely on former clerks to pick their law clerks. The Chief personally reviewed each of the several hundred applications he received each year. He enjoyed learning about the next generation of lawyers. Before my interview, I had boned up on all of the major decisions from the recent term, expecting a quiz on constitutional law. When the big day came, I went through a series of doors to his relatively modest personal office. As I sat down on his couch, he said, "John Quincy Adams died on that couch, but you look pretty healthy."

After fifteen minutes discussing such topics as the geography of Westchester County, New York (where my family lives), sports, my college thesis, and how he once was caught using Justice Jackson's shower when the Justice was giving a tour of his chambers, he asked me if I had any questions. I said, "No. I would be honored to be your law clerk." He then got up and walked me to the door. I thought that I had blown the interview. Years later, when I reminded him of my interview, he wryly said that he would not have hired a prospective clerk who asked, "How many opinions will I get to write?"

The Chief Justice is entitled to five law clerks. Chief Justice Rehnquist hired just three. We speculated that he picked three clerks so that he could fill out his weekly tennis game of doubles. By the time I clerked, the Chief had been on the Court for over twenty-five years. He possessed a near photographic memory of Supreme Court decisions. Once, when we worked on one of his opinions, he asked me to pull a U.S. Report from 1845 from his shelf and to look at page 245. Sure enough, on page 245, there was the perfect quote for his 1989 opinion.

William Rehnquist was efficient and decisive in his work. He generally came and went at the same times every day. He did not permit lawyers to exceed their time at oral argument once the "red light" went on. He did not rely on bench memos, preferring to discuss cases during a walk "around the block" of the Court. He expected his law clerks to prepare first drafts of opinions in ten days. For a new clerk, this deadline appeared ominous. The Chief then would take those drafts and dictate his own draft of the opinion. He could dictate ten pages of polished prose in an hour or so. That's why his opinions had a conversational, informal tone. Early in the term, the clerk's draft bore scant resemblance to the final opinion. By example, the Chief was the best writing instructor I ever had. His cardinal rule: No sentence should be more than six lines long.

The Chief often relied on history. In *Hustler Magazine v. Falwell*,¹³ for example, he emphasized the prominent place of cartoons in American political life:

Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist. From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.¹⁴

He sometimes even quoted poetry, perhaps most famously in his dissent in *Texas v. Johnson*,¹⁵ where he included, in full, John Greenleaf Whittier's "Barbara Frietchie," the story of a Maryland woman who defiantly waved the Union flag at Confederate troops. I will never forget how "Barbara Frietchie" found her way into the U.S. Reports. During a ride back to the Court after our weekly game of tennis, the Chief asked about the status of some research on the history of the American flag. After hearing the report, the Chief suddenly recited from memory, while we were still driving on Interstate 295, each and every line of "Barbara Frietchie." My co-clerks and I were spellbound. We also knew what to include in the next draft of the Chief's dissent.

In deciding cases, the Chief was deferential to the popularly elected branches of the government. For him, "[t]he justices of the Supreme Court were not appointed to roam at large in the realm of public policy and strike down laws that offend their own ideas of what laws are desirable and what laws are undesirable."¹⁶ He saw the potential for judicial activism in "the very breadth of the language of the Constitution."¹⁷ Thus, beginning in his dissents in the early 1970s, he was the force behind the movement to make adherence to the text of the Constitution as understood by the Framers a principle of constitutional interpretation. He also did much to elevate the importance of federalism as a constitutional value.

The Burger Court and the Rehnquist Court marked a period of transition from the liberal Court that prevailed under Earl Warren. William Rehnquist did not muster a majority behind him in every big case, but he changed the Court's direction. Never one to overstate his own importance, he likely would credit the voters who elected the presidents who then appointed more conservative Justices. In any event, he left a Supreme Court that now plays a less dominant role in our society than the Court he joined in 1972. Just on the numbers, the Supreme Court under William Rehnquist took a lower profile simply by deciding fewer cases. In the 1985 Term, the Court heard argument in 147 cases.

13. 485 U.S. 46 (1988).

14. *Id.* at 55.

15. 491 U.S. 397, 424-25 (1989) (Rehnquist, J., dissenting).

16. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 313-14 (1987).

17. *Id.* at 316.

By the 2003 Term, the number was down to only seventy-three.

William Rehnquist had a modest view of the power of the Chief Justice. He knew that the other Justices could be “as independent as hogs on ice.”¹⁸ He praised Justices who routinely disagreed with him. Ever the historian, he took the long view when his opinion did not muster a majority. He was protective of the institutional power of the Court. He believed that John Marshall was the greatest Chief Justice, and that *Marbury v. Madison* was the most important decision in the history of the Court. He was a fierce defender of judicial independence and of the federal judiciary.¹⁹

For me, the lessons of William Rehnquist’s life are less about his tenure as Associate Justice and as Chief Justice and more about how he lived his life. He was a proud member of the Greatest Generation. Because he was so efficient and decisive in his day job, he had the time to learn much about many things—art, music, history, the classics, poetry, religion, and sports. He was a walking encyclopedia. He almost never lost a wager or a trivia contest. “Do not let the law be too jealous a mistress,” he advised one law school graduating class.²⁰ Unlike many lawyers, he always put his family first.²¹

William Rehnquist was a second father to his clerks. He came to my wedding. He sent me (and many others) handwritten postcards when he traveled to places like Egypt, Italy, and England. I’m half-Irish by background, so when he returned from a spring trip to Ireland he wrote me a letter, noting that his “one disappointment” was not “see[ing] the sun go down on Galway Bay.” Reflecting his interest in geography, he went on to explain:

It turns out that only in the fall of the year can one see the sun go down on Galway Bay—the mouth of the bay is angled to the south, and with the sun changing position the way it does throughout the year when one looks at it setting in the spring it sets over the land to the north of the bay opening. The song writers never tell you those things!²²

This was classic Chief.

My office is located in downtown Manhattan. On February 26, 1993, after a bomb-laden truck exploded in the parking garage of the World Trade Center, the Chief’s loyal assistant, Janet Barnes Tramonte, called to make sure that I was fine. Janet called me again right after September 11, 2001. When my first daughter, Elizabeth Rose, was born about a month later, the Chief sent a note of

18. William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 637 (1976).

19. See, e.g., WILLIAM REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4-8 (2005), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>.

20. George Lardner, Jr. & Sandra Saperstein, *A Chief Justice-Designate with Big Ambitions; Even as a Boy, Rehnquist Hoped To “Change the Government,”* WASH. POST, July 6, 1986, at A1.

21. See Lane, *supra* note 11.

22. Letter from William H. Rehnquist, Chief Justice, United States Supreme Court, to author (May 19, 1992) (on file with author).

congratulations to my wife Joyce and me. A lover of poetry, he wrote: “Being born in October myself, I pass along to you these words of wisdom: ‘October’s child is born to woe/And life’s vicissitudes must know/But lay an opal on her breast/And fate will lull her cares to rest.’”²³

After his beloved wife Nan died in 1991, the Chief invited me to visit him in Greensboro, Vermont, where he spent the summer for almost thirty years. I worked in New York City, so the Chief thought I needed some fresh air. He was not much for big cities. For a number of summers, I went up for a weekend. The Chief’s house was a modest Swiss chalet off a dirt road near the Highland Lodge. We played tennis, croquet, and the word game Boggle. The Chief made bologna sandwiches and cooked burgers on the brick grill in his yard. With dinner, we might have the Chief’s favorite—a “Miller’s Lite.” At bedtime, he read, usually some biography or history.

The Chief took pleasure in the simple things—a beautiful view, a brisk walk, and a show tune. In Vermont, he loved a restaurant, the Creamery, which served delicious pie. His wife was a wonderful cook. We went to the movies; he particularly enjoyed the Tom Hanks movie, *Apollo 13*. When he shopped in the local store, Willy’s, the small town’s most famous resident was greeted warmly as “Bill,” including by the teenager behind the cash register. He was a proud member of the “Romeos”—Retired Old Men Eating Out in Style.

Greensboro is home to Caspian Lake, one of the most beautiful lakes in New England.²⁴ The Chief was a powerful swimmer into his seventies, with a slow and steady stroke. The first time I went swimming with him—as he methodically swam ahead—I feared that I would drown on the way to his favorite rock far off shore. He was a competitive tennis player, particularly at the net, where his height and reach made up for his sometimes slow step. In doubles, he selected his partner carefully.

The Chief was one of the most powerful people in the country for thirty-three years and the head of one of the three branches of government for nineteen, but he treated everyone alike—the powerful and the ordinary. He knew the name of virtually every Court employee, and when he saw a new employee, he would introduce himself as “Bill Rehnquist.” He always remembered that person’s name.

When the Chief’s pine coffin was carried up the front stairs of the Court last September, there were tears in the eyes of the Justices, the law clerks, and Court staff who knew him best as a person. Those tears were testament to his greatness.

The Chief’s favorite president was Lincoln. During the term I spent as his law clerk, his proudest moment was participating in the celebration of the 125th

23. Letter from William H. Rehnquist, Chief Justice, United States Supreme Court, to author (Dec. 17, 2001) (on file with author).

24. The Chief said that the lake was so named, because its shape supposedly bore some resemblance to the Caspian Sea.

anniversary of the Gettysburg Address. When Lincoln died, Congress passed a resolution that read, in part: "Take him all in all, it will be long ere we look upon his like again."²⁵ The same is true of William Rehnquist.

25. H.R.J. RES, 19, 39th Cong. (1865).