Justice William H. Rehnquist

A Key Fighter in Major Battles

By A. E. Dick Howard

Richard Nixon, who put him on the Supreme Court, had some trouble remembering his nominee's name, once he called him 'Renchburg.' Critics of the nomination however had little trouble remembering William H. Rehnquist's name. Delving into his political activities and philosophy, they were quick to condemn.

The minority report filed by members of the Senate Judiciary Committee declared that Rehnquist had 'failed to show a demonstrated commitment to fundamental human rights,' that he was 'outside the mainstream of American thought' and therefore should not be confirmed.

Once on the Court, Justice Rehnquist soon became known for his willingness to stake out a position in the strongest of terms. Within months of taking his seat, Rehnquist began arguing that the Court should confine its uses of the 14th Amendment by consulting the intent of its framers. Thus he argued, for example, against making alienage a "suspect classification" for the purposes of 14th Amendment review. *Sugarman v Dougall*, 413 U.S. 634 (1973).

Nor was Rehnquist deterred by finding himself the only dissenter in a case. For example, he was the sole dissenter when the Court overturned, on equal protection grounds, a Louisiana statute that denied unacknowledged illegitimate children recovery rights under a workers' compensation statute on their father's death. Here, as in the alienage case, Rehnquist found the majority's use of the 14th Amendment devoid of 'any historical or textual support.' *Weber v. Aetna Casualty & Surety*, 406 U.S. 164 (1972).

From his earliest days on the Court, Rehnquist has stirred strong reactions, especially among those who admire the

Justice Rehnquist and his clerks

work of the Warren Court. Four years after Rehnquist's arrival at the Court, David L. Shapiro, a Harvard professor, wrote an article in which he criticized the justice for, among other sins, "unwarranted deference to state institutions and 'tacit abandonment'" of evolving constitutional protections.

Fond regards

Yet, for all his detractors, perhaps no justice at the Court generates more genuine warmth and regard among both his colleagues and others who work at the Court. A former law clerk to Justice White describes Rehnquist as "the nicest person at the Court. Within a few weeks of the Term's commencement, Justice Rehnquist knew all the clerks by their first names." A justice says of him, "Bill has an exceptional mind. No member of the Court carries more constitutional law in his head than he does."

As one looks back over the nearly 15 years Rehnquist has been on the bench, the evidence mounts that he has become one of the most influential members of the Court. One of Rehnquist's colleagues suggests that one reason for Rehnquist's influence is the chief justice's inclination to assign him many of the important opinions.

Examples include the Iranian assets case, the decision rejecting an attack on all-male registration for the draft, and decisions limiting the reach of the *Miranda* doctrine and of the Fourth Amendment's prohibitions against unreasonable searches and seizures. Professor Owen Fiss and writer Charles Krauthammer have declared that there is a "vision" that informs the work of the Burger Court and that the "source of that vision" is Justice Rehnquist.

What are some of the qualities that William H. Rehnquist brings to his work as a justice of the Supreme Court? One is a powerful intellect. Sen. Edward M. Kennedy, an opponent of Rehnquist's confirmation, paid him the compliment (intending irony, no doubt) of being "a man with a quick, sharp intellect, who quotes Byron, Burke and Tennyson, who never splits an infinitive, who uses the subjunctive at least once in every speech."

Students of the Court's opinions see a good mind at work. Professor Shapiro calls Rehnquist "a man of considerable intellectual power and independence of mind. Those who work with Rehnquist at the Court recognize his intellectual qualities. A former law clerk to Justice Brennan comments that he found Rehnquist to be 'a fantastic writer, one who knows his own mind.'"

Consistent jurisprudence

Another key to Rehnquist's place on the Court is his well-formed jurisprudence. The Court during Rehnquist's time has not been noted for the coherence and consistency of its opinions. Sometimes judicial restraint seems to be the hallmark (as in refusing to use the equal protection clause to decree that states must correct imbalances in school financing between rich and poor school districts). Other times, judicial activism seems to be the order of the day (as in finding a right to privacy that includes a woman's decision to have an abortion). Often the decisions of the Burger Court have been characterized by shifting and unpredictable voting partners.

In a Court often given to ad hoc and pragmatic decisions, a justice of firm, focused views stands out. Just as Hugo L. Black fashioned a comprehensive jurisprudence in another era on the Court, so does Rehnquist have a set of precepts to steer his votes and opinions.

Central to Rehnquist's views is his objection to the kind of judicial activism often encompassed by the phrase, "the living Constitution." In a 1976 lecture, Rehnquist objected to the notion that "nonelected members of the federal judiciary may address themselves to a social

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problem simply because other branches of government have failed or refused to do so." For Rehnquist, such a freewheeling approach to constitutional law is incompatible with a democratic society.

"Original intent"

Fidelity to the "original intent" of the framers is a cornerstone of Rehnquist's constitutional interpretation. For Rehnquist, the Constitution's language is not infinitely elastic, to be shaped to the perceived needs of succeeding generations. Interviewed for this article, Rehnquist summed up his belief in the centrality of original intent as a search for "what the words they [the framers] used meant to them."

Thus Rehnquist has emphasized that the principal purpose of those who drafted and adopted the 14th Amendment was to prevent invidious discrimination on the basis of race. Hence, the Court has no warrant extending the reach of that Amendment to other problems without historical evidence that the framers meant to place them within the Amendment's compass.

Belief in the virtues of federalism is a *leitmotif* that runs consistently through Rehnquist's opinions. He invokes both historical and structural arguments to support the Court's protection of the prerogatives of the states. The structural argument is especially interesting, for it does not rely solely on the language of the Constitution. Rehnquist maintains that the "implicit ordering of relationships" within the federal system yields "tacit postulates" of federalism that are "as much ingrained in the fabric of the document as its express provisions."

One should not overemphasize the extent to which an "agenda" shapes the work of a justice, including Rehnquist. As he puts it, "This is basically a reactive job. You take what comes and do the best you can." Nevertheless, one cannot read his opinions or speeches and miss the force of ideas, of history, of a jurisprudence of judging that informs his work.

That being so, the question arises: what views and doctrines has Justice Rehnquist sought to have the Court adopt? And to what extent has he succeeded?

Federalism

Rehnquist's efforts to have the Court respect the values of federalism have produced a mixed scorecard. Recalling how a 1942 opinion dismissed the 10th Amendment as a mere "truism," Rehnquist has succeeded in making the issue of state autonomy a serious question on the

Court's agenda. The high water mark of this effort was *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the majority decided that Congress may not exercise its commerce power in such a way as to displace functions essential to the states' "separate and independent existence."

National League of Cities was a bold stroke, but subsequent events revealed that Rehnquist lacked the votes to give his 10th Amendment views firm grounding. In case after case after 1976, a majority of the justices rebuffed federalism attacks on acts of Congress. Then, in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), a majority of five justices ruled that if the states "as states" want protection they must look to Congress, not the courts. *National League of Cities* was overruled. In a brief dissent, Rehnquist made it clear that he hoped some day to see *Garcia*'s demise. But for the moment, at least, that decision represents a rebuff to his efforts to give genuine content to the 10th Amendment.

Justice Rehnquist also found himself in dissent when the Burger Court began making increasingly active use of the dormant commerce clause to strike down state regulations affecting commerce. When the Court in 1981 struck down an Iowa law largely banning 65-foot double trailers on its highways, Rehnquist complained that the Court's opinion "seriously intrudes upon the fundamental right of the states to pass laws to secure the safety of their citizens." *Kassel v. Consolidated Freightways*, 450 U.S. 662 (1981).

The Burger Court has been especially active in voiding state restraints on exports of a state's natural resources. In earlier cases, the Supreme Court had tended to sustain state preferences for local use of natural resources, but recent cases have struck down state restrictions on the export of such commodities as minnows, hydroelectric power and groundwater. Rehnquist would prefer a more deferential stance toward state policies, one that recognizes a state's "substantial interest" in preserving and regulating its resources.

Institutional reform

In line with his efforts to give local institutions breathing space in which to handle local problems, Rehnquist has sought to curb lower federal courts' equity powers in institutional reform litigation. Sometimes he has been successful, as in *Rizzo v. Goode*, 423 U.S. 362 (1976). There Rehnquist reversed a federal district court's order to the Philadelphia Police Department to submit a plan for dealing with complaints about police misconduct. Rehnquist rested his opinion squarely on considerations of federalism: the need to allow a local government agency to do its job without undue judicial interference.

In school desegregation cases, Rehnquist has had less success in curbing judicial power. Reviewing a district court order in Dayton, Ohio, Rehnquist ordered the case remanded in 1977 because of the disparity between the evidence of constitutional violations and the lower court's "sweeping remedy." *Dayton Board of Education v. Brinkman*, 433 U.S. 406.

Two years later, however, with two Ohio cases before the Court (one of them the same Dayton litigation), the majority took a generous view of lower courts' equity powers, affirming remedies that Rehnquist, in dissent, described as being "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system." *Columbus Board of Education v. Penick*, 443 U.S. 449.

Two of the great battlegrounds of constitutional law, especially during the Warren and Burger eras, have been the due process and equal protection clauses of the 14th Amendment. Rehnquist has sought to limit the Court's expansive use of the clauses, but with limited success. *Paul v. Davis*, 424 U.S. 693 (1976), is perhaps Rehnquist's most noted effort to curb the due process clause. There he held that an interest in reputation urged by the plaintiff (who had been named by the local police as an "active shoplifter" in flyers distributed to local merchants) was neither "liberty" nor "property" protected by the due process clause. And in *Kelley v. Johnson*, 425 U.S. 238 (1976), Rehnquist used a deferential standard of review to reject a policeman's challenge to his department's regulating the length and style of his hair.

Despite Rehnquist's efforts, however, substantive due process has prospered in the Burger Court. Dissenting in *Roe v Wade*, 410 U S 113 (1973), Rehnquist argued in vain that the 14th Amendment's drafters never intended to withdraw from the states the power to regulate abortions.

In a heated dissent from a 1977 decision invalidating New York restrictions on the sale and distribution of contraceptives to minors, Rehnquist thought it "not difficult" to imagine the reaction of the framers of the 14th Amendment if they could have lived to see "enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors." Rehnquist likewise has dissented from the Court's use of heightened due process review of laws affecting marriage and the family.

Sex discrimination

The Burger Court has been less fond of the equal protection clause than was the Warren Court. But in at least one notable area—gender discrimination—the Court in recent years has vastly expanded the opportunities for judicial intervention. In gender cases, Rehnquist has fought, in effect, a series of delaying actions. In *Craig v Boren*, 429 U S 190 (1976), Rehnquist, dissenting, argued for the application of the traditional rational basis test in reviewing allegations of gender discrimination, but the majority opted for a higher level of scrutiny.

Applying an "intermediate" level of review, Rehnquist has written opinions rejecting an attack on California's statutory rape law (punishing the male but not the female participant) and upholding a federal statute authorizing the president to require the draft registration of males but not females. Gender discrimination cases have separated Rehnquist from his conservative colleague Justice O'Connor, who in a 1982 opinion (from which Rehnquist dissented) shaped perhaps the Court's most rigorous gender discrimination language to date: *Mississippi University for Women v Hogan*, 458 U S 718.

In First Amendment cases, Rehnquist tried but failed to prevent the Court from bringing commercial speech under the Amendment's umbrella. Dissenting in *Virginia Pharmacy v Consumer Council*, 425 U S 748 (1976), Rehnquist complained that the decision elevated commercial intercourse "between a seller hawking his wares and a buyer seeking to strike a bargain" to the same plane as the "free marketplace of ideas."

In religion cases, Rehnquist has objected in strong terms to the Court's use of Thomas Jefferson's "misleading metaphor" to decree a wall of separation between church and state. Relying on his reading of the framers' intentions, Rehnquist argues that the Constitution does not require government to be neutral "as between religion and irreligion."

Rehnquist has left an unmistakable stamp on criminal justice cases. Hints dropped in early Rehnquist opinions for a good-faith exception to the exclusionary rule have taken root. Rehnquist has pushed successfully for other limitations on the rule's reach, such as the inevitable discovery and public safety exceptions that he spelled out in *New York v Quarles*, 467 U S 649 (1984). Similarly, he has been able in recent opinions to restrict the scope of *Miranda* requirements and the penalty for non-compliance. Rehnquist also has written opinions curtailing standing to assert exclusionary claims, such as the Court's 1978 decision that passengers in an automobile lack standing to challenge the search of a glove compartment. *Rakas v Illinois*, 439 U S 128 (1978).

Fourth Amendment

In Fourth Amendment cases, Rehnquist has expanded the scope of allowable searches by restricting the definition of what constitutes legitimate expectations of privacy or by balancing the privacy claim against societal or police efficiency interests. A central theme is deference to and a presumption of the validity of police actions. Illustrative Rehnquist opinions are *INS v Delgado*, 466 U S 210 (1984), holding that cordoning off a factory and interviewing workers is not a "seizure," and *Illinois v Gates*, 462 U S 213 (1983), abandoning the *Aguilar-Spinelli* test for assessing informants' tips for a more relaxed "totality of the circumstances" approach.

When prisoners have asked federal courts to intervene in prison administration, Rehnquist consistently has deferred to the discretion of prison administrators, writing a number of the Court's major opinions in this area. Similarly, in habeas corpus cases Rehnquist has taken a restrictive line. Rehnquist's major habeas corpus decision is *Wainwright v Sykes*, 433 U S 72 (1977), which instituted a "cause and prejudice" standard for failure to object during a state court trial, a standard that makes federal habeas more difficult to obtain. By limiting habeas availability to claims of guilt or innocence, Rehnquist seeks to promote the effective administration of justice, finality in criminal proceedings, and minimization of friction between state and federal courts.

Section 1983 has been the font of many claims that some justices, Rehnquist among them, consider picayune and meritless. Rehnquist has led the effort to curb the uses of 42 U S C §1983. In 1981, he found that the availability of an adequate state remedy foreclosed a Section 1983 cause of action. *Parratt v Taylor*, 451 U S 527. In 1986 he brought together a majority to hold that the mere negligence of a state official is not enough to sustain a Section 1983 action. *Daniels v Williams*, 106 S Ct 662.

A review of Justice Rehnquist's opinions reveals that no one on the Court writes with more style, force or assurance. It is hard to match Rehnquist's agility in shaping a record and marshaling arguments to reach a conclusion.

One is struck by the recurrence of certain basic themes. Prominent among these is federalism—a belief that federal intervention into the affairs of a state requires convincing justification and ought to be the exception to the rule. Other themes include an adherence to the framers' original intent, a skepticism about judges setting out to solve social problems, a deference to legislative judgments and to the political process, and a belief that judicial review ought to be kept well within defined bounds.

In each Supreme Court era, there have been justices who tended to shape the ground on which the issues were debated —Black and Frankfurter are examples. In the Burger Court, Justice Rehnquist has gone from being the "lone dissenter" to being a key fighter in many of the major battles. Sometimes he wins, sometimes he loses. But when the history of the present Court is written, Justice Rehnquist will be recognized as a catalyst to many of that tribunal's great struggles.