

Isaac Marks Memorial Lecture
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**REFLECTIONS ON ARIZONA'S PACE-SETTING
JUSTICES: WILLIAM HUBBS REHNQUIST AND
SANDRA DAY O'CONNOR**

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The Court's 2005–2006 term will be remembered as the year the Court changed. From Justice Breyer's appointment in 1994 until Chief Justice Roberts's confirmation in 2005, the Court's composition remained the same. The 1994–2005 Court was the longest-tenured bench since the Court first numbered nine. (Only the Court that sat from 1811 until 1823 had a longer tenure.) While we have been rejuvenated by our newest and youngest members, we miss the good counsel of two extraordinarily effective jurists, our late Chief and his sister Arizonan, first woman ever appointed to the Court. This fall, the College of Law will launch the William H. Rehnquist Center on Constitutional Structures of Government to pursue themes important to Chief Justice Rehnquist. Fittingly, the Chief's principal aide, Sally Rider, will head the Center and Justice O'Connor will serve on the governing Board. It is an appropriate time to reflect on the large contributions these Justices made to the health and well-being of the Court.

William Hubbs Rehnquist served for some thirty-three years on the United States Supreme Court, the last nineteen as Chief Justice. Though he fought a dread disease bravely, he was unable to complete the twenty years his colleagues hoped he would serve at the Court's helm.

On September 4, 2005, the morning after Chief Justice Rehnquist's death, each of his colleagues released statements through the Court's Public Information Office. Mine conveyed that of all the bosses I have had as lawyer, law teacher, and

* These remarks expand on tributes to Chief Justice Rehnquist and Justice O'Connor earlier published in the *Harvard Law Review*. See Justice Ruth Bader Ginsburg, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 6 (2005); Justice Ruth Bader Ginsburg, *A Tribute to Sandra Day O'Connor*, 119 HARV. L. REV. 1239 (2006).

** Associate Justice, Supreme Court of the United States

judge, Chief Justice Rehnquist ranked among the fairest and most efficient.¹ Presiding over six prime dons and two prima donnas, he kept us all in line and on time. Justice O'Connor, recalling the Chief's mastery of the art of short statement, said: "He led the Court with firm principles but with a light touch."²

Among the Chief's many responsibilities, he gave us our homework assignments: At the end of each sitting, whenever he was in the majority (which, as Chief Justice, he was much more often than not), he decided who would write which opinion. There was an occasional grumble from the Justice assigned to write for the Court in a particularly dense or dull case. But at the end of each term there was agreement that the cases, overall, had been fairly distributed. And once the Chief announced that all majority opinions must be in circulation by June 1, and all dissents by June 15, no one ever missed the deadlines.

The Chief's talent for keeping the players in line and on time was evident at oral argument, Court conferences, U.S. Judicial Conferences, Smithsonian meetings, and other gatherings. Part of the secret of his success, the Chief had an irreverent sense of humor. He could deliver, poker face, lines that provoked smiles, sometimes even irrepressible laughter.

The Chief was a plain speaker; he had no airs or affectations. A characteristic example. When his nomination as Chief Justice was announced by President Reagan at a June 1986 press briefing, a reporter asked then Justice Rehnquist: "Do you . . . consider it the culmination of a dream . . . ?" The soon-to-be Chief responded: "I wouldn't call it [that], but it's not every day when you're 61 years old and get a chance to have a new job."³

William Hubbs Rehnquist's first job at the Court was as law clerk to Justice Robert H. Jackson, from February 1952 until June 1953. Following that auspicious start, he did just about everything one can do in the legal profession—private practice, service in the Executive Branch, Supreme Court judging, even, on one occasion, trial court judging. I described that episode some years ago when I spoke at a Court function. The Chief smiled, so I feel comfortable retelling the story to you.

While still an Associate Justice, in June 1984, he bravely volunteered to preside over a civil jury case in Richmond. (June, many of you know, is the Supreme Court's busiest time, weeks when all of us labor to produce or refine the opinions that must be released before we recess for the summer.) According to press reports, Justice Rehnquist quickly took control of the trial court proceedings, in a captain-like

1. Press Release, Supreme Court of the United States, Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist (Sept. 4, 2005), available at http://www.supremecourtus.gov/publicinfo/press/pr_09-04-05b.html.

2. *Id.*

3. Press Release, Office of the Press Sec'y, The White House, Remarks by the President, Chief Justice Warren Burger, Justice William Rehnquist and Judge Antonin Scalia (June 17, 1986).

manner. Alas, in the fullness of time, the judgment he entered on the jury verdict was reversed, per curiam, by the Fourth Circuit.⁴

After that encounter with first-instance judging, the Chief remained safely at home in our Marble Palace. In accord with Santayana's wisdom, he remembered the past and did not repeat it. And he was mindful of the reality Justice Jackson captured in the famous expression: Supreme Court justices "are not final because we are infallible, but we are infallible only because we are final."⁵

The Chief was a private person, who did not share his dreams with the press (or his colleagues). (If he did have some delectable dreams, they were probably accompanied by tastes of the "mean" hamburgers he himself grilled, or the chocolate chip bars occasionally made for him by son Jim.) Items that might have been on his wish list: to see landscapes by acclaimed artist William Hubbs Rehnquist displayed alongside those of Turner and Constable at the National Gallery; to succeed Robert Shaw as leader of glorious chorales; to learn the secret of the aged grandmother in Tchaikovsky's *Pique Dame* (originally Pushkin's Queen of Spades) how always to win at cards; to add to his books in print a suspense-packed mystery filled with action in the great outdoors, a book worthy of comparison with Raymond Chandler.

From dreams to sage counsel, a few examples of Chief Justice Rehnquist's wisdom in his own words. On responding to a colleague's suggestions for improvement of a circulating draft opinion, he quoted a description of the practice of one of his predecessors, Chief Justice Charles Evans Hughes:

He approached his own opinions with his usual meticulous care, turning out innumerable drafts in order to be certain of the most correct and precise language. But he had no particular pride of authorship, and if in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant.⁶

Of our highest law, he said: "[C]onstitutional law require[s] vision and common sense as well as careful legal analysis."⁷

My favorite among his repeated comments concerns the obligation key to judging:

The Constitution has placed the judiciary in a position similar to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he

4. Heislup v. Town of Colonial Beach, 813 F.2d 401, 1986 WL 18609 (4th Cir. 1986) (per curiam) (unpublished table decision), *cert. denied*, 482 U.S. 909 (1987) ("The Chief Justice took no part in the consideration or decision of this petition.").

5. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

6. William H. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 643 (1976) (quoting Edwin McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 19 (1949)).

7. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 69 (2d ed. 2001).

will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.⁸

When asked by Senator Laxalt in July 1986, why he believed he was qualified to be the Chief Justice, this is what William Hubbs Rehnquist said:

I have a very real interest in the Federal judicial system and the American judiciary I have a very great interest in trying to see improvements made, not just [in the Supreme Court and] in the lower Federal courts, but seeing what might be done through the Center for State Courts, in helping State courts, at least getting financial assistance to them without trying to tell them what to do.⁹

Federal–state relations is one of the areas that was of special concern to Chief Justice Rehnquist, and it is one of the three areas on which the Rehnquist Center will focus.

Visitors to the Court in recent years could hardly miss noticing the Chief's self-designed robe, copied from the Lord Chancellor's costume in a local theater company's summer production of Gilbert and Sullivan's *Iolanthe*. The robe has gleaming gold stripes, as does the robe of the U.K.'s Lord Chancellor, but Chief Justice Rehnquist's version was less regal, resembling the stripes of a master sergeant more than those of a British Lord. Why did a man not given to sartorial splendor decide on such a costume? In his own words, he did not wish to be upstaged by the women. (Justice O'Connor wore several attractive neck pieces, collars from British gowns, and a frilly French foulard; I wear British and French lace foulards too, and sometimes a collar of French Canadian design.)

The Chief and I more than occasionally held different views on important issues. But he sometimes surprised me. Two examples, one from my advocate days, the other from my years on the Court.

In March 1975, the Court decided the case of a young father, Stephen, widowed when his wife died in childbirth.¹⁰ Stephen's wife was a teacher for whom social security taxes were regularly paid. When a male wage earner died leaving a child in his wife's sole care, the social security law provided monthly child-in-care benefits to the surviving parent. But when the deceased wage earner was female, the law allowed no child-in-care benefits.

The Court reached a unanimous judgment: The gender line was unconstitutional, a violation of the equal protection principle. But the Justices divided over the rationale. The majority viewed the law as discriminating impermissibly against women wage earners, because it provided their families less protection than it provided the families of male wage earners. Counsel had also argued that the law discriminated against men as parents, because it did not afford them the same opportunity as women to care personally for their children. Justice Rehnquist resisted both arguments, but he was satisfied that the baby had been

8. William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229-30 (1980).

9. *Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 153 (1986).

10. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

treated badly. He wrote: “[I]t is irrational to distinguish between mothers and fathers when the sole question is whether a child of a deceased contributing worker should have the opportunity to receive the full-time attention of the only parent remaining to it.”¹¹

Another surprise. In June 1996, I announced the judgment and opinion of the Court in *United States v. Virginia*, better known as the Virginia Military Institute (or VMI) case.¹² Reading the opinions below and the briefs in preparation for oral argument, I feared that the Chief would not share my view of the case. To my delight, he concurred in the judgment, persuaded that Virginia offered a valuable educational opportunity for men, and no equivalent opportunity for women. Justice Scalia was the lone dissenter and directed many arrows at the Chief’s opinion that might otherwise have been aimed in my direction.

Chief Justice Rehnquist regarded an independent judiciary as our country’s hallmark and pride. In his annual reports on the state of the federal judiciary, and in his public addresses, he urged Congress to safeguard that independence by resisting measures aimed to curtail Third Branch authority.

A personal note. True to his Scandinavian heritage, the Chief sometimes seemed a model of Nordic cool. But I saw first hand his capacity for empathy. Seven years ago, in my year-long bout with colo-rectal cancer, he helped allay my anxieties. He kept my assignments light during the most trying weeks and let me decide when I could tackle more challenging opinions. Coping with cancer himself his last term as our Chief, his courage and determination were exemplary. He wrote a fair share of the Court’s opinions, and kept as firm control as ever in managing the Court’s conferences and operations.

William Hubbs Rehnquist was the sixteenth Chief Justice and the third Associate Justice to be elevated to the center chair. Describing his office, and the performances of the first fourteen Chief Justices, he said in an April 2002 address:

[T]he Chief Justice [in contrast to the President] brings to office no one but himself. He takes his seat with eight Associate Justices who are there already, and who are in no way indebted to him. By historic usage, he presides over the Court in open session, presides over the Court’s conferences, and assigns the preparation of opinions in cases pending before the Court if he has voted with the majority. He also speaks on behalf of the federal judiciary in matters which pertain to it.

. . . Perhaps the best description of the office is to say that the Chief Justice has placed in his hands some of the tools which will enable him to be *primus* among the *pares* but his stature will depend on how he uses them.¹³

11. *Id.* at 655 (Rehnquist, J., concurring in the result).

12. *United States v. Virginia*, 518 U.S. 515 (1996).

13. William H. Rehnquist, Chief Justice of the United States, Lecture at Duke University School of Law: Great Lives in the Law (Apr. 13, 2002), *in* 52 DUKE L.J. 787, 805 (2003).

In his leadership of the U.S. Judicial Conference and his superintendence of the Supreme Court, Chief Justice Rehnquist used to great effect the tools Congress and tradition entrusted to him.

I turn now to Justice O'Connor, first woman ever to serve on the Supreme Court. Collegiality is the key to the effective operation of a multi-member bench. Sandra Day O'Connor, in my view, has done more to promote collegiality among the Court's members, and with our counterparts abroad, than any other of the 110. Justices Justice Breyer recently wrote of that quality: "Sandra has a special talent, perhaps a gene, for lighting up the room . . . she enters; for [restoring] good humor in the presence of strong disagreement; for [producing constructive] results; and for [reminding] those at odds today . . . that 'tomorrow is a new day.'"¹⁴

Of all the accolades Justice O'Connor has received, one strikes me as describing her best. Growing up on the Lazy B Ranch in Arizona, she could brand cattle, drive a tractor, fire a rifle with accuracy well before she reached her teens. One of the hands on the Ranch recalled his clear memory of Sandra Day: "She wasn't the rough and rugged type," he said, "but she worked well with us in the canyons—she held her own."¹⁵ Justice O'Connor did just that at every stage of her distinguished professional and devoted family life.

When she joined the Court in 1981, she brought to the Conference table experience others did not possess at all or to the same degree: the experience of growing up female in the 1930s, 40s, and 50s, of raising a family, of doing all manner of legal work—government service, private practice, successful candidacies for public office, leadership of Arizona's Senate, and state court judicial service, trial and appellate. Hard worker and quick learner that she is, she mastered mysteries of federal law and practice and held her own from the very start.

Her welcome when I became the junior Justice is characteristic. The Court has customs and habits one cannot find in the official Rules. Justice O'Connor knew what it was like to learn the ropes on one's own. She told me what I needed to know when I came on board for the Court's 1993 Term—not in an intimidating dose, just enough to enable me to navigate safely my first days and weeks.

At the end of the October 1993 sitting, I eagerly awaited my first opinion assignment, expecting—in keeping with tradition—that the brand new Justice would be slated for an uncontroversial, unanimous opinion. When the list came round, I was dismayed. The Chief gave me an intricate, not at all easy, ERISA case, on which the Court had divided 6-3. (ERISA is the acronym for the Employee Retirement Income Security Act, candidate for the most inscrutable legislation Congress ever passed.) I sought Justice O'Connor's advice. It was simple: "Just do it," she said, "and, if you can, circulate your draft opinion before he makes the next set of assignments. Otherwise, you will risk receiving another

14. Justice Stephen G. Breyer, *A Tribute to Sandra Day O'Connor*, 119 HARV. L. REV. 1242, 1244 (2006).

15. PETER HUBER, *AMERICAN WOMEN OF ACHIEVEMENT: SANDRA DAY O'CONNOR* 25 (1990).

tedious case.” That advice typifies Justice O’Connor’s approach to all things. Waste no time on regret or resentment, just get the job done.

Justice O’Connor was a dissenter in that case. As I read the bench announcement summarizing the Court’s decision, she gave an attendant a note for me. It read: “This is your first opinion for the Court, it is a fine one, I look forward to many more.”

As first woman on the Supreme Court, Justice O’Connor set a pace I could scarcely match. To this day, my mail is filled with requests that run this way: Last year (or some years before) Justice O’Connor visited our campus or country, spoke at our bar or civic association, delivered a Marks Memorial Lecture, did this or that; next, words politely phrased, but to this effect—now it’s your turn. My secretaries once imagined that Justice O’Connor had a secret twin sister traveling the world. The reality is, she has an extraordinary ability to manage her time.

Why does she go to Des Moines, Belfast, Lithuania, Rwanda, when she might rather fly fish, ski, play tennis or golf? In her own words:

For both men and women the first step in getting power is to become visible to others, and then to put on an impressive show. . . .

. . . As women achieve power, the barriers will fall. As society sees what women can do, as *women* see what women can do, there will be more women out there doing things, and we’ll all be better off for it.¹⁶

Of her journeys abroad, her former law clerk, Ruth McGregor, now Chief Justice of the Arizona Supreme Court, said: “[Justice O’Connor has] worked tirelessly to encourage emerging nations” to “live under the rule of law” by maintaining “democratically elected legislatures” and “independent judiciaries”; at the same time, she strongly “remind[s] us that this country could lose the rule of law if we do not act to protect our precious heritage.”¹⁷

There was a time in 1988 when Justice O’Connor’s energy flagged, long months in which she endured rigorous treatment for breast cancer. Though tired and in physical discomfort, she didn’t miss a sitting day on the Court that busy term. Once fully recovered, she spoke of that hard time; her account, carried on public television, gave legions of women hope, the courage to continue, to do as she did. She went back to the 8:00 a.m. exercise class she inaugurated at the Court long before it was predicted she could. “[T]here was a lot I couldn’t do,” she said, “[b]ut I did a little, I did what I could.”¹⁸

16. Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, Address to the 1990 Sixteenth Annual Olin Conference: Women in Power (Nov. 14, 1990).

17. Ruth V. McGregor, *A Tribute to Sandra Day O’Connor*, 119 HARV. L. REV. 1245, 1246 (2006).

18. *Surviving Cancer: A Private Person’s Public Tale*, WASH. POST, Nov. 8, 1994, Health, at 7 (reprinting selections from Sandra Day O’Connor, Associate Justice, Supreme Court of the United States, Address to the Nat’l Coalition for Cancer Survivorship (Nov. 3, 1994)).

What she could do became evident years later, when the Olympic Women's Basketball Team visited the Court. Justice O'Connor led the Team on a tour ending at "the Highest Court in the Land," the full basketball court on the building's top floor. The team practiced some minutes, then one of the players passed the ball to Justice O'Connor. She missed the first shot, but the second went straight through the hoop.

Each case on the Court's docket attracted Justice O'Connor's best effort and she was never shy about stating her views at Conference or in follow-on discussions. When she wrote separately, concurring or in dissent, she presented her disagreement plainly and professionally. She avoided, as I do, castigating colleagues' opinions as "Orwellian,"¹⁹ "profoundly misguided,"²⁰ "not [to] be taken seriously,"²¹ or "a jurisprudential disaster."²²

In the twelve and a half years we served together, Court watchers have seen that women speak in different voices, and hold different views, just as men do. Even so, some advocates, each Term, revealed that they had not fully adjusted to the presence of two women on the High Court bench. During oral argument, many a distinguished counsel—including a Harvard Law School professor and more than one Solicitor General—began his responses to my questions: "Well, Justice O'Connor . . ." Sometimes when that happened, Sandra would smile and crisply remind counsel: "She's Justice Ginsburg. I'm Justice O'Connor." Anticipating just such confusion, in 1993, my first term as a member of the Court, the National Association of Women Judges had T-shirts made for us. Justice O'Connor's read, "I'm Sandra, not Ruth," mine, "I'm Ruth, not Sandra." (To my sorrow, I am now what Sandra was for her first twelve years of service on the Supreme Court, the lone woman.)

But Sandra remains close by. She has moved to chambers next to mine and is continuing her involvement in an array of "off the bench" activities. Prime among her current undertakings, Sandra is endeavoring to encourage all concerned with the health and welfare of our federal system to join forces to preserve the independence of the Judiciary from the political branches of Government, and the independence of judges from the partisan expectations of some who supported their appointment. With the aid of Justice Breyer, she has convened an end-of-September conference at Georgetown University Law Center, co-sponsored by the American Law Institute, to air the issues and propose means to advance a better understanding of the role of the Judiciary in our tripartite system of government. The new Rehnquist Center, established at this law school, will follow up on ideas sparked at the conference.

19. *E.g.*, *County of Allegheny v. Am. Civil Liberties Union*, Greater Pittsburgh Chapter, 492 U.S. 573, 678 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

20. *E.g.*, *Republican Party of Minn. v. White*, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 685 (2002) (Stevens, J., dissenting).

21. *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part).

22. *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting).

To end these remarks, I will recall the surprise appearance Justice O'Connor made one night, some seasons ago, in the Shakespeare Theatre's production of *Henry V*. Playing the role that evening of Isabel, Queen of France, she spoke the famous line from the Treaty scene: "Hap'ly a woman's voice may do some good."²³ Indeed it may, as Justice O'Connor has constantly demonstrated in her twenty-five years of service on the Supreme Court, and no doubt will continue to demonstrate, in all her endeavors.

23. WILLIAM SHAKESPEARE, *HENRY V* act 5, sc. 2.