

Alan Dershowitz: Telling the Truth About Chief Justice Rehnquist

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Alan Dershowitz

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My mother always told me that when a person dies, one should not say anything bad about him. My mother was wrong. History requires truth, not puffery or silence, especially about powerful governmental figures. And obituaries are a first draft of history. So here's the truth about Chief Justice Rehnquist you won't hear on Fox News or from politicians. Chief Justice William Rehnquist set back liberty, equality, and human rights perhaps more than any American judge of this generation. His rise to power speaks volumes about the current state of American values.

Let's begin at the beginning. Rehnquist bragged about being first in his class at Stanford Law School. Today Stanford is a great law school with a diverse student body, but in the late 1940s and early 1950s, it discriminated against Jews and other minorities, both in the admission of students and in the selection of faculty. Justice Stephen Breyer recalled an earlier period of Stanford's history: "When my father was at Stanford, he could not join any of the social organizations because he was Jewish, and those organizations, at that time, did not accept Jews." Rehnquist not only benefited in his class ranking from this discrimination; he was also part of that bigotry. When he was nominated to be an associate justice in 1971, I learned from several sources who had known him as a student that he had outraged Jewish classmates by goose-stepping and heil-Hitlering with brown-shirted friends in front of a dormitory that housed the school's few Jewish students. He also was infamous for telling racist and anti-Semitic jokes.

As a law clerk, Rehnquist wrote a memorandum for Justice Jackson while the court was considering several school desegregation cases, including *Brown v. Board of Education*. Rehnquist's memo, entitled "A Random Thought on the Segregation Cases," defended the separate-but-equal doctrine embodied in the 1896 Supreme Court case of *Plessy v. Ferguson*. Rehnquist concluded the *Plessy* "was right and should be reaffirmed." When questioned about the memos by the Senate Judiciary Committee in both 1971 and 1986, Rehnquist blamed his defense of segregation on the dead Justice, stating – under oath – that his memo was meant to reflect the views of Justice Jackson. But Justice Jackson voted in *Brown*, along with a unanimous Court, to strike down school segregation. According to historian Mark Tushnet, Justice Jackson's longtime legal secretary called Rehnquist's Senate testimony an attempt to "smear[] the reputation of a great justice." Rehnquist later admitted to defending *Plessy* in arguments with fellow law clerks. He did not acknowledge that he committed perjury in front of the Judiciary Committee to get his job.

The young Rehnquist began his legal career as a Republican functionary by obstructing African-American and Hispanic voting at Phoenix polling locations ("Operation Eagle Eye"). As Richard Cohen of *The Washington Post* wrote, "[H]e helped challenge the voting qualifications of Arizona blacks and Hispanics. He was entitled to do so. But even if he did not personally harass potential voters, as witnesses allege, he clearly was a brass-knuckle partisan, someone who would deny the ballot to fellow citizens for trivial political reasons -- and who made his selection on the basis of race or ethnicity." In a word, he started out his political career as a Republican thug.

Rehnquist later bought a home in Vermont with a restrictive covenant that barred sale of the property to "any member of the Hebrew race."

Rehnquist's judicial philosophy was result-oriented, activist, and authoritarian. He sometimes moderated his views for prudential or pragmatic reasons, but his vote could almost always be predicted based on who the parties were, not what the legal issues happened to be. He generally opposed the rights of gays, women, blacks, aliens, and religious minorities. He was a friend of corporations, polluters, right wing Republicans, religious fundamentalists, homophobes, and other bigots.

Rehnquist served on the Supreme Court for thirty-three years and as chief justice for nineteen. Yet no opinion comes to mind which will be remembered as brilliant, innovative, or memorable. He will be remembered not for the quality of his opinions but rather for the outcomes decided by his votes, especially *Bush v. Gore*, in which he accepted an Equal Protection claim that was totally inconsistent with his prior views on that clause. He will also be remembered as a Chief Justice who fought for the independence and authority of the judiciary. This is his only positive contribution to an otherwise regressive career.

Within moments of Rehnquist's death, Fox News called and asked for my comments, presumably aware that I was a longtime critic of the late Chief Justice. After making several of these points to Alan Colmes (who was supposed to be interviewing me), Sean Hannity intruded, and when he didn't like my answers, he cut me off and terminated the interview. Only after I was off the air and could not respond did the attack against me begin, which is typical of Hannity's bullying ambush style. He is afraid to attack when there's someone there to respond. Since the interview, I've received dozens of e-mail hate messages, some of which are overtly anti-Semitic. One writer called me "a jew prick that takes it in the a** from ruth ginzburg [sic]." Another said I am "an ignorant socialist left-wing political hack You're like a little Heinrich Himmler! (even the resemblance is uncanny!)." Yet another informed me that I "personally make us all lament the defeat of the Nazis!" A more restrained viewer found me to be "a disgrace to the Law, to Harvard, and to humanity."

All this, for refusing to put a deceptive gloss on a man who made his career undermining the rights and liberties of American citizens.

My mother would want me to remain silent, but I think my father would have wanted me to tell the truth. My father was right.

Alan Dershowitz is a professor of law at Harvard. His latest book is *The Case for Peace: How the Arab-Israeli Conflict Can Be Resolved* (Wiley, 2005).

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