

WISCONSIN’S OWN: SOME THOUGHTS ON THE LEGACY
OF CHIEF JUSTICE WILLIAM H. REHNQUIST

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I. THOUGHTS AND REFLECTIONS ON CHIEF JUSTICE WILLIAM H.
REHNQUIST

When I reflect back on Chief Justice William H. Rehnquist, three basic thoughts come to mind. First, is the Chief's remarkable command over the Courtroom. When you walked into the Courtroom as an advocate, you had no doubt, from even before the argument started, and certainly once it began, that the Chief was in charge of the argument. He had an incredibly formidable presence.

People have talked about his enforcement of the red light, and that is of course legendary. But his every action, especially the questions he asked, demonstrated his dominion over the Courtroom. He spoke with such great authority. I remember one argument in which he had a question, or really more of a statement, to the effect that the argument that I was making was not included in the question presented. And that was the end of the matter. When the Chief Justice of the United States has said that the argument is not within the question presented, what is an advocate to do? Move on—go to argument number two. That is the kind of presence he had in the Courtroom.

I remember in one case that I was arguing, I invoked a precedent and Chief Justice Rehnquist said that the case was over fifty years old, like that was a bad thing. But when the Chief said it, it put you on the defensive as if the whole Vinson Court was illegitimate somehow. This is the sort of presence the Chief had. And as Solicitor General Ted Olson has mentioned,¹ one of the greatest signs of impending doom for a counsel was when the Chief asked you for your best case because you knew that whatever case you offered, the Chief had in mind some reason why you still lost. Yet you had already offered your best case, and so you did not have much to fall back on.

This was such a characteristic of the Chief Justice's questions that in one of the first argument sessions after he was taken ill and sat out—the November argument session of 2004—Justice Scalia asked an advocate,

1. Theodore B. Olson, *A Remarkable Man*, 10 TEX. REV. L. & POL. 261, 265 (2006).

let me ask you [a] question that the Chief Justice would ask, were he here, because he always asked this kind of question. . . . [I]f you had to pick your best case of ours which interpreted the word . . . in the way that you would like us to interpret [it] here . . . what's the best case you have?"²

We lost that case.³

To go along with this incredible command of the Courtroom, the Chief Justice also had a legendary command of the material. It was as if every case decided in the *United States Reports* was part of his personal database. For example, I was at an argument, and I remember just being amazed at what I saw transpire. Just by way of background, this was a case about the tax treatment of tips for payroll tax purposes. And to echo something said by Solicitor General Olson about the Court as a whole and the Chief Justice in particular, they take no days off, and they take no cases off.⁴ By way of contrast, look at the way the Congress operates: If there is a big, high-profile hearing, the hearing room will be full and all the senators will be there. But if there is some obscure issue that arises, you often find just the chairman and the ranking member, and the rest of the chairs behind the dais will be empty. But in the Court, whether it is the highest profile case or the most obscure question of tax law or federal jurisdiction, all of the Justices are there, incredibly prepared and ready to ask you difficult and probing questions. And the Chief Justice, of course, was a prime example. So in a somewhat less than high-profile case,⁵ the advocate argued as follows:

COUNSEL: This Court has already held in *Flora v. United States*⁶ and as quoted in *Steele v. United States*⁷ that it isn't a tax on aggregate earnings.

2. Transcript of Oral Argument at 22, *Small v. United States*, 544 U.S. 385 (2005) (No. 03-750).

3. The United States argued that the plain meaning of "convicted in any court" includes convictions by foreign courts. By a vote of 5-3, the Court held that the legislative intent indicated that the word "any" does not include convictions by foreign courts. In dissent, Justice Thomas, joined by Justices Scalia and Kennedy, relied upon the plain meaning of "any" to include foreign convictions. Chief Justice Rehnquist took no part in the decision of the case. *Small v. United States*, 544 U.S. 385 (2005).

4. Olson, *supra* note 1, at 263.

5. *United States v. Fior D'Italia*, 536 U.S. 238 (2002) (argued April 22, 2002).

6. 362 U.S. 145 (1960).

7. 267 U.S. 505 (1925).

CHIEF JUSTICE REHNQUIST: There are two *Flora* cases, neither of which are cited in your brief. Which *Flora*—there was a rehearing grant. Which one are you—

COUNSEL: *Flora v. United States*, and I believe it's footnote 37 in *Flora v. United States*.

CHIEF JUSTICE: Yes, but there are two *Flora v. United States* cases[;] a rehearing was granted, one's 357, one's 362, and your brief doesn't seem to mention either of them.

COUNSEL: Well, we referenced them in our complaint, Your Honor. I think it's in paragraph 14 of our complaint.

CHIEF JUSTICE: Does it give a citation there?

COUNSEL: Yes, Your Honor. 362 U.S. 145.

CHIEF JUSTICE: But that was just about whether or not the tax court had jurisdiction if the assessment wasn't completely paid beforehand, wasn't it?

COUNSEL: Yes, but I believe that footnote 37 in that brief, in that opinion said that the Court agreed that the excise tax, like the FICA tax, is a divisible tax.⁸

Now, I do not mean to relate that story because of the important issue of the tax treatment of tips, but rather because of how remarkable it is that, with respect to a case that is over forty years old and had not been briefed by the parties, the Chief Justice was at the ready—knowing that there were two reported cases with that name, knowing a rehearing was granted in one, and ready to walk counsel through the paces as to which case was which, and which one they were relying on. It was really stunning, especially when considering that the cases were not even mentioned in the briefing in the case.

The last thing I can say about the Chief Justice—and on this, I will fully admit I am as biased as anyone can be—is that he never lost his important characteristic as a Wisconsinite. I have some evidence to support this. The year that I clerked for Justice Scalia on the Court, the one thing on which I could bond with the Chief Justice was the first of Wisconsin's recent series of trips to the Rose Bowl.⁹ I know the State of Arizona wants to claim the Chief, and you might think that he was rooting for the Pac-10 team in the Rose Bowl, but there was no question he was 100% behind the Badgers. He was following it very closely and was very

8. Transcript of Oral Argument at 43–44, *Fior D'Italia*, 536 U.S. 238 (No. 01-463).

9. The Badgers of Wisconsin went to the Rose Bowl in 1994, 1999, and 2000, and won all three years. Tournament of Roses History, Past Game Scores, <http://www.tournamentofroses.com/history/gamescores.asp> (last visited Apr. 28, 2006).

interested in the game. I think he might even have had a side wager with one of his clerks who had gone to UCLA.

I think those Wisconsin roots and his Wisconsin sensibilities were reflected in many of the ways in which he ran the Court, from keeping it open on the snowiest days in Washington—which really are not that snowy—to enforcing the red light and his incredible good humor.

In closing, I want to share with you one of my favorite passages from an opinion by the Chief Justice. I think it captures both his Wisconsin roots and his sly sense of humor. This is from a case called *Ornelas v. United States*.¹⁰ It involved the extent to which courts of appeals should give some level of deference to the factual findings of district courts in making determinations about probable cause. The district court judge in this case was Wisconsin's own Judge Randa. The facts involved an individual who was arrested, and there was a search of his vehicle in December, in Milwaukee. But this individual came from California, and his car had California plates.

The Chief Justice made the point that there was reason in these circumstances to give some deference to the determinations of the local judge and local police officers in deciding what constitutes probable cause. He noted that there was this car from California in Milwaukee, and he said,

[W]hile the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business[—in this case, drug business—]or to visit family or friends.¹¹

The climate here in February is no more salubrious than in December and the fact that so many people have come here today is a testament to what a tremendous influence the Chief Justice has had, what a remarkable man he was, what a remarkable jurist he was, and certainly a foreboding figure for those of us who have had the privilege of arguing before him.

10. 517 U.S. 690 (1996).

11. *Id.* at 699–700.

II. THE REHNQUIST COURT'S IMPACT ON FEDERALISM AND THE ALLOCATION OF AUTHORITY BETWEEN THE FEDERAL GOVERNMENT AND THE STATES

One remarkable aspect of the Rehnquist Court's federalism jurisprudence is that despite all of the federalism cases decided by the Rehnquist Court, it is probably accurate to say that *Garcia*¹² has never been overruled. It has certainly never been overruled in explicit terms. And I think that is not an accident because one of the remarkable accomplishments of the Court in this area is that the Rehnquist Court was able to build a federalism jurisprudence on foundations other than the Tenth Amendment. The Tenth Amendment as conceptualized in *National League of Cities*¹³ was never a particularly sturdy doctrinal foundation upon which to build federalism jurisprudence. There are certainly some concepts that the Court has found in the Tenth Amendment in cases like *New York*¹⁴ and *Printz*,¹⁵ but for better or worse, the Tenth Amendment does seem, at least to some degree, to be tautological and a reflection of the limits on the Commerce Clause and the other enumerated powers.

What is notable in the Court's jurisprudence is that the Chief Justice, by his leadership on the Court, managed to ground these federalism cases on several different doctrinal theories. Even if people have issues with various federalism decisions, it is fair to say that they are on a firmer doctrinal foundation than if everything were analyzed through the lens of *National League of Cities* and *Garcia*.

Through the Chief Justice's leadership, the Court has developed several distinct aspects of its federalism jurisprudence: For example, you can point to Tenth Amendment cases like *New York* and *Printz*, you can point to the Commerce Clause cases like *Lopez*¹⁶ and *Morrison*,¹⁷ or you can point to the Eleventh Amendment cases. It is a helpful development, because by bifurcating or trifurcating the federalism doctrine in this way, people can reach more nuanced conclusions about federalism. So part of the accomplishment of

12. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

13. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

14. *New York v. United States*, 505 U.S. 144 (1992).

15. *Printz v. United States*, 521 U.S. 898 (1997).

16. *United States v. Lopez*, 514 U.S. 549 (1995).

17. *United States v. Morrison*, 529 U.S. 598 (2000).

the Rehnquist Court is finding different doctrinal bases for this broader notion of federalism in the Constitution.

One other comment, which is consistent with observations by Solicitor General Olson,¹⁸ is that if you look at cases like, for example, this most recent bankruptcy case¹⁹ but also some of the other Eleventh Amendment cases,²⁰ it is clear that this federalism movement, which was originally identified by at least some people as a revolution, has its limits, and it is not just in the Eleventh Amendment area that this is true.

Justice O'Connor seems like the one in the Eleventh Amendment context who was the least robust fifth vote. But then if you turn around and look at the Commerce Clause cases, Justice O'Connor was in dissent in *Raich*,²¹ Justice Kennedy joined the majority opinion, and Justice Scalia joined in the majority's result on a Necessary and Proper Clause analysis. So, one observation I would make here is that one of the Chief's strengths was his ability to get five votes for various propositions and to keep five together in so many cases even though there was not a "Federalism Five" in absolute agreement on the doctrinal foundations of every decision.

It is hard to know how strict a constructionist or doctrinally pure the Chief would have been if left to his own devices without trying to secure five votes. This was one of his strengths on the Supreme Court. The Chief Justice's extraordinary ability to get five and to keep five suggests that some of these decisions may not have as much legs as others. It is easy to look back at the early federalism cases, in light of later decisions like *Hibbs* and *Raich*, and say that this was a revolution that wasn't or that the revolution was at least vastly overstated. But another way of looking at those early cases—that is, through the lens of judicial process—is to sit back and respect the Chief's accomplishment. After all, during the time he was leading the Court, he was generally able to keep five votes in this area, in a series of 5–4 decisions, even though not all five Justices were comfortable with the full implications of some of these decisions.

18. Olson, *supra* note 1, at 269–70.

19. *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990 (2006).

20. *See, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

21. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

III. JUDICIAL POWER AND LEADING SEPARATION OF POWERS CASES FROM THE REHNQUIST COURT

In evaluating the separation of powers decisions of the Rehnquist Court, they defy easy categorization relative to the Rehnquist Court's federalism cases. But if you look at the data points, there were obviously some important separation of powers decisions.

There was *Morrison v. Olson*²² upholding the independent counsel statute. There was *Mistretta*²³ upholding the Sentencing Commission. There were also a number of acts of Congress and claims of the President struck down, everything from the line-item veto statute²⁴ to claims of executive immunity in *Clinton v. Jones*.²⁵ The Court rejected Congress's effort to revive claims that were already adjudicated to final judgment in *Plaut*,²⁶ and the Court invalidated many of Congress's efforts under Section Five of the Fourteenth Amendment. Many people think of these latter cases as federalism cases, but there is obviously an important separation of powers component as to the relative roles of the Congress versus the Court in having the final word on the scope of the Constitution's guarantees. If you look at all of those cases, it is harder to draw firm conclusions and firm trend lines on those data points than in the federalism context.

I have two brief observations about the Rehnquist Court's separation of powers cases. First, if you look not only at the decisions of the Court but also the approach of the Chief Justice in his own votes and compare that to Justice Scalia, there is a difference that emerges and is probably demonstrated most dramatically in the *Morrison* case. The Chief Justice's opinions reflect a much greater tendency to adopt a pro-congressional perspective on these issues. Justice Scalia's opinions, in contrast, reflect a pro-executive view of these issues. What makes that rather obvious difference interesting is that both the Chief Justice and Justice Scalia have a common history as heads of the

22. 487 U.S. 654 (1988).

23. *Mistretta v. United States*, 488 U.S. 361 (1989).

24. *Clinton v. City of New York*, 542 U.S. 417 (1998).

25. 520 U.S. 681 (1997).

26. *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).

Office of Legal Counsel.²⁷ That common background did not manifest itself in agreement in cases like *Mistretta* or in *Morrison*.

Furthermore, in trying to detect some trend lines in these cases, there are at least two that I think superficially—but perhaps only superficially—seem like they cut in different directions. One is that the Rehnquist Court in interpreting Article III generally, and in standing cases in particular, did reaffirm some limits on the jurisdiction of the federal courts and took a more restrictive view of standing than previous courts. A case like *Lujan*²⁸ stands out as an example of that.

Second, at the same time the Court is being relatively demanding about standing requirements, the Court's conception of the competence of the Article III courts to decide issues appears to be expanding. You see that dramatically in two cases decided a couple of terms ago: the case involving habeas corpus jurisdiction over Guantanamo Bay,²⁹ and the Court's decision about the scope of the Alien Tort Statute.³⁰

In the latter case, the Court addressed a relatively obscure provision in Title 28 of the *United States Code*, which had been there since the first Judiciary Act, and the Court did two things.

First, the Court—in agreeing with the argument of the Government—held that the Alien Tort Statute was a purely jurisdictional provision that did not create a cause of action. But then in the second step of the analysis, the Court found that even though there was no statutory cause of action, certain common law international torts could be brought through the vehicle of the Alien Tort Statute. Justice Scalia's concurring opinion in that case, which was joined by the Chief Justice, criticized that second step of the analysis as an example of the Court's expansion of its own judicial role.

Justice Scalia said:

For over two decades now, unelected federal judges have been usurping [the lawmaking power of Congress] by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle,

27. Chief Justice Rehnquist served as Assistant Attorney General of the Office of Legal Counsel from 1969 to 1971. Justice Scalia served in the same capacity from 1974 to 1977.

28. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

29. *Rasul v. Bush*, 542 U.S. 466 (2004).

30. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

though urging the lower courts to be more restrained. This Court seems incapable of admitting that some matters—any matters—are none of its business.³¹

There are certainly exceptions, and one of the most notable is actually the last separation of powers case decided by the Rehnquist Court, at least by my reckoning. That is the case of *Tenet v. Doe*,³² where the Court, in a unanimous opinion by the Chief Justice, found that the courts had absolutely no jurisdiction over claims by individuals who were alleging that they had suffered a constitutional violation in conjunction with their covert relationship with the CIA. The Court, reaffirming a precedent from 1876—the *Totten* case³³—held that notwithstanding that these were claims by citizens, and notwithstanding that they were constitutional claims, there was no Article III jurisdiction over these claims. That decision obviously comes out very different from the enemy combatant cases, like the *Hamdi* decision³⁴ and the *Rasul* decision.³⁵ And it just shows the difficulty of drawing these kinds of trend lines, especially in the separation of powers context.

But the last of the Court's decisions concerning the enemy combatants should also be examined. These two competing tendencies—strict application of jurisdictional doctrines like standing and expanding notions of the Court's competence to decide difficult issues—are on display in the *Padilla* case.³⁶ The Chief Justice wrote an opinion for a five-vote majority that, applying very strictly the jurisdictional rules for filing habeas petitions, found that there was no jurisdiction over that case. Justice Stevens authored a dissent in *Padilla* that would have asserted jurisdiction and the same day issued the majority opinion in *Rasul* in which the Court distinguished its World War II precedent and asserted jurisdiction over all of the habeas petitions being filed by the detainees in Guantanamo.

Finally, let me conclude by noting that the tension between these two tendencies may be somewhat superficial because the courts, in determining the Article III jurisdiction for purposes of

31. *Id.* at 750 (Scalia, J., concurring in part).

32. 544 U.S. 1 (2005).

33. *Totten v. United States*, 92 U.S. 105 (1876).

34. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

35. *Rasul v. Bush*, 542 U.S. 466 (2004).

36. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

standing, still have the ultimate control over the scope of the claims: what claims they will hear, and when they will hear them. In that sense, both tendencies may reflect the reality that the Rehnquist Court had a very robust view of its role as having the final say on legal disputes, including questions that past Courts may have left to the political branches.