



WAGER OF JUSTICE

THE BETTING COMMISSION AND THE 1984 CAMPAIGN

Ross E. Davies

MUCH HAS BEEN SAID, most of it indulgently, about William Rehnquist's enthusiasm for small-scale, friendly wagering. On more than one occasion, for example, Chief Justice John Roberts has described the place of gambling in his predecessor's life:

Although occasionally a stern figure on the bench, the Chief had a whimsical side. He was a great one for games He excelled at trivia contests and enjoyed small wagers on anything – athletic contests, presidential elections, the day of the first snowfall, and how much snow there would be.¹

Less has been said about the operational details of the gambling enterprises Rehnquist participated in.² This article provides a quick look at one of them: the Betting Commission of which he was an active member during the 1984 election season.

On September 18, 1984, the Betting Commission (hereafter “the Commission”) met in Washington, DC, at the Metropolitan

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¹ John G. Roberts, Jr., *A Tribute to William H. Rehnquist*, 106 Colum. L. Rev. 487, 489 (2006); *William H. Rehnquist: A Remembrance*, 31 Vt. L. Rev. 431 (2006).

² One notable exception is Forrest Maltzman, et al., *Supreme Court Justices Really Do Follow the Election Returns*, 37 POLITICAL SCIENCE & POLITICS 839 (2004), a thorough treatment of Rehnquist's office pool for the 1992 presidential election, in which Justices Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, and Clarence Thomas joined him.

Club – “a destination for many local, national and international leaders, including nearly every U.S. President since Abraham Lincoln”³ – to deal with “staff recommendations as to the handling of the forthcoming general election on November 6th” Most of what we know of the workings of the Commission comes from the minutes of that meeting, which are reproduced below on page 96.⁴

MEMBERSHIP

The Commission seems to have had four members in 1984:

1. *Richard Moore, a founder and Emmy Award-winning producer of the weekend political talk show “The McLaughlin Group.”* He graduated from Yale Law School in 1939, served in the Army during World War II, and then worked in the television business in California for many years before moving to Washington to serve as special assistant to Attorney General John Mitchell and special counsel to President Richard Nixon in the early 1970s. According to Nixon, it was Moore who, in mid-October 1971, first proposed that he appoint Rehnquist to the Supreme Court.⁵ Moore would later serve as Ambassador to Ireland (1989-92). He died in 1995.⁶

2. *William Rehnquist, an Associate Justice of the Supreme Court.* A World War II veteran (Army 1943-46), he graduated from Stanford Law School in 1952 and clerked for Justice Robert Jackson in 1952-53. After practicing in Phoenix from 1953 to 1969, he moved to Washington to serve first in the Department of Justice as head of the Office of Legal Counsel (1969-71) and then on the Supreme Court as Associate Justice from 1972 to 1986 and Chief Justice from 1986 until his death in 2005.⁷

³ See www.metroclub.org (vis. Nov. 27, 2010).

⁴ Minutes of a Meeting of the Betting Commission, Sept. 18, 1984 (hereafter “Meeting Minutes”), in Box 595, Potter Stewart Papers, Yale University Library (hereafter “Stewart Papers”).

⁵ RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 424. And according to John Dean, it was Dean who first suggested Rehnquist to Moore. JOHN W. DEAN, THE REHNQUIST CHOICE 127-28 (2001).

⁶ *Richard Moore, 81, Nixon Aide and Former Ambassador*, N.Y. TIMES, Jan. 29, 1995.

⁷ Biographical Directory of Federal Judges, www.fjc.gov (vis. Nov. 27, 2010).

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3. *George Revercomb, an Associate Judge of the Superior Court of the District of Columbia.* After serving in the Air Force (1951-53), Revercomb attended the University of Virginia School of Law, graduating in 1955. He spent most of the years from 1955 to 1969 practicing in West Virginia, Virginia, and the District of Columbia. He then spent one year as associate deputy U.S. Attorney General – during the time when Rehnquist, too, was at the Justice Department – before accepting a seat on the D.C. Superior Court in 1970. Beginning in 1985, he would serve on the U.S. District Court for the District of Columbia until his death in 1993.⁸

4. *Potter Stewart, a retired Associate Justice of the Supreme Court.* Stewart received his LLB from Yale in 1941 and almost immediately enlisted in the Navy, where he served until 1945. He then practiced briefly in New York City and for several years in Cincinnati. President Dwight Eisenhower appointed him to the U.S. Court of Appeals for the Sixth Circuit in 1954, and to the Supreme Court in 1958. Stewart retired in 1981 (his tenure on the Court having overlapped with Rehnquist's for nearly a decade), and sat by designation in dozens of lower-court cases until his death in 1985.⁹

The backgrounds of the four members of the Commission thus shared at least two features: (1) service in the armed forces of the United States and (2) a professional connection to Rehnquist. Either or both could have been the basis for the formation of the Commission, or a source of conversation topics when the commissioners were not dealing with election-wager-specific matters.

There may be material relating to the Commission in the William H. Rehnquist Papers in the Hoover Institution Archives, but that is a project for another day.

⁸ Biographical Directory of Federal Judges, www.fjc.gov (vis. Nov. 27, 2010); Matt Neufeld, *Jurist labored until end*, WASH. TIMES, Aug. 3, 1993. Nothing in the overview of his papers at the University of Virginia suggests they would shed light on this matter. See Inventory of the Papers of Judge George H. Revercomb, MSS 93-3, Arthur J. Morris Law Library, Special Collections, ead.lib.virginia.edu/vivaead/published/uva-law/viul00030.xml.frame (vis. Nov. 21, 2010).

⁹ Federal Judicial Center, Biographical Directory of Federal Judges, www.fjc.gov (vis. Nov. 27, 2010); Leon Friedman, *Potter Stewart*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1547 (1997).

ORGANIZATION AND OPERATION

The Commission – which had been in existence since at least 1976 and active as recently as the presidential primaries of 1984 – was headless at the time of the September 18, 1984 meeting. It operated without a chairperson, and the commissioners are listed in the meeting minutes in alphabetical order. To the extent there was leadership, it was in the hands of Rehnquist, who served as Secretary. Perhaps further adding to Rehnquist's influence on the Commission was the absence of Revercomb, both from the September 18 meeting and from the wagering that autumn.¹⁰

But why rely on even a simple bureaucracy to govern an activity as common, as easy, and as harmless as a few friends putting a few bucks behind their political predictions? One obvious possibility is entertainment value. For a group of high-powered figures living and working in high-pressure Washington, DC, it might have been great fun to work within a familiarly formal governing body, but without having to take that body entirely seriously. Or maybe Rehnquist and company simply enjoyed elaborate gambling schemes.¹¹

One not-so-obvious possibility is that Rehnquist may have preferred a structured and disciplined arrangement in light of the relatively high stakes involved. According to his friend and unofficial biographer Herman Obermayer, Rehnquist

did not consider himself a gambler: he was a bettor, nothing more. He said this to me categorically, repeatedly. The distinction between the two was clear in his view: gamblers put meaningful amounts of money at risk; bettors, on the other hand, found pleasure in wagering small, insignificant amounts. He never bet more than three dollars with me on anything, and I am not aware of his betting more than five dollars with anyone else.¹²

¹⁰ See Meeting Minutes at page 96 below; Letter to Mr. Justice Rehnquist, Mar. 13, 1984, in Box 595, Stewart Papers ("Dear Bill, Enclosed are my predictions on today's primaries, with the money to back them up.").

¹¹ See HERMAN J. OBERMAYER, REHNQUIST: A PERSONAL PORTRAIT OF THE DISTINGUISHED CHIEF JUSTICE OF THE U.S. 82-83 (2009) (describing how "wagering terms . . . became complicated" over time in small-scale betting with Rehnquist).

¹² *Id.* at 155.

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Former clerks recall similar, one-dollar bet maximums.¹³ In contrast, the wagering overseen by the Commission was a bit heavier: \$10 on “the net gain or loss for the Republican party in the House of Representatives”; another \$10 on the same question in the Senate; and \$5 on the outcome of the presidential election in every state where there was “a disagreement among the Commissioners” as to whether that state would be “carried by the Democratic candidate [or] . . . the Republican.” In addition, the Commission “urged” its members to make “[a]ppropriate supplemental wagers.”¹⁴

In any event, the commissioners took their duties quite seriously (at least as a formal matter). On September 26 Rehnquist distributed neatly typed minutes of the September 18 meeting . . .

Dear Potter,

I enclose a copy of the minutes of the recent meeting of the Betting Commission at the Metropolitan Club under the auspices of Commissioner Moore.¹⁵

. . . and received a prompt and friendly-but-formal reply from Stewart two days later:

Dear Bill,

Thank you for sending me a copy of the minutes of the recent meeting of the Betting Commission. I have no corrections to offer, and shall abide by the decisions there made.¹⁶

In due course, Moore, Rehnquist, and Stewart made their bets, in imperfect but intelligible conformity with the Commission’s rules (there is no indication of any supplemental wagering). Moore’s choices are not available, but those of the other two are:

WHR ELECTION CHOICES

States which Mondale will carry:

Massachusetts, Minnesota, Washington, D.C.

¹³ See, e.g., James E. Ryan, *The Chief as Teacher*, 58 STAN. L. REV. 1687, 1689 (2006); Ted Cruz, *Clerking for the Chief*, FEDERAL LAWYER, Oct. 2005, at 32, 33.

¹⁴ Meeting Minutes at page 96 below.

¹⁵ Letter to Potter Stewart, Sept. 26, 1984, in Box 595, Stewart Papers.

¹⁶ Letter to William H. Rehnquist, Sept. 28, 1984, in Box 595, Stewart Papers.

Net Change in House:
Republicans +24
Net Change in Senate:
Democrats +1

PS ELECTION CHOICES

States and jurisdictions that Mondale will win:
Massachusetts, Minnesota, District of Columbia
President Reagan will win all the others.
The Republicans will suffer a net loss of 2 in the Senate.
The Republicans will have a net gain of 17 in the House
of Representatives.¹⁷

Justice Sandra Day O'Connor has said of Rehnquist, "If you valued your money, you would be careful about betting with the Chief. He usually won."¹⁸ But not always, as his 1984 post-election correspondence with the wagering commissioners reveals:

Dear Dick and Potter,

It seems that we had a "dead heat" with respect to the number of states that Walter Mondale would carry, and that I gave the party with respect to the net gains in the House and Senate. I accordingly enclose checks to the order of each of you in the amount of \$10.00.¹⁹

All three commissioners equally underestimated the support for Republican presidential candidate Ronald Reagan, who lost only Minnesota and the District of Columbia to Democrat Walter Mondale. Stewart was closest to the mark on the result in the Senate (he scored a bull's-eye) and presumably Moore was closest for the House (which saw a net gain of 32 seats for the Republicans).

Stewart struck an appropriately upbeat and sociable tone to conclude the Commission's season: "Dear Bill, Thank you for your check for \$10.00. Better luck next time."²⁰

¹⁷ Two [gently consolidated] documents dated "November 5, 1984," in Box 595, Stewart Papers.

¹⁸ Sandra Day O'Connor, *William H. Rehnquist*, 119 Harv. L. Rev. 3, 5-6 (2005).

¹⁹ Letter to Potter Stewart, Nov. 13, 1984, in Box 595, Stewart Papers.

²⁰ Letter to Justice William H. Rehnquist, Nov. 14, 1984, in *id.*

THE COMMISSION AND THE COURT

Wagering on an election whose outcome might depend on one's own judicial decision ought to prick the conscience of any judge. Rehnquist was no exception. For example, in early November 2000, he laid a bet with his friends the Obermayers on the outcome of the presidential election. When, on November 21, the Supreme Court of Florida decided *Palm Beach County Canvassing Board v. Harris*,²¹ he faxed this letter to the Obermayers:

It now appears remotely possible that the Florida election case might come to our Court. I therefore feel obliged to cancel all my election bets in any way dependent on the Florida vote. I hope you will agree to let me do this²²

In 1984, too, election cases bubbled up to the Supreme Court. Indeed, of the three in-chambers opinions issued on such matters that fall, two were by Rehnquist. Neither, however, was a case in which he had an interest due to his involvement in the Commission, because neither involved a campaign for federal office.²³ So, not surprisingly, he did not cancel his bets with his fellow commissioners.

Which suggests the existence of both (1) a low-probability version of “might” come to our Court, in the faint shadow of which a creature like the Commission can safely operate, and (2) a higher-probability version of “might,” in the deeper shadow of which a judge should not engage in extracurriculars. In the difference between those “mights” there might be a clue – reflected in the differing contexts of 2000 and 1984 (and 1992²⁴) and the correspondingly different responses of wagering Justices – to one vector in the complex calculus of judicial conduct: the likelihood that an extrajudicial act will intrude on or undermine a judicial function.

²¹ 772 So.2d 1220 (Fla.), vacated sub. nom *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000); see also *Bush v. Gore*, 531 U.S. 98, 100 (2000).

²² Reprinted in OBERMAYER, REHNQUIST at 88-89.

²³ See *Uhler v. AFL-CIO*, 468 U.S. 1310 (1984) (dispute over placement of balanced federal budget initiative on the California ballot); *Montanans for a Balanced Federal Budget Committee v. Harper*, 469 U.S. 1301 (1984) (same for Montana ballot).

²⁴ See note 2 above.

Minutes of a Meeting of the Betting Commission
Washington, D.C.
September 18, 1984

Present: Commissioners Moore, Rehnquist, and Stewart

The meeting was convened at approximately 12:30 p.m. by the genial host, Commissioner Moore. Various problems within the jurisdiction of the Commission were discussed, and staff recommendations as to the handling of the forthcoming general election on November 6th were considered. The following staff recommendations were adopted:

(1) Each commissioner will submit to the others, post-marked or delivered not later than midnight November 5th, a list of the 50 states, with appropriate notations indicating which states will be carried by the Democratic candidate and which by the Republican. In accordance with past practice, with respect to each state as to which there is disagreement among the Commissioners, there will be a wager, with each Commissioner putting up \$5.00. The Commissioner or Commissioners whose submissions reflect the correct result will receive, or share (as the case may be) the amount wagered.

(2) Each Commissioner will submit an entry, under the terms and conditions provided in paragraph (1), indicating the net gain or loss for the Republican party in the House of Representatives. There will be a wager of \$10.00 by each Commissioner as to this result, and the Commissioner whose proposed figure is numerically closest to the actual result will receive the proceeds of the wager.

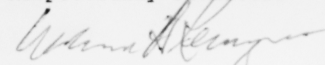
(3) A similar wager will be made with respect to the net Republican gain or loss in the United States Senate.

(4) Appropriate supplemental wagers may be proposed by any Commissioner prior to midnight November 5th. The Commissioners were reminded by the staff of the famous "three I" wager between Commissioner Moore and Commissioner Rehnquist in 1976, and that Commissioners were urged to propose similar innovative wagers this year.

Before adjournment, it was suggested that those Commissioners present contact Commissioner Revercomb in order to resume the periodic men's bridge game. It was agreed, subject to confirmation by Commissioner Revercomb, that the bridge game

would be held on Thursday, October 11th, at 7:00 p.m., at a residence to be designated.

Respectfully submitted



William H. Rehnquist
Secretary