



EXTRAJUDICIAL RETICENCE

NINE JUSTICES TAKE A BRIEF BREAK FROM CONSTITUTIONAL COMMENTARY

Ross E. Davies

FOR A LONG TIME, Justices of the U.S. Supreme Court felt free to express their views about the Constitution not only in their judicial opinions, but also in their off-the-bench writing. There came a time, however, when they seemingly did not feel so free – just briefly, in 1991. And then things returned to normal. This article sketches the background and context of that stop-and-start, and then speculates about how and why it happened.

I. IN THE BEGINNING AND THE MIDDLE

Justices – a few of them, at least – in every era of the Court have authored some weighty extrajudicial works. Early on, for example, there was Chief Justice John Marshall’s five-volume *Life of George Washington* (1805-1807), which was unsubtly chock-full of constitutional commentary. Justice Joseph Story followed with his famous and influential *Commentaries on the Constitution* (1833), as did Justice Henry Baldwin with his not-famous and not-influential *A General View of the Origin and Nature of the Constitution and Government of the United States* (1837).

In the next generation, Justice Benjamin R. Curtis produced what may be the all-time greatest work of stealthy constitutional com-

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mentary: the headnotes in his 22-volume edition of the complete decisions and opinions of the Court up to his own time.¹ Justice Samuel F. Miller continued Curtis's work for a while in the 1870s and then again briefly in the 1880s,² and also wrote *The Constitution of the United States: Three Lectures Delivered Before the University Law School of Washington, D.C.* (1880).

Similar commentary continued to emanate from various Justices, down through the Terms and into modern times with works such as Justice Hugo Black's *A Constitutional Faith* (1968), Justice William O. Douglas's *Points of Rebellion* (1969), and Chief Justice William Rehnquist's *The Supreme Court: How It Was, How It Is* (1987).³

II. THE INVITATION AND THE ANSWER

Then, in May 1991, Chief Justice Rehnquist received a letter from Mary Steinbauer, an editor of *Life Magazine*. The magazine was planning a special issue for the bicentennial of the ratification of the Bill of Rights. Steinbauer was inviting each of the Justices to write about one of those first ten constitutional amendments for *Life*.

Rehnquist promptly declined, for himself and everyone else:

[Y]ou propose that each member of the Court write a historical profile of one of the amendments comprising the Bill of Rights I have taken up your proposal with my colleagues, and we are all of the view that it would not be appropriate for us to undertake the sort of writing which you propose.⁴

¹ B.R. CURTIS, REPORTS OF DECISIONS IN THE SUPREME COURT OF THE UNITED STATES (1855-1856); see also 1 A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. 188-91 (1879) (Benjamin R. Curtis, ed.).

² SAMUEL F. MILLER, REPORTS OF DECISIONS IN THE SUPREME COURT OF THE UNITED STATES (1874-1875) (4 volumes); SAMUEL F. MILLER, REPORTS OF DECISIONS OF THE SUPREME COURT OF THE UNITED STATES (1882) (2 volumes); see also CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART TWO 535 (1987).

³ See, e.g., Ronald Collins, *353 books by Supreme Court Justices*, SCOTUSBLOG, www.scotusblog.com/2012/03/351-books-by-supreme-court-justices/ (Mar. 12, 2012).

⁴ Letter from William H. Rehnquist to Mary Y. Steinbauer (May 10, 1991), in Papers of Harry A. Blackmun, Box 1407, Library of Congress, Manuscript Division. The letter is reproduced on page 114 below.

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It was the right reply to a wrong-headed idea. Rehnquist could have stopped right there. He was not bound to explain.⁵ But he did not stop. He did explain. Before turning to Rehnquist's extraordinary, highly principled yet implausible reason for declining *Life's* invitation, consider two conventional, purely practical reasons: a matching problem and a coordination problem. Both surely came to mind when he read the invitation. Either would have made for a sufficient justification, if one were called for.

A. Two Practical Reasons to Decline

1. The Matching Problem

Nine Justices on the Supreme Court do not match up neatly with ten amendments in the Bill of Rights. Two complications would have been especially obvious to Rehnquist and should have been obvious to the editors at *Life*: (a) 9 \neq 10, so one amendment would be orphaned, and thus would likely (and probably incorrectly) be viewed by *Life's* readers as disfavored by the Court, and (b) each Justice would be the only member of the Court writing about any particular amendment, and thus would likely (and probably incorrectly) be viewed by *Life's* readers as the champion of that amendment on the Court.

2. The Coordination Problem

The symbolism of coordinated action – especially when not strictly necessary for their judicial work – is a powerful tool the Justices have used from time to time throughout the Court's history. The most famous instances were, and are, the Topeka and Little Rock desegregation cases. In the former (*Brown v. Board of Education*), the simple achievement of unanimity on the controversial but noble result was headline-making. In the latter (*Cooper v. Aaron*), the headliner was that each of the nine Justices emphasized his commitment to the unanimous opinion of the Court by individually signing it.⁶

⁵ See, e.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

⁶ 347 U.S. 483 (1954); 358 U.S. 1 (1958); see generally Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEORGETOWN L.J. 1 (1979).

Having capitalized so famously in the past on that many-voices-one-message symbolism, the Justices would create (or seriously risk creating) the perception that they were trying to do it again if they all wrote for *Life*. As Rehnquist surely realized – and the editors of *Life* ought to have as well – a nine-Justice, nine-essay publication of the sort *Life* proposed would likely (and probably incorrectly) be viewed by readers as some sort of coordinated legal statement by the Court about the Bill of Rights. It would not be seen as merely a bundle of extrajudicial comments by individuals who all happened to be judges on the same most-powerful-court-in-the-land, all writing about particular, often-controversial constitutional amendments in the same famous magazine, all at the same time.

True, a single Justice cannot speak for the Court without the concurrence of a few colleagues,⁷ and in *Life*'s plan single Justices would be writing about single amendments. Also true, a Justice writing outside of a case or controversy is not writing a judicial opinion,⁸ and a *Life* magazine article, no matter how controversial, would not qualify as a case or controversy for jurisdictional purposes. But those distinctions might well have been lost on lay readers.

And the problem would not be only with *Life*'s lay readership. Readers with some knowledge about the Court would also be likely to put great stock in whatever a collection of Justices might say about the Bill of Rights, though for a different reason. They would not misunderstand the technical and legal insignificance of the Justices' writings; rather, they would understand the non-technical and practical significance, or at least potential significance, of those writings. They would know that the Justices' past exercises in coordination were not limited to a couple of celebrated civil rights cases. The Justices have in fact a long history of acting independently as a matter of law, but in collaboration as a matter of fact, in a wide range of circumstances. And while it would be an overstatement to say that such collaboration has been a common feature of the Court's history,

⁷ 28 U.S.C. § 1 (quorum); S. Ct. R. 4 (2013) (same); see also Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643 (2002).

⁸ *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726 (2013).

it has not been rare either. Moreover, the range of circumstances in which it has occurred is wide enough that anyone familiar with even part of that range would doubt that any activity involving most or all of the Justices was purely coincidental.

To get a sense of the possibilities, consider the following examples involving adjudication, lobbying, boycotting, and marketing.

Unorthodox adjudication. There are cases other than *Cooper v. Aaron* in which the Justices have managed – by engaging in coordination that went beyond adjudication – to be more than merely ninths of a judicial collective. *Holtzman v. Schlesinger*, for instance. On August 3, 1973, Justice Douglas (acting in his individual capacity as a Circuit Justice) issued an order permitting a lower court to enjoin the controversial U.S. bombing of Cambodia.⁹ The next day, Justice Thurgood Marshall (also acting as a Circuit Justice) issued his own contrary order. In this duel of one-Justice orders, Douglas was trumped by Marshall, who disclosed in his opinion explaining his own order that he had consulted the other seven members of the Court and all of them supported his decision, even though they were not actually sitting on the case.¹⁰ In other words, those seven Justices were publicly declaring, via Marshall's opinion, how they would vote if they ever were to become judges in the *Holtzman* case. They were, in effect, issuing a group advisory opinion, which, of course, they could not constitutionally do, at least not in their capacities as Supreme Court Justices.¹¹ (Marshall et al. prevailed: The bombing continued through August 14, 1973, when it ended because Congressionally authorized funding for the bombing ended.¹²)

⁹ Order, A-150 *Holtzman v. Schlesinger* (Aug. 3, 1973) (Douglas, J., in chambers), in Papers of Harry A. Blackmun, Box 172, Library of Congress, Manuscript Division.

¹⁰ *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J., in chambers); 414 U.S. 1316 (1973) (Douglas, J., in chambers); *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973) (Marshall, J., in chambers); *id.* at 1322-24 (Douglas, J., in chambers); Ross E. Davies, *The Last Word*, J. APP. PRAC. & PROC. 229, 264-69 (2010).

¹¹ *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *but see, e.g.*, Mark R. Killenbeck, William Johnson, *The Dog That Did Not Bark?*, 62 VAND. L. REV. 407, 441-42 (2009).

¹² See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 908 (1990).

Lobbying. The great example of lobbying by Justices is the letter from Chief Justice Charles Evans Hughes to Senator Burton Wheeler attacking President Franklin Roosevelt's 1937 "Court-packing plan."¹³ Hughes and Wheeler – seasoned, sophisticated politicians – knew the impact of the letter depended on the extent to which it appeared to express a view held by all the Justices. That knowledge was reflected in the truth-stretching in which both men engaged in order to maximize that appearance. In the letter itself Hughes said, "I am confident that it is in accord with the views of the Justices," although he had consulted only Justices Willis Van Devanter and Louis Brandeis, and later reports indicated that Justice Harlan Fiske Stone disapproved.¹⁴ (Indeed, if we are to believe a letter written by Wheeler to Professor Paul Freund years later, "In pointing out the concurrence of the two side Justices, Hughes told the Senator, 'they are the Court.'"¹⁵) In addition, Hughes remained silent when Wheeler said during debate in the Senate, "although the members of the Supreme Court may have differed on a great many things, they are unanimous with reference to the letter from the Chief Justice; at least that is my understanding of the matter."¹⁶ (Hughes et al. prevailed: The Court-packing plan failed.¹⁷)

Just as *Cooper v. Aaron* was not the only case in which the Justices went beyond adjudication to make a point, the Hughes letter was not the only creature of its kind. Another fairly potent lobbying effort by the Justices (of the Executive this time) involved the campaign to put John Campbell on the Court in 1853. As Campbell himself recalled the causation for his nomination, "The death of Justice McKinley made a vacancy, and that vacancy was supplied by one [Campbell] recommended by the Justices – Justices Catron and

¹³ Letter from Charles Evans Hughes to Burton K. Wheeler (Mar. 21, 1937), reprinted in S. REP. NO. 75-711, at 38-40 (1937).

¹⁴ ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 450-54 (1956).

¹⁵ Paul A. Freund, *Charles Evan Hughes As Chief Justice*, 81 HARV. L. REV. 4, 27 & n.79 (1967) (quoting a letter from Wheeler to Freund, Dec. 21, 1962).

¹⁶ 81 CONG. REC. 2815 (Mar. 29, 1937).

¹⁷ See WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930-1941 ch. 4 (2007).

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CURTIS bearing their recommendation to the President.”¹⁸ (Catron, Curtis, et al. succeeded: Campbell became a Justice.¹⁹)

Boycotting. Conversely, the Justices have on occasion also spoken volumes by coordinated inaction, as in their response in 1838 to an invitation from the U.S. House of Representatives to attend memorial services for a Member, Jonathan Cilley of Maine. Cilley died in a duel, a disreputable mode of dispute resolution that was not yet illegal in all U.S. jurisdictions. The Justices – who “deemed it to be their duty to confer together in order to determine upon the course proper for them to pursue” – concluded that they could not, “consistently with the duties they owe to the public, attend in their official characters, the funeral of one who has fallen in a duel.”²⁰ (Chief Justice Roger Taney et al. succeeded: One year after the Justices registered their disapproval, Congress and the President criminalized dueling in the District of Columbia.²¹)

Marketing. And, finally, a crass example. On page 107 below are excerpts from an advertisement for Curtis’s *Reports of Decisions in the Supreme Court of the United States* (1855-1856).²² Every one of his colleagues on the Court endorsed his product and commended it to “the legal profession” – the people who appeared before the Justices and whose success in court could depend on them. (Chief Justice Taney et al. succeeded again, or at least helped: Curtis’s *Reports* sold well, going through six editions before the turn of the century.²³)

¹⁸ MEMORANDA: BENJAMIN ROBBINS CURTIS, 87 U.S. v, ix (1874); *see also* PROCEEDINGS OF THE BENCH AND BAR OF THE SUPREME COURT OF THE UNITED STATES IN MEMORIAM JOHN ARCHIBALD CAMPBELL 18 (1889); CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 245 (rev. ed. 1926).

¹⁹ 56 U.S. v (1854) (Dec. Term 1853).

²⁰ *See* David P. Currie, *Miss Otis Regrets*, 7 GREEN BAG 2D 265, 271, 274 (2004) (quoting an “Order of the Court” dated Feb. 27, 1838).

²¹ *Id.* at 269.

²² *See* page 100 & n.1 above. The advertisement was printed in the front matter of the first volume of Curtis’s *Reports of Decisions in the Supreme Court*.

²³ *See* CARL B. SWISHER, THE TANEY PERIOD 1836-64 at 313-15 (1974); MORRIS L. COHEN & SHARON HAMBY O’CONNOR, A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES 83-84, 229-30 (1995).

In light of this history of coordinated, purposeful, extrajudicial, and often effective activity by the Justices – and bearing in mind that the sampler presented above exhausts neither the types of coordinated activity in which they engaged²⁴ nor the instances of activity of the types listed²⁵ – a knowledgeable reader of the proposed special issue of *Life* could quite reasonably have concluded that something was up with the Court and the Bill of Rights. Thus, the *Life* project risked stirring some already muddy and treacherous waters, both institutional and constitutional. Certainly it would have been best for Chief Justice Rehnquist and his colleagues to répondre with regrets, unless, of course, they felt there was something worthwhile to be achieved by accepting.

²⁴ See, e.g., CHARLES FAIRMAN, FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 at 47-57 (1988) (coordinated acceptance of invitations to engage in extrajudicial official activity; Justices Nathan Clifford, Samuel Miller, Stephen Field, William Strong, and Joseph Bradley as presidential election commissioners); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 at 53-54 (1995) (another coordinated acceptance; Chief Justice Melville Fuller and Justice David Brewer as arbitrators of an international boundary dispute); see also, e.g., MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY 45, 61-74 (1902) (Charles Bradley, ed.) (secret agreement to coordinate votes in future cases; Chief Justice Salmon P. Chase and Justices Samuel Nelson, Nathan Clifford, and Stephen Field on legal tender); Letter from Byron White to the Conference (Oct. 20, 1975), in DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 463-65 (1998) (another secret agreement; Chief Justice Warren Burger and Justices William Brennan, Potter Stewart, Thurgood Marshall, Harry Blackmun, Lewis Powell, and William Rehnquist to “not assign the writing of any opinions to Mr. Justice Douglas” and “not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority”).

²⁵ See, e.g., *Marks v. Davis*, 4 Rapp 1413 (1912) (Van Devanter & Pitney, Circuit Justices) (unorthodox adjudication); JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801 at 554-69 (1971) (lobbying); William H. Rehnquist, *The Supreme Court and the Disputed Election of 1876*, 55 ALA. L. REV. 527, 532 (2004) (boycotting); CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES 128 (1942) (boycotting); Advertisement for “Limited Edition Subscription Edition of the United States Supreme Court Reports, Published by the Lawyers’ Co-operative Publishing Company” (ca. 1887) (marketing), www.availableat.org.

LITTLE, BROWN & CO'S
LAW ADVERTISER.

112 WASHINGTON STREET, BOSTON.

JULY, 1855.

JUDGE CURTIS'S
EDITION OF THE
DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES.

Now in Press, and will shortly be Published, the Decisions of the Supreme Court of the United States, with Notes and a Digest, by Hon. BENJAMIN R. CURTIS, one of the Associate Justices of the Court. In 18 volumes, octavo. Comprising the Cases reported by DALLAS, 4 vols.; CRANCH, 9 vols.; WHEATON, 12 vols.; PETERS, 16 vols.; HOWARD, 16 vols.; in all 57 volumes.

We ask attention to the following approval by the Members of the Supreme Court of the United States:—

“We approve the plan of Mr. Justice Curtis's ‘Decisions of the Supreme Court of the United States,’ and believe that its execution by him will be of much utility to the legal profession, and to our country.”

ROGER B. TANEY, *Chief Justice.*

JOHN McLEAN, *Associate Justice.*

JAMES M. WAYNE, *Associate Justice.*

JOHN CATRON, *Associate Justice.*

PETER V. DANIEL, *Associate Justice.*

SAMUEL NELSON, *Associate Justice.*

ROBERT C. GRIER, *Associate Justice.*

J. A. CAMPBELL, *Associate Justice.*

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Vols. I. II. III. are now ready for delivery. Those wishing to subscribe will please send in their names to the Publishers as early as possible.

B. One Principled Reason to Decline

Rehnquist did decline *Life*'s invitation, but on grounds principled and almost poetic, not practical and prosaic. He did not say the Justices would not write because disproportionate and individuated treatment of the amendments would confuse more than enlighten (page 101 above), or because coordinated writing by all the Justices would cause readers to give undue weight to whatever they might say (pages 101-07), or anything else of the sort. Instead he said:

We are constantly engaged in deciding what the various provisions of the Bill of Rights mean in cases which come before us, and we think that our interpretations of these amendments should be confined to that sort of effort.²⁶

There you have it: Each of the Justices was invited by *Life* to "write a historical profile of one of the amendments" and they declined because they were "all of the view" that they should only speak on that topic "in cases which come before us." So it was that in May 1991 each of the nine members of the Court – Rehnquist and Associate Justices Byron White, Thurgood Marshall, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and David Souter – disapproved extrajudicial writing about the Constitution (or at least about the first ten amendments to it).

It was a break with tradition. An unfortunate one, since the purpose (and at least sometimes the effect) of their extrajudicial writing had always been to enlighten the public about the Court, its work, and the legal system of which it was a part. As Justice O'Connor would later put it in her book *The Majesty of the Law* (2003), echoing similar aspirations of other Justices, from Story in his *Commentaries* (1833) to Rehnquist in his *The Supreme Court* (1987):

My hope is that the historical themes explored in this book, and the reflections expressed here, will help the reader better understand our own system, and also why and how the Rule of Law offers the world its best hope for the future.²⁷

²⁶ Letter from Rehnquist to Steinbauer (May 10, 1991), page 114 below.

²⁷ SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* xvii (2003); JOSEPH STORY,

III. THE SPECIAL ISSUE, AND THE RETURN OF CONSTITUTIONAL COMMENTARIES

Life went ahead with its Bill of Rights special issue. Journalist Roger Rosenblatt contributed an article entitled *The Bill of Rights: The first of the 10 amendments launches us on a journey of self-discovery*, which covered the subjects Steinbauer had hoped the Justices would take on. It was on newsstands in the autumn of 1991.²⁸

While *Life* and Rosenblatt were at work, the Justices were recovering from their brief bout of extrajudicial reticence. The extremity of its brevity is perhaps best illustrated by a pair of extrajudicial constitutional commentaries delivered by members of the Court at roughly the same time that the *Life* special issue was published.

The first was a speech titled *The Bill of Rights: A Century of Progress*. Delivered by Justice Stevens at the University of Chicago on October 25, 1991, it was published the next year.²⁹ Stevens's *Bill of Rights* was roughly the same length, and on the same topic, as Rosenblatt's *Bill of Rights*. It would have been a perfect fit for the *Life* special issue.

The second was a book by Rehnquist titled *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson*. His files contain a manuscript of the book dated October 16, 1991, and it was published in 1992.³⁰ While the main subject of *Grand Inquests* is impeachment, Rehnquist does discuss parts of the Bill of Rights (the First, Sixth, and Eighth Amendments), as well as parts of the Constitution most directly relevant to impeachment, and his views on interpretation of the Constitution generally.³¹ *Life*'s editors surely would have welcomed a chance to include a relevant excerpt of *Grand Inquests* in their special issue.

1 COMMENTARIES ON THE CONSTITUTION vi-vii (1833); WILLIAM H. REHNQUIST, THE SUPREME COURT 7-9 (1987); see also Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275 (1998).

²⁸ Roger Rosenblatt, *The Bill of Rights: The first of the 10 amendments launches us on a journey of self-discovery*, LIFE, Fall 1991 (Special Issue), at 9.

²⁹ John Paul Stevens, *The Bill of Rights: A Century of Progress* (Occ. Papers No. 29, 1992).

³⁰ Papers of William H. Rehnquist, Box 181, Hoover Inst. Archives, Stanford Univ.

³¹ WILLIAM H. REHNQUIST, GRAND INQUESTS 74, 89, 97-98, 160, 227 (1992).

Since then, the Justices have continued to comment on the Constitution off the bench. For example, Justice Scalia's *A Matter of Interpretation: Federal Courts and the Law* came out in 1997, and Rehnquist's *All the Laws but One: Civil Liberties in Wartime* in 1998. The spirit lives on in recent works such as *Reading Law: The Interpretation of Legal Texts* (2012), by Scalia and lexicographer Bryan Garner, and Justice Stephen Breyer's *Active Liberty: Interpreting Our Democratic Constitution* (2006) and *Making Our Democracy Work: A Judge's View* (2010).

IV. REASONS FOR THE RETICENCE

It is difficult to reconcile the Rehnquist letter to *Life*, the *Life* Bill of Rights special issue, and the Stevens speech and Rehnquist book. Why did either (a) the Justices experience an odd, mayfly moment of extrajudicial reticence in 1991 or (b) Rehnquist send a letter saying something untrue? The possibilities are manifold. With the passing of Rehnquist, however, the correct answer may be gone beyond recovery. But there are some interesting candidates, including:

1. *The Justices did not say it, only Rehnquist did, and he erred.* Like the Hughes letter responding to the Court-packing plan, Rehnquist's response to the *Life* invitation might have been the product of his consultation with just one or two colleagues who happened to agree with him, combined with a mistaken assumption that the views of that minority matched the views of all the Justices. Recall that Justice Stone, at least, did not approve of the Hughes letter, but Hughes insisted he had had no reason at the time to believe he spoke for any less than all the Justices.³² Perhaps Rehnquist felt the same way.

Unfortunately, Hughes's rationale for consulting only Van Devanter and Brandeis – "[o]n account of the shortness of time I have not been able to consult with the members of the Court generally"³³ – was not plausible. As Stone pointed out:

Although the Court was then in recess, all its members were in the city. They could have been brought together for a conference on an hour's telephone notice, or less. Throughout the recess Justices

³² THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 305 & n.48 (1973).

³³ Letter from Hughes to Wheeler, note 13 above, at 40.

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Sutherland, Cardozo, and myself were in our homes, which are within five minutes' walk of the residence of the Chief Justice.³⁴

Also unfortunately, Rehnquist was no more plausible. Even as he was declining to write for *Life*, he was completing a book that dealt with the Bill of Rights, his second touching on that topic. All of us are capable of self-deception, but for Hughes to believe that most of his colleagues were out of town and inaccessible when they were not, or for Rehnquist to believe that his books did not contain "interpretations of these amendments" when they did, seems like quite a stretch.

Nevertheless, if Rehnquist did follow Hughes's selective consultation approach, then anywhere from one Justice (if Rehnquist consulted seven colleagues) to eight (if he consulted no one) were not party to his letter declaring their unanimous commitment to extrajudicial reticence. It is an imperfect explanation – it cannot account for Rehnquist himself, and it does not definitely include or exclude any particular Justice – but it might account for much, including Stevens's *Bill of Rights* speech at the University of Chicago.

2. *All the Justices erred.* Rehnquist's letter to *Life* might have been perfectly accurate. The Justices might have thought they had hit on a sound new approach to extrajudicial expression but then discovered, on further reflection, that they were wrong. Such things do happen. The Justices opine, and then change course, occasionally speedily.³⁵ It also happens with individual Justices, who may confess error. Douglas, for example, did so in *Flood v. Kuhn*:

While I joined the Court's opinion in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, I have lived to regret it; and I would now correct what I believe to be its fundamental error.³⁶

But speed, when it comes to a change of direction by the Court, is measured in years – not in weeks or days, as it would have to be to make sense in this way of Rehnquist's letter to *Life* and its aftermath. Then again, outside decided cases, the Justices can change course

³⁴ MASON, note 14 above, at 452.

³⁵ See, e.g., *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 501 & n.9 (2007) (Scalia, J., concurring) (collecting cases).

³⁶ See *Flood v. Kuhn*, 407 U.S. 258, 286 n.1 (1972) (Douglas, J., dissenting).

more speedily and mysteriously. Who knows how many granted cert. petitions that are dismissed as improvidently granted have been victims of thinking akin to whatever was behind Rehnquist's letter?³⁷

This explanation, too, is imperfect. It might explain the behavior of all nine Justices – all could have been party to the letter, and any number equal to or greater than the number who have since engaged in extrajudicial commentary could have changed their minds later – but it does not definitely include or exclude any particular member of the Court, even Rehnquist. And absent any Douglas-style public statements, changes of mind can only be inferred, tentatively, from individual acts of post-letter commentary.

3. *It was a tongue-in-cheek brush-off, never intended to be believed.* Rehnquist was known as both a man with a sense of humor and a Chief Justice occasionally sharp with those who seemed to treat the Court unseriously.³⁸ Keeping in mind those characteristics of the author of the letter to *Life*, consider this hypothetical: The assistant director of a leading opera company invites the Justices to be supernumeraries in a comic adaptation of a famous opera. They will wear their judicial robes, plus clown shoes and big purses, and form a kickline behind the featured performers for a scene lampooning the corruptibility of judges. The Chief Justice responds:

I have taken up your proposal with my colleagues, and we are all of the view that it would not be appropriate for us to undertake the sort of performance which you propose. We never wear our robes outside the courtroom.

The response is obviously both true and false. True because even though several Justices are prominent opera enthusiasts, it would not be appropriate for them to pose as corruptible, even comically. False because they are easy to spot on television – in their robes, outside the courtroom – at presidential inaugurations and other events. Why respond in this way? Because, the Chief Justice might

³⁷ Relatedly, the letter could have been a single-use ticket. Cf. Richard M. Re, *On "A Ticket Good for One Day Only"*, 16 GREEN BAG 2D 155 (2013).

³⁸ See generally *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1 (2005); JOHN PAUL STEVENS, FIVE CHIEFS ch. 6 (2011).

think, if the assistant director knows enough about the Court to capitalize on Justices' passion for opera, she knows enough to recognize that Justices posing as corruptible would be bad for the Court. Thus, it was rude of her to ask. And if she made the invitation blindly – without bothering to learn even enough to recognize the obvious impropriety of inviting Justices to pose as corruptible – well, that was rude too. The true-and-false response would be a way to deliver both an explicit “no” and an implicit “shame on you,” to brush off the invitation without being overtly offensive about it. And for knowledgeable recipients of the letter (the Justices cc'd on it, and perhaps the assistant director), there would be a bonus: the humor in the reason given for declining – the comedy of extreme implausibility.³⁹

Now consider reality: Mary Steinbauer, the *Life* assistant managing editor who sent the invitation to the Court in 1991, was an accomplished professional. (Her Bill of Rights special issue won an ABA Silver Gavel Award.) She should have known, by experience or investigation (or even arithmetic), that her invitation was not one the Justices would be wise to accept. Yes, they were prominent Bill of Rights enthusiasts, but writing on *Life*'s terms would likely cause all sorts of trouble. And yet she sought to impose on them anyway. Or so Rehnquist might have seen it. He had his colleagues' agreement to decline the invitation. His job was to speak for all of them, and he did so in his own style. Thus the message from Rehnquist to Steinbauer: No, and shame on you. And small wonder that she was treated to a true-and-false brush-off the sort hypothesized above, and for a suitably comical, implausible reason. Kind and gentle? Perhaps; he certainly could have been unkind. Amusingly implausible? Yes. Intentionally so? We will probably never know.

I could go on with ever more attenuated speculations, but I like explanation #3. It is consistent with the behavior of the Justices. It is consistent with the manner of Rehnquist as Chief Justice. And it is consistent with what we know of Rehnquist the human being, which makes for a nice reminder that the Justices are, after all, human.

³⁹ See, e.g., *Three Nights Drunk*, in JOHN A. LOMAX AND ALAN LOMAX, OUR SINGING COUNTRY 300 (1941).

William H. Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

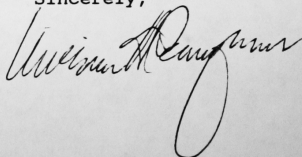
May 10, 1991

Mary Y. Steinbauer
Assistant Managing Editor
Life Magazine
Time & Life Building
Rockefeller Center
New York, New York 10020

Dear Ms. Steinbauer,

I have received your letter of May 3rd, describing the planned special issue of Life Magazine to be issued next October on the 200th Anniversary of the Bill of Rights. In that letter you propose that each member of the Court write a historical profile of one of the amendments comprising the Bill of Rights, and say that you would be willing to assist in the writing process and to pay an honorarium for the material. I have taken up your proposal with my colleagues, and we are all of the view that it would not be appropriate for us to undertake the sort of writing which you propose. We are constantly engaged in deciding what the various provisions of the Bill of Rights mean in cases which come before us, and we think that our interpretations of these amendments should be confined to that sort of effort. We are naturally pleased that Life Magazine is planning to do a special issue on the Bill of Rights, and commend you for this undertaking.

Sincerely,



*William H. Rehnquist to Mary Y. Steinbauer, May 10, 1991,
Papers of Harry A. Blackmun, Box 1407,
Library of Congress, Manuscript Division*

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