

A REMARKABLE MAN

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

During my tenure as Solicitor General, I made sure to go to many arguments that the Government was participating in during those three-and-a-half years. Because other arguments took place on those same days, I was able to observe almost all of them. I always had deep affection and respect for the Supreme Court, the Justices of the Supreme Court, and the institution of the Supreme Court. That experience of watching it closely intensified that degree of respect.

In addition to Chief Justice Rehnquist, we have a Court of Justices who are extraordinarily well qualified, extremely intelligent, and extraordinarily and without exception very well prepared for oral argument. Their questions come immediately and they are very good, penetrating questions. As much as you prepare, they always go to the very weakest portions of the case, no matter which side you are on. Part of that discipline was attributable to Chief Justice Rehnquist.

A word or two about Chief Justices: We are now at the seventeenth Chief Justice of the United States. Think about that. We have had forty-three Presidents, but we have only had seventeen Chief Justices in the history of our country. The last three Chief Justices, before Chief Justice Roberts, served from the very beginning of the Eisenhower Administration.¹ That is ten presidencies and three Chief Justiceships. The Justices and the Chief Justices of the United States have enormous influence on our life, our culture, our law, the structure of our government, the things that we are free to do, and the things that we allow the government to restrict us in doing.

Chief Justice Rehnquist served on the Court for almost thirty-four years; fifteen as Associate Justice and nineteen as Chief Justice.² That is a remarkable tenure. He served longer as Chief Justice than all but two of the Chief Justices.

1. Chief Justice Earl Warren served from 1953–1969, Chief Justice Warren E. Burger from 1969–1986, and Chief Justice Rehnquist from 1986–2005. Supreme Court of the United States, Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Apr. 3, 2006).

2. *Id.*

He brought a Midwestern discipline to the Court, but he did it in such a congenial way that the other eight Justices of the Court on which he was Chief Justice, no matter how much they disagreed at the end of the day and no matter how sharp their differences in the opinions that they wrote, they were always a collegial and respectful group. I have been told by several of the Justices individually about their relationships, how well they get along, and how much they respect one another. They almost invariably attribute that in large part to the kind of Chief Justice that Chief Justice Rehnquist was.

Justice Ginsburg has said publicly that Chief Justice Rehnquist is the best boss she ever had.³ Such praise comes from someone from the opposite end of the conservative-liberal spectrum, but that same sentiment was reflected in the other Justices that I have spoken to.

The Midwestern discipline was an important part of Chief Justice Rehnquist. The Court always started on time. It was there whether there was a snowstorm or not. During the anthrax scare in Washington, D.C., the Court went on despite concern about whether the Supreme Court itself had been affected by anthrax through the Postal Service.⁴ The Court moved over to the United States Court of Appeals for the D.C. Circuit, and went on just as if nothing had happened.⁵ There was nothing that was going to stop the Court from operating.

As many have noted before, you had to stop when that red light went on. I saw an argument once where Professor Tribe, a highly respected constitutional lawyer and a very experienced advocate, was arguing a case, and he was representing the petitioner. As a petitioner, if you intend to reserve some time for rebuttal it is up to you to finish arguing and still have some time left for your rebuttal. As Professor Tribe went on with his argument, the white light went on indicating he had five minutes left, and he kept talking and answering questions. Finally, the red light went on, and the Chief Justice said, "Mr. Tribe, your time has expired." Professor Tribe said, "I had

3. Jeffrey Rosen, *The New Boss*, N.Y. TIMES MAGAZINE, Sept. 18, 2005, § 6, at 19.

4. Charles Lane, *Supreme Court Building Closed; Anthrax Spores Found in Off-Site Facility that Screens Mail*, WASH. POST, Oct. 27, 2001, at A15.

5. Tony Mauro, *Uprooted Court Doesn't Miss a Beat: Justices, Ejected From Quarters by Anthrax, Hit the Ground Running*, N.J. L.J. Nov. 5, 2001.

intended to reserve some time for rebuttal.” The Chief Justice said, “You didn’t.” That was it.

That same discipline carried over in the way the Court conducted its business. For example, the opinions got out on time. Chief Justice Rehnquist was a bit of a disciplinarian. Some Justices were slow in getting their opinions out. When it came time for the next month’s assignment of opinions, that slow Justice may not have received an assignment if he or she was not caught up with getting the opinions out.

During his tenure, the Court reduced the number of cases they took every year from about 150 down to what it is now about seventy-five. Those of us who argued before the Court wished the Court would take more cases, and none of us could figure out exactly why that change took place. But we are all relatively confident that it had a lot to do with Chief Justice Rehnquist deciding that the Court, at 150 cases per term, was not doing its work well, and was maybe not producing crisp opinions. Maybe it was deciding cases without as much thought as possible. Nonetheless, he reduced the number.

Chief Justice Rehnquist had a wicked sense of humor, and he was capable, with a very quick remark, of introducing some levity to the opinion and keeping things on a very civil level. But he was also very disciplined. As a litigant before him, you knew that at some point during your argument you would say something about what happened in the record, and the Chief Justice would ask, “Where do we find that in the record?” I am sure it was a conscious way of Chief Justice Rehnquist teaching the Bar that you had better know where the things are that you are talking about, because he might ask you. It got to the point where we would anticipate that a question was going to come so we would refer to something early in the argument that we knew where in the record it appeared. So when Chief Justice Rehnquist then inevitably asked the question, we could answer it, it would be over with, and we could go on with our argument.

Although trivial, another interesting and fun characteristic of the Chief Justice was that forty minutes into the argument he would have problems with his back and stand up. He had back troubles throughout his life, and he just needed to move around a little bit. So he would stand up, walk behind the curtain, which was right behind the bench, and then come back about forty seconds later. The clerk would warn inexperienced advocates

not to get rattled. “It is not anything you said; he is just going to get up and do that.” You could set your watches by that. It would be forty minutes into the first argument, and then another forty minutes later—twenty minutes into the second argument.

He was a wonderful man. He never forgot anything about any case that was ever argued in the Court. Some obscure case would come up, which may not have even been in the briefs or was an obscure case in some footnote, and the Chief Justice would correct an advocate on what it was about. He had an incredible memory for the cases that the Court had decided. He asked me one time in the middle of an argument, “What is your best case for that proposition?” When I answered, he said, “Yeah, but that was a case of original jurisdiction. I want the case that was decided under the Court’s appellate jurisdiction.” I wondered how he knew that I was going to mention that case, that it was an original jurisdiction case, and that there was something wrong with it because it was an original jurisdiction case. I finally muddled on through the argument, but it was that kind of thing that you had to be able to expect. An advocate had to have it exactly accurate.

He was a remarkable, remarkable man. The Court and the Justices will miss him—and America will, too.

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

Federalism meant a great deal to Chief Justice Rehnquist. From his very early days on the Court, you could see it with his dissents.

The structure of our Constitution, as Justice Scalia discussed during his Senate confirmation hearings, is the mechanism that has preserved our liberty and preserved the strength of our country. Justice Scalia explained that there are all kinds of constitutions in the world with beautiful bills of rights—the former Soviet Union, the Constitution of Iraq or Pakistan—and each of them have long lists of rights that are guaranteed to the citizens.⁶

6. *Nomination of Judge Antonin Scalia to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 99th Cong. 32 (1986) (testimony of Hon. Antonin Scalia).

What we have that has made those rights persist and has guaranteed us liberty is a structural constitution that guarantees that those liberties will be retained. The separation of our government between the Judicial, the Executive, and the Legislative branches and the structure of our Federal Constitution, where states retain sovereignty over a number of issues, are the mechanisms that guarantee our liberty. That particular point was extremely important to Chief Justice Rehnquist, and he changed the surrounding jurisprudence enormously.

The year before he became Chief Justice, in a case called *Garcia v. San Antonio Metro Transit Authority*,⁷ the Court reversed a previous decision called *National League of Cities v. Usery*.⁸ In *National League of Cities*, the Court, by a 5–4 vote and in an opinion written by then-Associate Justice Rehnquist, said that the United States could not enforce the 1974 amendments to the Fair Labor Standards Act and other federal requirements on the governance of cities.⁹ Cities and local governments had the power to organize themselves and to decide how much to pay their own employees, and the United States government, under the Tenth Amendment, did not have the power to exercise such control.

In 1985, the year before Justice Rehnquist became Chief Justice, *Garcia* reversed *National League of Cities* and said that the federal government did have the power to enforce wage and price controls over transit workers in San Antonio.¹⁰ The Chief Justice said, “I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”¹¹ He was sending, in a very succinct way,¹² a signal in that one sentence: We are coming back to this and it will change. That was 1985.

Over the next nineteen years of his tenure, it indeed did change. The doctrine of the Tenth Amendment changed. In a case called *New York v. United States*,¹³ the Supreme Court held in

7. 469 U.S. 528 (1985).

8. 426 U.S. 833 (1976).

9. *Id.* at 855.

10. *Garcia*, 469 U.S. at 557.

11. *Id.* at 580.

12. Chief Justice Rehnquist’s dissent in *Garcia* was only a paragraph long.

13. 505 U.S. 144 (1992).

a 6–3 decision, this time by Justice O’Connor, that Congress could not command the legislatures of various states to enact certain policies with respect to nuclear waste. Next came the Commerce Clause cases, including *Lopez v. United States*,¹⁴ and the Supreme Court held for the first time in about sixty years that there are meaningful limits on the Commerce Clause and that Congress could not just do anything it wanted and claim it had the authority to do so under the Commerce Clause. Congress could not, in *Lopez*, regulate whether people in the vicinity of local schools could carry guns or have guns in their possession. Absent a regulation concerning the channels or instrumentalities of interstate commerce, Congress had to identify some substantial relationship with the interstate commerce before regulating such activities.¹⁵

In *Seminole Tribe*¹⁶ a couple of years later, the Supreme Court held, again in a 5–4 decision led by the Chief Justice, and in several cases since then, that there were limits on the power of citizens to sue states for damages, first in a federal court and then in the state courts. All of this took place under the leadership of Chief Justice Rehnquist in four ways: (1) bolstering the power, sovereignty, and integrity of the states; (2) limiting the power of Congress to regulate local activities; (3) restricting Congress’s power to impose its will on the states; and (4) restricting the ability of Congress to, by legislation, allow citizens to sue states, and therefore protect the integrity of the courts. He was very strict about this. The Court had been—and continues to be—divided on 5–4 grounds in that area, but the Chief Justice led the way to that change.

In the last couple of years, Justice O’Connor, who was a part of the majority in those cases, has switched to the other side. The first case was a case about the Family Medical Leave Act,¹⁷ where it was clear that there was a very good possibility that Justice O’Connor would go over to the other side. The Chief Justice anticipated that switch and wrote the opinion for the Court so the Court came out a different way on the Eleventh Amendment issue. Then in two subsequent cases, the Americans

14. 514 U.S. 549 (1995).

15. *Id.* at 558–59.

16. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

17. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

with Disabilities Act case,¹⁸ and then just a couple of weeks ago in a bankruptcy case,¹⁹ the Court came out 5–4 on the other side of the federalism debate. We will see, with a new Chief Justice and Justice Alito replacing Justice O’Connor, which way that pendulum will now swing.

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

Another aspect of federalism involved *Morrison v. Olson*,²⁰ a case in which I initially was involved. I did not argue the case, but my name is in there and I know a lot about that case. As firm as Chief Justice Rehnquist was with respect to the structural Constitution when it came to states and the federal government, he was quite different when it came to the allocation of powers among the branches of our federal government. I would have thought he would have been a very firm believer in the separation and allocation of federal powers because he was an Assistant Attorney General at the Office of Legal Counsel, as was Justice Scalia and I. In that job, you get a strong feeling about executive power, and part of your job is to make sure that the Executive does not forfeit the power, back away from the responsibilities given to him by the Constitution, or allow his power to be eroded by Congress.

Morrison v. Olson involved the independent counsel statute that Congress had created in the wake of Watergate.²¹ During the Clinton years, every claim of wrongdoing by anybody required the appointment of an independent counsel to investigate. The independent counsels were appointed by judges, their jurisdiction was decided by judges, they could not be recused except for cause by the President, and they had all of the power to enforce the laws that the President and the Attorney General had.

My experience with the statute was earlier than that. I was the subject of an independent counsel investigation, and we firmly felt that it was an unconstitutional stripping of the President’s authority to appoint Executive Branch officials, and therefore be able to remove Executive Branch officials, because Article II of

18. *Tennessee v. Lane*, 541 U.S. 509 (2004).

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

20. 487 U.S. 654 (1988).

21. See Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–599 (2000).

the Constitution says that the “executive Power shall be vested in a President”²² and that the President “shall take Care that the Laws be faithfully executed.”²³

Our perception was that the independent counsel statute violated the prerogatives of the President in many different ways: He could not appoint a subordinate to enforce the laws, he could not remove a subordinate who was enforcing the laws in a way that he did not like, and he could not control the exercise of the executive power. If the statute would be struck down as unconstitutional, that would be a major step to restore some of the integrity of the constitutional structure, which was described as the unitary executive during Justice Alito’s recent confirmation hearings.²⁴ The Executive has the power to override what Congress does but all executive power is vested in the President and the President’s subordinates, not in various independent agencies that are not acting as subordinates to the President.

The D.C. Circuit decided in a 2–1 vote²⁵ to strike the statute down as unconstitutional on the grounds that I explained above and it went to the U.S. Supreme Court. Justice Kennedy had just been appointed to the Court and did not participate, so there were eight Justices. All that we needed was four to affirm the decision of the Court of Appeals. Our thinking was that we could surely convince Chief Justice Rehnquist, Justice Scalia would support it, as well as Justice O’Connor, and we thought we would maybe pick up another vote somewhere along the line and at least get four votes.

But we were very disappointed. The decision was 7–1.²⁶ Justice Scalia’s dissenting opinion in that case is probably the best dissenting opinion ever written in the history of the world. But to our surprise, the majority opinion was written by the Chief Justice, and it was not so that he could soften the impact of the decision. The Chief Justice systematically dismantled every argument that had been made on the appointment power, the power of the President to remove, and the power of the

22. U.S. CONST. art. II, § 1, cl. 1.

23. *Id.* § 3.

24. See, e.g., *Witnesses Appraise Supreme Nominee’s Approach to the Law*, N.Y. TIMES, Jan. 14, 2006, at A1 (quoting Professor Erwin Chemerinsky’s Senate Judiciary Committee testimony stating that then-Judge Alito believed in the unitary executive theory).

25. *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988).

26. *Morrison*, 487 U.S. at 654.

President to control the Executive Branch. Justice White, for example, did not feel very strongly about separation of powers and was very much a pragmatist with respect to those issues. That was reflected in the Chief Justice's view that allocation of powers is important but he was much more of a functionalist in that area.

*Bush v. Gore*²⁷ is another good example. Here, the Supreme Court decided that the recount of votes in Florida, which the Florida Supreme Court had required on two separate occasions, violated the Equal Protection Clause because the votes were being counted in a different way, in different counties, and according to different standards.²⁸

The concurring opinion by the Chief Justice, joined by Justice Scalia and Justice Thomas, was focused on Article II of the Constitution and the portion of the Constitution that says how Presidents are elected, how the electors in the different states must be selected, and how that decision is made by the legislatures of the various states.²⁹ The opinion recounts the allocation of power with respect to a presidential election and the fact that the Florida Supreme Court—the state judicial branch—by changing the rules of the recount after the election, was interfering with the power of the legislative branch, which is where the Constitution required the determination of the manner in which electors would be selected to be.³⁰ The concurrence in *Bush v. Gore* is an extremely important separation of powers opinion.

The rumor around Washington, D.C., was that the concurrence was going to be the majority opinion; however, Justices Kennedy and O'Connor eventually chose to go with the Equal Protection argument, which managed to get a majority vote, and became the opinion of the Court. However, it is very important to take a look at the Chief Justice's opinion in that case.

In a subsequent speech in the wake of some of the controversy about the decision, Chief Justice Rehnquist recounted the fact that the Supreme Court had been involved in an earlier, highly controversial presidential election. In the election of 1876 there

27. 531 U.S. 98 (2000).

28. *Id.*

29. *Id.* at 112–22 (Rehnquist, C.J., concurring).

30. *Id.*

was, again, a very close vote.³¹ There were disputes in various different states—including, of all places, Florida—with respect to which set of electors had won.³² The dispute went on for several months and was finally resolved by Congress creating a fifteen-member Electoral Commission, consisting of five congressmen, five senators, and five Supreme Court Justices.³³ The commission was supposed to be composed of seven Republicans, seven Democrats—including two Republican-appointed Justices and two Democrat-appointed Justices—and one Independent Justice.³⁴ However, Justice David Davis, the Independent, was suddenly elected to the Senate by the Illinois state legislature.³⁵ Justice Davis withdrew from the commission and was replaced by Justice Joseph Bradley, a Republican appointee.³⁶ This tilted the balance of the commission toward the Republicans. The Republican-leaning commission then proceeded to vote down party lines on each of the twenty disputed electoral votes.³⁷ After a Democratic filibuster, Congress declared Hayes, the Republican, the winner.³⁸

The criticism that came was what were Supreme Court Justices doing sitting on a commission that was to decide a presidential election? This criticism resurfaced later when Justice Robert Jackson temporarily left the Supreme Court to be the chief prosecutor at the Nuremberg trials.³⁹ The same criticism of why the Supreme Court was acting so politically was levied after *Bush v. Gore*. Those of us who were on the Bush side of the case did not think the Court was being political, but instead that what the Supreme Court was doing was preventing an alteration of our election outcome by a Florida Supreme Court that had already been reversed nine to zero by the United States Supreme Court. Furthermore, the Supreme Court was acting in an entirely

31. TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE app. B, at 210 (World Ahead Publishing 2004).

32. *Id.* at 4.

33. *Id.*

34. *Id.* at 169.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See Brady O. Bryson, *Tribute: Remembering Robert H. Jackson at Nuremberg Decades Ago*, 68 ALB. L. REV. 9 (2004) (recollections of Justice Jackson's involvement with the Nuremberg trials).

appropriate way with a presidential election at stake—a very important matter.

But in the Chief's subsequent speech about facing such criticism, he reflected on the 1876 election and the Nuremberg trials, and at the end of the speech he said that in the face of such peril, the Justices must act, and, "Perhaps it was not good for them individually, or for the Court, but it was assuredly good for the nation."⁴⁰

40. William H. Rehnquist, C.J., *2003 Albritton Lecture: The Supreme Court and the Disputed Election of 1876*, 55 ALA. L. REV. 527, 536 (2004).