

The Chief Justice, Federalism, and Access to Federal Courts

It is sometimes asserted that because the Chief Justice of the United States has “just one vote” in Court rulings, this position is not significantly more important than the eight Associate Justice positions on the Supreme Court. Such claims understate the importance of the Chief Justice’s role in presiding over Court arguments and conferences, and his ability to dictate who writes most of the Court’s opinions.

Even more importantly, such assessments ignore completely the important roles the Chief Justice plays as the spokesperson of the judiciary and as chairperson of the Judicial Conference of the United States, which is the official policymaking entity for the federal judiciary. The Chief Justice is both the leader of the Supreme Court and the Chief Executive officer of the federal judiciary. A skillful and determined Chief Justice can employ these complementary powers to expand dramatically his ability to advance a particular perspective on the law.

A perfect example is the work of Chief Justice Rehnquist to promote a vision of federalism that limits the role of federal courts. In well publicized cases such as *United States v. Lopez* (1995) and *United States v. Morrison* (2000), Justice Rehnquist, speaking on behalf of a closely divided Court, has struck down federal causes of action based on a controversial conclusion that the statutes at issue in these cases exceed the limits of Congressional power and inappropriately expand the role of the federal judiciary. Less publicized, but no less important, has been Chief Justice Rehnquist’s efforts to limit the scope of the federal courts through his position as the judiciary’s spokesman and as head of the Judicial Conference.

For example, in early 1995, the same year the *Lopez* decision was announced, Chief Justice Rehnquist stated in his annual report to Congress on the federal judiciary that “There is considerable sentiment in the federal judiciary at the present time against further expansion of federal jurisdiction into areas which have previously been the province of state courts enforcing state laws.” He attributed this sentiment, in language that foreshadows the language of the *Lopez* opinion, to “a genuine concern about the erosion of federalism, and the traditional division of responsibility between federal courts and state courts.” (William H. Rehnquist, 1994 Year-End Report on the Federal Judiciary, 18 Am. J. Trial Advoc. 499, 502-03. *Compare id.*, with *United States v. Lopez*, 514 U.S. 549, 561 n. 3)

Later in 1995, Rehnquist’s Judicial Conference promulgated the first-ever Long Range Plan for the federal judiciary. The plan was drafted by a committee hand-picked by Rehnquist, and not surprisingly, the plan institutionalized his views on federalism and access to federal court. The Plan does so explicitly, saying, “Chief Justice Rehnquist has frequently noted that although the Framers gave to Congress the ultimate task of developing a role for the federal courts, they left two important guideposts. Federal courts were intended to complement state court systems, not supplant them. And federal courts were to be a distinctive judicial forum of

limited jurisdiction, performing the tasks that state courts, for political or structural reasons, could not.” (Long Range Plan for the Federal Courts, 166 F.R.D. 49, 68)

Getting more specific, the Plan says, “If the federal courts' civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish.” (166 F.R.D. at 79) The Plan then advocated strongly against the federalization of crime, listing five fairly narrow categories of offenses that should have federal court jurisdiction. (166 F.R.D. at 84) The same year the long-range plan was published Rehnquist wrote the majority opinion in *U.S. v. Lopez*, holding as a matter of constitutional law that Congress could not make gun possession near a school a federal crime.

Equally illuminating are the complementary roles played by the Judicial Conference and the Supreme Court in limiting federal causes of action under the Violence Against Women Act (VAWA). In the early 1990s, the Judicial Conference weighed in against the Civil Rights Remedy of the Violence Against Women Act (VAWA). Congress took the Conference’s position into account and changed the legislation, prompting the Conference to withdraw its opposition.

But the Conference and the Chief Justice continued to protest the expansion of federal court jurisdiction. The Long Range Plan warned that “Recent legislative trends suggest that federal caseloads will continue to grow rapidly” (166 F.R.D. at 77) and foresaw resort to “apocalyptic alternatives” unless “appropriate action is taken” (Id. at 80). “As Congress continues to ‘federalize’ crimes previously prosecuted in the state courts and to create civil causes of action over matters previously resolved in the state courts, the viability of judicial federalism is unquestionably at risk,” the plan ominously predicted. (Id. at 82)

Justice Rehnquist also maintained his criticism of new federal causes of action. “The desire to federalize new crimes or civil causes shows that the federal Judiciary has become of victim of its own success,” he said in 1998. “But no small part of the success of the federal system...is because the federal courts have traditionally been courts of *limited jurisdiction*. If the federal system ends up with the same sort of potpourri of cases that state courts *must* necessarily decide, it may lose the special competence that now sets it apart from many state systems.” (William H. Rehnquist, The 1997 Year-End Report on the Federal Judiciary, at <http://www.uscourts.gov/ttb/jan98ttb/january.htm>, emphasis in original) The Chief Justice ultimately had the final say on whether victims of gender-based violence should have a federal civil remedy. In 2000, he assigned himself the Supreme Court opinion in *U.S. v. Morrison* that struck down VAWA’s federal Civil Rights Remedy.

The Judicial Conference under Chief Justice Rehnquist has also been aggressive in advocating against new federal causes of action in a number of other areas. In March 2000 the Judicial Conference “urg[ed]” Congress to make state courts the “primary fora” for denial of health care benefit claims, because these claims had “historically been governed by state tort law.” (See Report of the Proceedings of the Judicial Conference of the United States, March 14, 2000 at <http://www.uscourts.gov/judconf/00-mar.pdf>.) When Congress in 2001 attempted to expand access to courts for people claiming that they had been injured because their health insurance plan denied a benefit, the Conference again warned lawmakers against expanding

access to federal courts. The Conference “express[ed] concern with any provision in patients’ rights legislation that would create a new cause of action in federal court for personal injury claims arising from medically reviewable ... benefit decisions” and “encourage[d] Congress” to give state courts jurisdiction over suits forcing insurance companies to provide emergency benefits and ban removal of these suits to federal court. (*See* Report of the Proceedings of the Judicial Conference of the United States, September/October 2001 *at* <http://www.uscourts.gov/judconf/sept01proc.pdf>.) Similar extremely detailed recommendations regarding ERISA were contained in the 1995 Long Range Plan. (166 F.R.D. at 95-97)

In March 2002 the Conference decided to oppose Section 204 of the proposed Innocence Protection Act. The legislation provided that when an indigent defendant facing the death penalty instituted a habeas corpus proceeding in federal court, the court would not presume that the state court’s findings of fact were correct, nor would it refuse to consider a claim that the defendant had not raised in state court if the state did not provide the defendant with representation that met a specified national standard. The Conference’s Committee on Federal Jurisdiction (whose members are appointed, like all conference committee members, by the Chief Justice) decided that the legislation “raised serious federalism, resource, and practical concerns and threatened to unsettle existing habeas corpus requirements and therefore should be opposed.” The Judicial Conference agreed. (*See* Report of the Proceedings of the Judicial Conference of the United States, March 13, 2002 *at* <http://www.uscourts.gov/judconf/marc02proc.pdf>)

Again, this opposition was prefigured in Chief Justice Rehnquist’s 1996 year-end address. He gave high praise to Congress for moving in the opposite direction that year, by limiting access to federal courts in some habeas proceedings. He called the Antiterrorism and Effective Death Penalty Act of 1996 a “significant achievement” because it “restrict[s] access to the federal judiciary” in some cases, and “narrowed federal habeas corpus jurisdiction” in capital cases. (William H. Rehnquist, 1996 Year-End Report on the Federal Judiciary, *at* www.uscourts.gov/cj96.htm)

As Yale professor Judith Resnik has written, through the Judicial Conference, “The judiciary has entered the policymaking sphere, weighing in on a wide range of topics....Further, when the official policymaking organ for the institution speaks, the positions taken gain status and have, in fact, produced results. The judiciary has succeeded in altering the texts of certain statutes.” Chief Justice Rehnquist has also entered these debates directly, promoting his vision of federalism and access to courts in his annual “state of the judiciary” addresses, which have regularly denounced congressional decisions that provide federal causes of action to new litigants.

Wearing robes and presiding over Supreme Court sessions is just one part of the job of Chief Justice of the United States. Less well publicized, but no less important, are the Chief Justice’s roles as the principal spokesperson for the judiciary and chairman of the Judicial Conference. As explained above, the Chief Justice has significant power in these roles to advance his own policy preferences.

For a more detailed discussion of these topics, see *Judith Resnik, Constricting Remedies: The Rehnquist Judiciary, Congress and Federal Power*, 78 *Ind. L. J.* 223 (2003), and *Judith Resnik, The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*. 74 *S. Cal. L. Rev.* 269 (2000).

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