SJR

12

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 3/3/05

FURTHER:

Date of 5-Day Notice: ________________
(in accordance with Uniform Rule 23)

DATE TURNED
IN TO OFFICE: ____________

Judiciary Committee considered SENATE JOIN RESOLUTION NO. 12

SJR 12 URGE ONFIRM US SUPREME COURT NOMINEES

Requesting the United States Senate to move quickly to confirm all nominations by President George W. Bush to the United States Supreme Court.

and recommends:

[ ] be **replaced** with _______ **CS** ____________________ (________)

[ ] adopt **previous** _______ **CS** ____________________ (________)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by ____________________ Committee

[ ] further referral to ____________________ Committee

Senate Bill:
[ ] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
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[signature]			✓	
[signature]	X			
[signature]	X			
CHAIR: [signature] Ralph Jenkins	✓			

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Confirming judges: The constitutional option

By Michael B. Rappaport and John C. McGinnis
March 11, 2005

Politicians have notoriously short memories. With Democrats still retaining enough votes to filibuster President Bush's judicial nominees, many Republicans seek to weaken or eliminate the ability of senators to mount judicial filibusters. Under existing Senate rules, however, a proposal to change the filibuster rule can itself be filibustered and this filibuster ended only with a two-thirds vote of the Senate.

Republicans therefore favor using majority rule to change the filibuster rule, but Democrats contend that this would be improper and perhaps unconstitutional. By labeling such a change "the nuclear option," Republicans appear to concede that any majoritarian amendment would be an unprecedented threat to the harmony of the Senate.

Both Republicans and Democrats forget, however, that the existing filibuster rule itself was a product of a process very much like the so called "nuclear option." Moreover, whatever one thinks of the desirability of the filibuster rule, the structure and history of the Constitution confirm the majority's right to amend the rule.

The existing filibuster rule was enacted at the beginning of the congressional session in 1975. At that time, Sen. Walter Mondale, D-Minn., and James Pearson, R-Kan., proposed to change the old filibuster rule to permit 60 senators, rather than two-thirds of those voting, to end debate.

When this proposal was filibustered, they made a motion that debate on the amendment be ended by a mere majority. Although a senator objected that the Senate rules allowed debate to be terminated only with the approval of two-thirds of the Senate, a majority of the Senate rejected this objection. In the end, the Senate reached a compromise which enacted the present filibuster rule with its 60-vote cloture requirement, but reversed the ruling that allowed a majority to end debate on an amendment to the rules.

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Thus, majority amendment of the Senate rule is not something new, but was a necessary step to enacting the existing filibuster rule, which otherwise would have been defeated by a filibuster. Moreover, liberal Democrats like Walter Mondale, D-Minn., were among the principal architects of the change. And this majority amendment was anything but nuclear, since it neither destabilized the Senate nor eliminated the filibuster. Instead, the amendment caused the Senate to negotiate a compromise that has lasted for a generation.

The Senate majority's power to modify the filibuster is also strongly supported by constitutional principles. Both the text and structure of the Constitution show that only one of three possible views about the constitutionality of the judicial filibuster is correct. The first view – advocated most recently by Senate majority leader Bill Frist, R-Tenn. – is that filibustering judges is simply unconstitutional. But the Constitution expressly gives the Senate the right to fashion its own rules of procedure and nowhere requires application of majority rule to confirmations.

The second view – advocated by many Democrats – is that a majority has no right to change the filibuster rule because the Senate rules still require a two-thirds vote to end a filibuster mounted against a resolution to change the filibuster. But this Senate rule conflicts with the structure of the Constitution.

The Constitution provides only a single method – the constitutional amendment process – to entrench a rule against repeal by a majority. If Democrats were correct that rules can be insulated from majority amendment, a bare majority in each House could have passed the Bill of Rights and made it our fundamental law by declaring that only unanimous votes by both Houses could pass legislation violating its principles. The Democratic view also conflicts with a principle known since before the framing of the Constitution that one legislature cannot bind subsequent legislatures.

The third and constitutionally correct view is that the Senate can choose to retain the filibuster rule, but that a majority must be able to change it. The Senate can thereby exercise its full constitutional authority to fashion rules of procedure but past majorities of the Senate cannot put current majorities in a procedural straitjacket. Thus, a change in the filibuster rule by a majority is not a "nuclear" option but instead the constitutional option – the route contemplated by our founding document.

Of course, the Senate majority's undoubted power to change the filibuster rule does not mean that doing so would be good policy. If modern judges feel free to amend the Constitution in the guise of interpreting it, there is a strong argument that an express supermajority confirmation rule might be beneficial. After all, through its express amendment process the Constitution requires a stringent supermajority rule before politicians can establish new norms that will bind future generations. If judging has become just politics by other means, it does seem strange to permit justices confirmed by a mere majority to start imposing their values on the rest of us.

The Republican view, however, is that judges should enforce the Constitution as understood by those who framed it. Under this more

formal view of the judicial role, the Senate does not need the hurdle of a supermajority rule, because judges are not engaged in policy-making but rather enforcing a document that was itself enacted by a supermajority.

Thus, Republicans have a legitimate, even if contestable argument, for a pure majoritarian confirmation process. What cannot be contested, however, is that the Constitution prevents the Democratic minority from blocking the Republican majority's decision to embody its principles in the rules of the Senate.

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From Fran G

REHNQUIST THE GREAT?

Even liberals may come to regard William Rehnquist as one of the most successful chief justices of the century

BY JEFFREY ROSEN

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In his thirty-four years on the Supreme Court, William Rehnquist participated enthusiastically in the annual Christmas party for the justices and their clerks. "He and I wrote the Christmas show the year I clerked for him, in 1975," recalls Craig M. Bradley, who now teaches law at Indiana University.

One carol that year was sung to the tune of "Angels From the Realms of Glory." It went like this: "Liberals from the realm of theory should adorn our highest bench / Though to crooks they're always chary / at police misdeeds they blench." ("The word 'blench' came from Rehnquist," Bradley says. "I didn't know it meant 'blanch.'") The members of the chorus then fell to their knees and sang, "Save *Miranda*, save *Miranda*, save it from the Nixon Four." The so-called Nixon Four were Supreme Court Justices Warren Burger, Harry Blackmun, Lewis Powell, and, of course, Rehnquist.

Twenty-five years later, after having repeatedly ridiculed the constitutional soundness of the decision requiring police officers to read suspects their *Miranda* rights, Rehnquist voted to uphold it. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," he wrote in a 7-2 opinion for the Court in *Dickerson* v. *U.S.*, in 2000. Rehnquist's apostasy provoked one of Justice Antonin Scalia's most vitriolic dissenting opinions. Joined by Justice Clarence Thomas, Scalia declared, "Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."

Rehnquist's evolution from *Miranda*'s leading critic to its improbable savior infuriated conservatives and confused liberals; but in fact it was emblematic of his career. Throughout his long tenure, liberals always simplistically lumped Rehnquist together with the other conservatives on the Court, whereas conservatives never fully embraced him as one of their own. Furthermore, liberals have never understood how significantly and frequently Rehnquist departed from doctrinaire conservative ideology, and conservatives have failed to grasp that his tactical flexibility was more effective than the rigid purity of Scalia and Thomas. In truth, Rehnquist carefully staked out a limbo between the right and the left and showed that it was a very good place to be. With exceptional efficiency and amiability he led a Court that put the brakes on some of the excesses of the Earl Warren era while keeping pace with the sentiments of a majority of the country—generally siding with economic conservatives and against cultural conservatives. As for judicial temperament, he was far more devoted to preserving tradition and majority rule than the generation of fire-breathing conservatives who followed him. And his administration of the Court was brilliantly if quietly effective, making him one of the most impressive chief justices of the past hundred years.

The chief justice, like each of his colleagues, has one vote; his greatest power lies in choosing who will write an opinion when he's in the majority—himself or another justice who he thinks will best reflect his views. On this score Rehnquist proved to be a master tactician, unlike his inept and pompous predecessor, Warren Burger, who infuriated his colleagues by changing his votes in order to seize the best opinions for himself and then losing his majorities. And Rehnquist's judicial philosophy also made it easier for him to reshape the Court in his own image. He was essentially a pragmatist who believed in certain core conservative values—primarily states' rights and convicting criminals—but didn't fuss too much about how he achieved his aims. In contrast, Scalia and Thomas are more concerned about ideological purity than about persuading a majority of their colleagues, which is why neither would make an effective chief.

One of Rehnquist's unique and abiding talents was for getting along with his ideological opponents. When he first joined the Court, at the age of forty-seven, he was taken under the wing of the liberal activist William O. Douglas, a fellow westerner who saw in the irreverent young conservative an incarnation of his youthful self. Rehnquist's other liberal colleagues were similarly impressed by his fairness and good nature: Thurgood Mar-

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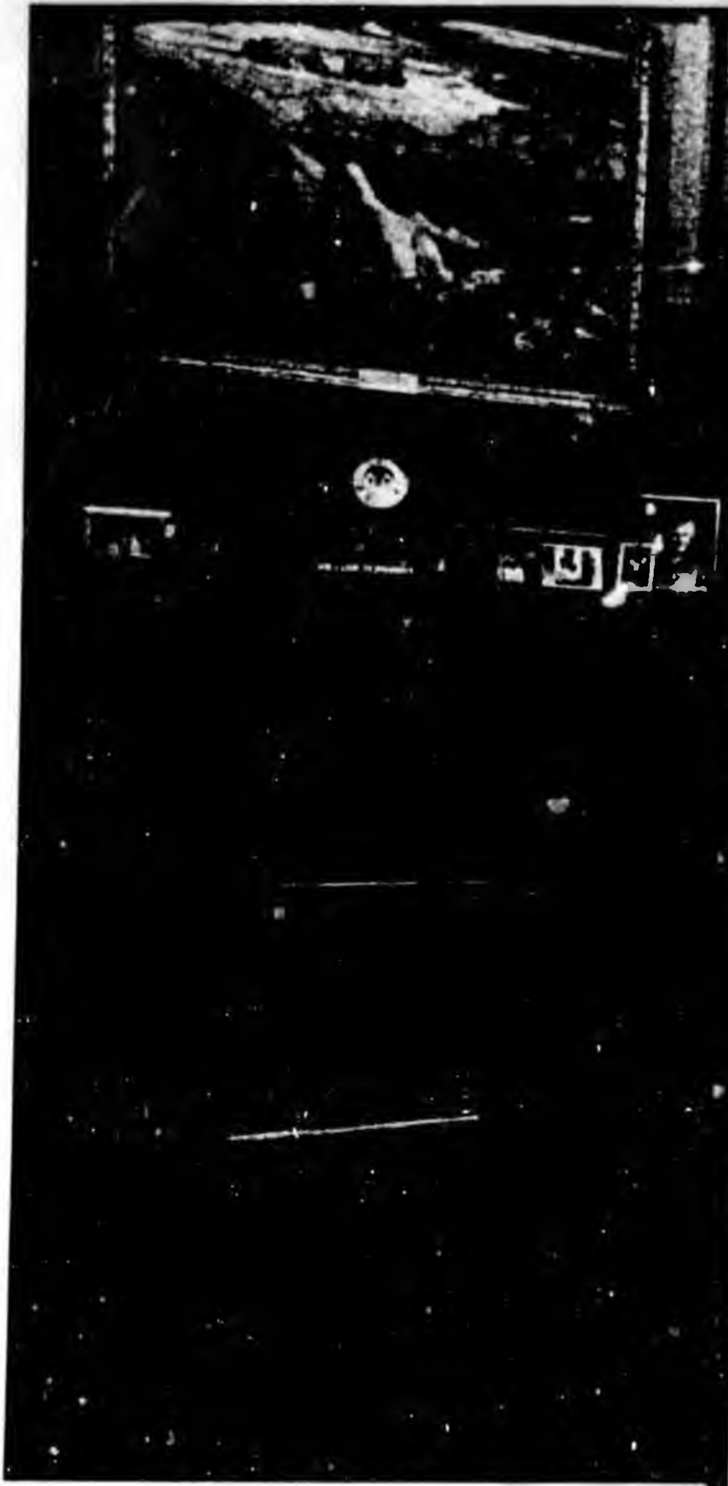
shall called Rehnquist "a great Chief Justice," and William Brennan described him as "the most all-around successful" chief he had known—including Earl Warren. On the current Court, Rehnquist has been praised frequently and effusively by Ruth Bader Ginsburg, who, despite her philosophical differences with the chief justice, admires his administrative skills so much that after the complicated campaign-finance case last term, she told clerks how happy she was that the rumors he was retiring weren't true. One former clerk remembers Rehnquist best for his sensitivity toward colleagues: "He was very concerned about hurt feelings among the justices, and he was very careful and observant of the way that certain memos or interactions would make other justices react or feel. He always avoided invective in his own memos, and smoothed over hurt feelings when other justices used it."

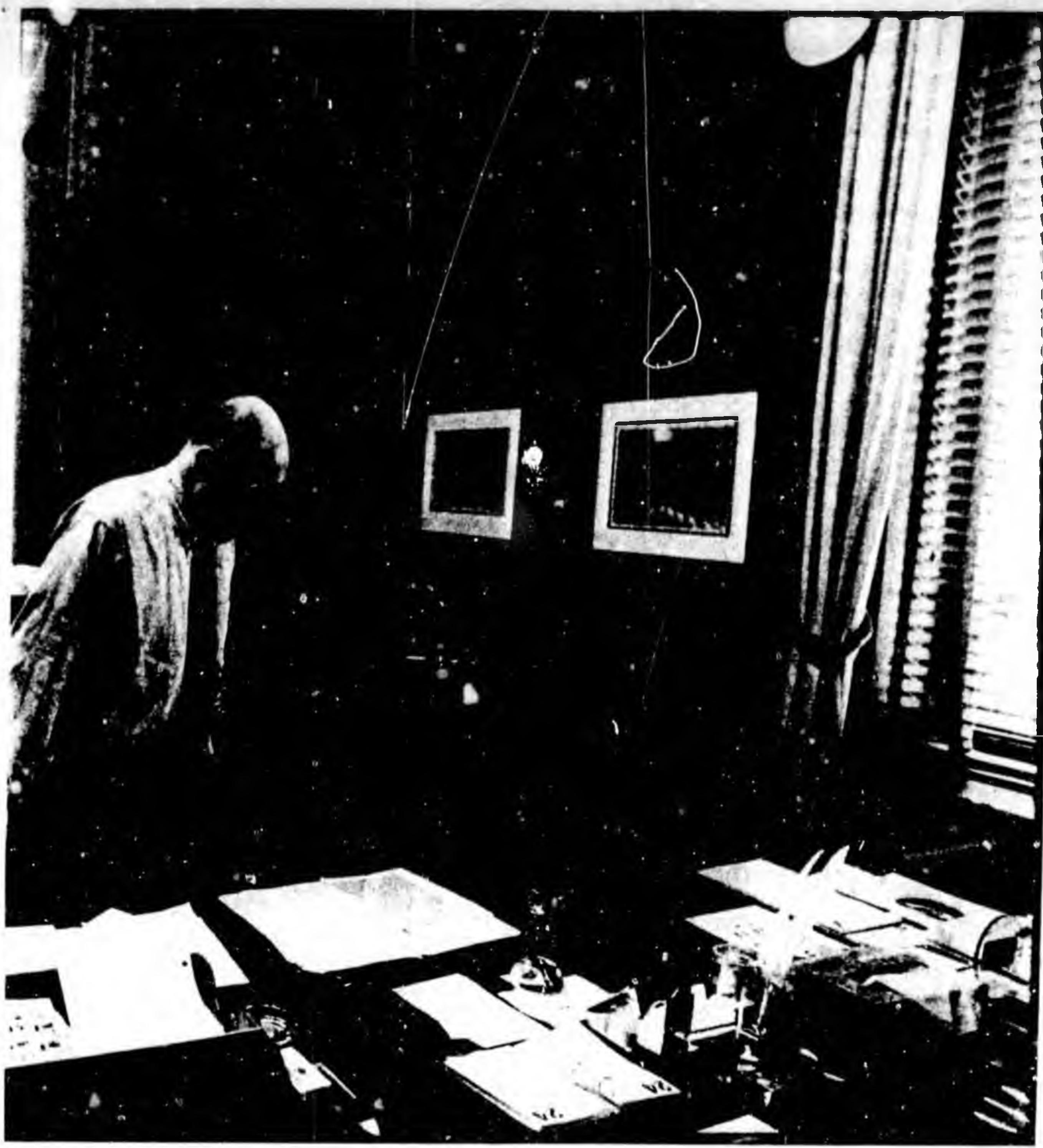
A hallmark of Rehnquist's rule was his unparalleled organizational skill: he got opinions out quickly and made the arguments run on time both in and out of court. When, in a rare interview last year, Charlie Rose asked him how he would most like to be remembered, Rehnquist said as a good administrator; he had tried, he said, to run "a relatively smoothly functioning Court." And he suggested that his ability to get along with a group of strong personalities reflected "a relatively passive nature," a "very high boiling point," and the ability to compromise.

Liberals have never understood how significantly and frequently Rehnquist departed from doctrinaire conservative ideology, and conservatives have failed to grasp the effectiveness of his tactical flexibility.



Certainly he was a creature of habit; his daily routine in his chambers remained the same for more than thirty years. He would arrive between 8:30 and 9:00, say hello to his two secretaries, go through his mail, and smoke a cigarette (for years he was a two-cigarettes-a-day man—no more, no less). At exactly 9:30 he would call in his clerks, gently reminding them, if they were even a minute late, that "the doctor doesn't wait for you." A trivia buff, he loved to test the mettle of his clerks at the morning meeting, asking them, for example, to name the five largest states in order of their area. He would often go to the University Club for a swim, to alleviate chronic back pain, and he usually left the office at 4:00. He was not known for taking work home with him. When he assigned the writing of an opinion to himself, he would set a deadline for the first draft ten days away and then start asking his clerks about it after a week. He was insistent that his fellow justices meet his exacting standards for punctuality, and would punish those who fell behind on their opinions (including the notoriously slow Harry Blackmun) by not assigning them new ones. And he ran an especially tight ship during the justices' private conferences, the twice weekly meetings after oral arguments, at which the justices cast their preliminary votes. Briskly going around the table, in order of seniority, to allow each justice to give his or her views, he refused to let discussion wander. Some colleagues complained that this format discouraged active debate, but

DAVID HUME KENNERLY/GETTY IMAGES



Rehnquist argued that because most of the justices had already made up their minds, a protracted colloquy would be a waste of time.

Rehnquist's courtroom style was similarly unvarying. He would cut lawyers off in mid-sentence when the red light on the bench began to flash, indicating that their allotted time had expired. (Each side gets precisely thirty minutes.) Some lawyers grumbled about this rigidity, but Rehnquist's clockwork discipline looked appealing in retrospect when Justice John Paul Stevens, who has presided in the chief ju[illegible]s place during his battle with thyroid cancer, recently let one advocate have extra time and was then compelled to grant an extension to his opponent as well.

The two chief justices Rehnquist most admired, John Marshall and Charles Evans Hughes, were both politicians who had a knack for bringing together unlike-minded colleagues: Marshall, who served from 1801 to 1835, had been a Virginia congressman and secretary of state; Hughes, who served from 1930 to 1941, had been the governor of New York, a Republican candidate for president, and secretary of state. As Rehnquist told the C-SPAN interviewer Brian Lamb in a *Booknotes* appearance in 1993, Marshall had "an ability

to get along with other people and persuade them that stood him in good stead when he was chief justice." And in a 1976 article in the *Hastings Constitutional Law Quarterly*, "Chief Justices I Never Knew," Rehnquist wrote that he especially admired Hughes's businesslike conduct of his private conferences, which lasted only six hours as opposed to the two or three days under Hughes's successor, Harlan Fiske Stone. Rehnquist concluded that "Hughes's superiority to Stone in presiding over the conference has a definite connection to their different amount of exposure to active political life."

Rehnquist's own political sensibility and experience were similarly central to his stewardship of the Court. By temperament and training he represented an older and what has come to be seen as milder strain of conservatism, rooted in the Goldwater wing of the Republican Party. Having cut his political teeth in Arizona in the heyday of Goldwaterism, he came to the Court with a far less angry and embattled attitude toward American democracy than younger conservatives like Scalia and Thomas. And unlike Scalia and Thomas, Rehnquist was never invested in fighting the culture wars from the bench, because of his overriding commitment to majority rule regardless of what the majority decides.

Unlike Scalia and Thomas, Rehnquist was never invested in fighting the culture wars from the bench, because of his overriding commitment to majority rule—regardless of what the majority decides.

If judicial activism is defined by a judge's willingness to strike down federal or state laws, then Scalia and Thomas are among the most activist justices on the Court today, surpassed only by Anthony Kennedy and, perhaps surprisingly, Sandra Day O'Connor. In contrast, Rehnquist is tied with Stephen Breyer for the role of second most restrained justice, after Ruth Bader Ginsburg. And while all the conservatives on the Rehnquist Court say for public consumption that the judiciary should occupy a modest role in American politics and should defer to the judgment of elected legislators, Rehnquist has most consistently practiced what he preaches.

"I'm a strong believer in pluralism," Rehnquist told *The New York Times Magazine* in 1985, the year before he was appointed chief justice. "Don't concentrate all the power in one place ... You don't want all the power in the Government as opposed to the people. You don't want all the power in the Federal Government as opposed to the states." When pressed about the source of these views, he joked, "It may have something to do with my childhood."

Rehnquist's Robert Taft–style conservatism—his faith in local majorities and his suspicion of broad federal power—does indeed reflect his midwestern upbringing. Born in 1924, he was raised, along with his sister, Jean, in Shorewood, Wisconsin, an affluent Milwaukee suburb known during the Depression for its Republicanism. Rehnquist's father, the son of Swedish immigrants, was an enthusiastic Republican who had never attended college and made his living selling paper wholesale. His mother, who had majored in French at the University of Wisconsin, was fluent in five foreign languages and worked as a translator for local export businesses.

Rehnquist's early years were suffused with old-fashioned patriotism. He enthusiastically supported U.S. intervention in World War II, and in 1941 he participated in a reenactment of America's founding called United States of Young Americans. That strong strain of patriotism has been an essential part of his makeup throughout his judicial career. In 1989, when Justices Scalia and Kennedy, both First Amendment libertarians, reluctantly voted to strike down a ban on flag-burning, Rehnquist produced an emotional dissenting opinion quoting John Greenleaf Whittier's Civil War poem "Barbara Frietchie": "'Shoot, if you must, this old gray head, / But spare your country's flag,' she said." It was one of the most personally revealing dissents he ever wrote.

Rehnquist won a scholarship to Kenyon College, in Ohio, but dropped out after one quarter, having found the atmosphere intellectually frivolous. He enlisted in the Army Air Corps and spent three years as a weather observer, ending up in Morocco and Egypt (where he was photographed on horseback in front of the Sphinx). Reluctant to return to the cold Milwaukee winters ("I wanted to find someplace like North Africa to go to school"), he enrolled on the GI Bill at Stanford, where he majored in political science.

While he was in the Army Air Corps, Rehnquist encountered a book that would be crucial to the development of his judicial philosophy: Friedrich A. Hayek's *The Road to Serfdom*. "This book was an advocacy book trying to show that state planning and socialism and that sort of thing didn't work economically and were dangerous politically," Rehnquist told Brian Lamb in a later *Booknotes* interview. "It made quite an impression on me."

Rehnquist graduated Phi Beta Kappa from Stanford in 1948 with a bachelor's and a master's degree, and then got a second master's degree in political science from Harvard, in the hopes of becoming a professor of government. While at Harvard he started a thesis about the conservative British political philosopher Michael Oakeshott, whose insistence on the importance of continuity and tradition for social stability resonated strongly with Rehnquist. Oakeshott, like Hayek, called into question the centrally planned welfare state, as part of a larger warning against the concentration of power in the hands of government. But Oakeshott

resisted Hayek's effort to construct a rigid libertarian ideology as the answer to collectivism; he argued that the best way to protect limited government was with a pragmatically conservative approach to politics, rather than with abstract theories about the true nature of the state.

"The chief's conservatism seems to reflect Oakeshott more than libertarians like Hayek," observes Richard Garnett, a former clerk who now teaches law at Notre Dame, and with whom Rehnquist discussed his admiration for Oakeshott. "It's not always about swashbuckling ideological adherence to first principles. It's also about temperament and disposition, about an attachment to traditions and institutions, and about stability and regularity."

After Harvard, Rehnquist attended Stanford Law School and graduated in 1952 at the top of an impressive class that included Sandra Day O'Connor. Based on his stellar academic record and genial personality, he won a clerkship with Supreme Court Justice Robert Jackson, who had been Franklin Roosevelt's attorney general and was committed to the principle of judicial deference to legislatures. During his clerkship, which began in 1952, Rehnquist wrote two highly controversial memos to Jackson that would provoke firestorms during his own confirmation hearings, in 1971 and 1986. In the memos Rehnquist seemed to urge Jackson to dissent in two historic civil-rights cases: *Brown* v. *Board of Education*, which would strike down school segregation, and *Terry* v. *Adams*, which would block efforts to exclude blacks from the pre-primary selection of Texas Democrats. Rehnquist claimed during the hearings that he was expressing these views at Jackson's request—an assertion disputed by Jackson's secretary. Several legal scholars believe that Rehnquist probably lied in denying that the views were his. He appears to have been the only Supreme Court clerk during the 1952 term who supported *Plessy* v. *Ferguson*—this at a time when the country as a whole was evenly split over desegregation. Whether he was speaking for himself or for Jackson, the central position that Rehnquist laid out in the memos—stressing the importance of judicial deference to the majority will—succinctly summarized what would become his judicial philosophy throughout his career.

In the *Brown* memo Rehnquist wrote that the Supreme Court was ideally suited to mediate disputes between the states and the federal government or between branches of the federal government. In contrast, he said, "where a legislature [is] dealing with its own citizens, it [is] not part of the judicial function to thwart public opinion except in extreme cases." *Brown* was not one of those cases, Rehnquist argued, because "in the long run it is the majority who will determine what the constitutional rights of the minority are." Similarly, in *Terry* v. *Adams*, Rehnquist insisted that "the Constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time that the Court faced the fact that white people in the South don't like the colored people."

As jarring as these memos appear now, they are consistent with the views of many political scientists today, who argue that the Court, except in rare cases, neither can nor should thwart the will of a determined national majority, and that it invites political backlash when it attempts to do so. After Rehnquist joined the Court, he was asked whether justices are able to isolate themselves from the pressures of public opinion. "My answer was that we are not able to

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TO THE FUTURE

I in completing
this poem
hope at least

to outlive the journey
from a notebook page
to the freedom of

one fair copy to be handed
to a friend and then
to other friends

one of whom may
see to it that
these words are

copied or left about so that
some person who knows nothing of
me who wrote them

may notice and
take the poem as a
delight or disturbance.

May it enlist or
puzzle readers enough so
that by undertaking its traffic

they may speak its language to
multiply its effect
and by voicing both
deliver me to you.

—PETER DAVISON (1928–2004)

Peter Davison was The Atlantic's *poetry editor for thirty years.*

do so, and it would probably be unwise to try," he recalled. Rehnquist's highly evolved pragmatism convinced him that the courts cannot ignore broad cultural shifts. This, as much as anything, distinguished Rehnquist from the later generation of judicial conservatives.

After his Supreme Court clerkship ended, in 1953, Rehnquist moved to Phoenix, always in search of warm weather and conservative politics. He joined a small law firm and became active in local Republican circles, which had been revitalized under the newly elected Senator Barry Goldwater. A decade later Rehnquist would write speeches for Goldwater's ill-fated 1964 presidential campaign, which united disparate parts of the conservative movement while alienating the liberal Rockefeller wing of the Republican Party. His speeches for Goldwater singled out for attack the Warren Court's landmark decisions requiring school busing. But unlike the Dixiecrats, who fought to protect the power of local communities to enforce traditional values, Goldwater was no social conservative, as his later support for birth control and gay rights would attest; he was a populist who ardently opposed the excesses of federal, state, and local authority. Although Goldwater dutifully denounced the Warren Court's liberal obscenity and school-prayer decisions, he had little patience for his party's growing moralistic forces, which insisted that Christian virtue, rather than liberty, should be the Republicans' highest calling. The Republican Party of the 1960s, for all its associations with extremism at the time, seems in retrospect a less strident and more inclusive organization than the party of today.

When Nixon first met Rehnquist, who was given to the loud shirts and psychedelic ties of the era, he wondered aloud, "Who's the guy dressed like a clown?" Upon hearing his name, Nixon said, "Is he Jewish?"

In 1957, after the Warren Court issued a series of controversial decisions protecting the rights of suspected Communists, Rehnquist, then a young lawyer, wrote an article in *U.S. News & World Report* criticizing the law clerks he had known for their predominantly "'liberal' point of view," which he defined as "extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business—in short, the political philosophy now espoused by the Court under Chief Justice Earl Warren." Rehnquist also strongly disagreed with the Warren Court's prominent role in advancing the civil-rights movement. Testifying as a private citizen before the Phoenix City Council in 1964, he opposed a local public-accommodations law, charging later that it would summarily do away with "the historic right of the owner of a drug store, lunch counter, or theater to choose his own customers." That same year Rehnquist had urged Goldwater to vote against the Civil Rights Act. During his 1971 confirmation hearings Rehnquist said that he had changed his mind about public-accommodations laws, acknowledging that he hadn't understood how strongly minorities felt about protecting their rights.

Every political movement has its moral blind spots, and civil rights was certainly a moral blind spot for Goldwater Republicanism. Rehnquist's insistence on deferring to the will of the people is hard to reconcile with his indifference to the then emerging majority of Americans who supported upholding the rights of black people. Goldwater and Rehnquist were never white supremacists, like Strom Thurmond, of South Carolina, and James Eastland, of Mississippi, but they seemed unconcerned that their devotion to states' rights could lead to enshrining racism. (Justice Byron White, a Kennedy Democrat of the same generation who shared Rehnquist's devotion to majority rule, did not make the same mistake.)

Both Goldwater and Rehnquist came belatedly to recognize the error of their ways. Rehnquist ultimately embraced the Warren Court's *Brown* decision, and after he joined the Court he made no attempt to dismantle the civil-rights revolution, as political opponents feared he would. His change of position reflected not only his reverence for the Court as an institution but also his sense that once a majority has spoken, the decision has a legal force that must be obeyed. Compare Rehnquist's attitude on these points with that of Clarence Thomas, who refuses to accept decisions that he thinks are wrong. Even Scalia has been critical of Thomas for this; as he recently told Thomas's biographer, Ken Foskett, Thomas "does not believe in *stare decisis*, period." "If a constitutional line of authority is wrong, he would say let's get it right," Scalia continued. "I wouldn't do that."

When Richard Nixon was elected president in 1968, he appointed as deputy attorney general Richard Kleindeinst, a Phoenix lawyer who had worked on his campaign. Kleindeinst persuaded Attorney General John Mitchell to hire his friend Rehnquist. As head of the Justice Department's Office of Legal Counsel, which provides constitutional advice to the president, Rehnquist distinguished himself as a conservative intellectual and an enthusiastic defender of executive power in the face of widespread social unrest. The country, Rehnquist said in a Kiwanis Club speech in 1969, had to devote all its energies to countering "the danger posed by the new barbarians." Two years later he staunchly defended the mass arrest of Vietnam protesters. That year, with Justices Hugo Black and John Marshall Harlan retiring, Nixon considered some

three dozen candidates to fill the two vacancies, including Vice President Spiro Agnew and Senator Howard Baker, of Tennessee. In an entertaining memoir, *The Rehnquist Choice*, John Dean, who was the White House counsel at the time and was later instrumental in Nixon's downfall, claims the credit (and also the blame) for being first to float the name of Rehnquist, who then was in charge of screening the other Supreme Court candidates. When Nixon first met Rehnquist, who was given to the loud shirts and psychedelic ties of the era, he wondered aloud, "Who's the guy dressed like a clown?" Upon hearing Rehnquist's name, Nixon said, "Is he Jewish? He looks it." But when the other candidacies fell by the wayside, the man Nixon was prone to call "Renchburg" won him over with his conservative credentials and unquestioned ability.

Rehnquist's first confirmation hearings focused on whether he had been truthful when he denied having challenged black and Hispanic voters as an Arizona poll watcher, and again in his account of one of his pro-segregation memos for Justice Jackson. Although Rehnquist was unanimously praised as an accomplished lawyer, he came under fire from a group of liberal Democrats on the Judiciary Committee, including Edward Kennedy, who charged that his record "reveals a dangerous hostility to the great principles of individual freedom under the Bill of Rights and equal justice for all people." Rehnquist was confirmed by a vote of 68 to 26.

As an associate justice, Rehnquist held fairly steadily to the views expressed in his *Brown* v. *Board of Education* memo of 1952. He almost invariably deferred to state legislatures on matters involving individual rights, and struck down federal laws only when he thought that Congress or the president had exceeded the bounds of constitutionally enumerated powers. The only cases in which Rehnquist was consistently willing to question federal power involved states' rights. During his first decade on the bench the most important states'-rights case for which Rehnquist wrote the majority opinion was *National League of Cities* v. *Usery*, in 1976; that case heralded the beginning of the so-called federalism revolution, which imposed meaningful limits on congressional power for the first time since the New Deal. In his opinion Rehnquist argued for limiting the federal government's ability to regulate the wages and hours of state and local government employees. The Tenth Amendment, he said, prevents Congress from acting in a way that "impairs the States' integrity or their ability to function effectively in a federal system." Although Rehnquist had mixed success maintaining majorities for this principle in the 1970s and 1980s, by the 1990s he had found at least four reliable allies—Scalia, Thomas, Kennedy, and O'Connor. But by not consistently deferring to Congress, Rehnquist failed to fulfill his oft-stated commitment to judicial restraint; under his leadership the Court indulged in overconfident rhetoric of judicial supremacy and struck down thirty federal laws in one seven-year period—a higher rate than in any other Court in history.

In most cases, however, Rehnquist voted to uphold federal and state laws. When I re-read his youthful and often solitary dissents, which earned him the nickname "the Lone Ranger," it was hard not to be impressed by their energy, lack of pretense, and lack of anger. "The 1970s dissents were magnificent," says Jack Goldsmith, a constitutional scholar at Harvard Law School. "Rehnquist didn't have an overarching substantive theory of constitutional interpretation, but he was always respectful of the Court as an institution, even when he thought it was off the tracks."

Despite his conservative temperament, Rehnquist was never unduly preoccupied with following judicial precedents. In a biting critique published in *The New Republic* in 1982, Charles Krauthammer, the conservative essayist, and Owen Fiss, a liberal scholar at Yale Law School, charged that Rehnquist "repudiates precedents frequently and openly, and if that is impossible (because the precedent represents a tradition that neither the Court nor society is prepared to abandon), then he distorts them." Perhaps one answer to this criticism is that Rehnquist was always focused on moving the law in a fundamentally conservative direction while trying to circumvent any potential roadblocks along the way. His clerks, past and present, report that he would simply remove the reasoning from opinions if it got in the way of the result.

"He took each case as it came," recalls Michael K. Young, a former clerk who is now president of the University of Utah. "He thought that the Constitution was not designed to shape all of our behavior but to box in elected officials at the margins ... He didn't see the sky falling, the way Scalia sometimes does, and if you read his dissents, they're often pragmatic. I've never been able to figure out *Bush* v. *Gore*, but in general he just deferred to the political process."

But even Rehnquist's highly controversial vote to stop the manual recount in Florida in the 2000 presidential election may be an expression of his pragmatism, for better or worse. In a speech to a Catholic service organization soon after the election, Rehnquist defended the participation of Supreme Court justices in deciding the presidential election of 1876 and seemed to be justifying *Bush* v. *Gore* in similarly practical terms. "There is a national crisis, and only you can avert it," he said. "It may be very hard to say no."

Typical of Rehnquist's early opinions was his 1973 dissent from *Roe* v. *Wade*. Without huffing and puffing or personal invective, Rehnquist made a straightforward but powerful case for majority rule. "The fact that a majority of the States, reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not [deeply rooted in tradition]," Rehnquist observed. It's striking to

compare his even-tempered dissent with Scalia's wrathful and apocalyptic one nearly twenty years later. In *Planned Parenthood* v. *Casey*, the case that reaffirmed *Roe* v. *Wade*, Scalia equated abortion with slavery—both of them issues "involving life and death, freedom and subjugation"—and predicted that the Court would detonate a culture war in the same way that its *Dred Scott* decision, in 1857, precipitated the Civil War.

RESIN

The needled air of the lodgepole.
Sting of pine at the base of your throat.
"A cold snap," he says. "Coming on."

Believing wasn't always hard.
The river forked in three; I knew
truth could go in different ways.

Corn was ripe when the tassels turned.
Late. Later still potatoes to be dug—
how far out, and how deep down.

I knew. Could slant the shovel right.
I'd use my hands now, claw deep
to better cup them, one by one,

as they let go their hold on earth.
This is the soil that I am from.
Those mountains—there, the Swan,

the Mission Range, and west the Salish—
they all washed down to fill this place.
We gained by their diminishment.

The harvest's passed to other hands.
The house is sold. The sap's curling
deep into the pines. "The weather's

turned," he says. I work the pump;
I try to slough the dirt stains off.
"Predictable as an Indian."

—GERI DORAN

Geri Doran works for the Djerassi Resident Artists Program, in Woodside, California. Her forthcoming collection of poems, Resin, *received the 2004 Walt Whitman Award.*

Rehnquist's moderate religious views (he is a Lutheran, although not a conspicuously observant one) may have contributed to his relative equanimity about abortion and prayer. "If I were a betting man, I would say personally Rehnquist thinks prayer in schools is pretty silly," Michael Young says. "You won't find him as hysterical about abortion and prayer as born-again Christians, who view these decisions as substantively essential to the moral fiber of the country. Rehnquist is willing to have it decided either way by the legislatures. Scalia couches it in a concern about democratic decisions, but that's not why Scalia cares."

Rehnquist reads broadly and avidly but, unlike Scalia, never comes off as a know-it-all and has never tried to lord his intelligence over his colleagues. While Scalia rails against popular culture, Rehnquist loves to rent movies—both new and old—and also goes to movie theaters by himself to see them. (His wife, Natalie, died in 1991 after a long struggle with ovarian cancer.) It is impossible to imagine him denouncing the Court for taking sides in the culture wars, as Scalia routinely does. "The Court must be living in another world," Scalia wrote in 1996. "Day by day, case by case, it is busy designing a Constitution for a country I do not recognize."

Temperament and religious sensibility may go a long way toward explaining differences of approach—between Rehnquist, on the one hand, and Scalia and Thomas, on the other. (It's worth noting that over the past ten years Rehnquist has voted more frequently with Kennedy and O'Connor than with Scalia and Thomas.) But another part of the explanation has to do with the reaction to *Roe* within the legal community itself. Because of *Roe*, a conservative judicial movement arose in the 1980s that was determined to curtail judicial discretion at all costs. *Roe* galvanized the religious right and unleashed far more conservative outrage against the Court than Earl Warren ever did. After he became president, Ronald Reagan, declaring that he wanted to avoid what he saw as Nixon's mistakes in picking moderate justices like Harry Blackmun, Warren Burger, and Lewis Powell, directed his Justice Department to find more-reliable ways of identifying doctrinaire strict constructionists. A turning point for this conservative judicial movement came in 1985, when Reagan's attorney general, Edwin Meese, delivered a speech to the American Bar Association denouncing the Burger Court for its "jurisprudence of idiosyncrasy." Meese asserted, "It has been and will continue to be the policy of this administration to press for a jurisprudence of Original Intention," which he defined as an "endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."

Although Rehnquist's opinions referred intermittently to this doctrine of "originalism" (most notably in cases involving the separation of church and state), he invoked constitutional history when it was convenient and otherwise ignored it. From the moment that Scalia and Thomas joined

the Court, in 1986 and 1991, respectively, they took a very different approach. Embracing the new orthodoxy with almost catechistic devotion, they insisted on the importance of construing each constitutional provision according to the presumed intentions of the Framers, no matter how disruptive or radical the consequences might be. For example, in 2003 Rehnquist wrote a majority opinion holding that Congress could allow state-government employees to sue their states for violating the Family and Medical Leave Act; Scalia and Thomas argued that this violated states' rights. "Scalia and Thomas embrace top-down theories of originalism and textualism as a principled way to control judicial discretion," Jack Goldsmith, of Harvard Law School, says. "Rehnquist is in a different, older, more pragmatic conservative tradition. He is less theoretical, often looks beyond text and history in discovering the relevant legal intentions, is more deferential to the political branches, and doesn't attempt to impose a general methodology across the board."

The gulf between Rehnquist and the Scalia-Thomas axis only widened this term and last. In *U.S.* v. *Booker*, decided in January, and *Blakeley* v. *Washington*, decided last spring, Scalia and Thomas joined three liberals on the Court in voting to strike down federal and state sentencing guidelines and in attempting to impose a sweeping new requirement that would have compelled juries to vote on each fact used to increase a sentence. Rehnquist, in contrast,

Rehnquist's successes as chief justice provide an object lesson for future holders of the office: having a judicious temperament is far more important than having a consistent judicial methodology.

sided with the more pragmatically minded justices—Breyer, O'Connor, and Kennedy—in upholding the sentencing guidelines, and avoided chaos by making the federal guidelines advisory rather than mandatory. Along the same lines, in an important terrorism case Rehnquist joined O'Connor in voting to allow the president to detain enemy combatants, but with a modest degree of judicial oversight. Meanwhile, Scalia and Thomas, in dissent, took rigid (and, as it happened, diametrically opposed) positions: Scalia argued that the president had no power to detain without congressional authorization, whereas Thomas contended that the president could do whatever he liked, without judicial or congressional oversight. Rehnquist will always take half a loaf over no loaf at all, and as chief justice he has proved far more willing than most of his colleagues to support, for the good of the Court, opinions with which he disagrees.

Rehnquist's successes as chief justice provide an object lesson for future holders of the office: having a judicious temperament is far more important than having a consistent judicial methodology. Rehnquist has always understood the political demands of whatever role he is asked to play, and was careful not to transgress its boundaries. His performance in presiding over the impeachment trial of President Clinton was masterly because he refused to pontificate, confining his interventions to rulings on procedural motions, which he handed down with confidence and skill. Had he played his part in a more intrusive or polarizing way, the trial might have turned into a political circus. (As a gesture of thanks, the majority and minority leaders of the Senate gave him a ceremonial cup.) By refusing as chief justice to give interviews except about his books on Supreme Court history, and by devoutly guarding his privacy, he has helped maintain and enhance the Court's carefully cultivated aura of mystery and authority.

The younger generation of justices, both conservative and liberal, have a dramatically different attitude toward questions of personal exposure. Clarence Thomas, for example, is far more accessible and emotionally revealing; he frequently gives speeches to groups of African-American students, in which he talks, in raw and intimate detail, about his childhood, his sense of inadequacy, and his abiding anger toward the civil-rights establishment. It is impossible to imagine the intensely private Rehnquist selling a memoir for $1.5 million, as Thomas recently did. But we are living in an age of celebrity that is ravenous for personal disclosure, and pressures on the justices to accede to these demands will only grow more insistent. It may not be long before we see them turning up on the morning talk shows, as O'Connor has done, to promote themselves and discuss their feelings.

"I've always admired Robert E. Lee for his refusal to write his memoirs," Rehnquist told Brian Lamb. "If memoirs are going to be interesting, if they're not going to be saccharine, you have to say some people didn't measure up and others did ... I think of a memoir as saying, 'When I came on the Court there were eight other justices and three or four were quite smart, but a couple of the others were creepy.' I don't want to get into that."

If the next chief justice turns out to be, as many Court watchers fear, less of a pragmatist and more of a rigid ideologue than Rehnquist, he or she may well end up dividing the Court that Rehnquist unified, and squandering its carefully constructed reserves of public trust. In that case Rehnquist's faith in majority rule, and his ability to resist the public's insistence that officeholders bare themselves in the spotlight, may seem like the scruples of a forgotten era. He may be the last of the old-fashioned judicial conservatives, who already look far more judicious than the conservatives who have arisen in their wake. And liberals may find themselves missing Rehnquist more than they could ever have imagined. ▲