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## Remarks of Chief Justice William H. Rehnquist

William H. Rehnquist

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## REMARKS OF CHIEF JUSTICE WILLIAM H. REHNQUIST

Thank you Chief Justice Hassell. I am pleased to be here today to participate in this conference on “Dual Enforcement of Constitutional Norms.”

When I saw the schedule for today’s conference, and the topics to be discussed, I knew you were not lacking for in-depth, scholarly material. I thought that rather than providing yet another entrée for your consideration, I would come up with what might be called either a palate cleanser or perhaps a dessert. I want to reflect today about why it is that state governors have, since the beginning of the Republic, seemed to move easily and regularly from Governor to President of the United States, while the practice of state court judges moving to the Supreme Court of the United States has tapered off during the last one hundred years.

Since 1801, there have been seventeen state governors who have gone on to the White House—nineteen if you count territorial governors. Eleven of those governors served as President during the nineteenth century and eight during the twentieth century. During that same time frame, eight governors have gone on to serve on the Supreme Court of the United States. Chief Justice John Jay and Justice James Byrnes did the opposite—serving as governors after they left the Court.

The first former governor to become President was Thomas Jefferson, who had served as governor of Virginia. Because he is one of our Founding Fathers, we are all familiar with Jefferson. But many of the other governors-turned-Presidents are not so well-

known. There is good reason for this. The federal government during most of the nineteenth century followed what one of my political science professors referred to as the "night watchman" theory of the state: the federal government was responsible for the nation's defense, for sustaining itself financially through the collection of tariffs at ports of entry, and delivering the mail. Beyond that, it was felt by most that it should leave people alone. This theory still strikes a chord with many individuals today, but federal and state governments have long abandoned it.

One well-known historian has described all of the Presidents but one who served between the end of Andrew Jackson's term in 1837 and the beginning of Abraham Lincoln's term in 1861, as "mediocrities who would not today be trusted with the management of a medium-sized bank." Perhaps the least remembered of these is William Henry Harrison, who served as Territorial Governor of Indiana before becoming President. He served only one month as the pneumonia which he caught at his outdoor inauguration in March, 1841, proved fatal a month later. But it seems rather clear that even if he had served his entire four-year term, he would be little better remembered than he is. He was elected in the famous "log cabin and hard cider" campaign of 1840, where the slogan of his Whig managers was "Tippecanoe and Tyler Too." Harrison had defeated a consortium of hostile Indian tribes at the battle of Tippecanoe in 1813. Twenty-eight years later, he became President through the shrewd planning of his managers, who did not have great confidence in his forensic ability. Today, one of the axioms of presidential politics is that the candidate must get his message out saying who he is and what he stands for. But Harrison's managers followed no such course. One of them, Nicholas Biddle, instructing the others, said that he should "take no position on any issue at all—he should be totally forbidden the use of pen and ink." Harrison, however, even without a message, was elected.

The one exception which the historian made for the Presidents between Jackson and Lincoln was James Knox Polk, who had been Governor of Tennessee before he became President. In his term from 1845 until 1849, he accomplished a great deal in fostering the westward expansion of the United States. Under his leadership, the country settled the northwestern boundary between what is now

Washington and British Columbia, and fought the Mexican War as a result of which the United States gained a huge amount of territory in the southwest—all or part of the present-day states of California, Nevada, Utah, Colorado, New Mexico, and Arizona.

The next former governor to become President was also a Tennessee governor, Andrew Johnson. Johnson, of course, became President when President Lincoln was assassinated in 1865. He served until 1869. President Johnson was impeached by the House of Representatives in 1868 for, among other things, violating the Tenure of Office Act of 1867. That Act had been passed by Congress as a result of its conflicts with President Andrew Johnson during Reconstruction after the Civil War. It provided in essence that all federal officials whose appointment required Senate confirmation could not be removed by the President without the consent of the Senate.

The Tenure of Office Act thus created a dramatic change in relations between the President and the Senate concerning the President's cabinet. It was a significant intrusion by the Senate into a President's ability to choose and control his own cabinet.

After the Tenure of Office Act was passed, President Johnson decided to remove Edwin Stanton as his Secretary of War and eventually did so without the approval of the Senate. This ignited a firestorm in Congress that led to his impeachment. Ultimately, President Johnson was acquitted. Eventually, the Tenure of Office Act, which applied to the President's cabinet, was partially repealed in 1887. The balance, affecting lesser officers, was held to be unconstitutional as a violation of the separation of powers in *Myers v. United States*, an opinion written by Chief Justice Taft in 1926.

Eight years after Johnson, Rutherford B. Hayes, who had been Governor of Ohio, became President in the disputed election of 1876. In addition to Governor of Ohio, Hayes had been a Union General in the Civil War and he had been a member of Congress. Henry Adams, the New England author and critic, described Hayes as "a third-rate nonentity whose only recommendation is that he is obnoxious to no one." Adams was scarcely fair to Hayes in this hypercritical evaluation, and at this particular time in the Republican Party, being obnoxious to no one was a very strong recommendation.

Hayes, a Republican, ran against Samuel Tilden, who had been Governor of New York, the Democratic candidate. The electoral votes of four states—South Carolina, Florida, Louisiana, and Oregon—were disputed. Tilden had won 184 electoral votes, only one short of the number needed to win. The Democrats controlled the House of Representatives, and the Republicans controlled the Senate, so it was perfectly clear that that body could not settle the dispute on its own. Proposals were made for the creation of an electoral commission, consisting of five Senators, five Representatives and five members of the Supreme Court, but there was great disagreement as to how those five Justices should be selected. One proposal was that the six senior Justices on the Court should be selected, and then one eliminated by lot. When this proposal was presented to Tilden, who was a rather cold and impersonal type of character, he coined one of the few *bons mots* ever attributed to him: "He said I may lose the Presidency, but I will not raffle for it." The Electoral Commission would vote eight to seven in favor of Hayes, and he would serve as President from 1877 to 1881.

At the opening of the twentieth century, President William McKinley, a former Governor of Ohio, was assassinated in Buffalo, New York, and he was succeeded by his Vice President, Theodore Roosevelt, former Governor of New York. Teddy Roosevelt was a larger-than-life character, and, at 43, was the youngest person ever to become President. He was a well-known hero of the Spanish-American War who led the Rough Riders in a charge at the battle of San Juan. Teddy Roosevelt had many wide-ranging accomplishments as President. He was instrumental in securing construction of the Panama Canal. He won the Nobel Peace Prize for helping to mediate the Russo-Japanese War, and he was a great conservationist. Roosevelt served from 1901 to 1909.

Franklin Roosevelt, another Governor of New York, was elected President in 1932 and was re-elected three times. He served until his death in 1945. In 1937, President Roosevelt was beginning his second term in the White House by virtue of an overwhelming electoral victory in 1936, in which he won the electoral vote in all but two states of the Union. On the strength of this victory, FDR took aim at the Supreme Court, which he viewed as a roadblock to the progressive reforms needed in the nation.

During FDR's initial term, the Supreme Court had declared unconstitutional the National Industrial Recovery Act, the Agricultural Adjustment Act, and the so-called "Hot Oil Act"—one of the centerpieces of his New Deal program to lift the country out of the Great Depression. Roosevelt planned to use his immense political resources to bring the Court into step with the President and Congress.

In February 1937, he proposed a "Court reorganization plan" under which the President would have been able to appoint an additional Justice for each member of the Court over seventy who did not retire. The true reason for the plan, of course, was to enable the President to "pack" the Court all at once, in such a way that New Deal social legislation would no longer be threatened. But Roosevelt based his public argument on the duplicitous premise that the older judges were unable to carry a full share of the Court's workload and that the Court was falling behind in its work. This reason was demonstrably false.

Despite the audacity of the plan, political observers thought that Roosevelt would undoubtedly get what he wanted. The Democrats had a four to one margin in the House of Representatives, and of the ninety-six members of the Senate, only sixteen were Republicans.

The Chief Justice at that time was Charles Evans Hughes, also a former Governor of New York, so we have two former Governors of New York facing off against each other. Hughes and the Associate Justices of the Court were offered free broadcast time by the radio networks to speak about the President's plan, which Roosevelt insisted on calling a "reorganization" plan while opponents dubbed it a "Court-packing plan." The Justices wisely declined these offers and said nothing. But Chief Justice Hughes worked busily behind the scenes with Senator Burton Wheeler of Montana, a Democrat who agreed to lead the opposition to the bill.

Hughes wrote a letter to Senator Wheeler, using very telling statistics to show that the Supreme Court was entirely abreast of its workload and could not possibly decide cases any faster than it was doing. This letter demolished the original justification for the bill and caused President Roosevelt to switch to a franker justification: the Supreme Court as presently constituted was frustrating the popular will by invalidating needed social legislation.

The battle in the Senate lasted from March until July 1937. One event after another damaged the plan's chances for enactment. That spring, the Supreme Court handed down two decisions which upheld, by the narrow vote of five to four, important pieces of Roosevelt's social legislation. This was thereafter known as "the switch in time that saved nine." Next, one of the oldest and most conservative members of the Court, Willis Van Devanter, retired, giving the President the opportunity to appoint a new member of the Court without the need for the Court-packing plan. Eventually, public opinion began to rally against Roosevelt's proposal and it was ultimately withdrawn.

The longest gap between former governors serving as President occurred between the death of Franklin Roosevelt in 1945 and the election of Jimmy Carter in 1976. Since Carter's election, every President except one—the first President Bush—has previously served as a governor: Ronald Reagan, of California; Bill Clinton, of Arkansas; and the current President Bush, of Texas.

What is it that makes moving from the state house to the White House so common? In 1959, Louis Harris, of opinion research fame, wrote an article about the 1960 Presidential election titled "Why the Odds Are Against a Governor's Becoming President." In the article, he predicted the decline of governors succeeding as presidential candidates in the 1960 election and in future elections.

Harris's prediction about governors held up during the 1960s and early 1970s, which saw the election of John F. Kennedy, Lyndon Johnson, and Richard Nixon, but it certainly has proved wrong since then. Even today, our President is the former Governor of Texas and one of the Democratic front-runners is the former Governor of Vermont.

Now let us look at state court judges who move onto the Supreme Court of the United States. Service as a state court judge or justice was the rule for Supreme Court Justices who were appointed during the late 1700s and 1800s. Out of fifty-seven Justices, thirty-five had experience on the state court bench. Scarcely any of them are remembered today, but that is equally true of Justices during that period who had not come from state courts. Chief Justices Marshall and Taney, Associate Justices Joseph Story, Samuel Miller, and Stephen Field are about the only ones who are given any promi-

nence even in a history of the Court. There was a learned article written sometime ago in an effort to determine who was the least distinguished Justice to ever serve on the Court. The prize was awarded by its author, Professor David Currie of the University of Chicago Law School, to Gabriel Duvall of Maryland. Before his appointment by James Madison in 1811, he had served for six years on the highest court of Maryland. He served for twenty-four years on the Supreme Court, during which time he wrote only nineteen opinions. His only separate writing in any of the constitutional cases heard by that Court during his tenure was three words: "Duvall, Justice, Dissented" in the *Dartmouth College Case*.

Of those who are remembered today, Stephen Field came to the Supreme Court from California, where he had been the Chief Justice of the Supreme Court of that state. He was something of a stormy petrel, and had feuded with another justice of that court, David Terry. Later, while sitting on circuit in California in the 1880s, he had antagonized Terry further by ruling against his wife in a will contest. Terry made threats against Field, such that the Justice's friends in California advised him that when he next sat on circuit there he should bring a United States Marshal with him. Field took the advice, and while traveling from Los Angeles to San Francisco by train with Marshal Neagle, he found himself in the same restaurant with Mr. and Mrs. Terry. Terry approached towards Field, whereupon the marshal shot him dead. California's efforts to try Neagle for murder gave rise to the case of *In re Neagle*, in which the Supreme Court held that the marshal had a federal defense to such prosecution.

Field served on the Court from 1863 until 1897, and was one of its most influential members during that period of time. In the *Slaughterhouse Cases*, which were the first decisions to interpret the newly enacted Fourteenth Amendment after the Civil War, Justice Miller's majority opinion observed that it was doubtful that this amendment would ever apply to benefit anyone but the newly freed slaves. Field wrote a dissenting opinion for the four justice minority, taking a much more expansive view of that amendment. As we all know today, it is his view, and not Miller's view, which ultimately prevailed.

Field's last years on the Court also generated some controversy. Field finally retired in 1897, having served the longest time of any Justice up until then. As the century turned, state court experience became less of a factor in the choice of Justices. Only thirteen out of fifty-one have had any prior state court experience.

Those thirteen include some of the most well-known Justices of the early twentieth century: Chief Justice William Howard Taft, who served as a judge on the Superior Court of Ohio early in his career; Oliver Wendell Holmes, who was Chief Justice of the Supreme Judicial Court of Massachusetts when he was named to the Supreme Court of the United States, and who served a combined total of fifty years on these two courts; and Benjamin Cardozo, who was Chief Judge of the New York Court of Appeals when he was named to the Supreme Court. They also include several Justices with whom I have served: William Brennan, who was a justice on the Supreme Court of New Jersey; Sandra Day O'Connor, who was a judge on the Arizona State Court of Appeals; and David Souter, who served on the Superior Court and the Supreme Court of New Hampshire. The other twentieth-century Justices with state court experience are William Day, Horace Lurton, Willis Van Devanter—the only person from Wyoming ever to serve on the Court—Joseph Lamar, and Mahlon Pitney.

What explains this rather drastic reduction during the twentieth century in state court judges who end up on the Supreme Court of the United States? I think a large part of the explanation lies in the changes in the nature of federal and state practice in that time. During the first one hundred years of the existence of our Republic, the legal questions determined in state courts and those decided by the Supreme Court of the United States were very similar. The federal trial courts had no "federal question" jurisdiction until 1875; this meant that if an individual wished to bring a lawsuit claiming that a right secured him by the Federal Constitution had been violated, that lawsuit had to be brought in state court. The great federal constitutional issues of this time were thus decided initially in the state courts, with ultimate review by the Supreme Court of the United States.

And a large part of the Court's docket consisted of diversity cases, such as torts, contracts and landlord-tenant disputes—the same

types of cases being decided by state courts. Under the Court's holding in *Swift v. Tyson*, decided in 1842, the federal courts deciding diversity cases were not required to apply state common law as declared by the state's highest court. As Justice Brandeis described *Swift* nearly one hundred years after it was decided, the federal courts were "free to exercise an independent judgment as to what the common law of the state is—or should be ...." Because of *Swift*, both state and federal court judges performed similar functions—determining issues of common law.

All of this began to change after the Civil War. In 1868, the Fourteenth Amendment was adopted making the Due Process and Equal Protection Clauses applicable to the states. In 1875, federal district courts were for the first time given federal question jurisdiction, so that from then on cases involving federal constitutional claims could be heard in those courts.

As the jurisdiction of the lower federal courts expanded during its first hundred years, the Supreme Court served essentially as an appeals court for the federal trial courts and the highest courts of the states. If a party to a suit in a lower court was dissatisfied, he had a right to a direct appeal to the Supreme Court. As the size and population of the United States increased, so did the number of state courts and federal trial courts, and as Congress conferred wider jurisdiction on those federal trial courts, the number of cases filed in the Supreme Court became too numerous for the Court to handle efficiently.

Although Congress created the intermediate courts of appeals in 1891, it was not until 1925 that Congress passed the Certiorari Act, which gave the Supreme Court discretion as to which cases to hear. This authority made the single biggest difference in the Supreme Court's docket. No longer did the Court have to hear every case an unhappy litigant appealed to it. Instead, the Court could decide which cases involved issues important enough that a decision from the Supreme Court was necessary. Chief Justice William Howard Taft was the person mainly responsible for the passage of that statute.

Taft, in my view, has been underappreciated as a Chief Justice. He is the only person who has been both President of the United States and Chief Justice. To the latter position he brought the view

of an executive, and the Supreme Court is much the better for it. He was not a great jurist, but he was a very good Chief Justice. He thought the Supreme Court should not be content to sit in quarters in the Capitol building more or less at the sufferance of Congress. And so he successfully pushed the idea of having a separate building for the Court.

When he was appointed Chief Justice, the Court had fallen nearly five years behind in its docket. He resolved this caseload congestion in the Court by convincing Congress to give the Court discretion as to which cases to hear. Some members of Congress were doubtful—why shouldn't every litigant have a right to get a decision on his case from the Supreme Court? Taft responded that in each case, there had already been one trial and one appeal. "Two courts are enough for justice," he said. To obtain still a third hearing in the Supreme Court, the question involved should be more important than just who wins this lawsuit.

Under the Certiorari Act, rather than serving as an appellate court that simply attempts to correct errors in cases involving no generally important principle of law, the Court instead tries to pick those cases involving unsettled questions of federal constitutional or statutory law of general interest. Thus it is the provisions found in the Bill of Rights and the Fourteenth Amendment, which secure individual rights against the federal and state governments, that have increasingly formed the staple of the Supreme Court's business during the last hundred years.

The Supreme Court was not the first court in the country to have this sort of discretionary jurisdiction—indeed, it had had some of this sort of jurisdiction before 1925—but the Certiorari Act established a system that would accommodate a growing population and a growing caseload without having to endlessly multiply the members of the court of last resort. Today almost all but the least populous states have similar intermediate courts of appeal, which I gather work very well.

There is also a less tangible explanation, I think, which probably explains the difference between governors becoming President and state court justices moving to the Supreme Court of the United States. I remember when I was a law clerk listening to Felix Frankfurter expound on the idea that there was simply no way to

plan to become a Justice of the Supreme Court of the United States. By contrast, an ambitious young man or woman who wants to be President can start out by running for the city council, then the state legislature, then for governor, and then throw his hat in the Presidential primary ring. It is a difficult path, more apt to conclude in failure than in success, but it is nonetheless a known path. With the Supreme Court, it is markedly different, particularly because the job is appointed and not elected. No one can get there on his own; he must be nominated by the President and confirmed by the Senate. Presumably one could seek a district court judgeship, or a federal court of appeals judgeship with the hope that the presidential eye would fall on him, but that is a real long shot. Being elevated to the Supreme Court from the highest court of one of the fifty states is probably still a longer shot. A lower court judge who seems a favorite of one President may find that, by the time there is an opening on the Supreme Court, another President is in office. Perhaps one of my predecessors summed it up best when he said: "It's just a question of being there when the bus goes by."

Thank you.