

*(Editor's Note: 2005 saw Justice Sandra Day O'Connor announce her retirement in July, and the passing of Chief Justice Rehnquist on September 3. The following three essays are personal tributes to two important figures in American legal history.)*

## **A PERSONAL TRIBUTE TO CHIEF JUSTICE REHNQUIST**

*By Douglas D. McFarland\**

Over the 216 years of our nation's history, 109 men and women have served as Justices of the Supreme Court of the United States. Mathematical division tells us a new Justice is appointed every two years. History tells us these appointments tend to come in bunches. Until the appointment of Chief Justice John G. Roberts this year by President George W. Bush, the membership of the Court had been constant for the unprecedented period of eleven years. In recent years, the President who had the good fortune to have the most appointments was Richard M. Nixon, who placed four Justices on the Court during his five-and-one-half years in office. This essay is about the man who was the fourth appointment.

William Hubbs Rehnquist spent his youth in Wisconsin, and served as a sergeant in the Army during World War II before his education at Stanford and Harvard. Upon graduating number one in his Stanford law class and clerking for Justice Robert H. Jackson, he took a job practicing law in Arizona. Both the weather and the political climate appealed to a young Republican in the Barry Goldwater years. After becoming active in party politics, upon the election of President Nixon in 1968, Rehnquist went to Washington as the Assistant Attorney General in charge of the Office of Legal Counsel at the U. S. Department of Justice.

One of the duties of the office was to identify and screen nominees to the federal courts. Consequently, Rehnquist along with Attorney General John N. Mitchell and Deputy Attorney General Richard G. Kleindienst were members of a small committee that discussed and approved forwarding to the President the successful nominations of Chief Justice Warren E. Burger, Justice Harry A. Blackmun, and Justice Lewis F. Powell (as well as the unsuccessful nominations of Judges Clement F. Haynsworth and G. Harrold Carswell). When the time came to discuss the fourth appointment, the others blocked AAG Rehnquist from entering the committee room. "We're going to discuss you," Kleindienst explained.

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One doubts William Rehnquist would have been chosen today. At the age of 47, he had a background in private law practice and less than three years service as a Justice official. He had little record of public positions. He had no particular political constituency or clout. He had no charisma to wow the Senators. What he did have was a brilliant legal mind. The confirmation vote was 68 to 26.

Associate Justice Rehnquist took office on January 7, 1972 as a member of the Burger Court, but in reality the Court was still controlled by a majority of the members of the Warren Court. This essay is not about judicial philosophy or case decisions, but readers will understand that the majority was “liberal” and the new Associate Justice was “conservative.” Over the first few Terms of his service, Rehnquist dissented many times, and often alone. Some critics snickered that he was the Lone Ranger on the Court, but he had the intellectual strength and intestinal fortitude to hold firmly to his judicial philosophy. Years later, his law clerks presented him with one of his prized possessions, a small statue of the Lone Ranger.

In 1984, I joined the staff of Chief Justice Burger. While each of the nine Justices has been said to operate a separate law firm in the same building, I did have the privilege of coming to know Associate Justice Rehnquist and to see what kind of man he was.

The best summary may be that Rehnquist was a typical Midwesterner. He drove himself to work in a Volkswagen Rabbit. Of course he wore a coat and tie to work, but usually the coat was slightly rumpled and the outfit was topped—or bottomed—off by Hush Puppies shoes. He liked football. He liked to laugh and smile. A few days after I took my parents to the Courtroom to watch an argument, which happened to be a soporific, arcane banking law case, I saw Justice Rehnquist walking towards me in a hallway. With a wink as he passed, he murmured “How’d you like that banking case argument?” Of the nine Justices on the Court at the time, he was the most personally engaging. A good example was the annual Court Christmas party: the other eight put in their obligatory brief appearances and disappeared; Bill Rehnquist hung around, leaned on the piano, and led the carols.

Faith was important. He attended a Lutheran church in suburban Virginia near his home. Family was important. He and his wife Natalie raised a son and two daughters. When Natalie died in 1991, Rehnquist (then Chief Justice) ordered the renaming of the Ladies’ Dining Room on the ground floor of the Court to the Natalie Cornell Rehnquist Dining Room. She was buried in Arlington National Cemetery; he joined her in 2005. The site is in the company of his predecessor and several other Justices less than a hundred yards north of the Kennedy grave sites.

In June, 1986, Chief Justice Burger announced his retirement at a White House press conference; President Ronald Reagan next took the microphone to introduce Rehnquist as his choice for the next Chief Justice. Fourteen years of service as an Associate Justice earned him a slightly closer confirmation vote of

65 to 33. William Hubbs Rehnquist took office as the sixteenth Chief Justice of the United States on September 26, 1986.

The membership of the Supreme Court had changed over the years, and the majority of the Rehnquist Court was more akin to his thinking. The new Chief Justice was able to assign himself the task of writing many landmark decisions. He dissented much less frequently. As Chief, he was a conciliator and an even-handed administrator of the cases and other Court business, not an intellectual firebrand. Every Justice praised him for the fair and cordial way he ran the Court Conferences at which the Justices discussed and voted on the cases.

When Chief Justice Rehnquist took over from Chief Justice Burger, a startling change occurred in the business of the Court. During the last few Terms of the Burger Court, the number of signed opinions per Term averaged in the 140s. The number of signed opinions during the Terms of the Rehnquist Court soon began to fall sharply, and in recent years have averaged in the middle 70s—half the Burger Court number. The explanation was not in the caseload, which continued to rise dramatically. While the Rule of Four had always allowed any four Justices to grant certiorari in a case, clearly the new Chief was exercising his leadership toward granting cert in fewer cases. He believed fewer plenary reviews meant more careful consideration and better-written opinions in the cases that were heard.

The explanation, I think, was also in the two men. Chief Justice Burger was a workaholic; Chief Justice Rehnquist was not a workaholic. Chief Justice Burger lived to work; Chief Justice Rehnquist worked to live. The latter was more a man of parts, enjoying tennis in his early years on the Court and writing nonfiction books in his later years—somehow he found time to publish five.

He did these things while holding down two full-time jobs. The Chief Justice of the United States wears two hats. One hat is the full-time job of Justice. The other hat is the full-time job of chief executive officer of the United States courts. Over the years, Congress has tasked the Chief with some 70 statutory duties, from chairman of the board of the Federal Judicial Center to appointing authority for the national intelligence court to administrator of the Supreme Court to Chancellor of the Smithsonian Institution (statute makes the Chief a member of the board of regents, and by tradition the regents elect him Chancellor—chair—of the board). The Chief Justice also has countless informal tasks, such as overseeing judicial transfers, dealing with Congress, and delivering scores of speeches annually.

Shortly before he was confirmed by the Senate, the new Chief and I met to discuss these new duties he would be assuming. The new Chief said he was willing and able to delegate administrative responsibilities. I told him that if he did intend to delegate, he would need to make that quite clear to the people on his staff and in the various institutions; under Chief Justice Burger, everyone was

accustomed to running decisions through his office.

During this conversation, I mentioned that one of his new duties would be Chancellor of the Smithsonian Institution, and said I thought he would enjoy the position.

Justice Rehnquist curled his lip, eyed me as he would a crazy man, and rasped, “Why would you think that?”

“Well, uh,” I stammered, “Chief Justice Burger has always enjoyed it immensely. You are at the center of policy-making for the Smithsonian. The three board meetings a year are scheduled for Court recess weeks, and don’t take too much time. And with each meeting they also have an evening reception or dinner, usually at one of the museum buildings. I accompanied the Chief, and these events are really spectacular.”

“Humph,” he said, mollified, but not convinced. I did learn years later from friends at the Court that the new Chief did indeed enjoy his association with the Smithsonian.

The Rehnquist Court encompassed nineteen Terms. During those years, the opinions he authored and the cases he participated in placed a huge imprint on the history of American law. Once again, however, this essay is about the man, not about the law.

Early in the October, 2004, Term, the Chief was diagnosed with thyroid cancer. The illness debilitated him for the remaining year of his life. Observers expected him to resign immediately. He did not. The Chief courageously soldiered on through the entire Term. Surely he would announce his retirement on the last day of the Term? My wife Mary and I had the good fortune to be in Washington on June 27, 2005, and the privilege of sitting in the Courtroom for the last public session of the Term. Watching the Chief was painful: he could speak only with the gasps and wheezes of a mechanical voice box. After the last of the decisions was announced, the Chief looked out over the packed and hushed Courtroom, which he knew was awaiting his announcement. He grinned a little and said “That concludes the business of the 2004 Term. We are adjourned until the first Monday in October.” One of his staff laughed out loud when I told her what the Chief had done.

The Chief clearly intended to serve a twentieth Term. Yet that was not to be. His health declined rapidly in late summer, and he died on September 3, 2005.

One can speculate on the reason the Chief refused to resign. He may have thought his vote on the Court was still needed, although that seems unlikely given that a Republican President would appoint his successor. He may have been trying to hang on to power, although that seems unlikely given his willingness to delegate. He may have enjoyed the adulation as Chief Justice, although that seems unlikely considering both the man and the fact he would have retained a large share of the acclaim as the retired Chief. He may not have had much to go home to as a widower, although that seems unlikely as his three children were nearby. He may have thought duty required him to remain until

death, although that seems unlikely given the fact that many Chiefs had retired. Perhaps Chief Justice Rehnquist was trying to cement his place in the history of the Supreme Court.

Chief Justice Burger was proud of having served sixteen years as Chief Justice, longer than any other except the great Chief, John Marshall, who served 34 years. Yet Chief Justice Rehnquist had already passed Burger's record by three years, and he had no realistic prospect of catching Marshall.

When one also considers the years of service of Associate Justices, an interesting hypothesis arises. The addition of William Rehnquist's years as Associate Justice and as Chief Justice totals 33 years, eight months. That places him sixth on the all-time service list, behind Justices William O. Douglas (36 years, 5 months), John Marshall (34 years, five months), Hugo Black (34 years, one month), John Marshal Harlan (33 years, ten months), and William J. Brennan (33 years, nine months). In other words, five more weeks of service would have moved him past his contemporary Brennan, and only one more Term would have placed him second on the all-time service list.

Whatever the reason for his continuing to serve, Chief Justice Rehnquist must have had his place in the history of the Supreme Court in mind during his last Term as Chief. He need not have worried. This plain Midwesterner will certainly be remembered as a great mind, a good man, a dutiful public servant, and an excellent Chief Justice. His was a life in the law lived in full.