

WILLIAM H. REHNQUIST: A REMEMBRANCE

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Thank you, President Liebowitz, for that very generous introduction and thank all of you for your warm welcome. I'm delighted to be here at Middlebury, and I'm delighted to be present for the announcement of the William H. Rehnquist Professorship. If Chief Justice Rehnquist were here, he would, with genuine modesty, discourage this wonderfully appropriate tribute. But I am sure he would also be quite pleased. He would be pleased because he maintained special ties with Vermont. The Chief would likely point out that, while no Supreme Court Justice has yet hailed from this State, the Supreme Court building in Washington is itself made out of marble from nearby Danby, Vermont.

Many parts of the country can make a claim to Chief Justice Rehnquist. He was born in the Midwest, was educated on the West Coast, settled and raised his family in the Southwest, and was called to public service in Washington. But he spent his summers here in Vermont. Justice Louis Brandeis said he could do the twelve months' worth of work on the Court in ten months, but he could not do it in twelve months. He needed at least a couple of months for renewal and reflection. When Chief Justice Rehnquist served on the Supreme Court, he found the ideal place for that renewal and reflection here in Vermont. I am going to talk this evening about Chief Justice Rehnquist and choices, and I can begin by noting that his choice of Vermont was a personally important one.

The William H. Rehnquist Professorship of American History and Culture is appropriately named, of course, because Chief Justice Rehnquist was a very important figure in American history: He was the 100th member appointed to the Supreme Court and the sixteenth Chief Justice. As President Liebowitz pointed out, he served for more than thirty-three years—longer than all but six of the Court's Justices. During his service on the Court, Chief Justice Rehnquist issued more than 450 opinions of the Court and presided over what I think is a very significant change in the way the Court conducts its business. But he didn't simply preside over that change; he was the leading force in implementing it. I will talk more about that later.

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A chair in history at Middlebury College is also appropriately named after Chief Justice Rehnquist because he was an historian himself, writing four important books on historical subjects. The most remarkable aspect of those books is how prescient the Chief was. He wrote a book about impeachment years before he became the second Chief Justice to preside over an impeachment trial. He wrote a book about civil liberties in wartime years before the events of September 11 caused those issues to come again to the forefront of the Supreme Court's work.

I applaud Middlebury College for establishing this chair in honor of Chief Justice Rehnquist. I thank the anonymous donors whose inspired philanthropy made it possible, and I congratulate Professor Ralph on being the first incumbent.

Twenty-six years ago, I came to Washington to clerk for then-Associate Justice Rehnquist. Justice Rehnquist told his clerks regularly that their lives would be shaped by a connected series of choices, and, as he put it, "How wisely you make those choices will determine how well you think you spent your life when you look back on it."

Looking back on the life of Chief Justice Rehnquist, I am struck by how many of his choices were extraordinarily unconventional, or even if conventional, were made in very unconventional ways. I would like to talk about a few of those choices.

William Rehnquist was born October 1, 1924, outside of Milwaukee, a descendent of Swedish immigrants. When in later life he was named Swedish American of the Year, I remember his only question was, "Who came in second?" He researched his genealogy in connection with that award and discovered that, in the 17th century, one of his ancestors had been executed for embezzling funds from an estate for which he was a steward.

The Chief was originally named William Donald Rehnquist. He changed his middle name to Hubbs, a family name, when his mother was told by a numerologist that he would have a successful career if his middle initial were H.

Early in his life, a particular episode signaled what would become a lifelong attraction to friendly wagers and the dogged determination that would characterize his career. It was Memorial Day. He bet his sister that he could dive into the frigid waters of Lake Michigan more often than she could. He won, contracting pneumonia in the process.

Pearl Harbor was a defining event for his generation and for him personally. He entered college shortly after the attack on Pearl Harbor, enrolling in an Army Air Corps program that trained meteorologists. The program, however, was cancelled within a year. It turned out that an army

typist had typed one too many zeros on the order indicating how many meteorologists were needed. The extra would-be meteorologists were given a choice. They could go to officer candidate school or enter as enlisted men in the Air Corps and be sent to an air base. In one of his many unconventional choices, Rehnquist chose the route of the enlisted man, saying he was not much for spit and polish.

William Rehnquist ended up at air bases in North Africa during the war. War teaches many lessons. One lesson that Rehnquist, the son of Milwaukee, said he learned from his time in North Africa was that, if you chose wisely where you lived, you would not have to shovel snow for four months out of the year.

Rehnquist earned GI Bill benefits from his war service, and he went to Stanford, focusing on political science. He then made a conventional choice, but in an unconventional way. He decided to abandon academia and become a lawyer. But he did so based on the results of a standard aptitude test, which suggested that he had the aptitude to be a good lawyer. One of his classmates, Justice Sandra Day O'Connor, said he was clearly the best student in his law school class. His performance allowed him to obtain a clerkship with Justice Robert Jackson at the Supreme Court of the United States.

At the end of Rehnquist's one-year clerkship, the Library of Congress received an unusual request from Justice Jackson's chambers, inquiring which United States cities had the most sun over the course of a year. The request, of course, was not from Justice Jackson but from his law clerk. Rehnquist was trying to decide where to live, and he would do that in an unconventional way.

The list came back. Tampa was first. Rehnquist decided it was too humid. Albuquerque was second. Rehnquist decided there was too much "old money" there and it would be hard to enter into that community. Phoenix was third, and Phoenix it was. Again, a very nonconventional choice.

At the time, a Supreme Court clerk could earn \$600 or \$700 a month in Los Angeles or Washington. In Phoenix, the going rate was \$300 a month. William Rehnquist thought that his experience as a law clerk would allow him to demand a little more money, so he asked for an extra \$50 a month from his prospective employer. The firm said no, but Rehnquist nonetheless accepted the job.

It was an important lifestyle choice. Years later, the Chief Justice would say that he instinctively appreciated the need to have a good balance between work and life. He said that, when you are young and impecunious, it is easy to trade your time for money, but as you grow older, it becomes

harder and harder to trade it back.

Two years after William Rehnquist began work at an established firm in Phoenix, he made another unconventional choice. He gave up the security of that firm to open his own firm with one other partner, the president of the Young Democrats in Phoenix. He became an extraordinarily successful litigator, although early on the going was rough, and he had to take whatever cases came his way, including the representation of many criminal defendants. Years later, someone from the law enforcement community would tell him that there was a wing at Leavenworth named after his former clients.

In 1968, William Rehnquist received a call from Washington, D.C., asking if he would consider accepting the position of Assistant Attorney General for the Office of Legal Counsel. He did what any reasonable person would do after receiving such a call. He went to the Phoenix Public Library to determine what the Office of Legal Counsel was. It turns out that it was an important office in the Justice Department that gave constitutional advice to the Attorney General and the President. He made another choice, and the family headed east.

The rest of the Chief's history is more familiar. William Rehnquist was appointed to the Supreme Court in 1972 at the age of forty-seven. In his early years, he was a dissenting voice on the Court. So often was he the lone dissenter that his law clerks bought him a Lone Ranger doll. That doll stayed on the mantelpiece of his fireplace long after his lone dissents had become accepted as law by a majority of the Court.

In 1986, William Rehnquist was appointed Chief Justice. During his tenure, he earned the respect of his colleagues by the fairness with which he discharged his responsibilities as Chief. One of his colleagues, Justice Ruth Bader Ginsburg, called him the best boss she ever had.

Throughout his career, Chief Justice Rehnquist was totally unaffected by the pretense to which so many in Washington fall victim. For example, he missed the State of the Union Address one year. When asked why, he explained that it conflicted with a watercolor class at the YMCA. An incredulous law clerk said, "You can't miss the State of Union Address for a watercolor class." Rehnquist responded that he had spent \$25 to enroll in the class, and he was going to get every benefit out of it.

Chief Justice Rehnquist went to New Orleans once for a judicial convention. While there, on Sunday, he went to the local Lutheran Church. The custom there was for the minister to recognize visitors. He said, "I see we have a visitor. Would you stand up and tell us who you are?" "I'm Bill Rehnquist." "Well, fine, Bill, where are you from?" "I'm from Washington." "What do you do?" "I'm a government lawyer."

Once, he went out to a law school in the Midwest to participate in a moot court program. He tended at the time to travel a little bit incognito. He would wear a trench coat, always a baseball cap, and sunglasses. A law student was assigned to meet him at the airport. When Rehnquist arrived, he recognized the young man as the person who was there to meet him, so he went up to the student and started a conversation. The law student asked the gentleman if he could please leave him alone, because he was there to meet the Chief Justice. According to the student, Rehnquist looked at him and said, “Well, what a remarkable coincidence. I happen to be the Chief Justice.”

Those who knew William Rehnquist also knew that he had a favorite piece of verse from Thomas Gray’s “Elegy Written in a Country Churchyard.” The poem observes, “Full many a flower is born to blush unseen, [a]nd waste its sweetness on the desert air.”¹ Someone from the English Department would be able to give a more in-depth analysis, but I’ve always understood that verse and the poem in general to stand for the proposition that the humblest among us is equal to the most elevated and that simply the fortuities of society have elevated some rather than others. That is certainly how William Rehnquist viewed the verse and how he lived his life.

I have referred to Rehnquist several times as nonconventional. He was not unconventional in the sense of the two characters in the James Thurber cartoon—where one tells the other, “Why can’t you be a nonconformist like everyone else?” He was unconventional in the very real sense and even in small matters. He had the long sideburns and the Buddy Holly glasses long after they were fashionable, and he wore garish ties that I am confident were never fashionable. He was unconventional in large ways as well. He decided to be an enlisted man rather than an officer, to go to the sleepy town of Phoenix rather than Los Angeles or Washington, and to start out on his own in his law firm rather than to stay with the security of the established firm.

He was unconventional in a way that is reflected in another favorite line of his, from Emerson’s essay on self-reliance. The Chief liked this admonition: “Trust thyself: every heart vibrates to that iron string.”² Later in Emerson’s essay, there is another paragraph that captures why the Chief liked that line. Emerson wrote,

1. Thomas Gray, *Elegy Written in a Country Churchyard*, in *ENGLISH POETRY* (1172-1892) 267, 267 (John Matthews Manly ed., Athenæum Press 1907) (1751).

2. Ralph Waldo Emerson, *Self-Reliance*, in *SELF-RELIANCE AND OTHER ESSAYS* 19, 20 (Dover Publications 1993) (1841).

What I must do is all that concerns me, not what the people think. This rule, equally arduous in actual and in intellectual life, may serve for the whole distinction between greatness and meanness. It is the harder, because you will always find those who think they know what is your duty better than you know it. It is easy in the world to live after the world's opinion; it is easy in solitude to live after our own; but the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of solitude.³

In those terms, Chief Justice Rehnquist was certainly a great man.

The establishment of the Rehnquist Professorship is important, not simply because it honors a great man, but because these times demand a greater emphasis on the subject matter of American history and culture. We live in an age of globalization. Middlebury College has been in the forefront of recognizing the need to appreciate that those of us in the United States are part of an interconnected world. That recognition should lead to more—not less—emphasis on studying what we as Americans stand for.

One thing we stand for is the rule of law implemented by an independent judiciary. People often ask me what is it about being Chief Justice that has surprised me the most. The answer for me is easy. It is the number of judicial visitors we receive at the Supreme Court from around the world. They come from Albania, from Kosovo, from Russia, and from other countries of the former Soviet Union. They come to the Supreme Court and other courts in our country to try to learn how to establish an independent judiciary that can enforce the rule of law, which is something that we take for granted.

I think that establishing an independent judiciary is the greatest challenge for emerging democracies. In some sense, getting to the point of a free election is the easy part. What is hard is establishing a judiciary that is capable of enforcing the rule of law against the government as well as against the governed. It is not simply a matter of words. As President Reagan pointed out, the Soviet Constitution was a magnificent document. It granted everyone magnificent rights. But it was utterly meaningless because there was no institution, no judiciary, that could enforce that document against the government.

The judicial independence that others from around the world seek and find here is not, of course, an end in itself. Our Constitution insulates judges from political pressure precisely because they are not supposed to be making political decisions, but instead deciding cases according to the rule

3. *Id.* at 23.

of law. That is what Hamilton meant in *The Federalist Papers* when he said that judges exercise “neither Force nor Will, but merely judgment”⁴—judgment concerning the law. Judicial self-restraint, a recognition of Hamilton’s point, must go hand-in-hand with judicial independence, and the concept of the rule of law, if it is to have any meaning, must be based on a shared understanding of what the law is. That brings me back to Chief Justice Rehnquist and his contribution to the development of law in the United States.

For the next many years, scholars are going to analyze Rehnquist’s contributions on the Court, and they will focus on his work in particular areas, such as strengthening the concept of federalism in the Constitution, giving meaning to the separation of powers, and refining principles in the area of criminal procedure.

From my perspective, I see his impact in broader terms. I think there has been a change in the scope of legal argument from the time he joined the Court in 1972 to the present time. In that period, legal argument has become more rigorous and focused, and Chief Justice Rehnquist was the leading proponent of that change. We see it clearly from the perspective of an advocate.

Any lawyer appearing before the Supreme Court when Chief Justice Rehnquist was on the bench, who made an argument about what Congress meant in a particular statute, was sure to get a question from the Chief, “You say that’s what Congress *meant*. What did Congress *say*?” Any lawyer stating an abstract proposition would similarly be met with what was the standard Rehnquist question: “Which of our cases supports that proposition?” The Chief Justice was reeling the lawyer in, trying to tie him down to the statutory language and particular precedents that are the building blocks of the law. Forty years ago, just before William Rehnquist went on the Court, legal arguments were more free-ranging, more free-wheeling. When he left the Court, they were more about law, as I think arguments in the Court should be.

This change is actually reflected in the composition of the Court as well. Forty years ago, a majority of the Justices on the Supreme Court were not judges when they were appointed. They were governors, senators, and attorneys general. Today, for the first time in our history, every Justice on the Court was a federal appeals court judge when he or she was appointed to the Court.

I am not sure whether Chief Justice Rehnquist, the last Justice who was

4. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis omitted).

not a judge when appointed, would regard this as a good thing. But I do think that it is consistent with the view of the Supreme Court as a court of law and not a political entity. I know that the Chief Justice would certainly view that as a very good thing.

I have enjoyed very much my visit to Middlebury College today. I am very impressed with the faculty and students. I appreciated the opportunity to meet with my colleagues in the federal judiciary and my fellow judges on the Vermont courts. I thank you very much for your attention this evening.