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Solicitors General Panel on the Legacy of the Rehnquist Court

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Solicitors General Panel on the Legacy of the Rehnquist Court

A Discussion Held on October 27, 2005, at The George Washington University Law School and Moderated by Solicitor General Paul Clement¹

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SOLICITOR GENERAL CLEMENT: Thank you very much, Brad. And I want to thank everybody on the panel for being here. I am really looking forward to this, in part because I have a rather modest role. I also want to thank everybody for staying for this part of the program. Following Justice Ginsburg is a little like arguing the ERISA case as the second case of the day after there has been a big constitutional case. And I am glad that the courtroom has not emptied as a result, so I appreciate that.

I am going to turn it over to the panelists in just a moment. I thought we would proceed in order of service in the Office of the Solicitor General. So we will start with Maureen and work our way chronologically to Ted.

What I wanted to do just very briefly before I turned it over to Maureen, is to make three points with a few anecdotes about what a pleasure it was to appear as a lawyer before the Rehnquist Court, and what a remarkable presence the Chief Justice was in the courtroom. And there are three things that I would identify: the command that he had over the courtroom, the command that he had over the legal materials—the cases, the Constitution, the statutes—and his sense of humor to leaven it all. And what I thought I would do is briefly offer some anecdotes taken from real live transcripts to illustrate these points.

Now, the command of the courtroom is perhaps the hardest one to illustrate from a transcript because there are things that the Chief Justice said that were little different from what other Justices might say, but coming from the Chief Justice, they simply had a different impact.

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I had one case in which the Chief informed me that an argument that I was busy making was not included within the question presented. Now, if any Justice had said that, it would have been a bad sign, but with the Chief, it was just time to move on. So too, if the Chief Justice asked you if you had a fall-back argument, it was time to start falling back. And one of his favorite questions to counsel, and this came out from time to time, was to ask counsel, "What is your best case for that proposition?" And that question standing alone was not that terrible, it is just that once you were asked it, you knew that whatever case you offered would have some flaw that the Chief Justice would point out and then you would have just lost your best case.

And I guess this is so common an occurrence that the anecdote I will give you on this one actually comes from a question that was asked by a different Justice, Justice Scalia. And this is from the oral argument in *Small v. United States*, which was from November of this last year. This case was argued in the first week of arguments during the time period when the Chief was missing from the Court because of his illness in early November.

And so Justice Scalia in the course of this argument asked the following question:

Let me ask the question that the Chief Justice would ask were he here, because he always asks this kind of question, what—if you had to pick your best case, which interpreted the word "any" in the way that you would like us to interpret it here, what's the best case that you have?

Clearly, Justice Scalia recognized that the Chief Justice had something of a royalty arrangement with this question because it figured so often in his questions to advocates before the Court.

The second point I would make is just the awesome command of legal material—of the cases, of the statutes, of constitutional history—that the Chief Justice had at oral argument. And one exchange he had with counsel in a case that I attended always stuck in my mind as being nothing short of amazing in terms of the Chief Justice's command of the case law, and I will offer it to you in a slightly excerpted version. This is, perhaps, as interesting as anything that could emerge from a tax case, but this is from the tax case of *United States v. Fior D'Italia* from April of 2002.

The lawyer for the taxpayer in this case invoked a decision at oral argument that was not in the briefs. And the lawyer said: "The Court has already held in *Flora* against *United States* that it isn't a tax on aggregate earnings." The Chief Justice, upon hearing the reference to the *Flora* case, asked her a question. "There are two *Flora* cases, neither of which are cited in your brief. Which *Flora* case are you citing?" "*Flora* against *United States*," the counsel replied, "And I believe it's footnote 37 in *Flora* against *United States*." The Chief stopped her. "Yes, but there are two *Flora* against *United States* [opinions]. A rehearing was granted. One is in 357 U.S., one is in 362, and your brief doesn't seem to mention either of them." The lawyer responded, "Well, we referenced them in our Complaint, Your Honor. I think it's in paragraph 14 of our Complaint." The Chief Justice: "Well does it give a citation there?" The lawyer: "Yes, Your Honor, it's 362 U.S. 145." The Chief Justice: "But

that was just about whether or not the tax court had jurisdiction if the assessment wasn't completely paid beforehand, wasn't it?" The lawyer responded, "Yes."

The fact that the Chief Justice was making these points about these two cases, neither of which was cited in the brief, is nothing short of remarkable to me and that anecdote has always stuck with me.

The last thing I will mention is the Chief Justice's sense of humor. And, perhaps, with the gruff exterior with which he commanded the courtroom and commanded the materials, it is a good thing for counsel that he had this sense of humor.

That is not to say that the counsel was not sometimes the object of the Chief Justice's humor. And, in fact, I think one of the less acknowledged roles of an advocate before the Supreme Court is to be the straight man or straight woman for the Justices. And I will take one recent example at my own expense from a case that was argued the very first day that the Chief Justice came back to the bench after his absence because of his illness. So this was the first day of the March sitting of 2005. And it certainly showed that despite all that the Chief was dealing with, he had not lost his sense of humor.

And in this instance, I was trying to make a point about Establishment Clause law. And, specifically, I was responding to a question from Justice Scalia, the import of which seemed to be that in order for the government to accommodate religion in a way that did not violate the Establishment Clause, the religious practice had to be either central to the religion or, in fact, compelled by the adherent's religion. I tried to make the point that centrality or compulsion were not required elements for a permissible accommodation of religion under the Court's precedents. So I pointed out,

Justice Scalia, I don't think this Court has ever, in its accommodations cases, held that the government can only accommodate those things that are central. I don't know for sure, but I rather doubt that employing co-religionists in a gymnasium is central to the practice of any faith. Yet in *Amos*, [*Amos against Corporation of the Presiding Bishop*], this Court upheld that as a valid accommodation.

And at that point I was interrupted by the Chief Justice. He stated, "[Counsel,] [y]ou may underestimate the LDS," i.e., the Church of Latter Day Saints, at issue in the *Amos* case. Not only did that show, of course, that he knew exactly what the *Amos* case had held, and what the facts of the *Amos* case were, but that he had not lost that sense of humor. And, of course, that sense of humor was evident even on his very last day in the courtroom when in announcing the decisions in the Ten Commandment cases and noting the various separate writings that were issued in that case, he made the observation that he did not know that there were that many Justices on the Court.

And I think for me, that was always an important part of watching the Chief Justice in action, to see not only that tremendous command, but also that wonderful sense of humor.

Well, with those opening remarks, let me turn it over to Maureen. In honor of the Chief, I will do what I can to enforce the red light, but there is

only so much that I, unlike the Chief, can do in that regard. But the idea is to allow about fifteen minutes for each of the participants. Thank you.

MS. MAHONEY: Thanks. I'd like to start by just pointing out one difference between me and my colleagues here from the Solicitor General's office. And you probably think you know what the big difference is. You probably think it is because I am the only member of the fairer sex. Or you might think it is because they were all Solicitors General and I was a Deputy. But the real difference for the purpose of today is that I am the only one who can make the following statement: I would not be sitting here but for Chief Justice Rehnquist.

He was the man that I clerked for in 1979 and by far the most important mentor in my professional career. He definitely caused me to be here today. So, I am forever grateful.

He also, as you have heard repeatedly, had a very powerful influence on the development of the law in the late twentieth century. From my perspective, I think it is fair to say that he changed the nature of legal discourse in America. He basically made it popular—or at least respectable—to be a conservative legal thinker, which is something that had gone out of fashion before he first joined the Court. So today I would like to share a few observations about his views of the Solicitor General's office, because that is a focus of this panel, and then touch on some areas where I think that his jurisprudence has often been misunderstood.

With respect to the SG's office, I would emphasize that he had tremendous respect for the office. I only heard him express two criticisms of the office over the time that I knew him. The first came shortly after I joined the office as a Deputy. I went in to see him and we talked about what the office could be doing better or what we were doing well. And he said very frankly that our office was just too slow. He was always quite adamant about getting work done on time. But the Solicitor General would get requests from the Court to submit his views in certain cases and it would take months and months and months for the SG's office to respond because those briefs would not have a deadline. So he sent me back with a mission, which was to speak to the office and make sure that the briefs got in sooner.

The second criticism concerned the attire for women in the SG's office. The men, as you may know, wear morning suits. But I did not. I wore dark suits. So the Chief asked me one day about why I decided to wear dark suits instead of following the tradition of wearing a morning suit, just like the men had always done. I tried to explain to him that some women might be comfortable in morning suits, but that it would feel a bit like a costume to me. Women do not traditionally wear morning suits and if I were going to wear the woman's equivalent of a morning suit to Court, it would be a wedding dress. He seemed to get the point, but he had great respect for tradition, and thought this was a great honor for the lawyers in the office that distinguished them from the rest of the bar. It was a bit of a sore point with him, but I also think he got over it.

Some ways in which his jurisprudence has been misunderstood. First, as a former female clerk, I am very distressed to read quotations in the press asserting that the Chief's jurisprudence in the area of women's rights can be

explained by gender bias. I'm not making this up. I want to read you some quotes from the *Washington Post* in 1986 around the time of his nominations to serve as Chief Justice.

A representative of the National Organization for Women was quoted as saying that Justice Rehnquist sought to maintain the role of women that was prevalent in the nineteenth century and that he could never "give a modern woman a fair chance."

The Federation of Women Lawyers said that he harbored a "basic hostility" to "women's rights and that's what his opinions over the years have been about." And the Women's Legal Defense Fund said that his vision contemplated "the husband having the traditional and legal right to order around their wives."

These statements are based on a misconception that confuses gender bias with judicial conservatism. There were probably two early decisions that fueled this view of him in 1986. The first was his dissent in *Roe v. Wade*, which he wrote in 1973, and no other Justice joined. The dissent took the position that the issue in *Roe* had to be left to legislatures. The opinion was not disrespectful towards women. It did not suggest gender bias. It did not even reveal how he might have viewed the moral issues surrounding abortion. It simply said that, based on history and tradition, the issue had to be governed by majority rule reflected through the legislative process.

Nevertheless, I think that the decision fueled the vehemence reflected in those quotes. Similarly, in the 1976 case of *GE v. Gilbert*, Justice Rehnquist wrote that discrimination on the basis of pregnancy was not discrimination on the basis of sex. It was a strict textual argument. He read the statute. He explained his views. In his view, pregnancy and gender are two different things and the statute only referenced gender, not pregnancy. This also did not make him popular with the women's movement. So we were left with this perception that he wanted to relegate women to the societal rules they had to live by in the nineteenth century.

As my own career shows, this is just a misunderstanding of who he was as a man. Not only did he hire me in 1979—and has hired many women clerks since then—he went out of his way to make sure that I would have the professional opportunities that helped me become a frequent advocate before the Court.

In 1988, by way of example, he appointed me to argue a case by special invitation of the Court. Such invitations are infrequent, and I was told that this was the first time in history that the Court had used this authority to appoint a woman advocate.

As for the claim that he was the kind of man who thought that men should order around their wives: anyone who knew Nan Rehnquist and knew their relationship would know this was ridiculous. But, one story should suffice. In 1986, shortly after he learned that the President had nominated him to be Chief Justice, the Deputy Clerk, Frank Lorson, asked him: "What did Mrs. Rehnquist have to say?" And the Chief responded, "She said to put the dishes in the dishwasher."

As Justice Ginsburg pointed out, if you look at his body of work, you can tell he called the gender issues as he saw them. He found that in the VMI

case, there was an equal protection violation. And he also wrote the opinion of the Court holding that sexual harassment was a form of discrimination prohibited by Title VII. He was not a gender-biased Justice.

One other area where his jurisprudence has been misunderstood is in the area of criminal law. There are, of course, many, many opinions where the Chief has taken a view of criminal procedure that could be characterized as favoring the police. His view of the Constitution certainly was to provide adequate running room for police to engage in effective law enforcement. But one feature of his criminal jurisprudence is often overlooked. When it came time to interpret criminal statutes, just as he often did in the area of civil statutes, he would not interpret them expansively. For example, the very last case that he heard, which I had the opportunity to argue, was *Arthur Andersen v. United States*. The issue was the proper interpretation of a witness tampering statute. The Chief wrote the opinion for the Court overturning Andersen's conviction. And he emphasized a theme he had emphasized in many opinions before: when courts interpret criminal statutes, the ambiguities need to be resolved in favor of fair warning, and there is a presumption that Congress only intends to punish conduct undertaken with consciousness of wrongdoing.

Many people were very surprised that the Chief would take that position, but if you look back over his precedents, it is not surprising at all.

I will turn it over to the next one, but I must say that he will be incredibly missed. He was a fabulous inspiration for everyone who clerked for him and, I think, for every advocate who appeared before the Court.

MR. DAYS: Maureen, I believe you stayed around for a couple of weeks between the Bush Administration and the Clinton Administration and I'm sure you gave us the message about the CVS problem.

MS. MAHONEY: I'm sure.

MR. DAYS: I'm sure we solved it. She's talking about the request of the Court for the views of the Solicitor General. It's a tall order. I guess it tests the question of whether the Solicitor General as an officer of the Court first and foremost is a member of the executive branch. And so this is the tension that we all have to deal with in his office.

With respect to attire, Chief Justice Rehnquist was not the only Chief Justice concerned about attire, but his predecessor, Chief Justice Burger, was as well. The story is that he became very upset one day when a male member of the SG's office showed up wearing the striped pants and morning coat and a light gray vest. He apparently wrote a letter to the Solicitor General pointing out that the proper attire was a dark gray vest. And at least during the time I was there, we all concluded that the dark gray vest was for arguments before the Supreme Court and for funerals—there was a similarity between those two functions sometimes when people stood up before the Court to argue a difficult case.

I don't have very many personal experiences with Chief Justice Rehnquist. I did get to see him perform in a couple of unusual circumstances. One was at the Fourth Circuit judicial conference where he was the circuit justice. He liked to lead a sing-along there, literally singing from a songbook that, apparently, he had either prepared or had blessed. And I remember

one of those conferences where there was an entertainer who performed songs of compositions of Cole Porter. I was just amazed at the extent to which the Chief Justice seemed to know every lyric of every Cole Porter song ever written. Not that he had a great voice, but it was the kind of enthusiasm behind the delivery that made its impression upon me.

And the other is the Christmas party every year at the Court where he would lead a sing-along of carols, once again more of the spirit than the, shall we say, actual delivery of his carol singing.

I want to follow up on some points that Paul Clement made, one about the light. The Chief Justice was known for cutting off an oral argument mid-syllable once the red light went on. And I must say for those of us who were at the swearing in of the now Chief Justice Roberts, we were watching very carefully during the first two arguments of the Term, indeed of his tenure as Chief Justice. And one of the members of this panel was actually up there arguing before the Court when we heard the Chief Justice say, "Thank you, Mr. Olson," in midsentence. The response was right on. This is the tradition continuing.

MR. OLSON: The tradition goes on, yes.

MR. DAYS: There's also something else that Chief Justice Rehnquist did that was very disconcerting to litigants who didn't have experience before the Court. Indeed, I think the job of the clerk was to prepare lawyers for what was going to happen—that about twenty minutes into an argument, the Chief would stand up, turn his back on the lawyer's argument, and walk out through the curtain into the back room.

Well, if you're arguing before the Court and you see the Chief Justice reject you and walk away, this is not a good feeling. It was simply that his back problems would necessitate his getting up and walking around. You may recall that there was an anthrax scare at the Court and the entire Court moved over to the home of the Court of Appeals for the District of Columbia Circuit. Well, there was no curtain and there was no back room and so the Chief got up and walked along behind the other Justices to get his exercise. And I know that Chief Justice Rehnquist was a great leader and a friend of the other Justices, as Justice Ginsburg just pointed out, but I got the feeling that the other Justices were leaning over covering their notes as the Chief Justice walked by.

Some pet peeves of the Chief Justice. He got very upset when lawyers began rearguing the facts in a case. He would make the point that the Supreme Court was not a court of errors; it was there to decide statutory and constitutional issues, not to correct errors. He also liked to ask where people were quoting from. And this took on a very interesting turn during one argument when Justice Breyer began to read from a document during the argument. And when he finished, the Chief looked at him and said, "What are you reading from?" At which point Justice Breyer very obviously reddened and announced that he was reading from one of his opinions that he wrote when he was Chief Judge of the First Circuit. It was really helpful to counsel to know where that was coming from.

And the last point I want to make is about an argument I made in the early days of his tenure as a Justice. It was a minority set-aside case and the

statute that set up the set-aside mentioned Blacks, Hispanics, Native Americans, and so forth, and the last in the groupings was—Eskimos. And Justice Rehnquist looked at me and said, “What exactly did Congress have in terms of records of discrimination against Eskimos?” Well, I had no preparation for that. In fact, there was no such record. And my response was, “Well, it’s not clear that they’re here in Washington, but I know up in Alaska they probably have a long list of records that support what Congress did in this case.” He was only mildly amused at that response.

I’d like to spend the rest of my time talking about the relationship between Justice Rehnquist and Chief Justice Rehnquist. I’m very honored, and I know the other people on this panel are as well, to be a part of this, to assess the legacy of the Rehnquist Court. As my introduction indicated, I served not only as Solicitor General, but Assistant Attorney General of the Civil Rights Division from 1977 to 1980 and, therefore, I had the opportunity to appear before not only the Rehnquist Court, but the Burger Court.

Given my experiences with both the Burger and Rehnquist Courts and as a Court-watcher for almost three decades, I thought it might contribute to the panel’s discussion for me to say a few words about William Rehnquist, the Associate Justice, during his earlier days on the Court, as well as about his tenure as Chief Justice more precisely. I hope I can do this in the time allotted to me.

I want to focus on the extent to which Justice Rehnquist was able to articulate a clear vision of his role, the role of the Court, and his positions on the major issues that came before the Court, and the extent to which Chief Justice Rehnquist was successful in bringing about the embracing of his positions that he had been able to advance previously, often only in dissent.

I want to offer three examples in this regard: federalism, the Establishment Clause, and federal jurisdiction. One of the hallmarks of the Rehnquist Court has been its robust view of state sovereignty and limitations on the invocation by Congress of its powers under the Commerce Clause and Section V of the Fourteenth Amendment to impose regulations and liability upon the states. The emergence of a firm majority of the Court in the early 1990s in support of these views was a development that concurred with views expressed by Justice Rehnquist early in his tenure in a 1975 case having to do with the Economic Stabilization Act of 1970. He basically invoked the need to limit the exercise by Congress of the commerce power. He also brought to bear in support of his position the Tenth and Eleventh Amendments, as what he called constitutional counterweights that could limit Congress’s exercise against states of its Commerce Clause power.

In the *City of Rome v. United States*—a case having to do with the Voting Rights Act of 1965—he described what the Court had done in upholding a provision of the Voting Rights Act as nothing more than a total abdication of the Court’s responsibility to determine the constitutionality of acts of Congress, rather than an exercise of deference due to a coordinate branch of government.

It’s also the case that Justice Rehnquist had a firm position with respect to the Establishment Clause, and government aid to religious educational institutions in particular. In recent years during his tenure as Chief Justice, the

Court has adopted in this regard a test that emphasizes neutrality and private choice as touchstones in evaluating constitutional challenges to government aid programs. It's amplified, for example, by the *Zelman* voucher case from Cleveland.

One can also find the seeds of this doctrinal final development in Justice Rehnquist's early dissents. In 1973, in an aid to private schools, Justice Rehnquist disagreed with the Court's invalidation of aid to schools in New York and Pennsylvania. And lamenting what he viewed as confusion in First Amendment Free Exercise and Establishment Clause jurisprudence, the Justice asserted that there is one solid basic principle: that the Establishment Clause does not forbid government—state or federal—from enacting a program of general welfare where benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that aid religious instruction or worship.

The final area I wish to discuss is federal jurisdiction, a subject that rarely gets the public attention that Supreme Court developments in the fields of federalism and the Establishment Clause have received. But it is, in fact, a critical area of the law, as David Shapiro will no doubt attest and as all on this panel are clearly aware, since the Court's decisions in this regard determine, among other things, the extent to which persons are allowed access to federal courts in the first place. For many years, the Supreme Court dealt with what were referred to as "implied private rights of action." That is, whether and to what extent access to federal courts not explicitly granted by the Constitution or federal statute might nevertheless be allowed. Until the 1970s, the Court took what might be called a "totality of the circumstances" approach that looked at a variety of factors, not only the intent of Congress with respect to an alleged implied right of action. Thereafter, led in significant part by Chief Justice Rehnquist, the Court has broadly rejected asserted, implied private rights of action in areas as diverse as securities legislation and civil rights statutes where evidence of congressional intent could not be found.

Moreover, in the area of constitutional, as opposed to statutory, implied private rights of action, as late as 1980, the Court continued to apply standards announced in a case called *Bivens* that allowed for private rights of action to enforce provisions of the Constitution despite the absence of explicit statutory authorization.

In 1980, however, Justice Rehnquist, that is Justice Rehnquist, dissented from the Court's holding of a private right of action under the Eighth Amendment. He called the Court's decision in *Bivens* a wrong turn. From the time he became Chief Justice, the Court has developed a nearly perfect record in rejecting efforts to advance *Bivens* arguments.

There are other areas of Justice Rehnquist's jurisprudence that I might have discussed to make the same basic points, but those that I have chosen I hope support my basic thesis—namely, that Justice Rehnquist had a clearly thought-out constitutional vision from the time he joined the Court, and although experiencing little acceptance by a majority of the Justices on the Burger Court with respect to some of his views, he was able, once he became

Chief Justice and assuredly with the help of several new appointees, to convert his dissents into majority opinions. Thank you very much.

MR. DELLINGER: Let me address the theme of the panel in the context of the overall theme of this two-day Symposium, and that is the relationship of the Solicitor General to this particular Court—the Rehnquist Court. It’s an interesting question how much the relationship of a Solicitor General to a Court changes depending upon the change in political administration or changes depending upon who is the Chief and who is in control of the executive branch.

I think, basically, we would probably all agree that the relationship of the SG to the Court changes far less with a change of President than most would assume who had not studied the relationship of Solicitors General to the Supreme Court. There is in fact continuity mostly, with a few fairly dramatic shifts, particularly as you change political party administrations in areas of social welfare. I think the theme that you would find through the time of three Solicitors General from Republican administrations and three from Democratic administrations is much more a story of continuity than it is of change. Partly, that’s because the Solicitor General is quite commonly in the interesting position of defending laws signed by the previous President in front of a Court mainly staffed by the presidents who served before even the previous President. So there is a time lag. You come into office, as Solicitor General Olson would have done, defending legislation passed by Congress and signed by President Clinton.

We’ve often discussed in gatherings of those who have served in this office the issue of “who is the client” of the Solicitor General. The Solicitor General, of course, has a special responsibility with the Court, as well as with his or her own administration. And I think each of us who served in the office have had to make it clear to departments, to agencies, to cabinet officials, and even sometimes to the President, that the Solicitor General’s client is the United States of America. It is the United States to whom you have the fiduciary responsibility and not to the particular President who happens to be serving or to his particular policies.

That being said, point number two is that the Solicitor General’s bosses are the Attorney General and the President. So the President gets to step into the shoes of the Solicitor General and overrule him or her.

But the third point of wisdom is that when the President does that—steps in and assumes the authority to make those decisions—the President should be reminded that the President’s client is also the United States, and that the obligation of the President is the same as that of the Solicitor General, and that is to be responsible for professional advocacy, respectful of the Court’s precedents, and most of all to act in the long-term interest of the United States.

The one area where a change of Solicitors General and a change of political administrations will result in different approaches is with respect to amicus briefs where the United States is entering as a friend of the Court and there’s no act of Congress or immediate programmatic interest of the United States to defend. In such cases, the Solicitor General has more choice about what position to take. That’s sometimes controversial. Solicitor General

Charles Fried was criticized for filing amicus briefs in cases where the United States was not directly involved, urging, for example, that *Roe v. Wade* be overruled. He also filed briefs taking positions on other social issues.

I would defend Solicitor General Fried's decision to enter those cases on the ground that, it seems to me, it's perfectly appropriate for the elected President to speak to the Court about issues of social controversy. The Justices have life tenure. They get to make up their own decisions. There are very few democratic checks. One of them is nomination by an elected president and confirmation by elected senators, but one other very modest check is that a president elected through constitutional mechanisms by the people of the United States can speak to the Court through the Solicitor General and say, "We think you're headed down the wrong track." And it seems to me that's an appropriate vehicle in a democratic government to have the elected government speak to the Court and say on behalf of an elected executive branch that "we think you've taken the Constitution in directions it should not go." And the fact that there will not be continuity between administrations on certain issues does not strike me as necessarily undercutting the role of the Court as long as the briefs are professional, responsible, and respectful of precedent.

Finally, I want to turn to the particular issues of this Rehnquist Court. During my time in office, I had the advantage of having been in the Administration for four years as head of the Office of Legal Counsel before becoming Acting Solicitor General. I was on my fifth White House counsel. And that actually is a great advantage because I knew my way around by then and could assert the better judgment of the Justice Department, often over programmatic interests of agencies and political interests of the Administration.

Sometimes government officials want to lose cases in which they're the defendant because they're the nominal defendant in cases challenging the acts of Congress and often they don't like those statutes, like the decency statute for the NEA. I think our clients were happy to be told that they couldn't discriminate against grant applicants on the basis of indecency, and having lost in the Ninth Circuit would have been perfectly happy for us to not seek certiorari.

I explained that was fine, but they were not our client. The client was the United States. It was an act of Congress that had been passed. And while I wouldn't have voted for it, it was not only defensible, it was probably constitutional, and, indeed, it was successfully and easily defended. It's sometimes hard to make the head of an agency or a cabinet department understand that when there's an act of Congress, you have to defend it.

Let me turn, finally, to the Rehnquist Court. Though the Chief Justice was not in my party, I think he was always extremely gracious. He had me over for tea to tell me how he thought the Office of Solicitor General should be conducted. (He once sent me a note immediately before I stood up to make an argument, criticizing the attire worn by one of the attorneys for the United States the day before, which is somewhat unsettling when you're getting ready to argue a case.)

The Chief's legacy, I believe, will secondarily be state sovereignty and more primarily judicial independence, and I fear, to some extent, an excessive degree of judicial supremacy. That is to say, this is a Court that was rather quick to invalidate acts of Congress, but moreover, I think, deferred very little to any other branch of government, including the states. I think in particular of cases like *FDA v. Brown and Williamson Tobacco Corporation*, in which Congress and the President read an act of Congress as conferring jurisdiction over the Food and Drug Administration to regulate tobacco. The statute struck me as ambiguous and *Chevron* deference was due, but the Court nonetheless gave fairly short shrift to the President's views. Also, I think of the President's assertion that lawsuits against the President should be postponed until the end of his term, a case in which we did not get a single vote on the Rehnquist Court, not just from the Chief, but from any of the other Justices, including the Justices appointed by the immediate President involved.

When the Chief came to dinner the night before I interviewed him publicly at Duke, he commented that he didn't know what the problem was, but every movie he saw these days struck him as about thirty minutes too long. And I said, "I'm not surprised. Every oral argument you hear you think is thirty minutes too long."

I was honored when he asked me to preside over a joint appearance that he held with the Chief Justice of Canada and the Lord Chief Justice of England. And it was quite interesting. I asked the three chief justices about the influence of oral argument. The Lord Chief Justice thought it highly influential, and England allows attorneys to argue usually for the entire day. In Canada, it's half a day. They were four-hour arguments, and they thought they were moderately influential. The Chief thought them hardly influential at all and thirty minutes seemed awfully long. When I ended that joint appearance for the American College of Trial Lawyers, I thanked the chief justices of England and Canada for coming to our country for this special occasion, but I said I had a particular word for our own Chief Justice. And I turned to him and said, "Mr. Chief Justice, in all the times I've appeared before you, there's something I have always wanted to say and this is my one and only chance: Mr. Chief Justice, your time has expired."

MR. WAXMAN: Well, I guess I'll pick up on Walter's thread, a thread that seems thematic: apparently it's impossible to talk about the legacy of William H. Rehnquist without addressing the red light.

All of us who are speaking probably share the same giddy feeling in front of a microphone with no red light. For years, my daughter told people that the greatest threat to Western civilization was her father at a podium without a red light.

Before becoming Solicitor General, I spent my career as a trial lawyer, arguing only a few appeals. I found this red light tradition a little peculiar. More often than not, timers and lights in courts of appeals are viewed as advisory at best. I've had arguments where ten minutes were allocated per side, and yet argument extended until the afternoon. In another case that allocated ninety minutes per side and began at nine o'clock, we didn't actually finish until four o'clock in the afternoon.

So coming into the SG's office, my view about the red light was, well, perhaps it shows your time has nominally expired, but undoubtedly the Justices will have other questions. And in any event, I might want to take a few extra minutes to address additional points. That was so wrong. The red light ended everything—absolutely everything—and not just for the advocates; it also ended the questioning of the Associate Justices. The Chief Justice was an equal opportunity cutter-offer. On many occasions, he cut off oral argument when a Justice was at the outset of a question he or she had been trying to get out in the open oral combat that was advocacy in the Supreme Court of Chief Justice Rehnquist.

I recall vividly that in one of my first arguments, I had just been asked a lengthy question by one of the Associate Justices and was in the middle of my answer when the red light came on. I turned to the Chief and I asked, "May I finish my answer? I only have one more sentence." Somewhat to my surprise, he said, "Yes, you may." I then found myself delivering what can only be described as a compound, complex, compound, complex sentence. In my own mind, I was putting in semicolons, but I could tell he was hearing periods.

And so a few arguments later, the same thing came up. I was in the middle of the first sentence of an answer, and I asked the Chief Justice again—this time with trepidation—"May I finish my sentence?" He said, "If it is a very short sentence."

MR. DELLINGER: But the problem is: if you had said, "Thank you," he would have said, "Your time has expired. That was your sentence."

MR. WAXMAN: The third time this happened, I asked, "May I finish my sentence?" That was just one time too many for Chief Justice Rehnquist. He said, "Thank you, General Waxman. Your time has expired."

How dramatically things changed when he took ill. Like Paul, I was in the courtroom on the first day of oral argument at which the Chief could not preside. It was the State Farm punitive damages case. And the Chief was on everybody's mind because when the red light went on, the lawyer arguing for State Farm—apparently untutored in the arresting influence of the red light—just kept talking. And gentlemanly Justice Stevens just couldn't, or didn't, cut her off for what seemed like an eternity. And you could see the other Justices across the bench looking uncomfortably at the light, and then at Justice Stevens. I actually thought that at one point Justice O'Connor was going to jump up and shout, "Your time has expired." The Justices all just seemed so discomfited by this breach of tradition.

The point I'm trying to make about the red light is that the rigorous fairness and efficiency with which the Chief ran his courtroom is in many respects a hallmark of his tenure. And the stern demeanor that often characterized the Chief in public obscured a very warm individual. At the time I became Solicitor General, I had never met William Rehnquist. My staff advised that it was traditional for the Solicitor General to pay a courtesy call on the Chief Justice before the Term began. When I arrived for my courtesy call, the Chief came out to show me in and immediately made me feel welcome. After serving tea, he looked up and said, "My colleagues and I enjoyed your arguments last Term, but we don't know much about you."

Mindful of the fact that it had been many decades since any Solicitor General had not previously served on the bench or in the academy, I said, "Well, it may be easier to actually explain what I'm not: I've never been a law professor or an appellate judge." He looked up with a twinkle and said, "Speaking on behalf of my colleagues, I can confidently say, 'Thank goodness.'" That was his way of making me feel comfortable.

As has been remarked, the Chief could be very gruff at oral argument. He could be humorous at the expense of advocates. But none of this was ever remotely personal, and he was the kind of person who could receive as well as he could give. In one Tenth Amendment case I argued, the Chief asked me whether the Court could not simply hold that county and local officials could be considered as simply not covered—because they didn't formally work for the State. I turned to him and said, "Well, if that's the case, I'd like some time to be able to reargue *United States v. Printz*," a landmark Tenth Amendment case that had struck down the Brady Bill on the assumption that county and local officials were indeed covered. When I said that, jokingly, the Chief scowled darkly, then grinned, as if to say, "Touché."

That sort of thing sometimes happens in the Supreme Court, where the advocate and the Justices are physically close. Sometimes your eyes just lock on each other in a way that doesn't happen elsewhere. In the incident I just described, our eyes met for an instant I'll never forget. His eyes first said, "Ouch," and then almost instantly—with a tremble, "Touché." His final glance conveyed the message: "Okay, well you got me on that one, but don't forget that I get to ask the questions in this relationship."

When I became Deputy Solicitor General, I began a regular practice of visiting several different law schools every year. I was perplexed at the sense among both liberals and conservatives that somehow the Chief Justice wasn't as scholarly or as deeply intelligent as some of his colleagues who typically wrote longer, more comprehensively analytical opinions. That surprised me because, from my own perspective, no one on the Court was by any perceptible measure ahead of William H. Rehnquist. He had a vision of what the Constitution meant and what the role of the Court was. He made that view plainly known without the necessity of detailed analysis. He was a patient strategist. And I think history will show that he exerted a remarkable influence on the jurisprudence of the Court over which he presided.

That influence was not dumb luck. It was the product of a formidable intellect and plan. Indeed, the notion that one judges the abilities of a jurist by the length or erudition of his or her opinions greatly misperceives the function of judicial opinions. William Rehnquist understood that a judge's duty—even a Supreme Court Justice's duty—is to decide cases, not to assemble a restatement of the law.

Look at the Holmes opinions and the Brandeis opinions. For the most part, they are no longer or detailed than the opinions of William Rehnquist. The Chief never confused the role of a Justice with that of an academician or legal scholar. Indeed, he displayed little interest in, or tolerance of, academic writings—at least in his capacity as a jurist. Any advocate who referred at oral argument to a law review article or the views of any legal scholar placed himself in harm's way. I watched an argument once presented by an attorney

who began his argument in an attorney-client privilege case by proclaiming that his interpretation was supported by “Mueller and Kirkpatrick.” He was immediately interrupted by the Chief Justice, who asked, “Who are Mueller and Kirkpatrick?” (knowing full well who they were). When the attorney explained that they were learned commentators on the law of evidence, the Chief paused and said, “Oh.” There was silence, then laughter, and that was the last anyone heard of Mueller and Kirkpatrick that day.

This didn’t reflect any lack of respect for the role of scholars in the legal profession. It was a statement about their role, versus the role of judges and advocates, in the judicial system. Chief Justice Rehnquist understood that all three branches of the legal profession—the bench, the bar, and the academy—have their own independent, equally important roles to play in their own arenas.

I’ll just say one thing about the jurisprudential legacy of the Rehnquist Court. I quite agree with the observation that there is a tendency to think at this early date that the predominant legacy will be in the area of federalism. Certainly, I was the unhappy recipient of a number of the Court’s opinions in that area. But that judgment may prove to be premature. It may well turn out that his greatest influence was in clarifying and redefining the place of the judiciary in our government of separated powers. I can’t think of a better example than one of the most noteworthy cases that came up during my tenure. The case was *United States v. Dickerson*, and it raised point-blank the question of the constitutionality of the *Miranda* rule. It placed in sharp relief a distinction between the Chief Justice’s personal views about the substantive merit of a prior Supreme Court decision and his understanding of the institutional roles of the different branches of government.

No Justice has ever been a more strident and consistent critic of the *Miranda* doctrine than the former Chief Justice. He wrote a number of post-*Miranda* decisions that went a long way to cabin the scope of the *Miranda* principle, and he wrote several dissents and speeches that were highly critical of the Supreme Court’s decision. And, therefore, when a case came up that required the Court to rethink the fundamental basis for *Miranda*, it provided both an opportunity and a dilemma for the Chief.

Dickerson involved the constitutionality of a statute enacted in 1968 to “overrule” *Miranda* by declaring that in federal courts the admissibility of a confession would be determined by its voluntariness and nothing else. Overturning *Miranda* was Congress’s prerogative unless the Court’s decision had been grounded in the Constitution. If it was, the Court could uphold the statute only by overruling *Miranda* itself.

The case thus presented *Miranda*’s greatest critic with a chance formally to lay it to rest. But for the Chief, the case more importantly presented the question of which branch of government really gets to decide what the Constitution means. And finding no way to understand *Miranda* and the thirty-plus Supreme Court decisions that had thereafter applied *Miranda* to the States as other than announcing a rule that is constitutionally mandated, the Court—in a 7-2 opinion authored by the Chief—struck the statute down and reaffirmed *Miranda*. Paramount in the Chief’s analysis were *stare decisis* and

the fundamental principle underlying *Marbury v. Madison*. That reaffirmation may reflect his greatest legacy.

MR. OLSON: Because many of the things that I might have said have been said by my colleagues, I will offer some random thoughts about the Chief Justice and maybe a little bit about the Office of the Solicitor General.

Professor Clark was asking me before whether there had been, in any recent time, a gathering of Solicitors General for a program like this and I pointed out there had been one about two years ago at BYU in honor of former Solicitor General Rex Lee. But it's good that this takes place because it's really fun for those of us who have served in the Solicitor General's office to talk about our cases and our experiences because I think that every one of us would say that was the best thing that we ever did in our life. It's such a thrill to be a part of the Office of Solicitor General and to appear in the Supreme Court in that uniform and to be the lawyer for the United States in the United States Supreme Court.

And Chief Justice Rehnquist sort of helped make that special. It's interesting. I'll make some observations about him. He was the only member of that Court for so many years who had not been a judge. He came to the Court straight from his position as the Assistant Attorney General for the Office of Legal Counsel.

When I occupied that position in the first part of the Reagan administration, I had the pleasure to refer frequently to Rehnquist opinions in the Office of Legal Counsel. And when we did, they were always exceptionally well written. They were brief, relatively brief compared to some of the things I wrote. People would tease me about the length of some of my opinions. But he was quite a scholar, despite the fact that he had not been a professor and had not been a judge. He was a brilliant man and it was fascinating to see the evolution of his scholarly opinions in the Office of Legal Counsel and to follow that on to the Supreme Court. He was the sixteenth Chief Justice. It's worth mentioning that we've had forty-three presidents, and in our history we've only had sixteen Chief Justices of the United States. That's extraordinarily remarkable when you think about that.

The last three Chief Justices, including Chief Justice Rehnquist, served from the first year of the Eisenhower presidency, so we're talking about ten presidents, fifty-some years. That's something like twelve presidential terms. So the impact of the Chief Justice on our nation's life is immense.

He was noted, as people have said, for bringing the Court together in a way of providing collegiality among the Justices. That was not true with respect to his predecessor, as I understand and as people have written. You can read something about that in Linda Greenhouse's book about Justice Blackmun.

But this Chief Justice had the same effect on each of his colleagues irrespective of their place on the political spectrum. And it wasn't really expected. I think that during the confirmation hearings and the run up to his appointment as Chief Justice, some people didn't realize that was going to be the way it was. He had been a lone dissenter in a lot of cases. As an Associate Justice, he even referred to himself as the "Lone Ranger." And yet when he became Chief Justice, he brought a Court together that Justice Blackmun,

I think it was, referred to as “nine scorpions in a bottle.” Maybe that was someone else, but I heard it attributed to Justice Blackmun. And at the end of Chief Justice Rehnquist’s Term, nothing could be further from the truth.

You heard Justice Ginsburg say, “He was the best boss I ever had.” Justice Breyer is quoted in the October 31 edition of *The New Yorker*, I guess it came out before October 31, referring to the Court—

MR. WAXMAN: Ted, you’re so current.

MR. OLSON: I’m really up on this. It helps to be riding airplanes all the time. You have a chance to read these things. It was a great article about Justice Breyer and his new book. He described it as a congenial and professional Court. “In our conference, there are very contentious issues and I’ve never heard a voice raised in anger in 11 years and I’ve not heard people make slighting remarks about others ever, not even as a joke.”

And I’ve heard Justice Stevens say that and I’ve heard Justice Thomas say that. And I’ve heard all of the Justices say that at one time or another. That’s a remarkable achievement. It’s a remarkable achievement given the difficulty of the issues that are presented and the divisions of the Court.

If you read the opinions of the dissenting Justices in *Bush v. Gore*, you would sense that they had intense personal anger about the outcome of the case, but the Justices didn’t. They moved on; Justice Breyer mentions this in the *New Yorker* article. There’s always another case. And they didn’t take it and don’t take it personally. And a great deal of that is attributable to Chief Justice Rehnquist, who despite his gruff demeanor, and I never knew him as well as Maureen and others did, was a very gentle man in the way he conducted himself and very gracious I think. Seth was the one that used the word “gracious.”

There was precision and discipline in oral argument. A lot takes place in that one hour of oral argument. Almost everybody is asking questions.

I had one occasion where—and the Court was sitting in the D.C. Circuit during the anthrax scare, and I got up. I was a couple steps away from the podium. I think I had gotten all the way to my feet, but I hadn’t gotten to the podium and I hadn’t had a chance to say, “Mr. Chief Justice and may it please Court.” I was just sort of picking up my papers, and he said, “General Olson, before you begin, I have this question to address to you.” So it started right away.

And I also experienced and watched what someone else today mentioned where he would, in the midst of your argument if you referred to a case or referred to the language of a statute, he would say, “Well, now where is that in the record?” And he did that quite often. I thought that it was probably a teaching device, that he was going to make sure that advocates knew that if they were going to go someplace in the record, they were going to have to know where it was. I anticipated it and so I would try at some point early in my argument to refer to something in the record that I knew where it could be found. So that when he asked that question, I could answer it and then go on with the rest of the argument without worrying about the question again. So it was a set-up and I felt very good when it worked.

Someone else said he had this practice of saying, “Well, what’s your best case for that?” There’s no way to prepare for that because—maybe it was Paul that was saying this—he always had an answer no matter what you said about your best case. I was arguing a case a few years ago and we had a theory that—I mean, it was a losing theory as it turned out—but we had a theory that I thought was a pretty good theory, and we had cases that supported this proposition and he interrupted me and he said, “What is your best case, Mr. Olson, for that argument that you’re making?” And I said, “The best case I would say would be *Colorado versus Nebraska*,” or something like that. And he said, “Well, that’s a case of original jurisdiction.” And I thought, what does that have to do with it. But he said, “Do you have a better case that’s not a case of original jurisdiction?” And I had cases there, but I was afraid to mention any more cases because I knew he was going to blow me away no matter what I said.

With respect to the timing and the red light that everybody has talked about, the example that I remembered most was the famous professor from Harvard who was arguing the Cippalone case, I guess the tobacco case, and he was top-side as we say—the first advocate—and he did his thirty minutes. And I should preface this by saying that if you expect to reserve some time for rebuttal, which you’re permitted to do, it’s your obligation to get out before the red light goes on, as soon as possible after the white light comes on. I’m color-blind, so I’m a little handicapped. The first light is the warning light; the second light is the one where you have to stop. But that first light goes on at five-minutes-left and it’s your job to exit the argument and save yourself time for rebuttal. And most of us know how to do this. But for the professor from Harvard, the red light went on and the Chief Justice said, “Your time has expired, Professor [blank].” And the professor said, “I had intended to reserve some time for rebuttal.” And the Chief Justice said, “Well, you didn’t.”

And I was there the day when he interrupted counsel and said, “It’s my duty, Counsel, to advise you that there is no such word in the English language as ‘irregardless.’”

One of the interesting things that happened with the Rehnquist Court in recent years. There have been a lot of very close opinions and I thought it was interesting that in the past two years there were three situations with two 5-4 decisions of cases argued the same day and decided the same day with somewhat, some would say, essentially identical facts that went two different directions.

Maureen remembers one of them because she was the successful advocate in an affirmative action case where the two similar programs from the University of Michigan were decided as both constitutional and unconstitutional. And then the *Booker-Fanfan* case on the sentencing guidelines where the sentencing guidelines were thrown out to the extent that Congress required judges to pay attention to them and upheld to the extent that judges could pay attention to them, but weren’t required to pay attention to them—the appearing and disappearing Sixth Amendment.

And then the last two decisions in the Ten Commandments cases where one of the Ten Commandments displays was held constitutional and another

was held unconstitutional. I think it must have been frustrating for the Chief Justice, who was such an orderly man, to have a situation where the Court was going two different directions concerning the Ten Commandments where only one Justice out of the nine thought both decisions were correct.

I think some day someone will do a study of the Chief Justice and the Rehnquist Court in connection with separation of powers. There were a lot of different decisions. And I throw the federalism cases in that category in the sense that the separation of powers includes the federal government and the state governments in terms of the separated role of government under our Constitution. But there were quite a number of separation of powers cases during his tenure.

I think the Chief Justice of all the Justices on that Court, with the possible exception of Justices Scalia and Thomas, felt the strongest about separation of powers.

When he was there, Justice White was sort of in the other direction. Pretty much what Congress did was to be deferred to. Justice Rehnquist, and then Chief Justice Rehnquist, was very much on the side of the separate allocation of authority to government agencies. I am, of course, required to say that the one place where he went seriously wrong on separation of powers was a case called *Morrison v. Olson*. And that was a big surprise and a very big disappointment, personally, I will tell you that.

It is interesting that Chief Justice Roberts is replacing the man for whom he clerked. And I think that there will be a lot of Chief Justice Rehnquist in Chief Justice Roberts.

I saw the Chief make an uncharacteristic mistake one time in that case that I was referring to, the affirmative action case where Maureen was making the argument, twice I think it was during the argument. He was always very formal and it was "Mr. Olson" this or "General Olson" that, or "Mr. Waxman" or "General Waxman," but twice during that argument he slipped and revealed his affection for the lawyer arguing the case by referring to Ms. Mahoney as "Maureen."

MS. MAHONEY: But I didn't get his vote.

MR. OLSON: But you won the case.

The morning suit, I'll mention something about that. When I got there, I thought that was sort of a shame that the women lawyers in the Solicitor General's office weren't wearing the morning suit because I thought it was a special privilege to be wearing that outfit in the Supreme Court. And I wanted to encourage the women in the office to do that, but I knew that I would be reading about this in the *Legal Times*, if I wasn't really careful about it. So I went to the Chief Justice first, and he said, "I think that would be a very good idea, but I would suggest," he said, "that you check with Justice O'Connor and Justice Ginsburg." So, of course, that was a good thing to do. And I checked with them and they thought it was a good idea. And by this time, I don't know when it started, but the Deputy Clerk of the Court is a female and wears a morning suit and the Marshal, a woman, wears a morning suit. So, I got approval from Justice O'Connor, the Chief Justice, and Justice Ginsburg.

And then I went to the women in our office and I said, "You don't have to do this, but I think it would be a great idea if we all wear the morning suit." And I think they're all doing that now.

The business with the gray vest, and the light gray vest, and the dark gray vest. You must feel funny about this, Paul, because I hear from what Drew was saying, the Chief Justice was unhappy with someone who wore a dark gray vest. Some of our lawyers, including Paul, wear a fairly dark gray vest. And Justice Scalia upbraided me a couple of times saying, "It's supposed to be a light gray vest." So I don't know. I mean, what is it going to be?

MR. CLEMENT: I was told that light gray vests were for weddings.

MR. OLSON: And I'll end on this note. The Solicitor General has been referred to in a book as the Tenth Justice. I checked that out when I became the Solicitor General. And I found that starting with the Chief Justice and all the way through the other eight, they don't think there are ten Justices.

MR. CLEMENT: Thank you all very much.