SUPREME COURT WILLIAM H. REHNQUIST

A NEW EDITION OF THE CHIEF JUSTICE'S CLASSIC HISTORY

SUPREME COURT

NEW EDITION

WILLIAM H. REHNQUIST



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All the Laws but One

Grand Inquests: The Historical Impeachments of Justice Samuel Chase and President Andrew Johnson

THE SUPREME COURT

Preface

ALEXANDER HAMILTON, writing in No. 78 of *The Federalist Papers*, described the Supreme Court of the United States as "the least dangerous" of the three branches of the federal government. Whether or not the passage of time has proved this assessment correct, it has most assuredly proved that the Supreme Court is the least understood of the three branches. This book is designed to convey to the interested, informed layman, as well as to lawyers who do not specialize in constitutional law, a better understanding of the role of the Supreme Court in American government.

Most of us have been exposed in either high school or college to a descriptive summary of the place of the Supreme Court in our system of government, but it is quite evident that this is not enough to convey any but the most rudimentary understanding of the nature of the Court's work. There are literally dozens of works dealing with one or more aspects of constitutional law, but almost all of them are written for lawyers and are too detailed and too technical to be easily understood by a nonlawyer. There are excellent biographical studies of some of the justices, and the volumes in the Holmes Devise History of the Supreme Court treat the subject comprehensively. But these volumes are intended for the serious scholar and not the interested citizen trying to find out more about how the government works.

I have tried in this book to fill what seems to be a hiatus between the descriptive material and texts in American government and the comprehensive historical works. I have been guided by the view that placing the work of the Court in the context of American history, and

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sketching the lives and personalities of some of the most influential justices, would be more apt to whet the reader's interest than would a purely abstract exposition of the constitutional doctrine expounded by the Court. The prologue, dealing with the first few months of my service as a clerk for Justice Robert H. Jackson in 1952, is designed to give the reader some feel for what the Court building is like physically, what it is like to work in that building, and the sort of work that law clerks do. The main body of the book deals with the history of the Court from the time of John Marshall to the latter part of the twentieth century; it is an effort to follow a trail on the borderland between history and constitutional law, and to give some idea of how the Court—and prominent individual justices who played crucial roles in shaping the Court's direction—have responded to important historical developments. I have tried to briefly portray the lives of some of these important justices, because the individuals who comprise the Court at any particular time have a great deal to say about the kind of decisions that the Court makes. The last section of the book is a description, from the point of view of a member of the Court, of how the Court today goes about its business of deciding cases.

To say that I have not attempted a treatise on constitutional law is an understatement. Several dozen cases at most are discussed, and whole areas of very important constitutional doctrine are not even touched upon. I have quite deliberately ended my discussion of the substantive doctrines developed by the Court with the Chief Justiceship of Earl Warren, because I wanted to avoid any discussion of the cases and doctrines in which any of my present colleagues have played a part. I have been quite willing to sacrifice completeness in my treatment of all of these subjects in the interest of putting together within manageable limits a synthesis which I hope will leave the reader feeling that he knows considerably more about the Supreme Court when he puts the book down than he did when he picked it up.

The first edition of this book went to press fourteen years ago, and was dedicated to my late wife, Nan. In the preface to that edition I said:

My wife, Nan, has been a true factorum throughout the preparation of the book. She has always encouraged me to go ahead with it, even though it meant more of my time spent in my study and

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less with her and the family. She has been the editor of first resort, and nearly every chapter bears the imprint of one or more suggestions which she made. When I have thought of the interested, informed, nonlawyer for whom I am writing, I have had her in mind.

I likewise dedicate this new edition to her.

My daughter, Nancy Spears, has provided invaluable help in the preparation of this revised edition. She has not only skillfully edited the two new chapters in the book, "The New Deal Court" and "The Warren Court," but gone over the entire text with a view to suggesting necessary changes. She says her aim is to make me sound less like a lawyer, and I hope she has succeeded. My editor at Alfred Knopf, Pat Hass, has a passion for "tightening sentences," and the book has benefited from her suggestions along this line.

My secretaries, Janet Tramonte and Laverne Frayer, have typed the new material in this edition, and my aide, Joe Mullaney, has also assisted me. The staff of the Library of the Supreme Court of the United States, headed by Librarian Shelley Dowling, has been more than cooperative in filling my requests for a number of volumes. Gail Galloway and her staff in the Office of the Curator of the Supreme Court have also rendered valuable help in obtaining and selecting additional pictures for the revised volume.

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SUPREME COURT

INTRODUCTION

A Law Clerk Comes to Washington

N THE MORNING of January 30, 1952, in Wooster, Ohio, I was en route from my parents' home in Milwaukee, Wisconsin, to Washington, D.C., where I was due in two days to report for duty as a law clerk to Robert H. Jackson, one of the eight associate justices of the Supreme Court of the United States. It was a highly prized position; I was surprised to have been chosen for it, and I certainly did not want to be late.

I had spent the night in a tourist home, where, despite the inflation resulting from the Korean War, one could still get a room for four dollars. But as I read the weather forecast, my concern grew about the remaining part of my trip. It had been snowing farther south in Ohio, and that storm was expected to move eastward across the Appalachians. Since my transportation for this trip was a 1941 Studebaker Champion, a good little car but eleven years old, I decided that I had better hurry. Driving through the Great Lakes states in the middle of winter, I had become keenly aware of a seasonal shortcoming of my car. It had no heater. As I look back, it's hard to believe that even in 1941 a heater would have been optional equipment on a car sold in Milwaukee, Wisconsin. But I knew from occasionally bitter memory that I did not want to be on the road after sundown if I could avoid it.

From the looks of the sky to the southeast, I appeared to be heading into the storm. The drive from Wisconsin to northern Ohio had been familiar because I had gone to school for a short time in Ohio before entering the Army, and had been stationed there while in the

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service. But from here on I would be covering new territory: through eastern Ohio to Wheeling, West Virginia, and across the northern panhandle of West Virginia, through southwestern Pennsylvania, and then southeastward through Maryland to Washington, D.C. I patted my small blue Studebaker's fender and thought, "Don't let me down, baby." I started it up and headed toward New Philadelphia and Wheeling.

I was a twenty-seven-year-old bachelor, somewhat late in completing my education because of three years' service in the military during World War II. By going through two summer sessions, I had managed to finish Stanford Law School in December 1951. The clerkship with Justice Jackson would be my first job as an honest-to-goodness graduate lawyer.

A large element of luck, it seemed to me, had entered into my selection for this position. I knew, of course, that justices of the Supreme Court had law clerks. Indeed, two recent Stanford graduates, Warren Christopher in the class of '49 and Marshall Small in the class of '51, had been clerks to Justice William O. Douglas. But Justice Douglas himself had western roots, and had arranged for the committee that chose his clerks to interview applicants on the West Coast. The chance of getting a clerkship with one of the other justices seemed remote indeed to a Stanford student like myself, in a day when people didn't fly across the country except for a major emergency, and didn't usually spend their small savings on transcontinental train trips for interviews that seemed to have little prospect of success.

But as fate would have it, Justice Jackson came to dedicate the new Stanford Law School building in the summer of 1951, when I was attending my second summer session. Phil Neal, my administrative-law professor, had himself clerked for Justice Jackson several years earlier. Shortly before the Justice arrived for the dedication ceremonies, Professor Neal asked me if I would be interested in clerking for him; the suggestion came out of a clear blue sky, but of course I said yes. Neal then arranged for Justice Jackson to interview me while he was at Stanford.

I met with the Justice in one of the faculty offices, and his pleasant and informal demeanor at once put me at ease. After a few general questions about my background and legal education, he asked me

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whether my last name was Swedish. When I told him that it was, he began to reminisce about some of the Swedish clients he had had while practicing law in upstate New York. I genuinely enjoyed these anecdotes, but somehow I felt I should be doing more to make a favorable impression on him. He, however, seemed quite content to end the interview with a courteous thanks for my having come by, and I walked out of the room convinced that he had written me off as a total loss in the first minutes of our visit.

I was naturally surprised, therefore, to receive a letter from him in November 1951, telling me that his efforts to get by with only one law clerk that term were not working out well, and that both he and the clerk felt that some added assistance was in order. I had told him that because of my studying through the summers I would graduate from Stanford in December, and he requested that I come to Washington on February 1, 1952, and plan to serve as his clerk from then until June 1953. Delighted by this quite unexpected offer, I accepted it immediately.

Now, as I crossed the Ohio River at Wheeling, West Virginia, I noted the steady lowering of the southeastern sky, and by the time I was in Pennsylvania, it had started to snow. An hour or so later, when I angled south across the Pennsylvania line into western Maryland, it was snowing hard. I was following U.S. Route 40, the old "national road," which would take me to within forty miles of Washington.

I pulled up at a Shell station on the outskirts of Cumberland, Maryland, and took another look at the weather. I guessed the visibility to be no more than a quarter of a mile, and I decided I was indeed hitting the tail end of the weather system moving eastward over the Appalachians. I held my speed down, which wasn't hard to do in the Studebaker. I came over the mountains, went through Hagerstown, and climbed back over the Blue Ridge without much improvement in visibility. But when I finally turned south toward Frederick, the skies began to brighten and the snow stopped. During the last forty miles from Frederick to Washington the sun emerged from behind the clouds, and I had the feeling that it was personally welcoming me to the Nation's Capital.

I was fortunate to have a hospitable great-aunt who lived in the northwest part of Washington, near Chevy Chase Circle. She had been widowed four years previously, and had generously undertaken

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to put me up until I found a permanent place to stay. She gave me a very pleasant bedroom in her house, and I spent the day after my arrival getting my bearings in the city and working out a route to cover the rather long distance between her house and the Supreme Court building. The following day, February 1, 1952, I proceeded to follow that route—south on Connecticut Avenue to Dupont Circle, then southeast on Massachusetts Avenue to Capitol Hill.

From Maryland Avenue, where I parked, one sees the north wing of the Supreme Court building. I walked around to the plaza in front of the main entrance to the building, and stood for a moment to admire it. I had been in Washington only once before in my life, when I came with my cousins from Iowa between my junior and senior years in high school. But I had absolutely no recollection of having seen the Supreme Court building; as I looked at it now, I felt sure that I would have remembered it.

Behind me and across the Capitol plaza was the United States Capitol, with its familiar dome thrusting up into the chilly gray February sky. In front of me was the main portico that provided entrance to the Supreme Court building, flanked on either side by two large, seated marble figures. The portico itself is supported by sixteen massive Corinthian marble columns. Above these on the architrave is inscribed in large letters the familiar phrase "Equal Justice Under Law." Capping the entrance is a pediment with a sculptured group in bas-relief. The whole impression is of a magnificent Greek temple of white marble, flanked by low wings extending outward on each side.

I climbed the seemingly endless steps leading up to the front entrance of the building, opened the large door, and walked through a vestibule into the Great Hall, and here I again paused to feast my eyes on the sight. The ceiling looked to be at least twenty feet high, and on each side were double rows of marble columns. Arrayed along each side of the hall in niches designed for that purpose were busts of the eleven former Chief Justices of the Court, from John Jay to Harlan F. Stone.

But what impressed me as much as the architecture was how quiet the Great Hall was. With the exception of the guard on duty, I was the only person there. I explained my mission to the guard—to report for work to Justice Jackson—and he directed me to the Marshal's Office. From there I was taken by messenger down a corridor, just as

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deserted as the Great Hall, through some brass gates and down another corridor to a door where inscribed on a bronze plaque were the black letters MR. JUSTICE JACKSON. At one of the desks inside was seated George Niebank, who had been clerking for the justice since the beginning of the term in the fall. He rose quickly when I entered the room, and I got the impression that he was delighted to see me, if for no other reason than that he would now have some help in processing the stacks of briefs and papers on the desks.

Justice Jackson arrived in his chambers and greeted me with the affability I remembered from our meeting at Stanford. He was a friendly-looking man, a little on the stout side, with thinning dark hair that came to a widow's peak. His face was broad, his complexion somewhat florid, and his eye had an incipient twinkle. Robert H. Jackson had been born sixty years earlier in a hamlet in northwest Pennsylvania, but when he was five his family moved north across the New York State line to the village of Frewsburg. Because he adhered to the political faith of his fathers, he was one of the few Democrats in otherwise staunchly Republican upstate New York. Jackson combined service to his party, to his state, and to his profession with his practice, and he became known throughout the state at the age of forty-two, when President Franklin Roosevelt appointed him general counsel for the Bureau of Internal Revenue in Washington. Jackson rose rapidly in the legal hierarchy of the New Deal; that rise culminated in his appointment as an associate justice of the Supreme Court in June 1941. As I stood before him on this February morning in 1952, he was in the midst of his eleventh year on the Court.

After an exchange of pleasantries, I said that I should probably get to work, but he smiled and said that first we had to do something even more important—have me put on the federal payroll. After signing the appropriate form, I became a GS-9 at a salary of \$6,400 per year, far and away the most I had ever earned in my life. Justice Jackson then remarked rather casually that he supposed I had a general idea of how the Supreme Court operated. Actually, I had only the foggiest notion of how the Supreme Court operated, but I was naturally loath to volunteer this fact. He told me that he would be "on the bench" beginning at noon that day, and was now engaged in reading some briefs for the cases that would be argued that afternoon. He

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suggested that I let George Niebank fill me in on the details of the clerk's job, and that he would discuss my responsibilities with me at greater length when he had more time.

I had taken a course in constitutional law in my second year of law school, but had done no work at all in the field called "federal jurisdiction," which dealt with the niceties of when a case might be brought in federal court as opposed to state court. I decided that I would have to work hard, keep my eyes and ears open, and hope to benefit from what was obviously going to be on-the-job training. Back in the law clerks' office, I confided some of my self-doubt to George Niebank while he was explaining to me what Justice Jackson expected of his law clerks. George assured me that his studies at the University of Buffalo Law School had not included any course in federal jurisdiction either, and although it might have been nice if they had, he had since been able to pick up whatever knowledge was necessary in that field. He explained that the principal tasks of law clerks were to write short memoranda on each petition for certiorari, and to help edit or make suggestions on Court opinions or dissents written by the justice they served.

I was glad I had done a little outside reading on the way the Supreme Court does its business. I did know the difference between petitions for certiorari and Court opinions. Petitions for certiorari was a term applicable almost exclusively to practice in the Supreme Court of the United States, and had its origin in the way the docket of the Supreme Court had grown from the time that our nation first began.

After the necessary states had ratified the Constitution in 1788, among other bills that the First Congress enacted was one called the Judiciary Act of 1789. That act provided that the Supreme Court of the United States should consist of a chief justice and five associate justices, and then went on to create federal trial courts in each of the thirteen states, and specified how appeals should be taken from those courts to the Supreme Court. The Supreme Court was thus from its very first day essentially an appellate court: a court that sits not to hear witnesses and to decide facts, but to hear appeals on questions of law from decisions of trial courts that do hear witnesses and decide facts.

As primarily an appellate court, the Supreme Court started out with very little to do because the principal source of its appeals—the