

National Law Journal

Rehnquist's paper trail

Newly released documents show private side of late chief justice.

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August 24, 2009

In the dark days after he announced that he was suffering from thyroid cancer in late October 2004, U.S. Supreme Court Chief Justice William Rehnquist's in-box filled up with anxious notes from his colleagues.

"Top priority at Court," wrote Justice Ruth Bader Ginsburg, is "to have our Chief back with us, steadily on course toward a cancer-free future."

Justice David Souter reported to the chief that, after an overly long discussion among the justices of a minor case in Rehnquist's absence, "I could hear Tony [Kennedy] muttering under his breath, 'Five minutes on [the case]. The chief better get back here fast.'" Souter added, "That's certainly the sense of the Court as we all pull for you in your ordeal."

From Justice Stephen Breyer also came a handwritten note: "You are missing nothing here! The cases are routine; our lunchtime discussions need your input — particularly on recent films." Breyer did joke that Rehnquist had missed a chance to win some money from him in the justices' apparently low-stakes wagering over the presidential election. "I paid \$1 to CT [Clarence Thomas]," Breyer said. It's a safe bet that Breyer had put his money on John Kerry and Thomas on George W. Bush.

The poignant letters are contained in the latest batch of Rehnquist papers released this month at the Hoover Institution Archives at Stanford University. Rehnquist died in September 2005. The papers paint a picture of a Court under distress, even adrift, in the absence of his leadership after his 18 years as chief justice. Ginsburg wrote in another note that Rehnquist had been "very much missed at last night's Senate dinner." The speeches had gone on too long, and "you would have said all that was needed in less than half the time," Ginsburg said.

"You did not need another medical problem," Justice Sandra Day O'Connor wrote upon hearing of his illness. "Please send word about how I can be of help." Thomas, referring to his wife Virginia, wrote, "Virginia & I want you to know that you are in our thoughts & prayers."

The get-well letters, among many others, stand as testament to the power of a chief justice to shape the Court he leads — and how the Court suffers when he is ill. And they also reflect, along with correspondence

with hundreds of others, Rehnquist's down-home, amiable style that won him admirers across the political spectrum. When he responded to his colleagues' notes about his illness, he was careful to keep track of to whom he owed money in the office football pool. "A great chief justice," the late Thurgood Marshall said of Rehnquist more than once.

THE INFLUENTIAL CHIEF

Justices went to him with dilemmas large and small. When Ginsburg was asked to moderate a panel on national security, terrorism and constitutional rights in 2004, she asked Rehnquist whether it would be appropriate. "I think participating, even as a moderator, would be a mistake — this kind of case is always a 'hot button' for the media," he scribbled back — and Ginsburg abided by his judgment, telling her host of Rehnquist's advice.

A decade earlier, retiring Justice Harry Blackmun wanted to keep his chambers in the Court rather than at the nearby Thurgood Marshall building, telling the chief the other building "is isolated, a fact I do not like." Rehnquist's reply: Congress is pressuring the Court to make use of the space at the Marshall building reserved for retired justices, so it would be "impolitic, to say the least," for Blackmun to stay at the Court building. Blackmun moved.

Not all the correspondence asked for hard judgments. In a playful note from then-newbies Breyer and Ginsburg in 1995, the justices wrote, "By coincidence, the two of us discovered ourselves thinking about Arthur Miller as an 'under-used resource.' " They urged Rehnquist to keep the famed Harvard Law School professor in mind for judicial committees. "And perhaps, as an added benefit, he would spend less time on television!" they concluded. Miller, who now teaches at New York University, notes on his resume several Judicial Conference committee appointments by Rehnquist.

One file labeled "Christmas parties" charts Rehnquist's early success in becoming the impresario of the Court's annual Yule event. An inveterate choir singer, Rehnquist included lyrics from several Christmas carol parodies he composed, most lampooning liberals. One went, "Pack the Court with hacks and cronies, fa la la....Weed out all those liberal phonies..." The lyrics appeared not to have ruffled any feathers because, in 1977, then-Chief Justice Warren Burger wrote Rehnquist, "By popular acclaim you have been designated to be architect, engineer and general contractor" for the Court's Christmas party. But the file contains no mention of later controversies involving the party, including the time in 1988 when a group of law clerks objected to its openly Christian religious character.

Then there's the friendly note from Ginsburg in April 1995: "Dear Chief: Just to say you are a mensch (Yiddish for fine human), and hope you do not regard me as too much of a kvetch." From the date and the

language, it appears that Ginsburg was complimenting Rehnquist for canceling, for the first time, oral arguments that had been scheduled for Yom Kippur — though no public explanation was offered at the time.

AN INSIDER'S VIEW

As for the broader public, file after file shows how many people sought Rehnquist's ear, his signature, his advice, his benediction. In 1999, a seemingly irritated Nebraska Senator Bob Kerrey, a Democrat, asked to meet with Rehnquist to discuss "what is going on at the Court with the federalism issue." A note attached to Kerrey's missive instructed that he be discouraged and told Rehnquist was out of town. "CJ doesn't talk about pending cases," the note said.

With techniques like that, Rehnquist and his secretaries held most supplicants at bay. But any correspondent who was an old friend, or who invoked the name of a high school classmate, a relative or a favorite football team, was likely to get a personal note from the chief justice.

An old friend, Denison Kitchel, asked Rehnquist about retirement in 1999, and he gave a response he never would have shared with the media or the public.

"So far as retiring is concerned, I have been paying about \$7,000 for the privilege of working for the last 10 years," Rehnquist wrote. "I could have retired in 1989, and upon retiring, I would no longer have had to pay Social Security taxes but would still receive my full salary. But I don't think I have made any mistake in keeping my nose to the grindstone — the grindstone is not as hard as it once was when we were taking a lot more cases to decide than we are now. And I continue to enjoy the work."

Another old friend, retired U.S. Court of Appeals for the D.C. Circuit Judge Malcolm Wilkey, wrote Rehnquist a note of support in 1999 when the chief justice was under attack for having led a conference in singing "Dixie," viewed by many as offensive. Rehnquist thanked Wilkey for his "encouraging letter." Rehnquist said, "I really feel that it does not bode well for race relations in this country if people constantly strain to find some basis for taking offense."

GRANDPA REHNQUIST

The first segment of Rehnquist's extensive collection became public last November. It was a small batch, limited by Rehnquist's stipulation that no files about specific cases be released during the lifetime of any other justice serving at the time. With Justice John Paul Stevens, who joined the Court in 1975, still alive, that meant only the case files from Rehnquist's arrival at the Court in 1972 until 1975 could be released.

Papers relating to Rehnquist's role as the presiding officer at the 1999 impeachment of President Bill Clinton also remain closed.

Although what was released this month was extensive, it appears that some materials of the kind that other justices have kept are not present. Files on individual law clerks — such as John Roberts Jr., his 1980 clerk who ultimately succeeded him — appear to be nonexistent. Information about Rehnquist's medical problems over the years is not to be found. Although there are files about the Judicial Conference and the Administrative Office of the U.S. Courts, few deal with the internal discussions that have sometimes occupied their attention. Unlike presidential papers, which are governed by federal law requiring they be maintained, no regulations pertain to justices' papers, and some justices over time have disposed of some or all of them.

There are clumps of files of letters between Rehnquist and other justices, though they seem random at times, with several gaps. Even though no new case files were made available, an occasional memo from a justice about a case was included in his correspondence files.

In one such note, O'Connor reported in 1994 to Rehnquist that in the pending Voting Rights case *Holder v. Hall*, Justice Antonin Scalia was leaving her "in a position that seems intellectually indefensible." She urged Rehnquist to re-assign the case to Blackmun. In the end, no one position garnered a majority.

It appeared from the files that Rehnquist always had time to correspond with his children and grandchildren. He had nicknames for his children: James was "Weakfish," Janet was "Fozzie" and Nancy was "Boombna."

In one 2004 note to "Weakfish" — his son James is now a partner at Goodwin Procter in Boston — Rehnquist commented on a *Wall Street Journal* article about Ronald Reagan and the difficulty of forming a logically consistent theory of how the country should be governed.

"When conservatives take positions on actual issues, they are inconsistent, as are liberals," Rehnquist observed. "The principles of [John Stuart] Mill and [John] Locke would probably dictate little or no regulation of abortion; yet today's 'conservatives' generally favor such regulation, while liberals oppose it." Rehnquist continued, "The principles of Mill and Locke would also oppose regulation of gun ownership, and here conservatives agree with Mill and Locke, while liberals do not."

In a more whimsical tone in 2003, Rehnquist responded in writing to a question his grandson Timothy had asked about his life in the fifth grade, nearly 70 years earlier in Shorewood, Wis. "My homeroom teacher was named Miss Wild — she had black hair and was quite tall. She had a reputation for being a hard grader," Rehnquist said, recalling that his classmates said of her, "Wild and wooly and full of fleas, and hard to carry above the D's."

Rehnquist also remembered the school sports he played, along with less organized activities such as kick the can, prisoner's base and hours of playing Monopoly — a game that had just been introduced to America.

"I know that your fifth grade life is much more organized and scheduled than mine was," Rehnquist concluded, "but I am not sure that I would want to trade your experience for mine. Love, Grandpa."

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