

PERSONAL REFLECTIONS ON THE CHIEF

RICHARD W. GARNETT*

On February 1, 1952, a young man, then recently graduated from the Stanford Law School, completed a long drive from Wisconsin in his 1941 Studebaker and reported to Washington, D.C. as a law clerk to Justice Robert H. Jackson. It was, as this young lawyer would later put it, “a highly prized position; I was surprised to have been chosen for it, and certainly I did not want to be late.”¹ I know the feeling.

I was more than surprised in June 1995 when by then Chief Justice Rehnquist invited me to interview for a law clerk position in his chambers. And I also approached the interview with, in his words, fear and trembling, all too aware that the opportunity owed much to a large element of luck. Later, the Chief’s incomparably able assistants Janet and Laverne would needle me for having arrived at the Court such a mess. I can only imagine how nasty I looked and how disheveled in appearance and mind I seemed, and was, as I waited, sweating horribly from the combined effects of the D.C. heat and my one still-unfamiliar lawyer suit.

Here is how the Chief remembered his own interview with Justice Jackson in his book, *The Supreme Court*. The Chief wrote,

I met with the Justice in one of the faculty offices, and his pleasant and informal demeanor at once put me at ease. After a few general questions about my background and legal education, he asked me whether my last name was Swedish. When I told him that it was, he began to reminisce about some

* Lilly Endowment Associate Professor of Law, Notre Dame Law School. J.D., Yale Law School; B.A., Duke University; law clerk to Chief Justice William H. Rehnquist, 1996 Term. This is a revised version of remarks delivered at the Federalist Society Conference on “The Legacy of the Rehnquist Court” in Milwaukee, Wisconsin, February 23, 2006. These remarks are based on a tribute essay, which is forthcoming in the *Yale Law Journal*. Reprinted by permission of The Yale Law Journal Company and William S. Hein Company from *The Yale Law Journal*, Vol. 115, pages 1847–55. Professor Garnett and the editors of the *Texas Review of Law & Politics* are grateful for the permission to re-publish portions of that essay here.

1. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 3 (2001).

of the Swedish clients he had had while practicing law in upstate New York. I genuinely enjoyed these anecdotes, but somehow I felt I should be doing more to make a favorable impression on him. He, however, seemed quite content to end the interview with a courteous thanks for my having come by, and I walked out of the room convinced that he had written me off as a total loss in the first minutes of our visit.²

Again, I know the feeling.

I remember the Chief greeting me quite casually, very much on time, in short sleeves and showing me matter-of-factly around his chambers, which were decorated with romantic landscapes that were on loan from the Gallery and pictures of his friends and his law clerks. We had what I am sure he tried to make a relaxed and friendly conversation about my childhood in Alaska, his law practice in Arizona, and our hitchhiking strategies—we both had spent some time hitchhiking, and we agreed that signs saying you were going to a family-friendly-sounding kind of place were good for getting picked up. And, we talked about my work in the death penalty context. I had represented some prisoners on death row, which I had been told by friends was going to be the kiss of death with the Chief. But he didn't seem to mind at all.

I asked him about practical jokes he had played as a junior Justice. I had done a book report on *The Brethren* when I was in high school and had thought, "Now that's the guy who's cool because he's playing jokes on the Chief Justice." Then, he asked me if I had any questions and, because I thought this would be my only chance, I said that I would like to see the basketball court on the top floor of the building. He was happy to oblige.

Well, I had been warned that these interviews did not last long, but when the Chief said "thanks" after about ten minutes, I started working in my mind on this speech that I was going to give my friends about how it was just great to have had the chance to interview. But then he remarked off-handedly that he had had a clerk from every state but Alaska. I remembered that his own connection with the frozen north of Sweden had helped him in his own clerkship interview, and so I figured maybe my connection with Alaska would help me. And so it did.

2. *Id.* at 4–5.

The Chief never forgot what it was like to arrive at the Court as a slightly awestruck and appropriately apprehensive law clerk. He never lost a sense of gratitude to the Court and to Justice Jackson for an opportunity to learn and to serve in that building. And he never outgrew or got tired of teaching young lawyers how to read carefully, write clearly, think hard, and live well.

I clerked for the Chief in 1996. That was the year that saw the twenty-fifth anniversary of his confirmation to the Court and also his tenth anniversary as Chief. So, in keeping with tradition—one that I'm sure some of my colleagues here remember—it was the then-current law clerks' job to plan the so-called entertainment for the law clerk reunion.

Against the advice of friends of mine with literary scruples, I composed a poem for the reunion purported to be inspired by John Greenleaf Whittier's poem *Barbara Frietchie*, which is the stirring account of an elderly Maryland woman, bowed with four-score years and ten, who had waived the Union flag in defiance at invading Confederates. The Chief, of course, had quoted this poem at length in *Texas v. Johnson*.³

My own alleged poem, called *The Lone Ranger*, opened with these very forgettable lines: "First from Wisconsin's cold and sleet / then east from the desert's arid heat / he came with sideburns and over-wide ties / 'do strict construction,' Nixon advised / 'and from Warren's antics, bring relief' / so came the Lone Ranger / our boss, now the Chief." In fact, President Richard Nixon is said to have remarked after meeting the future Chief, "This guy Renschberg looks like a clown with his pink shirt, psychedelic tie, and mutton chops."⁴

For the occasion, the law clerks also gathered together a bunch of quotes, sort of a Law Geek's Top Ten List. It was a bit different from the lists that one might find in law school hornbooks and such. Instead, we were trying to compile quotes that captured what the Chief was all about.

Several of the entries on our list captured the Chief's very dry, understated sense of humor. For instance, dissenting in *Anderson v. Liberty Lobby, Inc.*, the Chief had quipped that the Court's

3. 491 U.S. 397, 424–25 (1989) (Rehnquist, J., dissenting).

4. See JOHN W. DEAN, *THE REHNQUIST CHOICE* 86 (2001) (explaining that Rehnquist had been wearing "an awful psychedelic tie," that Rehnquist had "muttonchop sideburns," that President Nixon had called Rehnquist "a clown," and that President Nixon referred to Rehnquist as "Renschberg").

opinion “sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.”⁵ He described the matter under review in *Heckler v. Chaney* as “the implausible result that the FDA is required to exercise its enforcement power to ensure that the States only use drugs that are ‘safe and effective’ for human execution.”⁶

And he offered this in response to the Court’s ruling in *Carey v. Population Services International*:

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men’s room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.⁷

To be sure, a few other entries touched on substantial doctrinal disputes and struck the notes that one might expect from important opinions. So, in *Dolan v. City of Tigard*, the Chief wrote, “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation”⁸ Or, in *Wallace v. Jaffree*, he observed in dissent, “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading metaphor for nearly 40 years.”⁹

5. 477 U.S. 242, 269 (1986).

6. 470 U.S. 821, 827 (1985).

7. 431 U.S. 678, 717 (1977).

8. 512 U.S. 374, 392 (1994).

9. 472 U.S. 38, 92 (1985).

Our topic today invites us to reflect not only on the Chief's nice turns of phrase, or his sense of humor, but on his legacy and on his fundamental commitments. Two of the quotations that we selected for Law Geek's Top Ten List captured the Chief's big-picture view of the Constitution pretty well.

First, consider this from *United States v. Lopez*:

The Constitution creates a Federal Government of enumerated powers As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State Governments are numerous and indefinite" This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."¹⁰

And, there was this in his dissent from *Texas v. Johnson*: "The Court's role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government."¹¹

Now, again, my colleagues will explore in greater depth the implications of some of these hints at Justice Rehnquist's constitutional theory. But it seems to me that these two passages—just these two—go a long way to presenting the vision, or the disposition, that can plausibly be said to have animated the Chief's whole career. In his view, "We the People," through our Constitution, have authorized our federal legislators and courts and administrators to do many things, but not everything. And because the nation's powers are few and defined, Congress may not pursue every good idea or smart policy, nor should courts invalidate every foolish or immoral one. The point of this arrangement, though, is not to hamstring good government or throw up roadblocks to democracy. It is instead, by dividing and enumerating and structuring power, to "ensure protection of our fundamental liberties."¹²

Now some of the Chief's critics regard his calls for judicial modesty as little more than disingenuous cover for his own

10. 514 U.S. 549, 552 (1995).

11. 491 U.S. 397, 435 (1989).

12. *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S., 452, 458 (1991)).

brand of conservative judicial activism.¹³ But I think it is worth taking seriously both his claim that it is not arrogant or illegitimate for judges to enforce the structural features of our Constitution and his insistence that judicial review should rarely be employed by federal courts to revisit or second-guess the decisions of politically accountable branches on controversial or divisive social and moral questions. Running through his opinions on any number of issues, from assisted suicide to abortion to Christmas displays to campaign finance, is a commitment to the notion that our Constitution leaves the hard questions, generally speaking, to the people.¹⁴

It is one thing, the Chief believed—and he expressed this belief in his opposition to the so-called “living Constitution”¹⁵—to note the obvious fact that our Constitution is not always the most specifically worded document. It is one thing to note that there is wide room for disagreement about the meaning of some provisions. But it is another thing to authorize unelected members of the Federal Judiciary to function as the voice and conscience of contemporary society—to serve, as he put it, as “a council of revision,” armed with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for our country.¹⁶

13. See, e.g., Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13 (“For nearly a decade, the court’s five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws regulating issues as varied as gun sales, the environment and patents—as well as laws protecting women and now the disabled.”); see also Larry D. Kramer, *No Surprise. It’s an Activist Court*, N.Y. TIMES, Dec. 12, 2000, at A33; Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23 (“[W]e are now in the midst of a remarkable period of right-wing judicial activism.”); Linda Greenhouse, *Farewell to the Old Order in the Court: The Right Goes Activist and the Center is a Void*, N.Y. TIMES, July 2, 1995, Week in Review, at 1 (“[J]udicial activism, a phrase that conservatives once hurled as an epithet, easily fits Chief Justice Rehnquist’s 5-to-4 majority opinion striking down a Federal law that made it a crime to carry a gun near a school.”).

14. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979 (1992), (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.”).

15. See generally William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

16. See, e.g., *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 271 (1986) (Rehnquist, C.J., concurring in part and dissenting in part) (“If we sat as a council of revision to modify legislative judgments, I would hesitate to join the Court’s effort because of this fact alone. But we do not sit in that capacity; we are obliged to leave the drawing of lines in cases such as this to Congress if those lines are within constitutional bounds.”).

Back to the Top Ten List for a minute. As many lawyers know, the Chief was a big fan of map cases. He liked cases with maps and river boundaries and puddles and submerged lands and historic bays and those kinds of things. He once joked with my co-clerks and me that what he wanted to do after he retired was to get appointed a river master—a special master for an obscure boundary dispute, preferably up in Vermont, with Canada, perhaps. I learned from the start during conversations he and I had—including a very intense conversation about which was the cooler Arizona ghost town, Chloride or Bumblebee—that he was intrigued by topographical trivia and geographical minutia.

So, my favorite William Rehnquist quote is this, from *Kansas v. Colorado*:

The Arkansas River rises on the east side of the Continental Divide, between Climax and Leadville, Colorado. Thence it flows south and east through Colorado, Kansas, Oklahoma, and Arkansas, emptying into the Mississippi River, which in turn flows into the Gulf of Mexico. As if to prove that the ridge that separates them is indeed the Continental Divide, a short distance away from the source of the Arkansas, the Colorado River rises and thence flows southwest through Colorado, Utah, and Arizona, and finally empties into the Gulf of Baja, California. . . . The Arkansas River is unique in that the pronunciation of its name changes from State to State. In Colorado, Oklahoma, and Arkansas, it is pronounced as is the name of the State of Arkansas, but in Kansas, it is pronounced Ar-KAN-sas.¹⁷

People laugh or think that I am kidding when I say this is one of my favorite Chief quotes, but it is. It is not because it is endearingly idiosyncratic—although it is; or because it reminds me of pleasant conversations; or because I do not appreciate the significance of his work in so many important areas, from criminal procedure to religious freedom. I agree with former Solicitor General Walter Dellinger, who observed that the Chief is one of the dominant Justices in our nation's history.¹⁸ Professor Chemerinsky has reported several times that there is

17. 514 U.S. 673, 675, 677 (1995).

18. See Walter Dellinger, *In Memoriam: William H. Rehnquist, the Man Who Devised the Natural Law of Federalism*, SLATE, Sept. 4, 2005, <http://www.slate.com/id/2125685/>.

not an area of the law where he has not had an impact,¹⁹ and Professor Chemerinsky is right.

For all of Chief Justice Rehnquist's achievements and influences, for me the Arkansas River travelogue stands out because of its down-to-earthiness, its rootedness, and its affectionate appreciation for the concrete. For me, it evokes the Chief's healthy focus on the value, interest, and importance of ordinary life and his attraction to the really human things. All of this was highlighted by the friends and family who reflected on the Chief's life and career during the days following his death and particularly at the beautiful funeral, which was really a celebration of a wonderful life more than a sad farewell. We heard a lot from his friends and his children, his pastor, and his granddaughter about how hard he had worked—although, at the same time, about how easy it was for him—to put them at the center of his life. It was nice to be reminded how the Chief had taken to heart Mr. Johnson's dictum that to be happy at home was the end of all human endeavor.²⁰

In a speech the Chief gave in the year 2000 to the graduating students of George Washington University Law School, he talked about the Jimmy Stewart movie, and the play, *You Can't Take It With You*.²¹ He told the assembled, ambitious young lawyers to “[d]evelop a capacity to enjoy pastimes and occupations that many can enjoy simultaneously—love for another, being a good parent to a child, service to your community.”²² I can say that perhaps without even realizing it, the Chief not only taught me a lot about structural federalism, but he also instilled in me a commitment, one that I try to call my students to: to building and living an integrated life as a lawyer, a life that is not compartmentalized, a life that holds together work, friends, family, faith, and community. I think that the Chief understood

19. See Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 1 (2004) (explaining that “[v]irtually every area of law, criminal and civil, is touched by” the changes made by the Rehnquist Court).

20. Cf. M.D. Aeschliman, *The Good Man Speaking Well—Samuel Johnson*, NATIONAL REVIEW, Jan. 11, 1985, http://www.findarticles.com/p/articles/mi_m1282/is_v37/ai_3599109/pg_2 (quoting Samuel Johnson as having said “to be happy at home is the end of all human endeavor”).

21. William H. Rehnquist, Commencement Address at the George Washington University Law School (May 28, 2000), http://www.supremecourtus.gov/publicinfo/speeches/sp_05-28-00.html.

22. *Id.*

that a need for this kind of integration is particularly acute among young lawyers.

In his George Washington speech, he recalled happily that the structure of law practice in Phoenix when he practiced there was such that “I was able to earn a decent living while still finding time for my wife and children and some civic activities. Lawyers were not nearly as time-conscious then as they are now; this meant that they probably earned less money than they might have, but had a more enjoyable life.”²³ He put before the students and the young lawyers the fact that because of their abilities and opportunities, they were going to have choices, and that “how wisely you make these choices will determine how well spent you think your life is when you look back at it.”²⁴

I hope the Chief agrees with me that, indeed, his life was very well and inspiringly spent.

23. *Id.*

24. *Id.*