

Ronald Reagan Presidential Library Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Wallison, Peter: Files
Folder Title: Supreme Court/Rehnquist/Scalia
Press Clippings (3)
Box: OA 14287

To see more digitized collections visit:

<https://reaganlibrary.gov/archives/digital-library>

To see all Ronald Reagan Presidential Library inventories visit:

<https://reaganlibrary.gov/document-collection>

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: <https://reaganlibrary.gov/citing>

National Archives Catalogue: <https://catalog.archives.gov/>

Rehnquist, Scalia Hearings Set This Month

1289 By Howard Kurtz
Washington Post Staff Writer

Sen. Strom Thurmond (R-S.C.), the Judiciary Committee chairman, said yesterday that he will hold hearings on Chief Justice-designate William H. Rehnquist and Supreme Court nominee Antonin Scalia later this month and that he hopes both can be confirmed before the Senate recesses in mid-August.

The announcement drew an immediate protest from committee Democrats, who had been negotiating for more time to study records of President Reagan's nominees. They say the panel has not received the required evaluation reports from the FBI and the American Bar Association.

But Mark Goodin, a spokesman for Thurmond, said the senator "thinks there's enough time for everyone to do what they have to do. You're dealing with two nominees who have well-established records. He believes each of those nominees can be finished in a day. You're not dealing with unknown quantities."

Thurmond said he has scheduled committee hearings July 22-23 on Rehnquist, a Supreme Court associate justice, and July 29-30 on Scalia, a judge on the U.S. Court of Appeals here. In both cases, a second day of hearings would be held only if necessary.

Democratic committee aides said they generally have three weeks to study the FBI and ABA reports. In addition, they said, Rehnquist has not provided copies of all of his speeches on legal issues in response to a committee questionnaire. "We want to study this so-called well-known record," an aide said.

Thurmond made the announcement after rejecting a tentative staff compromise to begin the hearings a week later, worked out with aides to ranking Democrat Joseph R. Biden Jr. (Del.).

Scalia's Independent Past Suggests Future Surprises

By ROBERT L. JACKSON
and RONALD J. OSTROW,
Times Staff Writers

WASHINGTON—At a 1972 party at San Clemente, John Gavin, then president of the Screen Actors Guild, complained to President Richard M. Nixon that television reruns were siphoning income away from actors. He asked the President to do something about it.

Nixon's staff soon asked the Office of Telecommunications Policy, a piece of the White House bureaucracy, to order the Federal Communications Commission to intervene. But a hitch developed: Antonin Scalia, then Telecommunications Policy general counsel, said that such intervention would be illegal.

"You have to remember the times to appreciate what integrity that represented," a former OTP official said. "We were involved in a difficult Administration with a lot of politics flying around." The White House ultimately settled for ordering a study of the issue.

Now the same Antonin Scalia is President Reagan's nominee to the Supreme Court. And those who have worked both with him and against him agree that he remains today what he was in 1972: a staunch conservative with a deep respect for the law, no matter where it leads him.

Jack Fuller, a former colleague of Scalia at the Justice Department and now editorial page editor at the Chicago Tribune, said that Scalia may surprise those who expect a predictably conservative Supreme Court justice. Fuller looks for a continuing display of independence and integrity if, as expected, the Senate confirms Scalia to the Supreme Court.

Indeed, Scalia's personal qualities have held as constant as his conservative views throughout a career as a young lawyer in Cleveland, a high-ranking official of the Nixon and Gerald R. Ford administrations, a University of Chicago law professor and, finally, a federal appeals court judge in Washington.

At all stops, the 50-year-old Scalia has demonstrated an intense devotion to his work, tempered by wit and a gregarious nature. And, despite a family of nine children, he has shown a remarkable disregard for making a lot of money.

The son of a professor of Romance languages at Brooklyn College who had immigrated from Italy, Scalia received his undergraduate education at Georgetown University in Washington and got his law degree from Harvard University, where he was a magna cum laude graduate in 1960 and an editor of the Harvard Law Review.

As such, he drew the attention of some of the nation's top law firms and chose the blue-chip firm of Jones, Day, Reavis & Pogue in Cleveland, which has since become the country's second largest.

Richard W. Pogue, its managing partner, recalled in an interview that when Scalia first met other Jones-Day attorneys at a private home, the young Harvard graduate stayed up until 3 a.m. arguing with eight of them in defense of a law review note he had edited in support of blue laws.

'Loved to Debate'

"It never bothered Nino that everybody else was on the other side," Pogue said. "He always loved to debate. But even when you disagreed with him, you couldn't help but like him."

Scalia worked as an "inside lawyer" at Jones-Day, principally doing legal research to support litigators who were defending electrical equipment clients in civil antitrust suits. Because the firm had so many more experienced lawyers, he never appeared in court during his six years with the firm.

After four years as a law professor at the University of Virginia came Scalia's first tour in Washington. After stints in the Nixon White House and as chairman of the Administrative Conference of the United States, a federal inter-agency group on legal issues, he became assistant attorney general in charge of the Justice Department's Office of Legal Counsel in August, 1974. It was days after the Watergate scandal had forced Nixon from office and Ford became President.

The new job meant a salary cut of several thousand dollars. But associates said Scalia regarded this post, which is sometimes called "the attorney general's lawyer," as so significant and challenging that it was worth the cut in pay.

"He's never been one who cared a fig about making money," said Harold R. Tyler Jr., Scalia's former boss as deputy attorney general in 1975 and 1976.

At the Justice Department, Scalia did not have to wait long for a challenge. On his first day, said James A. Wilderotter, a former department colleague, "Nino reported for duty and said, 'What can I do?'"

Deputy Atty. Gen. Laurence H. Silberman, Scalia's new boss, replied without hesitation: "Tell us who owns the presidential tapes and papers." The ownership of Nixon's tapes, which helped establish his involvement in Watergate, was a particularly thorny issue left hanging by Watergate.

Made Tough Decision

Scalia concluded that the papers of previous presidents uniformly had been regarded as their personal property. Wilderotter said the conclusion established Scalia as "a guy who calls the shot as he sees it and refuses to take the easy way out."

"It was very gutsy," Wilderotter said. "It would have been much easier to join in kicking Nixon while he was down." Congress later passed a bill declaring the tapes public property.

As assistant attorney general, Scalia later served as the key drafter of the precedent-setting presidential order that established new restrictions on intelligence agencies.

Tyler recalled that Scalia worked on other difficult issues "on which reasonable men could differ," including whether Congress could write legislation allowing either the Senate or the House to veto a presidential action. Tyler said that Scalia's "valiant work on

this issue succeeded in mollifying and, in some cases, actually persuading members of Congress" that such veto power would infringe on the constitutional powers of the President.

As with the issue of presidential papers, Scalia's arguments opposing one-House veto power were unpopular in Congress, which sought to rein in the presidential excesses disclosed by the Watergate scandal. But Tyler noted that Scalia's views were later vindicated by the Supreme Court.

he was "unrelenting on preparation. You had to work hard to keep from being humiliated. He would call on you whether you were ready or not. It was frightening."

Now a member of the law faculty herself, Becker recalls vividly Scalia's "constant interplay with the students. I thought he was a good teacher, and I've adopted his style somewhat. But I try never to do it in such a scary way."

Scalia's former colleagues on the law school staff recalled that same intensity of purpose, punctuated

the private school tuition costs for the children of its faculty members. Scalia then had seven pre-college children in Catholic schools. To accommodate his large family, he and his wife, Maureen, bought and renovated an old fraternity house three blocks from the campus.

Although Scalia seemed much at home at the largely conservative law school, his colleagues were not surprised when he returned to Washington in 1982 to accept President Reagan's appointment to the U.S. Court of Appeals for the District of Columbia.

Richard A. Epstein, a friend on the Chicago faculty, said: "You knew he was not one to wait 25 years for a gold watch. His heart was in public affairs. He always wanted to be a judge."

On the appellate court, Scalia gained a reputation as a hard-working jurist who pored over the draft opinions of his colleagues and filled the margins with suggested changes. In line with Reagan Administration thinking, he generally has espoused strict limits on the powers of the federal government.

"I've often disagreed with Nino, but he's no ideologue," said a Scalia colleague on the appellate court who requested anonymity. "He forms his views only after great study. And no one is more congenial to work with."

Robert L. Jackson reported from Cleveland and Chicago and Ronald J. Ostrow reported from Washington.

Scalia seemed at home at law school, but one friend said he had always wanted to be a judge.

"I always admired him for his amiability," Tyler added. Although Scalia was a tenacious advocate of any position he adopted, Tyler said, he also "listened well" and won the respect of colleagues who disagreed with him.

After the Ford Administration, Scalia taught law for five years at the University of Chicago, where he is remembered as a demanding teacher whose intellectual intensity and Socratic methods scared the wits out of some of his students.

Mary E. Becker, one of 165 students in Scalia's first-year contracts class, recalled recently that

with a wry sense of humor and a twinkle in his eyes. And Scalia enjoyed the relaxation of monthly poker games with other faculty members.

"He'd always wear a beat-up old fishing hat—as if it were a symbol of his night out with the boys," said Prof. Geoffrey R. Stone. "They were nickel-and-dime games, so the stakes were not important. And there was no shop talk."

Scalia told associates that aside from the law school's reputation for excellence, he had been attracted by the University of Chicago's generous practice of paying half

Rex E. Lee

It Is The President's Court 128p

On June 17 President Reagan announced his intent to nominate Justice William Rehnquist as the 17th chief justice of the United States and Judge Antonin Scalia to take his place as associate justice. By all traditional measurements, both are superbly qualified.

No one has contended otherwise. There appears to be unanimous agreement that both nominees have the qualities of intellect, integrity and temperament necessary for service on the Supreme Court.

Nevertheless, several commentators have urged the Senate to scrutinize these nominees carefully because of the possible effect their substantive views might have on constitutional issues the court will consider during their tenure. See, for example, the Post articles by Richard Cohen ["Judges Beyond Judgment," op-ed, June 20] and Suzanna Sherry ["It's Not the President's Court," op-ed, June 26]. The plain implication is that the Senate should reject them on this ground. We are told that if it is proper for the president to consider ideology in exercising his constitutional power of appointment, it is just as proper for the Senate to do the same in deciding whether to confirm.

I believe this argument misses the mark.

Both the president and the Senate have a responsibility to consider the competence, integrity and temperament of a nominee. By contrast, the right to prefer one philosophical point of view must rest either with the president or the Senate, but not both. The only time the issue really matters is when the president has one philosophical preference and the Senate another. Because their choices differ, one or the other must yield. Otherwise, the potential for perpetual impasse would be built into our appointment/confirmation scheme.

Both the constitutional language and common sense convince me that the right to choose based on substantive views must rest with the president rather than the Senate. The Constitution expressly places the appoint-

Taking Exception

ment power in the president. The power to appoint includes the power to choose, to differentiate, to decide whether one candidate is preferable to another. Confirmation, by contrast, does not include the right to decide which of all possible candidates is preferable to the others, but only to pass on the qualifications of the person nominated.

In addition, leaving the appointment power where the Constitution puts it makes the whole process more responsible because accountability for appointments is located in one individual, rather than being spread over 100. The president, unlike the members of the Senate, is elected by a nationwide constituency. The only real opportunity the voters have to affect the federal judiciary is through their choice of a president. He alone appoints judges. By contrast, when we vote for a senator, we select one person out of 100 who will vote to confirm or reject the president's appointments.

Refusal to confirm for philosophical reasons must therefore be reserved for extreme cases—where the nominee holds positions outside the wide range of reasonable constitutional views. It cannot be exercised because the Senate, if it had the power to do so, would have appointed someone else. But the extreme-case exception is inapplicable here, because there is no suggestion, nor could there be, that either Justice Rehnquist or Judge Scalia presents such a case.

I have to ask this question of those who disagree with me: assume that we could turn back the clock to the late 1930s when President Roosevelt nominated Justices Hugo Black and William Douglas or the 1950s when President Eisenhower nominated Chief Justice Earl Warren. Assume further that you were there and were prescient enough to know the enormous impact those appointments would have on constitutional precedents. Would you have urged the senators of those days who would have disagreed with those results to vote against confirmation for that reason?

The whole issue really comes down to a simple unhappiness that these appointments are being made by Ronald Reagan. There is an accompanying refusal to accept either the constitutional provision vesting the appointment power in the president or the results of the 1984 election.

When the voters select a president, they do more than choose the person who can veto Congress' bills, give State of the Union messages and command Air Force One. The selection of Supreme Court appointees is among the most important decisions a president will make. I understand the disappointment of those who wish that Walter Mondale were making these appointments. But that question, whether sorrow over Supreme Court nominations was to be endured by them or by me, was settled on Nov. 6, 1984.

The writer was solicitor general from 1981 to 1985.

Suzanna Sherry 1284

It's Not the President's Court

With the nominations of William Rehnquist as the next chief justice and Antonin Scalia as associate justice, there has been much talk of the role of ideology in Supreme Court appointments. Most of that discussion has correctly assumed that the president has the right—or even the duty—to nominate judges on the basis of ideological compatibility.

What is disturbing, however, is the implicit or explicit rejection of the corollary proposition: that the Senate should also consider ideology in its confirmation process. Sen. Orrin Hatch, for example, said that it “would be a disgrace to fight [Rehnquist and Scalia] on ideological purposes.” Unnamed Democrats also conceded (according to a report in *The Post*) “the president’s prerogatives to select whomever he wished,” subject only to a “fair but thorough confirmation process.”

Thus those who will act on the nominations seem to believe that it is the president’s job to select Supreme Court justices on the basis of ideology and the Senate’s job to screen the nominees only on the basis of qualifications.

This one-sided view of the role of ideology in the appointment of Supreme Court justices is based on a misperception of the entire structure of the Constitution. To reject the Senate’s ideological role in choosing Supreme Court justices is to set at naught the Framers’ ingenious system of checks and balances.

Wholly trusting neither the executive nor the legislature, the Framers carefully constructed a Constitution that requires the joint action of both to achieve any significant governmental action. No laws may be enacted, no treaties implemented, no judges appointed, without the concurrence of members of both branches.

Even slight deviations from this scheme are not tolerated. Illustrations of the primacy of legislative and executive interdependence in our constitutional scheme include the court’s recent invalidation of the legislative veto device (with Justice Rehnquist dissenting on unrelated grounds), and the court’s expected invalidation of portions of the Gramm-Rudman Act.

It is ironic that a judge who played a major role in invalidating Gramm-Rudman and a justice who consistently purports to be guided solely by the intent of the Framers are the central focus of a philosophy that so ignores these principles.

Both history and precedent mandate the maintenance of the constitutional balance of power: the Senate, no less than the president, should consider ideology in deciding whether to confirm the two nominees.

There is a standard response to any argument that the Senate, too, must consider the nominee’s ideological fitness for office. It is to suggest, with appropriate historical illustrations (the favorites are Chief Justice Earl Warren and Justices Hugo

Black and William Brennan) that it is impossible to predict how a judge’s philosophy will evolve once he or she has been on the bench for some time.

Once the constitutional guarantee of lifetime tenure removes the political and other pressures that might otherwise influence the nominee’s political development, the new justice has the freedom to grow and change intellectually and politically, and thus the potential to surprise or disappoint the president ideologically. This evolutionary process is thought to be a natural check on a president’s ability to “stack” the court ideologically, obviating any need for the Senate to examine anything except the intellectual and legal qualifications of the nominee. Justice Rehnquist himself has espoused this view.

This is not a reliable check on the president’s power, however, and a look at Rehnquist and Scalia offers a good example of why. With both of these nominees, there is little or no chance of the sort of unpredictable intellectual development cited, since both have been insulated from political pressures for many years. Rehnquist has been on the high court for over a decade; it is highly unlikely that elevation to chief justice will change his political philosophy in any significant respect. While Scalia has not been on the federal bench for as long, his lengthy tenure as a professor at various law schools has similarly enabled him to develop a political philosophy free from ordinary political constraints.

By contrast, Chief Justice Warren was governor of California at the time of his appointment to the court. Justice Black was a U.S. senator, and Justice Brennan was sitting on a state court. All three had thus been subject to considerably more political pressure than a life-tenured federal judge or a life-tenured law professor.

Those who are encouraging the Senate to focus solely on *qualifications* of judicial nominees are suggesting that the president alone should have the power to shape the politics of the Supreme Court for years to come. Undermining the constitutional balance of power in this way would be dangerous enough in the context of treaties or ambassadors. In the context of the Supreme Court it would be disastrous, because the court, unlike treaties and ambassadors, has its own role in maintaining the constitutional balance: the practice of judicial review guarantees that without the concurrence of the Supreme Court, even the legislature and executive working together cannot prevail.

To allow one branch of this precisely balanced trio to have undue influence on another is to shake the very foundations of our republic.

The writer is an associate professor of law at the University of Minnesota.

ABROAD AT HOME | Anthony Lewis

278 / 128P

The Court: Rehnquist

BOSTON
 By the standards of the world Americans enjoy extraordinary freedom. We do, I believe, in good part because of the institution of the Supreme Court. Through the strains of our turbulent history the Court has given concrete meaning to the Constitution's promises of liberty, its provisions against concentrated official power.

Those of us who revere the Supreme Court and its role in keeping our society so free have to face some unwelcome realities now. President Reagan's two appointments are intended to change the Court's role, and they may well go a long way toward that end. It is best to face the fact, philosophically but without illusion.

The choice of Justice William H. Rehnquist to be the Chief Justice is the perfect symbol of the President's design. In his years on the Court Justice Rehnquist has single-mindedly pursued a vision very different from the broad consensus: a vision of judges doing little or nothing to restrain official power or protect individuals.

Justice Rehnquist is not a ogre. To the contrary, as many of the stories about his proposed promotion have said, he is personally charming and witty. But what matters is that he is a judge with a program.

He is often called "conservative," but that word gets him wrong. Judicial conservatives are, or were, supposed to have a particular respect for precedent and process. Justice Rehnquist is quite ready to brush all that aside to reach the result he wants. He is an extreme example of what the commentators call "result-oriented."

The late John Marshall Harlan was a great conservative Justice in the old sense: respectful of the past, sensi-

Mr. Reagan's instinct for the extreme

tive to the conflicting interests so often at stake in the Supreme Court, ready to follow the law and the facts to results he might not personally desire. He was therefore not a predictable Justice. Justice Rehnquist may be the most predictable since James Clark McReynolds retired in 1941.

Another word whose meaning Justice Rehnquist tests is "activist." It is an epithet thrown at judges who define the Constitution expansively to protect individual liberties. But in terms of a willingness to override precedent, to reshape constitutional traditions in radical ways, no one could be more "activist" than William Rehnquist.

It is no disrespect to Justice Rehnquist to say that such a loner, a judge so often out at the edge of the Court, is a curious choice to be Chief Justice of the United States. Historically, at least, one thinks of Chief Justices being chosen in the hope that they would ameliorate differences and bring the Court together.

The appointment reflects Ronald Reagan's instinct for the extreme. The President's temperament is genial. But his method has been to set out hard ideological goals — on taxation, say, or arms control — and not care about how he offends the consensus.

Applying the Reagan method to the Supreme Court is another thing. Undoing constitutional understandings long

accepted as part of the social fabric carries special dangers. So would drastic limitation of the Court's role as the protector of American liberties.

A Supreme Court remodeled in President Reagan's vision could give us a different country: one in which our freedoms were less secure, official power less restrained. The nominations of Justice Rehnquist and Judge Antonin Scalia thus pose a hard test for senators of liberal conscience.

Presidential appointment is the constitutional device that links the Supreme Court — judges who may serve for life — with the democratic system. Accidents of timing have great effect, of course. But in a rough way changes in the political climate of the country make themselves felt on the Court through the appointing process.

Justice Rehnquist and Judge Scalia are amply qualified in terms of intellect and legal skills. (The contrast with President Reagan's insultingly unqualified nominee to the Seventh Circuit Court of Appeals, Daniel Manion, is striking.) Yes, senators have historically considered ideology in voting on Supreme Court nominees. But Presidents generally have a degree of latitude — and by all signs this one will.

There is only this consolation: In my view, at least, the American public will not be happy with a Supreme Court reconstructed in President Reagan's image. Justice Robert H. Jackson, for whom William Rehnquist clerked, was a skeptic about judicial power. But he wrote in 1954:

"The people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate and trustworthy custodian that our system affords for the translation of abstract into concrete constitutional commands." □

Has Reagan Got the Court He Wants?

128P

By STUART TAYLOR Jr.

WASHINGTON

IN the heat of the 1984 Presidential campaign, Justice William H. Rehnquist gave a speech entitled "Presidential Appointments to the Supreme Court." It is natural and proper, he said, for a President to seek to shape the course of the law by naming Justices "sympathetic to his political or philosophical principles." But, he added, the effort "is apt to be only partially successful."

If President Reagan is only partially successful in reversing the direction of the Federal courts, it will not be for lack of trying. In selecting Justice Rehnquist to succeed the retiring Chief Justice, Warren E. Burger, and Judge Antonin Scalia to join the Supreme Court, Mr. Reagan has named men of impressive talents and appealing personalities whose records on the bench seem totally compatible with the Administration's views.

On issues including abortion, affirmative action, school prayer, busing, Presidential powers, the death penalty, obscenity, crime and civil liberties, Justice Rehnquist has been the Court's most conservative member since he was confirmed in 1972. Judge Scalia has been equally consistent, as a law professor and since Mr. Reagan made him an appellate judge in Washington in 1982.

At least one more appointment would be needed to produce a dramatic change in the Court's moderate course — in particular to restrict abortion rights. But Justice Rehnquist's ability to persuade colleagues in close cases will be enhanced by his new position. And he and Judge Scalia are both graceful writers with the intellectual firepower to plant seeds of legal change even in dissent. Justice Rehnquist delights in the barbed epigram. Judge Scalia's writing blends analytical rigor with visceral intensity.

A standard cliché about the Supreme Court — that a President has no way of telling what an appointee will do once ensconced in a lifetime job — is at least partly myth. In this respect, the choices of Justice Rehnquist and Judge Scalia are in instructive contrast with President Eisenhower's 1953 appointment of Chief Justice Earl Warren and, to a lesser degree, with Mr. Reagan's 1981 appointment of Justice Sandra Day O'Connor. Chief Justice Warren horrified Mr. Eisenhower with liberal rulings on criminal law and civil rights; Justice O'Connor has turned out to be a more moderate conservative than Justice Rehnquist, going against the Administration on some major issues, including school prayer.

But ideological purity was not the primary criterion in those selections. Mr. Eisenhower had earlier promised the job to then-Governor Warren of California, a man of national stature. Mr. Reagan was fulfilling a campaign pledge to name the first woman Justice.

In the cases of Justice Rehnquist and Judge Scalia, however, Attorney General Edwin Meese 3d is at the helm of an activist Justice Department bent on moving the courts to the right. In his radio address yesterday, Mr. Reagan said his Supreme Court nominees were "representative of the high caliber of our Federal court appointments." He also urged the Senate to confirm his stalled nomination of Daniel A. Manion for a Federal appellate judgeship, assailing opponents for partisanship. "I believe the Senate should consider only a nominee's qualifications and character, not his political views," Mr. Reagan said.

But many Democrats and some Republicans say Mr. Reagan is not practicing what he preaches. An increasingly single-minded Administration drive to put conservative ideologues on the bench, they say, has produced some lower court candidates notable less for their legal professionalism than for their extremism or racial insensitivity — though Justice Rehnquist and Judge Scalia seem immune to such charges.

The point of Justice Rehnquist's 1984 speech was less that people change once named to the Court — although some have — than that even Presidents and judicial nominees who agree on the current issues of importance lack "the foresight to see what the great issues of 10 or 15 years hence are to be." President Roosevelt, he said, sought and got Justices who would stop the Court from striking down the New Deal, but a few years later, when civil liberties issues became central, the Roosevelt Court

The Justices of the Supreme Court

	Appointment		Present age
	Year	President	
William J. Brennan Jr.	1956	Eisenhower	80
Byron R. White	1962	Kennedy	69
Thurgood Marshall	1967	Johnson	77
Warren E. Burger*	1969	Nixon	78
Harry A. Blackmun	1970	Nixon	77
Lewis F. Powell Jr.	1971	Nixon	78
William H. Rehnquist	1971	Nixon	61
John Paul Stevens	1975	Ford	66
Sandra Day O'Connor	1981	Reagan	56
Antonin Scalia**	1986	Reagan	50

* Retiring

** Nominated last week

"was rent asunder in rancorous squabbling."

A dominant conservative bloc on a future Court might, for example, have to sort out the tension between conservatives' professed devotion to judicial restraint — which would mean an end to what Judge Scalia as recently as Friday called "judicial intrusion into the business of the political branches" — and the urge to strike down economic regulations offensive to their free-market philosophy. Such a conflict, Justice Scalia has said, "presents the moment of truth for many conservatives who have been criticizing the courts in recent years."

President Makes Push For Judges

Manion Gets Support; Opposition in Senate Is Called 'Partisan'

11284
1237 By Spencer Rich
Washington Post Staff Writer

President Reagan urged the Senate yesterday to confirm embattled conservative Daniel A. Manion as a judge of the 7th U.S. Circuit Court of Appeals, and accused Senate Democrats of engineering the defeat of some of his judicial and legal nominees merely because they were conservatives.

The president also called for Senate confirmation of William H. Rehnquist as chief justice and Antonin Scalia, an appeals court judge, as an associate Supreme Court justice. Both are considered strong conservatives.

In his weekly radio address from Camp David, the president accused the Democrats of "partisan use of the confirmation process." The address was a sharp counterattack to a surprisingly successful Democratic effort to thwart Reagan's efforts to reshape the judiciary in a conservative mold.

"The real objection to Dan Manion is that he doesn't conform to the liberal ideology of senators," declared the president, saying he had "sent a letter to the Senate expressing my strong opinion about the prerogative of the president to make qualified appointments to the federal judiciary."

A copy of that letter was released by Senate Majority Leader Robert J. Dole (R-Kan.), according to United Press International. Reagan is reported to have said, "Dan Manion's political views are close to my political views. In particular, Dan Manion's belief that federal judges should interpret the law and not impose from the bench their social or philosophical notions upon society, is my belief. That is the real reason this nomination is encountering such hostility."

But Sen. Paul Simon (D-Ill.) said in a statement, "There is a marked decline in the quality of these appointments . . . and that is the issue in the Manion nomination."

The stakes in the dispute are larger than Manion's nomination, which is expected to reach a Senate vote this week or next.

In the past year, Senate Democrats and some Republicans such as Charles McC. Mathias Jr. (Md.) and Arlen Specter (Pa.), backed by a coalition of liberal, civil rights and civil

liberties organizations, have blocked a number of important nominations. They killed the nomination of administration civil rights chief William Bradford Reynolds to be associate attorney general and of Jeffrey I. Zuckerman to be general counsel of the Equal Employment Opportunity Commission. Also rejected was Jefferson Beauregard Sessions III as a federal judge.

In the Judiciary Committee, the Manion nomination failed to win approval on a 9-to-9 vote, and thus goes to the floor without a favorable committee recommendation.

Opponents coupled allegations of extreme right-wing views or insensitivity on racial matters with charges of lack of judicial temperament or legal distinction. Sens. Joseph R. Biden Jr. (Del.), Edward M. Kennedy (Mass.) and Howard M. Metzenbaum (Ohio) have been among Democrats opposing Manion and some of the other nominations.

Administration officials are said to think that Democrats have found a formula in these charges for their effort to thwart Reagan's attempts to remake the federal judiciary and legal agencies. They are said to believe that a counterattack was needed to prevent further trouble

on nominations. A White House spokesman agreed yesterday that the president's remarks on Manion should be interpreted as the start of a counterattack.

At a Senate Judiciary Committee hearing April 30, Democrats questioned whether Manion held such extreme right-wing views that he should not sit on the federal bench.

They cited Manion's sponsorship as an Indiana state senator of a bill to allow the Ten Commandments to be posted in the public schools two months after the Supreme Court ruled that such postings are unconstitutional, and 1971 statements urging that the Supreme Court be stripped of some of its jurisdiction and declaring that antiwar demonstrators "should be penned up."

Democrats also questioned whether his legal background in a small South Bend law practice was adequate to qualify him to sit on a federal appeals court. Manion has been strongly defended, however, by Indiana's two senators, Dan Quayle (R) and Richard G. Lugar (R).

Reagan said he is trying to name "tough, responsible judges" because "the scales of justice have become seriously unbalanced" and it is "difficult to convict criminals."

David S. Broder

252/1289

Finally the Reagan Stamp

With his Supreme Court parlay last week, President Reagan wins the George Washington Plunkett memorial trophy for 1986. It was Plunkett, the Tammany boss, who said he would like as his epitaph: "He seen his opportunities and he took 'em."

When Chief Justice Warren Burger decided—as he tells it—to resign from his judicial post so he could prepare for the 1987 celebration of the bicentennial of the Constitution, Reagan did not waste any time pleading that he reconsider.

He met briefly with Justice William Rehnquist—the man his advisers had suggested he elevate to Burger's post—and then with Appeals Court Judge Antonin Scalia, the brain trust's choice for Rehnquist's Supreme Court seat. By the end of each meeting, the job had been offered and accepted.

Thus, in two hours of pleasant conversation, the president had done as much to reshape the future laws of this nation as six years of battling with Congress have accomplished in redirecting fiscal policy.

With Rehnquist, 61, and Scalia, 50, Reagan likely has steered the course of jurisprudence along his chosen conservative channel for the next two decades or more. By elevating two judges of commanding intellect and considerable personal charm, he has denied his political critics any plausible grounds for denying them confirmation.

Presidents have always been eager to put their stamp on the Supreme Court, as University of Virginia political scientist David M. O'Brien demonstrates in "Storm Center: The Supreme Court in American Politics," nicely timed for publication later this month. The appointment and confirmation of Supreme Court justices have always been intensely political matters. They must be, given the crucial role of the high court in our system of government.

O'Brien quotes none other than Rehnquist as arguing in a 1984 speech that there is "no reason in the world why a president should not 'pack' the court," if you mean by that appointing "people to the court who are sympathetic to his political and philosophical principles."

So far as appointments go, Reagan is a bit behind schedule. Over the long span of American history, Supreme Court vacancies have come up on an average of once every 22 months. There are no guarantees, however. Jimmy Carter, luckless as ever, got none. Reagan has had only two in 65 months, and this last one was at least a bit contrived in its timing.

It has been common knowledge in Washington that Burger, now 78, intended to step down as Chief Justice in order to let Reagan name a younger successor to that vital post. An active and intense Republican partisan in his earlier years, Burger—who had benefited from the judicial patronage of Dwight D. Eisenhower and Richard M. Nixon—was certainly not going to frustrate the only other Republican to win the White House in more than 50 years.

My guess was that he would preside over

the Constitution's big birthday next year while still wearing judicial robes, and then step down. But he may have been prompted to advance his resignation date by fears that the Democrats will take over control of the Senate this November. If the Supreme Court of Mr. Dooley's day could be said to "follow the election returns," then why should today's high court not monitor the public opinion polls? And those polls increasingly say the Democrats may recapture the Senate.

O'Brien says that of 26 Supreme Court nominees refused confirmation, only two "suffered defeat because of mediocre judicial records and lack of professional qualifications." The other 24 "have fallen prey to partisan politics, either because of the nominee's political views or because the Senate wanted to deny 'lame duck' Presidents appointments to the Supreme Court."

The political talk in town holds that a highly conservative justice, such as Reagan would prefer, might not be confirmable by a Democratic Senate. I'm not sure that's correct. If the Democrats come back, their margin will be narrow, probably skimpier than the present Republican advantage.

Should Reagan offer them any of a half-dozen well-qualified conservative jurists with experience on state or federal benches, it might be tough for the Democrats to turn him or her down. It would at least be politically risky; I can certainly see Republicans making an issue of such a vote in the 1988 campaign.

The vital question is whether Reagan will get an opportunity to appoint another justice or two to make the conservative bloc the court's majority. Justices William Brennan Jr. and Thurgood Marshall, the staunchest liberals on the court, are 80 and 77 respectively. Two others in the moderate center, Harry Blackmun and Lewis Powell Jr., are 77 and 78.

History and the actuarial tables favor Reagan's making another appointment. And last week's nominations make it clear that, like Plunkett of Tammany, he will know what to do with the opportunity.

President Makes Push For Judges

Manion Gets Support; Opposition in Senate Is Called 'Partisan'

11284
1234

By Spencer Rich
Washington Post Staff Writer

President Reagan urged the Senate yesterday to confirm embattled conservative Daniel A. Manion as a judge of the 7th U.S. Circuit Court of Appeals, and accused Senate Democrats of engineering the defeat of some of his judicial and legal nominees merely because they were conservatives.

The president also called for Senate confirmation of William H. Rehnquist as chief justice and Antonin Scalia, an appeals court judge, as an associate Supreme Court justice. Both are considered strong conservatives.

In his weekly radio address from Camp David, the president accused the Democrats of "partisan use of the confirmation process." The address was a sharp counterattack to a surprisingly successful Democratic effort to thwart Reagan's efforts to reshape the judiciary in a conservative mold.

"The real objection to Dan Manion is that he doesn't conform to the liberal ideology of senators," declared the president, saying he had "sent a letter to the Senate expressing my strong opinion about the prerogative of the president to make qualified appointments to the federal judiciary."

A copy of that letter was released by Senate Majority Leader Robert J. Dole (R-Kan.), according to United Press International. Reagan is reported to have said, "Dan Manion's political views are close to my political views. In particular, Dan Manion's belief that federal judges should interpret the law and not impose from the bench their social or philosophical notions upon society, is my belief. That is the real reason this nomination is encountering such hostility."

But Sen. Paul Simon (D-Ill.) said in a statement, "There is a marked decline in the quality of these appointments . . . and that is the issue in the Manion nomination."

The stakes in the dispute are larger than Manion's nomination, which is expected to reach a Senate vote this week or next.

In the past year, Senate Democrats and some Republicans such as Charles McC. Mathias Jr. (Md.) and Arlen Specter (Pa.), backed by a coalition of liberal, civil rights and civil

liberties organizations, have blocked a number of important nominations. They killed the nomination of administration civil rights chief William Bradford Reynolds to be associate attorney general and of Jeffrey I. Zuckerman to be general counsel of the Equal Employment Opportunity Commission. Also rejected was Jefferson Beauregard Sessions III as a federal judge.

In the Judiciary Committee, the Manion nomination failed to win approval on a 9-to-9 vote, and thus goes to the floor without a favorable committee recommendation.

Opponents coupled allegations of extreme right-wing views or insensitivity on racial matters with charges of lack of judicial temperament or legal distinction. Sens. Joseph R. Biden Jr. (Del.), Edward M. Kennedy (Mass.) and Howard M. Metzenbaum (Ohio) have been among Democrats opposing Manion and some of the other nominations.

Administration officials are said to think that Democrats have found a formula in these charges for their effort to thwart Reagan's attempts to remake the federal judiciary and legal agencies. They are said to believe that a counterattack was needed to prevent further trouble

on nominations. A White House spokesman agreed yesterday that the president's remarks on Manion should be interpreted as the start of a counterattack.

At a Senate Judiciary Committee hearing April 30, Democrats questioned whether Manion held such extreme right-wing views that he should not sit on the federal bench.

They cited Manion's sponsorship as an Indiana state senator of a bill to allow the Ten Commandments to be posted in the public schools two months after the Supreme Court ruled that such postings are unconstitutional, and 1971 statements urging that the Supreme Court be stripped of some of its jurisdiction and declaring that antiwar demonstrators "should be penned up."

Democrats also questioned whether his legal background in a small South Bend law practice was adequate to qualify him to sit on a federal appeals court. Manion has been strongly defended, however, by Indiana's two senators, Dan Quayle (R) and Richard G. Lugar (R).

Reagan said he is trying to name "tough, responsible judges" because "the scales of justice have become seriously unbalanced" and it is "difficult to convict criminals."

Ideological Battle Over Judiciary Escalates in Senate

Reagan Assails Foes of Appeals Nominee

By PAUL HOUSTON, Times Staff Writer

128 p/1238

WASHINGTON—President Reagan, girding for an ideological battle over his judicial nominees, Saturday trumpeted the "high caliber" of two new Supreme Court choices and denounced "partisanship" in the Senate as a threat to approval of an appeals court nominee.

Reagan went on the offensive in his weekly radio talk after Democrats and some liberal Republicans had killed one nomination, jeopardized another and vowed to look even more closely at future nominees in the face of the President's moves last Tuesday to give the Supreme Court added conservative firepower.

The President praised Supreme Court Justice William H. Rehnquist, whom he has nominated for chief justice, as "a consistent model of fairness and an articulate spokesman for straightforward interpretations of the Constitution."

Praises Scalia's Talent

And he described Antonin Scalia, whom he has proposed for the vacancy created by the departure of Chief Justice Warren E. Burger, as "one of our most gifted legal minds." Scalia serves on the U.S. Circuit Court of Appeals for the District of Columbia.

But Reagan devoted most of his five-minute broadcast to urging Senate approval this week of Daniel A. Manion, a conservative former Indiana state senator nominated by Reagan for the U.S. 7th Circuit Court of Appeals in Chicago.

Reagan, hailing Manion for "a sense of fairness and justice . . . above reproach," protested that he is being subjected to "partisanship in the Senate (that) has pushed fair play by the boards."

Despite the charge of partisanship, two members of Reagan's own party cast key votes against Manion in the Senate Judiciary Committee.

Nomination in Trouble

In a heated session May 8, the committee rejected Manion's nomination on a 9-9 tie, with Sens. Arlen Specter (R-Pa.) and Charles McC. Mathias Jr. (R-Md.) voting with seven of the panel's eight Democrats against the nomination.

The committee then voted 11 to 6 to send the nomination to the Senate floor without a recommendation, making confirmation still possible, albeit difficult.

In support of Manion, Reagan said the American Bar Assn. "has declared him fully qualified to be a federal judge" and that he has the strong endorsement of Father Theodore M. Hesburgh, president of the University of Notre Dame, where Manion was an undergraduate.

Actually, the ABA screening panel gave Manion, an attorney in South Bend, a "qualified" rating, its lowest passing grade, with an unspecified minority calling him not qualified.

Reagan also said that opponents, in their all-out bid to block the nomination, had "even tried to make a major issue of a few typographical errors in several of his briefs and the fact that he practices law in a small town."

Several Democrats have charged that briefs written by Manion are flawed by numerous typographical and syntactical errors.

Reagan said it was clear that "the real objection" to Manion, the son of a longtime John Birch Society leader, was that "he doesn't conform to the liberal ideology of some senators."

The President said one unnamed senator had told Manion at his confirmation hearing that he was "decent and honorable" but unacceptable for the judgeship "because of your political views." Reagan commented that the Senate "should consider only a nominee's qualifications and character, not his political views."

Senator Replies to Reagan

Sen. Paul Simon (D-Ill.), leader of the opposition to Manion, said in reaction to Reagan's attack: "There is a marked decline in the quality of these (appellate court) appointments under Atty. Gen. (Edwin) Meese. . . . If the White House had shown the same attention to quality in these nominations that it has to Supreme Court candidates, there would be no showdown in the Senate on the Manion case."

In a letter to Senate colleagues, Democrats Joseph R. Biden Jr. of

Delaware, Edward M. Kennedy of Massachusetts, Howard M. Metzenbaum of Ohio and Patrick J. Leahy of Vermont said they oppose Manion because he has an "undistinguished legal career" and "cavalierly disregarded his oath of office to uphold the Constitution."

They cited Manion's 1981 sponsorship of a bill in the Indiana Legislature to allow posting the Ten Commandments in public schools, although the Supreme Court two months earlier had ruled that to be unconstitutional.

In his radio talk, Reagan did not mention the Judiciary Committee's bipartisan rejection June 5 of the nomination of Jefferson B. Sessions III to be a federal District Court judge. Critics had charged that Sessions was not qualified and that several remarks he had made showed a "gross insensitivity" about racial issues.

Meese had blasted the committee's action as "an appalling surrender to the politics of ideology."

all elections may have bearing on 'Reagan court' outlook

267/128



**MOND and
COVER**

WASHINGTON —

The biggest surprise in the announcement that Chief Justice Warren E. Burger is retiring from the Supreme Court is his ostensible reason, that he wants to devote more time to chair-

commission to commemorate the 200th anniversary of the American Constitution. The layman, that seems a flimsy reason to step up the premier judicial post in the

It is in keeping with the image that Burger has developed over 17 years — a man of no unusual intellectual talents or aspirations who often has seemed to be more interested in the mechanics and trappings of the court than in the mind-wrenching demands of judicial scholarship.

There has been a perhaps unintentional commentary on Burger's reputation as a man

who looks more like a Supreme Court chief justice than he celebrates like one that the man nominated to succeed him, Associate Justice William H. Rehnquist, has come to be regarded as the prime constitutional thinker and writer on the conservative side of the bench.

Although the Burger court has been credited with moving the country away from an earlier proclivity, real or imagined, for a liberal "activism" in the interpretation of the law, it really has been a very mixed bag not easily pigeon-holed by ideological leaning. The fact that the Reagan administration's card-carrying strict constructionist, Attorney General Edwin Meese, has attacked the court for what he sees as a straying from the intent of the founding fathers is witness to the point.

The important question, though, is not why Burger elected to leave the court when, as he says, he never felt better in his life, but what the change is likely to mean in the court's leadership and complexion. In Rehnquist, an early Barry Goldwater political

lieutenant who won high marks as an assistant attorney general in the Nixon administration, the court has a man who promises to provide more intellectual direction than it has had during Burger's 17 years at the helm. Although Rehnquist is only 61, he has been on the court 14 years.

In the new nominee, Judge Antonin Scalia of the U.S. Court of Appeals, the court from all reports has a man who shares Burger's conservatism coupled with Rehnquist's intellectual discipline. Those who have reviewed his lower-court decisions suggest he will be a staunch supporter of the Reagan administration in cases involving so-called social issues — abortion, affirmative action and religious questions.

On individual cases, he may on occasion tip the scales in favor of administration positions, but in replacing Burger he seems more likely to give the administration a more intellectual voice but not an additional vote. If there is one group in the society that may be most unhappy with him, it

may be the news media, because he has not seemed impressed with its pleadings of First Amendment protection in some libel cases.

In the 1984 presidential campaign, one of the major warnings against Reagan's reelection uttered by Walter Mondale and other Democrats was that Reagan would be in a position, as it was often put, to make over the Supreme Court in his own image. Of the nine justices, five were over 75. The "threat" struck great apprehension in liberal hearts but didn't make a dent in the Reagan landslide at the ballot box.

Still, in light of that Democratic fear, the expectation was that any changes in the court in the second Reagan term would result when vacancies occurred through the death or ill health of liberal associate justices. The seats of the oldest, William Brennan at 80, and Thurgood Marshall at 77, were considered the best prospects for conservative replacements that would produce a solid "Reagan court."

These liberals, or the two others gener-

ally regarded as more liberal, Harry A. Blackmun at 77 and John Paul Stevens at 66, could yet provide vacancies in Reagan's second term that would put teeth in the Democrats' warning. But the window of the president's opportunity could be narrowing, if in November his party should lose control of the Senate, which must confirm Supreme Court nominations.

Two of the more dramatic domestic episodes of the Nixon administration before Watergate were the rejected Nixon nominations of Clement F. Haynsworth and G. Harold Carswell by a Democratic-controlled Senate. The two current nominations of Rehnquist and Scalia are not expected to have serious trouble in the Republican-controlled Senate, but the fall elections could change the future outlook for a bona fide "Reagan court."

Jack W. Germond and Jules Witcover write for The Baltimore Evening Sun. Their column is distributed by Tribune Media Services, Inc.

THE RIGHT COURT STUFF

LAWRENCE WADE

1289

President Ronald Reagan is the Rodney Dangerfield of the Oval Office. Despite his successes, he still gets "no respect" from many Supreme Court ob-

servers.

Consider Mr. Reagan's recent choices for the court. Observers say these men won't steer the court to the right any faster, though both are two-handed drivers like the chief executive.

But, again, Mr. Reagan gets no respect. His critics assume that, like themselves, he counts justices on his fingers:

"Welllll, let's see now. Two liberals plus three moderates equals another 5-4 decision upholding the 'right' to an abortion."

But Mr. Reagan counts better than a child. He understands the nation's history and the role the court plays in it. He certainly grasps the persuasive role chief justices have played all the way from John Marshall to Earl Warren.

With that knowledge in mind, Mr. Reagan surely knows a Chief Justice William Rehnquist can cause a U-turn in the court's moderate direction. Mr. Rehnquist is no Earl Warren. But he's sharp. And coupled with the brilliant Antonin Scalia of the U.S. Court of Appeals here, the court could swerve toward the "right."

It has happened before, and not too long ago, but, with time, Americans have forgotten. And it happened with an issue of great moral importance, like abortion. The new chief justice was Earl Warren. The case: *Brown vs. Board of Education*.

The *Brown* case stemmed from five cases involving segregated schools argued before the court in 1952 under Chief Justice Frederick Moore Vinson. The popular myth is that the court was itching to overturn its 1896 sanction of racial segregation. The fact is, led by Mr. Vinson, the court could have reaffirmed America's apartheid.

Reads one historical analysis, "Vinson died before the suits were finally disposed of, but the available evidence suggests that had he lived he would most likely have voted to hold segregation *per se* constitutional."

Mr. Vinson passed on Sept. 8, 1953. Mr. Warren became chief justice late that year and found a court much like today's — sharply divided. In December the *Brown* cases were reargued. They'd been held over from Mr. Vinson's last term. By February, Mr. Warren had lobbied, wheedled, and worn down all of his fellow justices to find segregation in public schools unconstitutional.

These were the same justices who under Chief Justice Vinson were ready to continue the immoral practice of segregation. But their leader had changed. And though the basis of *Brown* can be disputed, the decision thrust the court in the proper direction of truly equal protection under the law.

Many Americans want to see the court do the same with abortion. They regard its 1973 decision, *Roe vs. Wade*, as immoral as *Plessy vs. Ferguson*. And they hope that, like Mr. Warren, a Mr. Rehnquist can help persuade so-called "moderate" justices to join the just, pro-life position.

Mr. Rehnquist may be no Earl Warren. But he is widely respected and liked by his court colleagues. Couple his skills with the intellect of coalition-builder Mr. Scalia, and a Rehnquist court could constructively impact upon justice as quickly as did the often destructive Warren court.

Such an impact would cause the strongest of liberal court observers to shake violently in their Reeboks. But the power of the chief justice is well-known. It's stated by the most widely respected liberal observer, Laurence H. Tribe of Harvard University.

Says Mr. Tribe, "The Chief Justices — only 15 have served in our entire history — present the most obvious examples of the 'one Justice who can make a difference.'"

Mr. Tribe wrote his book, *God Save This Honorable Court*, as a warning as to what a Reagan administration would do, given significant court appointments.

But what the administration would do is simply give Americans the court they've voted for in two landslide elections.

No doubt Mr. Reagan, unlike his critics, the court observers, has been reading Mr. Tribe's book.

Lawrence Wade is a staff columnist for The Washington Times.

Reagan gives court a push to the right ^{128p}

One reasonable criticism of President Reagan's choice of Antonin Scalia to the Supreme Court is that he didn't give him the chief justice job vacated by Warren Burger. The task of managing a group of strong-willed, independent and often quarrelsome personalities would be easy for any man who has raised nine children.

Most of the attention here has been focused on the elevation of Justice William Rehnquist to the top post. Rehnquist may prove to be a stronger leader and a more adept coalition-builder than his predecessor. But the power of the chief justice lies more in his skill at persuasion than in any inherent authority.

Rehnquist may be better liked and respected by his colleagues than Burger, but in judicial matters that hasn't gotten him very far. In an uncommonly high number of decisions, he has been a minority of one.

The impact of the proposed new member of the court is more certain. Scalia is appreciably more conservative than the departing chief justice. It is inconceivable, for example, that he would have voted with the majority, as Burger did, in the 1973 decision that discovered the constitutional right to abortion.

Stephen Chapman

At the age of 50, he can expect to serve on the court until sometime after President Caroline Kennedy finishes her term in the White House.

Perhaps more significant is that Scalia promises to provide a consistent vote for a three-member conservative bloc, the other members being Rehnquist and Sandra Day O'Connor. What may fall to him is the task, in important cases, of coaxing two more votes out of the remaining five justices. His unassuming charm, combined with intellectual powers that will be the most formidable on the court, make him a natural for that role, which may amplify his voice considerably.

For Reagan, who hopes to alter the direction of the court permanently, all this is good news. Scalia is a conservative's conservative, who can be expected to oppose most attempts to expand constitutional rights and to roll back some of those recognized by past rulings.

He takes a skeptical view of the landmark decisions protecting criminal suspects, thinks the press has been granted excessive freedom by judicial readings of the 1st Amendment and gives a wide berth to executive actions taken in the name of national security.

His most famous opinion (credited to him, though written anonymously) struck down the Gramm-Rudman deficit reduction act, which shows that Scalia can be provoked to exercise the power of judicial review. But he believes the judiciary, being undemocratic by nature, should overrule the choices of democratically elected officials only in extreme cases, when the Constitution gives it no alternative.

The judge's role, Scalia said once, is "certainly not to lead the society forward." Leadership belongs to people accountable to the voters.

That is a principled approach—Scalia is as hostile to conservatives who want judges to take a more active role as protectors of economic freedom as he is to liberals who want it to intervene on behalf of civil liberties—but an unsatisfying one. A passive, deferential judiciary is as much a threat to liberty as an arrogant, aggressive one.

Scalia sees the genuine danger to democracy from letting judges strike down legislative actions. What he overlooks is the risk to liberty of placing too much power in the hands of the majority. The Bill of Rights, after all, was put in the Constitution precisely for the purpose of shielding minorities from untrammelled democracy. Judicial activism in the defense of liberties explicitly or implicitly protected by the Constitution is no vice.

The danger is that the revamped court will ignore the legitimate conservative argument to limit government interference in economic affairs, while accepting its demand to expand state power in the realm of civil liberties. Conservatives are supposed to stand for limited government. But a conservative court will probably expand the government's authority over the lives of its citizens, particularly those given short shrift by the democratic process.

None of this is any reason for the Senate to block the nomination. The President was elected to put his stamp on the Supreme Court, and Scalia will do that with grace, integrity and intellectual force. For better or worse, this is a big step toward a Reagan court.

1 of 2

Scalia's Views, Stylishly Expressed, Line Up With Reagan's

By STUART TAYLOR Jr. 128

Special to The New York Times

WASHINGTON, June 18 — Judge Antonin Scalia, whom President Reagan said Tuesday he will name to the Supreme Court, has criticized several major Supreme Court precedents and expressed clear views contrary to existing law on a wide range of contentious issues.

His writings over the years have advocated positions almost perfectly consistent with the Reagan Administration's conservative legal and political agenda, and considerably more so than the judicial opinions of Chief Justice Warren E. Burger, who is retiring.

Among the issues on which Judge Scalia's conservative views appear to match those of the Administration closely are abortion, desegregation through busing, preferences for women and members of minority groups, the Freedom of Information Act, and the need to curb lawsuits and to reduce the role of the courts in making policy.

While largely unknown to the general public, Judge Scalia's record, both before and after Mr. Reagan named him to the United States Court of Appeals for the District of Columbia in 1982, has been closely studied by Justice Department officials.

They liked virtually everything they saw and have long listed him as a leading Supreme Court prospect. These officials view his planned elevation as a capstone of their efforts — which experts call the most systematic by any Administration in modern history — to reverse the course of the Federal judiciary.

'Imperial Judiciary' Assailed

In opinions, articles and debates, Judge Scalia has said or strongly suggested, among other things, that the Supreme Court was wrong to recognize a constitutional right to abortion, to approve "racial affirmative action," to order busing as a desegregation remedy and to strike down all existing death penalty laws in 1972.

He has assailed what he calls the "imperial judiciary" as deciding issues it has no business deciding and as usurping the powers of other branches of Government and of the states. He has criticized Congress as ducking political responsi-



Associated Press

Judge Antonin Scalia

bility by writing righteous-sounding legislation so vague as to be "absolutely meaningless." The result, he said, is that "unelected judges are left to determine its real content."

He has questioned both the constitutional basis for and the policy justification for acts of Congress that insulate more than a dozen independent agencies, including the Federal Trade Commission and the Federal Reserve Board, from Presidential control.

He is viewed by libel experts as deeply hostile to Supreme Court rulings that, he has said, have "fulsomely assured" the protection of the press from libel suits by public officials and public figures.

In expressing his views, Judge Scalia has won a reputation as one of the smartest, wittiest and most cogent stylists on the Federal courts, using a combination of rigorous logic, caustic irony and elegant rhetoric to skewer his opponents.

This talent, which along with an appealing personality made him all the more attractive to conservatives seeking a champion at the Supreme Court, is viewed by some critics of his views with a mixture

of concern — because it could magnify his impact — and admiration.

Bruce Sanford, a Washington lawyer and libel expert, said in an interview several months ago that Judge Scalia was viewed by press lawyers "as one of the worst judges in the country on First Amendment and libel issues."

Mr. Sanford added, however: "He's enormously intelligent. Ironically he is one of the best writers currently serving on the courts of appeals. What that man does with language in opinions is beautiful. He's humorous, he's savagely subtle, he's absolutely scathing at times, and just in reading it you can feel the emotional commitment that he has to his views in the libel area."

In a 1979 article attacking affirmative action preferences for members of minority groups, for example, Judge Scalia, stressing his own freedom from any notion of inherited racial guilt as the son of an Italian immigrant, facetiously suggested that if the nation's whites really wanted to repay a "racial debt" to various groups, a more finely tuned system could be devised:

"I have developed a modest proposal, which I call R.J.H.S. — the Restorative Justice Handicapping System. I only have applied it thus far to restorative justice for the Negro, since obviously he has been the victim of the most widespread and systematic exploitation in this country; but a similar system could be devised for other creditor-races, creditor-sexes or minority groups.

"Under my system each individual in society would be assigned at birth Restorative Justice Handicapping Points, determined on the basis of his or her ancestry. Obviously, the highest number of points must go to what we may loosely call the Aryans — the Powells, the Whites, the Stewarts, the Burgers, and in fact (curiously enough), the entire composition of the present Supreme Court, with the exception of Justice Marshall.

'Justices Would Not Shrink'

"This grouping of North European races obviously played the greatest role in the suppression of the American black. But unfortunately, what was good enough for Nazi Germany is not good enough

2 of 2

for our purposes. We must further divide the Aryans into subgroups."

Noting that "the Irish (having arrived later) probably owe less of a racial debt than the Germans," for example, he added: "It will, to be sure, be difficult drawing precise lines and establishing the correct number of handicapping points, but having reviewed the Supreme Court's jurisprudence on abortion, I am convinced that our Justices would not shrink from the task."

Judge Scalia also used a splenetic pen in a 1982 article titled "The Freedom of Information Act Has No Clothes," in which he assailed the 1974 amendments liberalizing the law, which requires Federal agencies to open their files to citizens, as a "disaster."

This law, he said, "is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." The amendments, he asserted, have "greatly burdened investigative agencies and the courts," adding: "They were promoted as a boon to the press, the public interest group, the little guy; they have been used most frequently by corporate lawyers."

Abortion a Societal Decision

On abortion, Judge Scalia — a Catholic who is said to oppose it — said in a 1978 debate: "In the abortion situation, for example, what right exists — the right of the woman who wants an abortion to have one, or the right of the unborn child not to be aborted?"

"In the past that was considered to be a societal decision that would be made through the democratic process," he said, "but now the courts have shown themselves willing to make that decision for us." He added, "The courts have no business being there."

In his judicial opinions, he has not challenged overtly the wisdom of Federal statutes or of Supreme Court precedents, which lower court judges are bound to follow. The critical views he expressed as a law professor on the Freedom of Information Act "would have nothing to do with my interpretation of it if I were sitting as a judge," he said in his 1982 confirmation testimony.

Nevertheless, he has managed to delight conservatives with majority, concurring and dissenting opin-

ions that have called for deference to Presidential decisions touching on foreign policy, cutting back on access to the courts and holding accountable in libel suits "media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with that power."

But inevitably, Judge Scalia cannot please all of the conservatives all of the time.

For example, some conservatives would like to see the courts go from the present broad protection of abortion rights to the opposite extreme of ruling that the Constitution requires states to ban abortion on the ground that a fetus is a "person" with a constitutional right to life.

Judge Scalia has not publicly suggested agreement with this view, which would clash with his statements that such issues should be decided by the elected representatives of the people. It is more likely, say conservatives including Bruce Fein, a constitutional expert with the American Enterprise Institute here, that he would vote to allow states to prohibit or to allow abortions as they choose.

While conservative critics of the Supreme Court have often assailed its "liberal judicial activism," Judge Scalia has recognized that judicial activism is a tool sometimes used by conservatives as well as liberals — both may be tempted to use vague constitutional phrases as a mandate for striking down laws they do not like.

He is a free-market advocate who favors economic deregulation as a matter of policy. But in a 1985 article, he expressed disagreement with conservative scholars who have called for striking down many economic regulations as unconstitutional.

"This issue presents something of a moment of truth for many conservatives who have been criticizing the courts in recent years," he said. "They must decide whether they really believe, as they have been saying, that the courts are doing too much, or whether they are actually nursing only the less principled grievance that the courts have not been doing what they want."

Court Nominees Face Ideology Issue

Approval Likely but Conservatism to Be Closely Examined

By RONALD J. OSTROW and PHILIP HAGER, *Times Staff Writers*

128P

WASHINGTON—Senate Democrats appear certain to focus on ideology in hearings on the Supreme Court nominations of Justice William H. Rehnquist and Judge Antonin Scalia, but they concede that confirmation appears likely—although not by the end of next month, the Administration's goal.

Aides to several Democrats on the Senate Judiciary Committee, which will conduct the hearings, predicted that the strong conservative bent of both men will be closely examined, despite expectations that Republicans will object on the grounds that the President has the right to nominate persons who share his views on the law.

Within 'Mainstream'

"We expect there'll be some concern within the committee over whether these nominees have views within the constitutional mainstream," said one aide, who spoke on the condition that he not be identified. "Most people believe the President should get his choice, as far as basic philosophy goes. But, if someone doesn't have constitutional values within a certain consensus, then the Senate committee has a role to play."

An aide to another Democratic member said: "We're going to be looking at where they stand—whether they're beyond the mainstream of American jurisprudence." But such an examination, he acknowledged, is likely to be "abstract—not a conflict-of-interest matter that gets the juices flowing."

Nevertheless, one Democratic member of the committee, Illinois Sen. Paul Simon, described President Reagan's elevation of Rehnquist, the court's most conservative member, to chief justice as "a safe decision" and acknowledged that "in all likelihood" he will be approved by the committee and the full Senate.

Elated by wide praise for both nominees' legal scholarship and

competence, a Justice Department spokesman said he thought the paper work required to begin confirmation proceedings will be submitted to the committee by Friday.

"You can be sure the FBI checks will be done in a hurry," said Patrick S. Korten, the department's deputy director of public affairs. Both nominees underwent FBI investigations when they were put on the bench—Rehnquist in 1971 and Scalia in 1982, when Reagan appointed him to the U.S. Circuit Court of Appeals here.

Timing of any Senate action is important because Chief Justice Warren E. Burger's resignation is effective on July 10, and the nominations conceivably could get caught up in the politics of an election year.

The Senate is expected to begin its Independence Day recess next week, returning on July 14. It then

'Most people believe the President should get his choice, as far as basic philosophy goes.'

has scheduled an Aug. 15 to Sept. 8 summer recess.

Meanwhile, details emerged Wednesday of the role played by former White House counsel Fred F. Fielding in arranging a May 27 meeting with Reagan for Burger, in which the chief justice related his desire to retire. In addition, sources said, Fielding and Burger themselves met for several hours on May 24, apparently to discuss the matter.

"I can assure you I was not sent as an emissary by the White House," Fielding said Wednesday. He said that Burger had called him at his law firm on May 22, asked him to arrange a meeting with Reagan and said he wanted to discuss the bicentennial of the U.S. Constitution. In announcing his retirement Tuesday, Burger said he wanted to devote full time to serving as chairman of the commission for that celebration.

After the session with Reagan had been arranged, Fielding said,

Burger invited him to his home on May 24. However, Fielding would not disclose what the two men discussed at that meeting. Their contacts go back to the Administration of Richard M. Nixon, when Fielding was deputy White House counsel and Burger was appointed chief justice.

When asked if the May 24 session was soul-searching, Fielding responded: "You'll have to characterize it."

Question About Timing

Burger, at the White House announcement Tuesday, brushed aside a question as to whether his retirement was timed to allow Reagan to appoint his successor. "If that had been my desire, I had quite a bit of time to wait here," he noted.

Although senators and their aides said that they expected eventual confirmation, spokesman for civil rights and liberal organizations expressed concern over the Rehnquist and Scalia nominations and over how thoroughly they would be examined.

Julius L. Chambers, director of the NAACP Legal Defense Fund, said the organization is "extremely concerned" over the implications of the nominations for civil rights groups. He asserted that Rehnquist had shown "implacable hostility" to advancing the civil rights of minorities and women and that Scalia holds "extremely conservative" views.

No 'Rush to Judgment'

And Anthony T. Podesta, president of the liberal lobbying group People for the American Way, cautioned that the Senate "must not rush to judgment on nominees at any level within the federal judiciary, but most particularly at the highest level."

Meanwhile, White House and Justice Department sources said that Judge Robert H. Bork of the U.S. Court of Appeals here—who had been considered the front runner for any Supreme Court vacancy—heads the list of possibilities if another opening should occur before Reagan leaves office.

One source said that Bork had been told this on Tuesday, but Bork would not comment Wednesday.

Staff writer Eleanor Clift contributed to this story.

George F. Will

300/128p

The Court: These Two Will Have Impact . . .

Zeke Bonura was a large and remarkably immobile first baseman whose slowness did not grieve him because he understood a vital principle of baseball: You are rarely charged with an error when you do not touch the ball.

Conservatives have hoped the Supreme Court would adhere to the Bonura Insight, sometimes known as judicial restraint. The Burger Court has not. Indeed, its judicial activism has been as marked as, and arguably more destructive than, the Warren Court's.

None of the Warren Court's most important rulings has been overturned or even significantly circumscribed in the 17 Burger years. The sweep of the Miranda ruling on the rights of suspects has been only slightly circumscribed. The Burger Court is responsible for the ruinous spread of forced busing as a "remedy" for segregation. The Burger Court misconstrued the 1964 Civil Rights Act to permit reverse racial discrimination

on behalf of government-approved minorities.

Burger Court activism extended procedural due process guarantees to public-school students accused of behaving badly. The Burger Court has done nothing significant to reassert reason in the interpretation of the ban on "establishment of religion"—nothing, that is, to re-establish the principle that government must be neutral between sects, not between religion and secularism.

And nothing the Warren Court did was as raw and radical an exercise of judicial power as the 1973 decision that swept away the laws regulating abortions in 50 states.

Supreme Court appointments are the premier spoils of presidential politics. Each appointee is 20 percent of a majority at the apex of one of the three branches of government, the branch that has assumed custody of the issues (race, abortion, etc.) the political branches have been pleased to relinquish. The court is where

American public philosophy is published as an unending serial. The departure of Burger, the elevation of William Rehnquist and the nomination of Antonin Scalia are important episodes in the process of lengthening the shadow today's president will cast into tomorrow.

The court is a small, face-to-face society where politics has subtle dynamics. The players are strong-willed professionals reasoning about hot issues in the cool climate of a written Constitution, changing statutes and a vast body of case law. The building of coalitions is influenced by intellectual nuance and the power of personality. On both counts, Scalia and Rehnquist will augment the power of conservative jurisprudence.

Scalia is an intellectual in a way that Burger is not: by training and inclination. Scalia has taught at several of the finest law schools. He has the theoretical turn of mind that deepens analytic powers and does not dispose a judge to try to split all differences.

That disposition can make intellectuals ineffective politicians but forceful judges. With Scalia leavening the court, it may be less inclined to torture itself, and all who love logic, with ever-more-baroque criteria for distinguishing permissible from impermissible "race-conscious" state action.

No one ever looked more like a chief justice than Burger, who if he ever as an infant played in a sandbox must have done so in striped trousers and a swallowtail coat. Rehnquist's clothes come from the factory pre-rumpled. The New York Times locates Rehnquist on "the Court's extreme right wing." (The Times style book probably says the phrase "the Court's extreme left wing" is an oxymoron.) Actually, Rehnquist has neither the abrasive philosophy nor, as important, the jagged temperament of an extremist.

What he has is the keenest mind on the court, which is why critics complain that he writes too well. When person A cannot cope with person B's

arguments, A says B is not wise, only articulate. In the administration of the court, Rehnquist's affability and intellectual effervescence will enhance his effectiveness.

The rise of Rehnquist to the pinnacle of his profession, with the last ascent achieved from the hand of Ronald Reagan, illustrates the geology of our politics. Rehnquist, an Arizonan, was pulled toward public life by the conservative movement energized by another Arizonan, Barry Goldwater, whose 1964 campaign brought political prominence to Ronald Reagan.

Rehnquist serves now with another Arizonan, a law-school classmate who was active in state politics, Sandra Day O'Connor. As Barry Goldwater takes his leave of Washington, he sees around him abundant evidence that the significance of 1964 is not that he lost 45 states, but that he won the Republican Party and, doing so, seeded the future.

Moderates on Supreme Court May Soon Be Pulled to Right

Aging Liberals Would Face Intellectual Firepower

By Al Kamen
Washington Post Staff Writer

1288

The internal politics of the Supreme Court under Chief Justice-designate William H. Rehnquist may undergo a significant and immediate change, pulling to the right the moderate center that has been pivotal for the last 17 years, court analysts said yesterday.

While that change may not be visible immediately, scholars agree, the ascension of Rehnquist and the addition of equally conservative Judge Antonin Scalia would mean a conservative wing that is expected to be better able to pick up centrist votes, to build and hold the majorities they will need to accomplish their agenda.

Whether that agenda is fulfilled, however, would depend on whether Rehnquist, who has often found himself alone in dissent for much of his 14 years on the court, will be willing to moderate his views to accommodate the center and yet lead the court where he wants it to go. It will also depend on how President Reagan and his successor fill the numerous vacancies on the court that are expected to occur in the next five years.

The court would see an aging liberal wing—Justice William J. Brennan Jr., 80, and Thurgood Marshall, who turns 78 in three weeks—under assault as never before by a conservative wing energized with substantial intellectual firepower.

And it would see the more centrist justices—Harry A. Blackmun, Lewis F. Powell Jr., John Paul Stevens and, on occasion, Sandra Day O'Connor—courted and appealed to as never before by two charming, exceptionally bright and committed conservative ideologues.

The immediate change may be seen most quickly in how Rehnquist uses the only real power the chief has over other justices—the ability, when he is in the majority, to designate who will write the court's opinions.

"The big difference between the court under Warren Burger and the court under William Rehnquist," said Harvard Law School professor Susan Estrich, would be a "much sharper strategic use of the assignment power" to make sure the court would move to the right. The new chief, she said, "has a much clearer legal agenda and will assign opinions to justices to further it, versus [Burger's] equally conservative but much less defined vision of where he wanted the court to go."

The justices gather in conference to vote on cases shortly after oral argument. After those votes, the most senior justice in the majority assigns the opinion-writing.

Where Burger's opinion assignments often seemed based on personal preferences, she said, Rehnquist's would almost certainly be geared to further his agenda, reserving for himself not necessarily the most visible cases, but the ones most likely to move the court in his chosen direction.

Estrich, a former Supreme Court clerk, said Rehnquist's opinions generally would be scrutinized for the innocuous-seeming "zinger" that turns out to be a significant legal change. Burger's opinions, on the other hand, have been checked more for flaws than for groundbreaking analysis, she said.

"Move the court's strategic thinker into the chief judgeship, someone whose prime concern is a vision of the Constitution, who attacks that concern with vigor and intelligence," she said, "then add a new voice, Scalia's, who shares that vision with an intellectual vigor that surpasses anything before," and the change could eventually be substantial, she said.

For the moment, Rehnquist would not have the votes he needs. The building process would take time and likely at least one or more Reagan appointees, and even then the changes might not be abrupt.

"The court," said former deputy solicitor general Kenneth Geller, "is like a gigantic aircraft carrier. It doesn't turn quickly but moves slowly through the water." Still, Geller said the recent moves would show "as sharp a turn as that court is capable of making with one change in membership," especially a change of one conservative for another.

Rehnquist, several scholars pointed out, would replace a chief justice whose main interests lie in improving a rickety court administrative structure. The remaining justices, especially those in the center, have been left to their own devices to forge consensus.

Those days, all observers agreed, are over.

But Rehnquist's ability to move the court may turn on whether he would moderate his views in the new role, and court watchers split on that point.

"I think we may see a moderation in Rehnquist's voting," said conservative legal analyst Bruce Fein. "He may vote in ways that may be different as chief justice in order to line up the votes. He is not going to be solely in the role of staking out a position. Now he has an incentive to maintain control over who is writing an opinion."

Other observers are not so sure. Columbia Law School professor Vincent Blasi predicted that "Rehnquist will march to his own drummer. Burger did not want to be in dissent."

Blasi noted that Rehnquist has always staked out his positions quite clearly, staying with them no matter what.

Blasi, who called Rehnquist a "strong infighter," forceful and energetic, said that with Scalia's help he may be able to move the court without altering his views much at all. Much of the moderate nature of the Burger era, Blasi said, may have been due to Burger's weak leadership.

But University of Chicago law school professor Geoffrey R. Stone said he felt that there may be "a lot more importance attached to who is the chief than should be."

The other justices all have "considerable egos in their own right. I don't think [Rehnquist] is going to be a leader," the former high court law clerk said. "Maybe if he had two more Scalias," Stone added, "but now, the truth is [Rehnquist] only has three votes or maybe two and a half, depending on where you put

O'Connor, and I don't see Rehnquist, given this makeup of the court, being a leader."

Stanford law professor Gerald Gunther agreed, saying, "I don't see the alignment shifting immediately." But Gunther said Rehnquist and Scalia would have a substantial impact on the court even if Reagan makes no other appointments and the Democrats win the White House in 1988.

"Even if Rehnquist and Scalia become the great dissenters," he said, "their views, articulately, crisply put, will be on the books and will be around for the next conservative wave."

Even in the short run, Gunther said, "you do have a bunch of people who are not ideologues," whose votes have been "up for grabs." Of the justices in the center, he said, "to the extent that talking to them and making tough, clear, logical arguments can persuade them in a group of cases, the added intellectual firepower may well make a difference in the short run as well."

Scalia's Affability, Intellect Could Sway Court

Nominee May Be More Conservative and More Persuasive Than Burger, Experts Say

By Ruth Marcus
Washington Post Staff Writer

MSR

In appointing federal appeals court Judge Antonin Scalia to fill the vacancy created by the resignation of Chief Justice Warren E. Burger, President Reagan is attempting to replace one conservative jurist with another. But many legal scholars said yesterday that the confirmation of Scalia—while not likely to transform the court overnight—could eventually leave the court a more conservative institution.

Legal experts said Scalia tends to be more conservative than Burger on some of the court's most hotly contested issues, including abortion, affirmative action and First Amendment rights—a philosophical difference that will be buttressed by what liberal and conservative lawyers describe as a persuasive manner and impressive intellect.

"In some ways one of the most significant things in the close 5-to-4 or 6-to-3 votes is that [the] combination of Scalia's affability and brains may swing votes that Burger's aloofness and intellect did not," said American University law professor Herman Schwartz, editor of a forthcoming book on the Burger court.

Scalia, said Harvard Law School professor Laurence Tribe, is "in general much closer to the pure philosophy that Justice [William H.] Rehnquist exemplifies on issues like affirmative action and the reach of the First Amendment and the incorporation of the Bill of Rights than to the

somewhat more centrist views of Chief Justice Burger."

Geoffrey R. Stone, who teaches constitutional law at the University of Chicago, where Scalia taught before being appointed to the U.S. Circuit Court of Appeals here, said Scalia is not only opposed to abortion, but thinks the *Roe v. Wade* decision—which Burger joined in legalizing abortion—"is not justified by the Constitution."

Although Scalia has not handled an abortion case during his four years on the circuit court, he joined an opinion by Judge Robert H. Bork, in a case upholding the Navy's right to dismiss homosexuals, that criticized a related line of Supreme Court decisions finding a constitutional right of privacy.

"The chief justice was more prepared than Judge Scalia is to infer rights from the overall history and structure of the Constitution," Tribe said. "There has been a willingness to go beyond the text in order to preserve the spirit."

Scalia could join Justices Rehnquist and Byron R. White in voting to overturn *Roe*. Justice Sandra Day O'Connor—who has criticized the reasoning in *Roe* but not stated her ultimate position on abortion—might go along, but that would leave abortion rights intact with possibly a 5-to-4 majority.

Scalia has harshly criticized affirmative action, one of the issues that has splintered the court and on which Burger has taken a generally centrist position. In 1980, Burger wrote the majority opinion upholding a law setting aside 10 per-

cent of federal public works contracts for companies controlled by members of minority groups, although he has dissented from other cases upholding affirmative action programs.

While Burger has written or joined some important opinions upholding press rights, including a 1980 ruling that the news media and public have a constitutional right to attend criminal trials, Scalia has come out against the press in a number of cases on the circuit court.

For example, Scalia broke from Bork, his conservative colleague, in dissenting from a 1984 case ruling that a Marxist professor seeking a job at the University of Maryland could not sue syndicated columnists Rowland Evans and Robert Novak for disparaging comments.

"[P]erhaps those are right . . . who view high libel judgments as no more than an accurate reflection of the vastly expanded damage that can be caused by media that are capable of holding individuals up to public obloquy from coast to coast and that reap financial rewards commensurate with that power," Scalia wrote.

Scholars also said Scalia may take an even more expansive view than Burger of executive branch power. Scalia wrote the unsigned three-judge panel opinion striking down the Gramm-Rudman-Hollings budget-balancing law because the comptroller general, responsible for implementing its automatic trigger provisions, is not under executive branch control. His opinion expressed doubt about the constitutionality of a host of independent U.S. regulatory agencies.

Reagan's policy stamp

High court nominees meant to strengthen President's social agenda for many years

128P

By Charlotte Saikowski

Staff writer of The Christian Science Monitor

Washington

The Reagan era will not end in 1989.

With his two Supreme Court appointments, President Reagan clearly hopes to extend the influence of his presidency beyond his term of office and solidify a more conservative philosophy throughout American society.

During his first term, the President did not push his social agenda except rhetorically. He chose instead to concentrate on getting the economy moving, curbing government, and building up the military.

But in his second term he is vigorously using the judicial system to put his conservative imprint on social policies, from affirmative action to prayer in the schools. The appointments of William H. Rehnquist as chief justice of the United States and of federal judge Antonin Scalia to replace him as associate justice, if confirmed by the Senate, will lend impetus to this effort.

"We are hoping to put on the court . . . a judicial philosopher who shares the President's philosophy and is young enough to remain on the court for many, many years," a senior White House official said after the announcement this week. "That is a very pleasant prospect for the President and others in this administration."

Constitutional scholars do not see a dramatic change on the court, however. Although the Justice Department under Attorney General Edwin Meese III has pursued a more aggressive posture on major social issues, it has not had much success. In such areas as school busing, separation of church and state, and abortion, the Supreme Court has by and large rebuffed the Reagan administration.

"The court has not been very responsive to Reagan on social issues, and I don't think that Scalia will change that outcome," says A. E. Dick Howard, a professor of law at the University of Virginia. "But over the long haul you might see change that comes about through the combination of two powerful minds — Rehnquist and Scalia, both of whom have a fully thought-out conservative philosophy."

With Mr. Rehnquist assigning opinions and Mr. Scalia at his right elbow, Professor Howard suggests, "we would begin to see a persuasive judicial strategy . . . that could influence justices who are moderately conservative."

The President seeks to reduce what he regards as the Supreme Court's overextended role in trying to resolve social and legal problems rather than interpreting the law. He would leave it to Congress and state legislatures to frame policies.

The net result of "judicial restraint," conservative scholars argue, would not be to undo policies favored by the majority of the public. It would simply leave these policies for local communities to decide. "If the Supreme Court overruled *Roe v. Wade* [the abortion decision], most communities in the country would keep the right of abortion," says legal scholar Bruce Fein. "The same is true of prayer in the schools. The country would not vote except in a few communities to reinject prayer in the schools."

But Mr. Fein does see the post-Burger court making a tangible if not dramatic shift to restraint in such areas as libel law, administrative law, presidential power, and aid to parochial schools.

The President's surprise announcement this week came three weeks after Chief Justice Burger on May 27 informed him of his decision to step down. Three of Mr. Reagan's close advisers — chief of staff Donald T. Regan, Attorney General Meese, and White House counsel Peter J. Wallison — searched for a replacement.

The process was speedy and straightforward. The screening group drew up a list of 10 to 15 potential justices who shared the President's philosophical views. Rehnquist was on the list. On June 9, according to the White House official, the three met with the President, who "at that time decided that he wanted to meet with Justice Rehnquist." He did so three days later and, after a discussion, offered him the post.

The President also asked to meet with Judge Scalia, whom he had appointed to the US Circuit Court of Appeals. Scalia stood out on the list, the official said, "because he is one of the principal exponents of the President's philosophy of judicial restraint." The three-member group did not apply a "litmus test" to determine how Scalia might vote on such specific issues as abortion and school prayer, the official said, but his record was scrutinized.

"It was concluded that Judge Scalia, in addition to his magnificent scholarship, was also an exemplar of precisely the view that the President wants the courts to take in a democratic society," the official said.

While the post-Burger court is not expected to change the voting outcome in future decisions, scholars say, the new appointments will ensure President Reagan's influence over the long haul.

"Reagan has molded the presidency in many ways . . . but he has not had a major impact on the Supreme Court and has suffered a reasonable number of losses,

because he had only one appointee, and two of the three Republican appointees [John Paul Stevens, Harry A. Blackmun and William J. Brennan] were not voting the way his legal advisers would have liked," says presidential scholar Thomas Cronin. "So he now has a chance to have equal control of the court but without dominating it."

The President has consistently preached a conservative gospel to his supporters on the right. But as a realist in calculating what is politically achievable, he has refrained from pressing his social agenda in Congress, leaving it to the judicial system to bring about changes.

It is estimated that by the end of his term Reagan will have the opportunity to appoint more than 50 percent of the federal appellate judges. The Rehnquist and Scalia nominations are important because lower and district courts decide the cases within the framework of Supreme Court interpretation.

"As long as the Supreme Court maintains that busing is a legitimate instrument to create racial balance or that there should not be religious activity in public schools, judges do not have a lot of leeway," says Stephen J. Wayne, a presidential expert at George Washington University. "So if Reagan can get change at the top, he'll be able to use the courts more aggressively to pursue test cases at the lower level."

The two Supreme Court appointments are expected to be taken up by the Senate Judiciary Committee by mid-July. Strom Thurmond, chairman of the committee, says he expects no strong opposition to their confirmation.

Judge Scalia seen as major force on Supreme Court

Formidable intellect and conservative philosophy mark Reagan appointee

By Robert P. Hey
Staff writer of The Christian Science Monitor

128P

Washington

Very bright, professionally able, personally charming. And a consensus-builder.

That's the way legal scholars describe Antonin Scalia, President Reagan's newest nominee to the United States Supreme Court. Judge Scalia is now a member of the US Circuit Court of Appeals for the District of Columbia.

On issues, Judge Scalia is generally conservative; by itself his vote is not likely to change the balance of the Supreme Court. Through his considerable powers of persuasion, however, Judge Scalia may wind up altering the balance — and thus the outcome of close decisions.

In reaching court decisions he is widely viewed as repeatedly seeking to "try to find a middle ground," in the phrase of Judge Abner Mikva, a liberal colleague for four years on the Court of Appeals. He calls Scalia's approach "collegial," and says the appointment "is going to be good for the institution" — the Supreme Court.

Scalia "will be far more capable of swaying the middle votes" on the Supreme Court than retiring Chief Justice Warren E. Burger, says Bruce Fein in a frequently expressed comment. Mr. Fein is

a legal consultant and an adjunct scholar at the American Enterprise Institute. As a result, say several legal experts, conservatives on the court may wind up turning 5-to-4 defeats into 5-to-4 victories.

Conservatives are delighted with the choice. "Very good news," says Daniel J. Popeo, general counsel of the Washington Legal Foundation, who calls Scalia "an articulate spokesman" for conservative points of view.

Mr. Popeo says the nomination signals "a new era that we are entering into in the Supreme Court."

"They're going to interpret law, not make it," he says. "The door is slowly closing for . . . the drug dealers . . . and for those who use the courts to accomplish a social agenda."

Yet some scholars warn it would be a mistake to put Scalia down as a guaranteed vote for conservative causes.

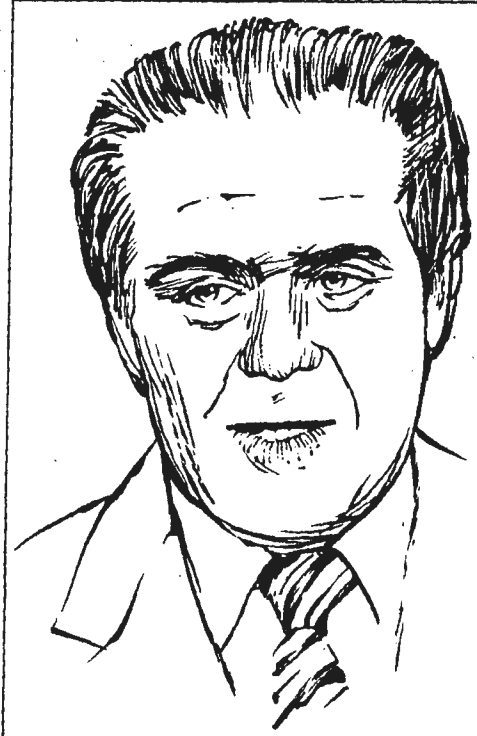
"He is basically a very independent man," says Gerhardt Casper, dean of the University of Chicago Law School, where Scalia was a professor from 1977 to 1982 except for a year as visiting professor at Stanford.

Dean Casper describes Scalia as "extremely bright."

"He is a very tenacious intellect," he adds. "He thinks things through and doesn't give up until he's thought them through all the way."

The object of all this comment graduated first in his class from Georgetown University, and went on to Harvard Law School.

He has taught at the University of



Supreme Court nominee Antonin Scalia

Virginia as well as at Chicago and Stanford. He worked several years in the Department of Justice, and has been a member of the US Circuit Court of the District of Columbia for four years.

Those who have worked with him say that, as Judge Mikva puts it, "he's a delightful colleague."

"He's got a great sense of humor," says Mikva. "He's a good story teller. He's got a good sense of himself, he's not vain-

glorious."

He's also a well-rounded individual, a jogger, tennis player, and family man. He's the father of nine children.

Upon his confirmation Judge Scalia will be the first American of Italian descent to be a member of the Supreme Court. President Reagan's previous court appointee, Sandra Day O'Connor, was the court's first — and thus far only — female member.

Some of Judge Scalia's views are highly controversial. He has criticized the Freedom of Information Act and upheld the right of the US Park Service to prevent demonstrators from sleeping in Washington parks.

But there is no disagreement about his intellectual capabilities. Both ideological friends and foes agree that these are formidable.

"He has written with great distinction," says Robert Katzmann, a lawyer and political scientist affiliated with the Brookings Institution. "On the administrative and legislative process, his principal expertise is in administrative law."

In a view with which others concur, Mr. Katzmann expects Scalia to zero in on legislative intent when rendering a judgment on a law.

As a judge "acutely aware of the workings of the legislative and administrative . . . he will tend to write opinions which force Congress to say what it means," Mr. Katzmann says, rather than relying on congressional reports, drafted primarily by staff assistants, to spell out the intent behind the laws that Congress enacts.

JEFF DANZIGER — STAFF

Opposition Tempered by Sense of Little Change

Senate Republicans Praise Choices

By KAREN TUMULTY
and BOB SECTER,
Times Staff Writers

128P

WASHINGTON—Although the Senate has been unusually hostile to some of President Reagan's most recent judicial choices, its Republican leaders Tuesday hailed Reagan's Supreme Court nominations and predicted speedy confirmation of both William H. Rehnquist as chief justice and Antonin Scalia as associate justice.

"Without question the President has selected two outstanding individuals who have . . . the right stuff, and I would guess they would be confirmed by (the Republican-controlled Senate) without any great deal of delay," Senate Majority Leader Bob Dole (R-Kan.) said.

Judiciary Committee Chairman Strom Thurmond (R-S.C.), equally enthusiastic, pledged to begin hearings as soon as he receives official notice of the nominations.

Some Withhold Judgment

Leading Democrats, meanwhile, said that they would withhold judgment until they had time to further examine the judicial records of the two, and some expressed concern about the conservative leanings of Rehnquist and Scalia.

California Sen. Alan Cranston, the Senate's second-ranking Democrat and an opponent to Rehnquist's original nomination to the Supreme Court in 1971, said: "I have grave doubts whether someone with the extreme right-wing views of Justice Rehnquist can properly manage the court as chief justice."

Sen. Joseph R. Biden Jr. (D-Del.), the Judiciary Committee's ranking Democrat, suggested, however, that such uneasiness alone may not be adequate grounds for blocking their nominations.

"I think many of President Reagan's policies are not good for the country, but he won the election and he has the right to make the choice," Biden said.

He added, moreover, that Rehnquist and Scalia are "in a different



Associated Press

Majority Leader Bob Dole

league intellectually" from some of the Administration's other recent judicial nominations, who have been criticized as unfit for the federal bench.

Reagan's judicial nominations have been a source of increasing friction between the White House and the Senate, which is given power by the Constitution to block the appointments.

A few weeks ago, for example, the Judiciary Committee rejected the Administration's nomination of Jefferson B. Sessions III, a U.S. attorney in Alabama, to be a federal district judge. The rejection, based on criticism that Sessions had been insensitive on racial issues, marked only the second time in almost five decades that the committee had blocked a judicial nomination from reaching the Senate floor.

It had followed a committee vote in May to send the nomination of Daniel Manion, a 44-year-old Indiana lawyer, to the full Senate without a recommendation. Critics had said that Manion was unqualified for nomination to a federal appeals court. A vigorous fight is

expected in upcoming Senate debate on Manion's nomination.

Opposition to the Supreme Court nominations may be tempered by a perception on Capitol Hill that the appointments of Rehnquist and Scalia, coupled with the retirement of Chief Justice Warren Burger, would have relatively little effect on the outcome of most cases before the court.

"I don't think that much will change, but you'll have even a more conservative hard-liner in the chair," said California Rep. Don Edwards (D-San Jose), a liberal who chairs the House Judiciary civil and constitutional rights subcommittee.

Edwards added: "I'm just glad it's not (Atty. Gen. Edwin) Meese," whom some believed was a top contender for a Supreme Court nomination.

Sen. Orrin G. Hatch (R-Utah), who is Edwards' Senate counterpart, said that the court is likely to chart a more conservative course in cases where it is closely divided. "About one-fifth of all cases decided in the court in the decade of 1974-1984 were decided by a one-vote margin," and in many of those Burger sided with the more liberal position, the conservative Hatch said.

More revolutionary swings will occur only if additional vacancies open on the court while Reagan is President, Hatch said. "If this Administration can put another person on the Supreme Court in addition, there really will be some very serious changes," Hatch said.

Members of the California Supreme Court agreed that the nominations, if confirmed by the Senate, would have relatively little impact on the U.S. Supreme Court's overall direction.

"I don't think it will have a great deal of impact on California law,"

California Supreme Court Justice Edward A. Panelli said. "I don't see that the changes (in philosophy) are going to be all that significant. In Scalia, we are picking up somebody who is in much the same school as Chief Justice Burger."

Chief Justice Rose Elizabeth Bird said she regretted that a woman had not been chosen to lead the panel.

"My only disappointment is that a well-qualified female jurist such as (Supreme Court Justice) Sandra Day O'Connor was not appointed," she said, "because it now appears that a woman will not appear as chief justice of the United States before the end of this century."

Staff writer Dan Morain contributed to this story from San Francisco.

14 Years on Court

Rehnquist's Conservatism Remains Firm

By DAVID G. SAVAGE,
Times Staff Writer

1289

WASHINGTON—When President Richard M. Nixon appointed William H. Rehnquist to the Supreme Court in 1971, he was looking for a "strict constructionist" who would not use the court to expand the rights of criminal defendants, women, blacks and other beneficiaries of the liberal Earl Warren court.

When Rehnquist took office on Jan. 7, 1972, Nixon got what he was looking for. Unlike so many other court appointees, Rehnquist proved to be just the kind of staunch and consistent conservative that he was advertised as being.

In his early years on the court, Rehnquist so often filed a lone dissent from generally liberal rulings that his law clerks presented him with a "Lone Ranger" doll, which still rests in his office bookcase.

In recent years, Rehnquist's image has moderated. In contrast to his generally aloof and close-mouthed colleagues, Rehnquist has been affable and open, appearing regularly at public meetings of lawyers and laymen. Earlier this year, he even made a cameo appearance as a wigged solicitor in a local theatrical spoof of Gilbert and

Sullivan.

But through 14 years on the bench, his basic judicial philosophy has remained unchanged. The high court, he noted in a recent interview, is a "thoroughly undemocratic" institution. Its members are not elected, and the Constitution does not give them the right to freely substitute their views in place of those of elected legislatures.

"We're carrying out a constitutional function that is a very delicate one," he said in a 1985 interview. "Every time we say that a law of Congress is unconstitutional, we are overriding a democratically reached decision. Now, the Constitution requires us to do that, but it requires us to do it only with great caution and circumspection."

Abortion View

On abortion, Rehnquist has been a steady dissenter from the court majority, which has given women the right to terminate a pregnancy. The Constitution, he has said, does not speak of abortion or even the "right of privacy" that the majority regularly cites. Therefore, he says, the matter should be left to the states.

On busing for school desegregation, Rehnquist has opposed the practice except when a judge finds that a school board has acted with "intent to segregate." But in most cases, the separation of black and white students results more from housing patterns than school board decisions, and Rehnquist has said busing is not usually a necessary remedy.

Similarly, on affirmative action, Rehnquist believes that extra help for blacks, Latinos and women is justified only when these individuals are actual victims of discrimination—not when other members of their class have suffered from discrimination.

For Death Penalty

In criminal cases, Rehnquist has been the Supreme Court's steadiest vote in favor of law enforcement officials and against criminal suspects. When the court in 1972 struck down the death penalty as arbitrary and capricious, Rehnquist issued a stinging dissent, noting that framers of the Constitution would have banned capital punishment themselves if they had thought it was wrong.

"The most expansive reading of the leading constitutional cases does not remotely suggest that this court has been granted a roving commission . . . to strike down laws based upon notions of policy

or morality suddenly found unacceptable by a majority of the court," he wrote.

Just two years ago, he wrote a decision allowing a "public safety" exception to the controversial Miranda ruling. He gave police officers the right to move quickly to confiscate suspects' weapons before reading them their right to remain silent.

Most legal experts said Tuesday that Rehnquist as chief justice would offer more of the same—a clear and consistent voice in behalf of judicial restraint.

"He is much more intellectual, more scholarly than (retiring Chief Justice Warren E.) Burger," said Walter Berns, a constitutional expert at the American Enterprise Institute in Washington.

"He can present a more formidable intellectual conservative position," added Gerald Gunther, a Stanford University professor of constitutional law. "I don't foresee a change on particular votes, but over time he will have an impact by making a more persuasive defense for the conservative position."

'Tempering' Seen

Rehnquist's hand has also been strengthened in recent years by a "tempering" of his most "far-out" views, Gunther said. "I think he has become more interested in getting a majority for his views, so he's become a more effective justice," he said.

Berns added, however, that Rehnquist, if confirmed, will face an awkward situation of leading his longtime colleagues on the court. "One can wonder how Brennan or Marshall or White will accept this. It could give rise to some problems," Berns said.

William Hubbs Rehnquist, now 61, came to the court from the Nixon Administration's Justice Department, where he was a highly regarded legal expert as assistant attorney general in charge of the office of legal counsel.

Controversial Memo

His confirmation to the high court drew criticism, however, because of a memo he wrote as a young law clerk in 1952 which suggested that racial segregation in the South was legal under the Constitution. Rehnquist denied that this represented his view and he was confirmed on a 68-26 vote on Dec. 10, 1971.

Born and reared in a Milwaukee suburb, Rehnquist earned a bachelor's degree from Stanford in 1948 and a master's degree from Harvard University in 1950 before graduating first in the Stanford Law School class of 1952. A classmate there, Sandra Day O'Connor, joined him on the court in 1981.

He has a chronic back problem and suffered a drug reaction in 1981 that resulted in slurred speech and signs of some mental impairment. But according to a Reagan Administration official, he told President Reagan last week that he recently had a physical and was found to be in good health.

Burger to Retire; Rehnquist Nominated for Chief Justice

Appeals Judge Antonin Scalia Also Selected

By ELEANOR CLIFT, 1288
Times Staff Writer

WASHINGTON—Chief Justice Warren E. Burger announced Tuesday that he is retiring after 17 years on the Supreme Court, and President Reagan nominated Justice William H. Rehnquist as the new chief justice and federal appeals Judge Antonin Scalia to replace Rehnquist.

Reagan, singling out judicial restraint as a major reason for his choices of Rehnquist and Scalia, told a packed White House briefing room: "I am mindful of the importance of these nominations."

Although Burger is noted for his conservative philosophy, a senior Administration official told reporters that the changed face of the court would nonetheless prove "one of the most significant decisions of this presidency." He predicted that Rehnquist and Scalia "will have enormous influence over the direction of the court for many years."

Confirmation Expected

The Senate is expected to confirm the nominations of both Rehnquist and Scalia with little opposition.

Rehnquist, who was appointed to the court in 1971 by former President Richard M. Nixon, has consistently opposed abortion, school busing and affirmative action and regularly supported law enforcement officials in their continuing legal struggle with criminal defendants.

Scalia, who, if he is confirmed, will be the first Italian-American to sit on the court, refused to answer any substantive questions for fear of prejudicing his Senate confirmation hearings. He called his appointment "the culmination of a dream."

Scalia is now a judge on the U.S. Appeals Court for the District of Columbia.

Widely Predicted

Burger, whose resignation had been widely predicted for next year, triggered Tuesday's reshuffling of the court with a visit to the White House on May 27. He told Reagan that he wanted to leave the court in order to devote full time to his role as chairman of the Commission on the Bicentennial of the U.S. Constitution. His resignation is effective July 10, after the court issues the final opinions of its current term.

Appearing before reporters Tuesday, he said the 200th anniversary celebration had gotten a late start and was "vastly underfinanced." He added: "We're going to have the devil's own time trying to do the kind of a job that ought to be done for this great event."

Reporters questioned why Burger would leave one of the nation's most influential positions to assume the chairmanship of a committee that will go out of business in a short time. Burger, who will turn 79 in September, denied suggestions that he resigned to ensure that Reagan could name his successor or that his health played a role in his decision.

"You make the diagnosis," he challenged a reporter. "Do I look like I'm falling apart?" He said he had recently had "the walking flu" but "never felt better in my life" and was "not weary" of the job.

But Administration officials did not conceal their happiness at having gained an actuarial edge with the promotion of Rehnquist, 61, to chief justice and the addition of the 50-year-old Scalia to the court.

Noting that Scalia is "young enough to remain on the court for many, many years," an Administration official, who spoke on the condition that he not be identified, said: "That is a pleasant prospect for many people and certainly the President."

When Rehnquist was asked how he felt about taking on the administrative tasks of the chief justice, he joked: "I wouldn't call it the culmination of a dream, but it's not every day when you're 61 years old that you get a chance to have a new job."

Rehnquist, who has a history of back problems, suffered a drug reaction in 1981 that resulted in slurred speech and signs of some mental impairment. He was hospitalized for several days and was treated for a withdrawal reaction to a drug he was taking to help him sleep.

The Administration official who briefed the press said that Rehnquist had told Reagan in a private meeting last week that he had recently had a physical and was found to be in good health.

After learning three weeks ago of Burger's decision to resign, Reagan asked Atty. Gen. Edwin Meese III, White House Chief of Staff Donald T. Regan and White House counsel Peter J. Wallison to come up with recommendations for both chief justice and, if that position was filled from within the Court, a new associate justice.

The three officials reported to Reagan on June 9 with a list of 10 to 15 candidates, along with written synopses of their judicial histories. White House officials said. On the basis of that, Reagan asked to see Rehnquist. The two met last Thursday, and Reagan offered Rehnquist the job of chief justice on

the spot.

Friends of Rehnquist expressed some surprise that he was willing to take on the additional responsibilities because he has talked longingly for some time about retiring soon to Vermont. When asked if Rehnquist had indicated any reluctance in his meeting with Reagan, Meese said, "That was a matter of private conversation," but he insisted that there was "nothing in the conversation . . . that indicates a reluctance to serve."

Reagan met with Scalia on Monday afternoon. Scalia was the leading contender based on Reagan's reading of a written brief of his overall philosophy compiled by Meese and Wallison. "He liked what he saw," an official said.

Meese said Scalia was chosen largely because of "a commitment to the interpretation of the law rather than being a lawmaker."

Meese, who himself was once considered a likely candidate for a Supreme Court opening, was evidently never considered in this round. Officials said that the list Reagan saw included only sitting Supreme Court justices, members of various appeals courts and one or two judges of other courts.

'Judicial Restraint'

An Administration official said that Reagan particularly admired Scalia for his "judicial restraint." At the same time, this official said he did not know whether Scalia had ever ruled on abortion law. He called it "fantasy" that opposition to abortion is used as a litmus test for a court appointment in the Reagan Administration.

Irritated by the number of questions about the possible impact of Scalia's appointment on such controversial social issues as abortion, this official, when asked how the "complexion" of the court would change, retorted breezily: "It's ruddier."

Staff writer Ronald J. Ostrow also contributed to this story.

One Small Step for the Court

Reagan Hardens the Lineup for the Next, Crucial, Vacancy

By ALAN DERSHOWITZ

1289

The resignation of Chief Justice Warren E. Burger and the promotions of Associate Justice William H. Rehnquist and Circuit Judge Antonin Scalia will probably have little short-term effect on the outcome of most of the controversial issues now dividing the Supreme Court. Burger was a political and judicial conservative who occasionally compromised his views in the interest of harmony or future leverage. The newly designated chief justice, Rehnquist, is a doctrinaire conservative who almost never compromises. During his 15 years on the Supreme Court, he has rarely been outflanked on the right. But if there is any sitting federal judge who is capable of making Rehnquist appear more moderate, it is Scalia, who currently serves on the U.S. Court of Appeals for the District of Columbia Circuit.

The net result of the three-way switch will be for the conservative wing of the court as a whole to move toward a somewhat more doctrinaire position. The leadership of the court, both ceremonial and intellectual, will become more ideological. Both Rehnquist and Scalia are intellectuals and scholars on a court dominated by practitioners. Their relative youth—Scalia is 50, Rehnquist 61—and vigor will assure them disproportionate influence, both in the short and the long runs.

But the bottom-line numbers on most important votes will come out about the same, since one conservative has replaced another. It is not as if either Justice William J. Brennan Jr. or Thurgood Marshall had created the vacancy, which would have altered the current ideological balance of the court. Of course, that may happen in the not-too-distant future.

Perhaps the least tangible but most immediate effect of the current change in personnel will come not from the elevation

of Rehnquist and Scalia but rather from the retirement of Burger.

Burger has not served his own cause very well. He has been a divisive chief justice within the court, and not highly respected for the quality of his legal work outside the court. His major contributions have been ceremonial and administrative rather than substantive. His conservative opinions have been an easy target for liberal critics. Some civil libertarians have dreaded the day when he would leave and be replaced by a "better" conservative. That day has come.

One of the enduring legal legends of our age is that no President can pick a justice to fit an ideology. People change when elevated to the Supreme Court or to the rank of chief justice. Look at Earl Warren, Felix Frankfurter or Oliver Wendell Holmes. Each turned out to be quite different from what was expected by the President who appointed him. But selective legends won't always apply. Moreover, this President has learned from his predecessors' experiences and is taking no chances with his current appointees. Both Rehnquist and Scalia come with full warranties based on long track records. Neither will surprise or disappoint President Reagan. Both are totally committed to his conservative ideology. They can be counted on to vote the President's way on most important issues.

Nor is the Senate likely to pose any barrier to confirmation. Although some senators seem dissatisfied with the President's choices on ideological grounds, the excellent professional backgrounds of the new nominees will make them difficult to oppose.

Both are among the sharpest 19th-Century legal minds in America. They will bring a new intellectual legitimacy to

judicial conservatism. But they will make our rights—to expression, privacy, due process and equality—a bit less secure. Popular majoritarian views will go unchallenged more frequently, and sensitivity to the concerns of the disfranchised and politically unempowered will be less recognized. This may translate into restrictions on abortion, on affirmative action, on voting rights and on safeguards for those accused of crimes, and into expansion of censorship, libel actions and presidential power. It also promises to affect the tone and rhetoric of the justices, and may have a trickle-down effect on the lower federal, and even state, courts.

The battle for the control of the Supreme Court into the next century is just beginning. Its outcome will depend on timing. If the next vacancies—especially if left by liberals or moderates—occur while both the presidency and the Senate are under Republican control, we may see a major alteration in our system of checks and balances. The Supreme Court may become little more than a rubber stamp for actions taken by the elected branches. But if the Democrats gain control of the Senate or the presidency before the next swing vacancies occur, any changes are likely to be less dramatic. They may affect the outcomes of particular cases or particular issues, but will not alter the delicate balance among our branches of government.

Chief Justice Burger is stepping down to direct the nation's observance of our Constitution's 200th anniversary. As the celebration approaches, we may see on the horizon some cataclysmic confrontations about the very meaning of that venerable document.

Alan Dershowitz teaches at Harvard Law School and writes a syndicated column.

Move to Provide New Conservative Strength

Rehnquist Expected to Lend More Philosophical Leadership; Scalia Noted for Energy and Youth

By PHILIP HAGER, *Times Staff Writer*

WASHINGTON—The elevation of Justice William H. Rehnquist and the addition of Judge Antonin Scalia will provide new voting strength and intellectual firepower to the conservative block of a Supreme Court known for its generally moderate but sometimes zig-zag judicial course, legal authorities said Tuesday.

Rehnquist, an articulate exponent of legal conservatism throughout his 14 years on the court, is widely seen as able to lend more philosophical leadership than Chief Justice Warren E. Burger and to exert more power of persuasion.

Scalia, a one-time law professor and Reagan appointee to the U.S. Court of Appeals for the District of Columbia, is viewed as providing new intellect, energy and youth—and a philosophy that over the long run may produce a voting record more conservative than that of Burger.

The 50-year-old Scalia nearly personifies the type of committed, credentialed conservative that the Reagan Administration has sought for appointments throughout the federal bench. If confirmed, he will join a court that next fall would have become the oldest in history.

Legal observers generally agree that there is little prospect of sharp changes at the court in the immediate future. The Burger court was regarded as turning in a more conservative direction than the court under Chief Justice Earl Warren. But it supported many of the Warren court's most significant rulings—including controversial decisions on school prayer, desegregation, reapportionment and the rights of criminal defendants.

Rehnquist and Burger—and now perhaps Scalia—have been conservative mainstays. Justices William J. Brennan Jr. and Thurgood Marshall have been consistently liberal. But an often-shifting philosophical center has effectively controlled the court—and seems destined to do so until there is further change.

"There'll be no significant, meaningful difference in the Supreme Court's product," said Jesse H. Cooper, dean of the UC Berkeley Law School. "I'd be very surprised if there were any basic changes."

Prof. Yale Kamisar of the University of Michigan Law School agreed. "It seems to be essentially one conservative vote—Scalia—for another—Burger," he said. Not surprisingly, President Reagan's choices drew praise from conservative legal observers.

"Scalia is an outstanding judge, a great scholar and a strict constructionist—a 'soul mate' of Rehnquist," said Patrick B. McGugan of the Judicial Reform Project, a division of the Free Congress Research

and Education Foundation. "This is putting the Reagan imprint on the Supreme Court."

Liberals foresaw little change, noting that the naming of Scalia would have taken on far more significance had he been replacing Brennan, Marshall or a court moderate such as Justice Lewis F. Powell Jr.

"The difference, really, is in longevity: replacing a 78-year-old man with a 50-year-old man," said Burt Neuborne of the American Civil Liberties Union. "Burger tended to vote for the government and against the individual. I assume Scalia will continue that pattern."

Scalia has been a judge only since 1982 and thus has not had the opportunity to establish a record from which to make sound predictions on how he will vote on the Supreme Court.

Among other things, he has voted against challenges to governmental authority and has ruled against First Amendment claims made by journalists and protesters. Along with Judge Robert H. Bork—himself another potential Reagan nominee to the high court—he is regarded as the most conservative member of the D.C. appellate court.

Scalia dissented when the appeals court said that the right to "symbolic speech" prohibited the government from barring demonstrators from sleeping overnight in federal parks in Washington. Scalia wrote that sleeping is not a form of speech protected by the First Amendment—and the Supreme Court later reversed the appellate ruling, allowing the government to bar the protesters.

Conservative Positions

Authorities who have studied his opinions as an appellate judge believe Scalia will take distinctly conservative positions on such big issues as abortion, affirmative action and separation of church and state. Still, on some key issues, it may be some years before his impact will be felt.

In their recent decision on abortion, for example, five justices strongly reaffirmed the court's 1973 ruling giving women a constitutional right to end their pregnancies. Burger, who is leaving the court, issued a dissent, saying that the 1973 ruling should be reconsidered.

In another recent case, Burger voted with the majority when the

court struck down a Michigan school district plan providing special job protections for blacks at the expense of whites with more seniority—but joined in an opinion suggesting that some carefully tailored affirmative action plans can meet constitutional standards.

Last year, in another celebrated case, Burger dissented when the court invalidated an Alabama law that provided for a "moment of silence" in school classrooms—a law the majority said was enacted improperly for the purpose of encouraging prayer.

Intellectual Leadership

Rehnquist, of course, will continue to cast only one vote on the nine-member court—but in his capacity as chief justice, he will be in a better position to assert intellectual leadership.

"Rehnquist has been a much more consistent, systematic and effective spokesman for extreme judicial conservatism than Burger," said Benno Schmidt, former dean of Columbia University Law School.

"In the long run, the appointments of Rehnquist and Scalia, even without further changes on the court, are going to mean an important reshaping of the court for the future."

Both supporters and critics agreed that Rehnquist's personal warmth, friendliness and legal intellect may enable him to exert more influence on the other justices than did Burger—a man widely respected for his devotion to court administration but not regarded as particularly persuasive in fashioning court majorities in important cases.

SELECTION PRAISED BY G.O.P. SENATORS

Party Leaders Predict an Easy
Confirmation of Rehnquist
— Democrats Doubtful

30/128
By STEVEN V. ROBERTS

Special to The New York Times

WASHINGTON, June 17 — Republican leaders of the Senate today praised President Reagan's selection of Justice William H. Rehnquist to become Chief Justice of the United States and predicted that he would be easily confirmed.

But some Democrats said they had "grave doubts" about what they described as Mr. Rehnquist's "extreme right-wing views," and they vowed to scrutinize his record very carefully before deciding whether to support his nomination.

Mr. Reagan's intention to nominate Judge Antonin Scalia to replace Mr. Rehnquist as an Associate Justice stirred less controversy, in part because his views on many issues are not well known. In addition, lawmakers from both parties said that Judge Scalia's reputation for intellectual brilliance would mute criticism from senators who disagreed with his conservative rulings.

Lawmakers differed on what impact the two nominees would have on the Supreme Court, should both be confirmed. Senator Strom Thurmond, the South Carolina Republican who heads the Judiciary Committee, said that both men share the conservative views of Chief Justice Warren Burger and added: "I don't think the balance of the court will be changed."

But Senator Orrin G. Hatch, a Utah Republican who serves on the Judiciary panel, said both nominees are "more conservative" than Justice Burger, and predicted that they would pull the court to the right. The Senator described the retiring Chief Justice as "a moderate with conservative leanings," and he mentioned Mr. Burger's support for the decision that legalized abortion in 1973.

Representative Don Edwards, Democrat of California, the chairman of the subcommittee on civil and con-

stitutional rights, agreed with Senator Hatch and explained: "On balance, this change will likely result in a more conservative court."

From a political standpoint, the choice of Judge Scalia drew praise from Italian-Americans in both parties. Senator Pete V. Domenici, a New Mexico Republican, called the nomination a "magnificent tribute" to Americans of Italian origin, and Representative Mario Biaggi, a Bronx Democrat, added: "Of course, there is a special pride I feel as an Italian American. Our community has always asked for consideration based on merit."

The Republican reaction to Mr. Reagan's surprising announcement was led by Bob Dole, the majority leader, who said "I can think of no finer choice" than Justice Rehnquist to replace Chief Justice Burger.

Senator Cranston called the timing of Justice Burger's retirement "very interesting." As a result, he added, it would be more difficult to delay action on the nominations until the end of the Congress, should a surge of opposition develop in the weeks ahead.

Many lawmakers have noted that if the Democrats regain control of the Senate in November's election, one of the primary results could be greater trouble for judicial nominations in Mr. Reagan's final two years in office.

Many lawmakers were cautious to-

day about passing judgment on the two selections, but Senator Cranston said he was particularly concerned about how Justice Rehnquist might perform as the chief administrator of the Supreme Court.

"The question is: can a man, who has an extreme right-wing ideology, manage the court in a fair and balanced way?" the California Democrat said.

The developments regarding the Court were greeted with dismay by some feminist and liberal groups. Eleanor Smeal, president of the National Organization for Women, said that Mr. Rehnquist "has consistently been against the women's rights and feminist position in a whole host of cases."

Conservative groups, on the other hand, were generally elated. "In my view, Mr. Burger was a transition figure, from the radical activism of the Warren court to the principled restraint of the Rehnquist era," said Patrick B. McGuigan, director of the judicial reform project for the Free Congress Foundation. "In terms of style and tone, the Court will be much more conservative than it has been."

Richard Viguerie, a conservative activist, hailed Mr. Scalia's prospective appointment, adding, "I particularly like the fact that he's 50 years of age. We want to make sure we have a situation where the judiciary is going to reflect the Reagan philosophy for many years to come."

BURGER RETIRING, REHNQUIST NAMED CHIEF; SCALIA, APPEALS JUDGE, CHOSEN FOR COURT

TENURE OF 17 YEARS

Reagan Acts to Solidify Bloc That Would Back His Social Agenda

128

By BERNARD WEINRAUB
Special to The New York Times

WASHINGTON, June 17—President Reagan today announced the retirement of Warren E. Burger as Chief Justice of the United States after 17 years and the intention to nominate Associate Justice William Hubbs Rehnquist to replace him.

Mr. Reagan also announced that, upon Justice Rehnquist's confirmation as Chief Justice by the Senate, he would nominate Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia to the Supreme Court.

Republican leaders of the Senate praised the selection of Justice Rehnquist to become Chief Justice, but some Democrats expressed doubts about his record. Lawmakers from both parties said Judge Scalia's reputation as a legal scholar was likely to dissolve opposition to his nomination, and many said he would shift the balance of the Court perceptibly to the right.

A Decisive Move

With the announcement today, Mr. Reagan moved decisively to insure that on the central issues of his social agenda — civil rights, abortion, church-state relations and the constitutionality of independent Federal agencies — the Supreme Court will include a forceful number and possibly a majority of Justices supporting the President.

The departure of Chief Justice Burger marks an end to the tenure of a Chief Justice whose years heading the Supreme Court were marked by an unexpected activism, even in areas such as civil rights and criminal law. Mr. Burger was appointed by President Nixon in an effort to seek "judicial restraint" in the Court's decisions.

Chief Justice Burger said he was retiring to devote his time entirely to organizing ceremonies surrounding the 200th anniversary of the Constitution in 1987. Chief Justice Burger, 78 years old, who is chairman of the Commission on the Bicentennial of the United States Constitution, denied that he was leaving the Court because of poor health or weariness with the job.

'I Wasn't Weary'

"I wasn't weary of being Chief Justice," he said with a grin. "It's a lot of fun."

Asked if he was leaving for reasons of health, Justice Burger said: "You make the diagnosis. Do I look as though I'm falling apart? I never felt better in my life."

White House and Reagan Administration officials said today that Chief Justice Burger, at a private White House meeting three weeks ago, told

the President unequivocally that he wanted to retire.

Mr. Reagan, who made the announcement at 2 P.M. today at the White House before a national television audience, said Judge Scalia was "noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues."

"His great personal energy, the force of his intellect, and the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court," said Mr. Reagan, who stood in the White House beside Justice Burger, Justice Rehnquist and Judge Scalia.

White House officials said they expect no substantive opposition to Judge Scalia in the Senate, where a majority vote is required for his confirmation. He is believed to be the first American of Italian descent to serve on the Supreme Court, and at 50, he is younger than any sitting Justice.

Senator Strom Thurmond, the South Carolina Republican who heads the Senate Judiciary Committee, which has jurisdiction over the nominations, promised to hold hearings quickly. "I expect no problem in having either of the President's nominations confirmed," he said.

Attorney General Edwin Meese 3d, who was involved in the selection process, said the President had adhered to three basic criteria in nominating Justice Rehnquist and Judge Scalia. "One is intellectual and lawyerly capability," he said, "secondly, integrity, and thirdly, a commitment to the interpretation of the law rather than being a lawmaker."

A senior Administration official, also involved in the selection process, said the nominations "will have enormous influence on the direction of the Court for many years."

Republican leaders of the Senate praised Mr. Reagan's selection of Justice Rehnquist, who was named to the Supreme Court in 1971 by President Nixon and has long been the Court's most conservative member. Democrats vowed, however, to examine his record carefully before deciding whether to endorse his nomination as Chief Justice.

The views of Judge Scalia are not widely known. He has criticized the Supreme Court's approval of affirmative action plans that include racial preferences, hinted at disagreement with the Court's broad First Amendment rulings limiting libel suits, questioned the constitutional basis for the independence from the President of such agencies as the Federal Reserve Board and is said to be personally opposed to abortion.

White House officials insisted that "there was no litmus test" for selecting Judge Scalia and that he was not subject to any specific screening for opinions on school prayer, abortion or other issues. Mr. Meese said a principal criterion was seeking two jurists who are "interpreters of the law rather than lawmakers."

The effective date of Chief Justice Burger's departure is July 10, when the Court expects to finish work on its cur-

rent term, although he said he would stay longer if needed until the replacement is complete. A spokesman for the Court said Mr. Burger would draw his full annual salary of \$108,400 in retirement.

Mr. Reagan said Chief Justice Burger informed him three weeks ago of his yearning to leave the Supreme Court to devote full time to the commission.

Chief Justice Burger said today, "It is vastly underfinanced and we're going to have the devil's own time in trying to do the kind of a job that ought to be done for this great event."

White House officials said the disclosure surprised the President and his chief of staff, Donald T. Regan. Also attending the Oval Office meeting was Fred F. Fielding, the former White House counsel.

Chief Justice Burger, in his letter of resignation, said that his work heading the commission on the Constitution was a "full-time enterprise" and was "an enormous and challenging task." The responsibilities of serving as Chief Justice as well running the commission were far more than he could handle, the Chief Justice indicated.

Chief Justice Burger, in a joking mood, was asked by reporters if he would change some of the opinions he had written. "I wish some of them were a little shorter," he said.

Justice Rehnquist, asked if the nomination to replace Chief Justice Burger was the culmination of a dream, said: "I wouldn't call it the culmination of a dream, but it's not every day when you're 61 years old that you get a chance to have a new job."

Chief Justice Burger said: "That strikes me as a perfect parallel. Bill Rehnquist is the same age as I was when I was nominated back in the Garfield Administration, I think it was."

The two Justices and Judge Scalia broke into laughter.

Reshaped Court to Face Major Issues

1288

By ROBERT PEAR

Special to The New York Times

WASHINGTON, June 17 — In the next few years the Supreme Court will probably face a series of momentous cases dealing with civil rights, abortion, church-state relations and the constitutionality of independent Federal agencies, according to lawyers who follow the Court.

The Court's agenda became the object of increased attention today as President Reagan announced that Warren E. Burger was retiring after 17 years as Chief Justice of the United States. Mr. Reagan said he would nominate William H. Rehnquist to be the next Chief Justice and Antonin Scalia to be an Associate Justice of the Supreme Court. Mr. Scalia has been a judge of the United States Court of Appeals for the District of Columbia since 1982, when he was appointed by Mr. Reagan.

Major undecided questions, according to lawyers who closely follow the work of the High Court, include the legality of various types of affirmative action in employment and education; the propriety of state efforts to restrict access to abortion; the permissible forms of state support for church-related institutions, and the legal status of independent Federal agencies such as the Federal Trade Commission.

In his judicial opinions and essays, Judge Scalia has generally insisted on a rigid separation of powers among the branches of Government, raising questions about the constitutionality of independent agencies. He has indicated that he is receptive to the Justice Department argument that such agencies are an anomaly, a "headless fourth branch" of Government, outside the legislative, executive and judicial branches explicitly authorized in the Constitution.

Ruling on Budget Law

Judge Scalia was a member of a three-judge panel that struck down a key provision of a new budget-balancing law in February. The court held the law unconstitutional on the ground that it violated the principle requiring separation of powers.

In a passage widely assumed to have been written by Judge Scalia, the panel cast a legal shadow over independent agencies, saying, "It is not as obvious today as it seemed in the 1930's that there can be such things as genuinely

'independent' regulatory agencies." The Supreme Court may be asked to consider numerous cases challenging the legal authority of such agencies in the next few years, and Reagan Administration officials have encouraged such challenges in some of their public remarks.

Other issues likely to face the Court include exceptions to the rule that generally bars use of illegally seized evidence in criminal cases; Government regulation of electronic communications media such as cable television, and the proper balance of power between the Federal Government and the states in regulating economic activity.

Since 1978, the Supreme Court has enunciated a few general principles about the use of racial preferences designed to overcome the effects of discrimination. The Court has approved certain types of affirmative action and disapproved others, but its rulings have given rise to conflicting interpretations.

Yale Kamisar, a professor at the University of Michigan Law School, said that in terms of its importance to the Administration, "the abortion issue

is in a category by itself, and everything else pales into insignificance."

By a 5-to-4 vote last week, the Supreme Court reaffirmed its landmark 1973 decision establishing a constitutional right to abortion. But in coming years, lawyers said, the Court will undoubtedly be asked to rule on the legality of other state efforts to regulate or restrict access to abortion. The Court will also probably be asked again to overrule its 1973 decision, in which the vote was 7 to 2.

Kenneth S. Geller, a former Deputy Solicitor General of the United States, said the Court would probably also be asked to reconsider the three-part test it has used in determining whether a state or Federal law represents an unconstitutional "establishment of religion." This test stipulates that to pass muster, a law must have "a clearly secular legislative purpose," must neither advance nor inhibit religion and must "avoid excessive government entanglement with religion."

Experts on the Supreme Court said there would be no difficulty in making the transition envisioned by President Reagan because the Court would, by the end of the current term next month, issue decisions in virtually all cases that had been briefed and argued. There will be few if any cases to carry over to the next term.

Outlook on Libel Issue

On another First Amendment issue, the key question is whether the Court will begin cutting back on the protection it has given to news organizations in libel cases.

In a 1964 case, *The New York Times Company v. Sullivan*, the High Court ruled that a state could not award damages to a public official for a defamatory falsehood unless he proved that the statement was made with knowledge of its falsity or with "reckless disregard" of whether it was true or false.

Judge Scalia has suggested that there is a "distressing tendency" for political commentators and columnists to "descend from discussion of public issues to destruction of private reputations." In a 1984 opinion, he wrote that the rough treatment of people who entered the "public political arena" was "fulsomely assured" by the standards laid down in the 1964 case relating to defamation of public figures.

More Vigor for the Right

Court Would Ease Toward Conservatism
Without Abruptly Changing Its Direction

1288

By STUART TAYLOR Jr.

Special to The New York Times

WASHINGTON, June 17 — The ideological balance of the Supreme Court is likely to shift perceptibly to the right if the Senate confirms President Reagan's selections of Justice William H.

Rehnquist to become Chief Justice and Judge Antonin Scalia to become an Associate Justice.

But legal experts do not expect this change alone to produce dramatic reversals of the Court's precedents on major issues. Chief Justice Warren E. Burger, who is retiring, is also a conservative, although less so than Justice Rehnquist and Judge Scalia.

The two selected today are said by most students of their records to be more consistent, more energetic and more intellectually formidable advocates of conservative views, and of judicial restraint, than Chief Justice Burger has been.

Persuasive Abilities Cited

Both are regarded by ideological friends and foes alike as first-rate legal minds who have a clear view of where they want the Court to go and the persuasive powers to influence wavering colleagues in close cases.

But they may often find themselves outvoted on politically charged issues in which the Court's two consistent liberals, Justices William J. Brennan Jr. and Thurgood Marshall, are joined by some of the five in the shifting ideological center — Justices Harry A. Black-

mun, John Paul Stevens, Lewis F. Powell Jr., Byron R. White and Sandra Day O'Connor.

Conservatives who have been unhappy with some of Chief Justice Burger's votes on major issues, including school desegregation through busing, abortion, affirmative action, sex discrimination, separation of church and state and press access to court proceedings, hope for a more consistent ally in Judge Scalia.

Judge Scalia has, for example, criticized the Supreme Court's approval of affirmative action plans that include racial preferences, embraced an expansive view of Presidential power, questioned the constitutional basis for the independence from the President of agencies such as the Federal Reserve Board, trenchantly criticized the Freedom of Information Act and hinted at disagreement with the Court's First Amendment rulings limiting libel suits.

He has also questioned the basis for the Supreme Court's recognition of a constitutional right to sexual privacy, including abortion rights, and has joined a ruling that the Constitution does not protect private homosexual acts between consenting adults. A Roman Catholic, he is said by acquaintances to be personally opposed to abortion.

But even if Judge Scalia were, as a Justice, to vote to allow states to restrict or prohibit abortion, there would still be five solid votes for broad abortion rights, as demonstrated by last week's decision striking down a Pennsylvania law regulating abortion.

More generally, Judge Scalia has, like Attorney General Edwin Meese 3d and other Administration officials, criticized the courts for invading the sphere of elected officials, and assigning to themselves "social judgments that ought better be left to the democratic process."

A Reagan appointee to the United States Court of Appeals for the District of Columbia, Judge Scalia has said he has an obligation to follow Supreme Court precedents even if he thinks them incorrect. He has refrained from criticizing the Court's decisions as overtly as he did in his writings as a University of Chicago law professor.

While some members of the Court, like the Chief Justice Earl Warren, have done things that surprised and horrified the Presidents who appointed them, this is unlikely in the case of Justice Rehnquist and Judge Scalia, whose legal philosophies seem remarkably compatible with Mr. Reagan's political philosophy.

They are known quantities, having expressed consistent views on a broad range of political and legal issues over the years, both in judicial opinions and, in Judge Scalia's case, in academic writings.

Professor Laurence H. Tribe of Harvard Law School said today that two issues on which Judge Scalia's presence on the Court could make a difference are sex discrimination, in which Chief Justice Burger interpreted the Constitution to strike down some state laws as discriminatory, and freedom of speech, in which Chief Justice Burger has written some opinions applauded by press groups and libertarians.

Another issue on which Judge Scalia might make a difference is affirmative action, on which the Court has been splintered.

Tipping the Balance

If, as some experts speculated, he were to support the Administration's broad attack on affirmative action plans that grant racial preferences, it could tip the balance of the Court in some cases.

Chief Justice Burger has been something of a swing vote in affirmative action cases, expressing concern about broad use of racial preferences but voting to approve such preferences in some cases, including a 1981 decision upholding an act of Congress that required a specific percentage of Federal construction grants to be set aside for minority-owned businesses.

Justice Rehnquist has long been the Court's most conservative member. Although Chief Justice Burger has often been aligned with him, Mr. Tribe and other scholars said Justice Rehnquist was much better equipped to be an intellectual leader.

As Chief Justice, he would still have only one vote in a group that he himself said in 1984 was marked by "the extraordinary independence that each Justice has from every other Justice."

But he would have more power to shape the Court's deliberations and to influence the national legal agenda. The Chief Justice presides at the Court's private conferences, assigns opinions when he is in the majority, acts as administrative chief of the Federal judiciary, and can command far more attention from the news media and public than any other member of the Court.

"The Chief Justice has a lot of subtle power to push the Court in the direction in which he wants it to go," said Kenneth Geller, a Washington lawyer who was for years one of the top Supreme Court litigators in the Solicitor General's Office. "I think it could make a big difference" to have Justice Rehnquist in the job.

This would not necessarily mean that issues that have gone one way by close votes would start going the other way with Justice Rehnquist as Chief Justice and Judge Scalia on the Court, presumably as his ally.

"The voting pattern should remain stable," predicted Burt Neuborne, legal director of the American Civil Liberties Union, because Chief Justice Burger was aligned with Justice Rehnquist in the great majority of cases.

Mr. Neuborne added: "Burger's tenure demonstrates that merely being Chief Justice isn't enough to make you a leader of the Court. Either you have to have a natural ideological majority or you have to have qualities of mind and heart that make you a natural leader."

Chief Justice Warren, who led the Court's liberal majority as it became an engine of change in the 1950's and 1960's, had both the ideological majority and leadership qualities, other experts said. While Justice Rehnquist has the mind and may have the heart, he does not yet have enough allies on the Court to have a similar impact.

Mr. Neuborne added that with the retirement of Chief Justice Burger and the addition to the Court of Judge Scalia, "even if they were absolutely identical in their views, you're replacing a 78-year-old man who is tired with a 50-year-old man who is energetic and very gregarious."

WASHINGTON | James Reston

Hear Ye in the Court

1269

WASHINGTON

The surprising thing about the coming changes on the Supreme Court is that they have not occurred earlier.

With President Reagan approaching his sixth year in the White House, and five of the nine members over 75, it was expected even in the last Presidential election that by now Mr. Reagan would have been able to appoint a clear conservative majority.

The timing of Chief Justice Burger's resignation was a surprise. It was known that he had become increasingly preoccupied in the last year with the bicentennial celebration of the Constitution, and he gave this as the sole reason for stepping down next month.

At the same time, though saying he was in excellent health, he has been suffering from a painful back and respiratory difficulties, and he told the press that working 105 hours a week was a bit much for a man of 78.

There seems to be general agreement here among students of the Court on two points:

First, that Associate Justice William Rehnquist, nominated to succeed Chief Justice Burger, and Judge Antonin Scalia of the Federal Court of Appeals for the District of Columbia Circuit, nominated to fill the resulting vacancy, are highly qualified conservative judges and will have no trouble being confirmed. This might have been different if the Democrats were to gain control of the Senate in this November's elections, and may help explain why the Administration is pleased with the present moves.

The result, therefore, is that the new Court will include Chief Justice Rehnquist at 61, Associate Justices White, 69, O'Connor, 56, and Scalia, 50, all conservatives, plus Justice Stevens, 66, and Justices Brennan, Marshall, Blackmun and Powell, all over 75. The Democrats, fearing that Mr. Reagan will leave behind a young conservative Court that will sustain his policies long after he's gone, are complaining that these appointments are clearly political.

But as Associate Prof. David M. O'Brien, of the University of Virginia, notes in an excellent new book on the Supreme Court, "Storm Center," "the reality is that every appointment to the Court is political."

Justice Rehnquist left no doubt on this point in a speech he made at the University of Minnesota just before the Presidential election of 1984.

There is no reason, he said, that a President should not appoint people to the Court who are sympathetic to his political and philosophical principles, and nothing really to worry about.

"The institution [of the Court]," he

What was surprising in the moves

observed, "is so structured that a brand new Presidential appointee, perhaps feeling himself strongly loyal to the President who appointed him, and looking for colleagues of a similar mind on the Court, is immediately beset with the institutional pressures. . . . He identifies more and more strongly with the new institution of which he has become a member and he learns how much store is set by his behaving independently of his colleagues."

On such delicate constitutional questions as abortion, prayer in the schools and desegregation of the schools, Justice Rehnquist has been the most outspoken advocate of conservative policies. He has managed to take these positions without personal animosity among his colleagues and is a great favorite with his clerks, whom he allows to make the first draft of his opinions.

Also, he has backed Chief Justice Burger in the effort to establish a national court of appeals to ease the case load and work load of the Court. And while he is less interested in the administrative duties of the Court than Chief Justice Burger, he indicated today that he could put up with them.

There is perhaps one surprise in the appointment of Judge Scalia. While it is agreed here that he is articulate and personable, it was thought that Robert Bork, a former Yale University law professor who is also on the U.S. Court of Appeals for the District of Columbia Circuit, had a more brilliant career, and having been passed over once despite the recommendation of the conservative wing of the Republican Party, would this time be chosen.

Judge Bork, wrote Senator Barry Goldwater of Arizona to President Ford, "is young and is a strict constructionist and would give continuity to the kind of Court that you want for at least 25 years." Mr. Ford, however, refused and so did Mr. Reagan.

Judge Scalia, a Roman Catholic who would be the first Justice on the Court of Italian descent, is thought to be a more reliable conservative, perhaps halfway between Justices Rehnquist and O'Connor. But in any event, the long-anticipated switch in the balance of power on the Court, though not assured by these moves, is undoubtedly on its way. □

Dedicated Conservative Jurist

128p William Hubbs Rehnquist

By STEPHEN ENGELBERG

Special to The New York Times

WASHINGTON, June 17 — Justice William H. Rehnquist, nominated to be Chief Justice of the United States by President Reagan today, is a conservative jurist whose polished opinions have won grudging respect even from those who oppose his views.

Men Justice Rehnquist, 61
In the years old, was named to
News the Court by President Nixon in 1971 after serving for two years in the Justice Department as head of the Office of Legal Counsel. As one of the Government's chief legal strategists, he articulated that Administration's policies on such issues as obscenity, wiretapping and defendants' rights.

In an interview last year with The New York Times Magazine, he said that when he was appointed, he saw himself as a counterweight to the direction taken by the Court under Chief Justice Earl Warren.

"I felt that at the time I came on the Court, the boat was kind of keeling over in one direction," he said. "Interpreting my oath as I saw it, I felt that my job was, where those sort of situations arose, to kind of lean the other way."

More recently, with the appointment by President Reagan of Sandra Day O'Connor, his classmate at Stanford Law School, and shifts in the thinking of other colleagues, Justice Rehnquist has found himself increasingly in the majority.

The most frequent complaint about Justice Rehnquist voiced by academic critics is that his accomplished writing style obscures disingenuous arguments and the twisting of facts to fit his viewpoint.

In his interview last year, Justice Rehnquist said such assertions were not "well founded." He said it was the academics who were being disingenuous, noting that a 1972 poll showed 85 percent of law school faculty members favored George McGovern, the Democratic Presidential candidate. "You have to say, based on the law of averages, the author is going to start with a predisposition against a lot of my ideas," he said.

Early Years in Wisconsin

William Hubbs Rehnquist was born in Milwaukee and reared in the suburb of Shorewood. He attended Kenyon College for a year before joining the Army Air Corps as a weather observer.

With the end of World War II, he entered Stanford University and ma-

jored in political science. Subsequently he earned master's degrees in political science from Harvard and Stanford. He went on to Stanford Law School from which he graduated first in the Class of 1952.

After law school, he became a clerk for Justice Robert H. Jackson. While there he wrote a memorandum for the Justice that was later an issue in the Senate confirmation for Mr. Rehnquist's seat on the high court.

Written two years before the Court overturned the legal doctrine supporting separate but equal schools for blacks, the memorandum said segregation in education was "right and should be affirmed." Mr. Rehnquist maintained that the memorandum was written to express the views of Justice Jackson, not his own.

Friendly With Kleindienst

After working as a Supreme Court clerk, Mr. Rehnquist moved to Phoenix, Ariz., where he worked in private practice as a lawyer with several firms. He was active in local politics, and became friendly with Richard G. Kleindienst, who became President Nixon's Deputy Attorney General. Justice Rehnquist joined Mr. Kleindienst in the Justice Department.

Legal scholars agree that Justice Rehnquist's abilities as an advocate

and writer mark him as a potentially influential Chief Justice. "There's no doubt that if he were confirmed, Justice Rehnquist would be an extraordinarily powerful and influential Chief Justice," said Laurence Tribe, a professor at Harvard Law School. "To have someone with as powerfully developed views on issues, leaning sharply to the right, occupying the center of the judicial system would be significant."

Judge With Tenacity and Charm

128 p

Antonin Scalia

By IRVIN MOLOTSKY

Special to The New York Times

WASHINGTON, June 17 — To Judge Abner J. Mikva, a liberal member of the United States Court of Appeals for the District of Columbia Circuit, his colleague Antonin Scalia is a conservative but not antigovernment.

To Richard W. Pogue, the managing partner of the Cleveland law firm in which Judge Scalia once was a partner, he is a consensus builder despite his strongly held views.

But to Larry L. Simms, who worked for Judge Scalia when he was an Assistant Attorney General in the Justice Department, he can hold to positions on important issues with great tenacity.

These and other views of Judge Scalia emerged today as President

Reagan announced he intended to nominate him as a Justice of the United States Supreme Court. The views came from his colleagues, friends and adversaries, and while they sometimes differed on emphasis, they all predicted that his scholarship and charm would lead to his speedy approval by the Senate.

Tenacious Advocate

Mr. Simms said that once Judge Scalia arrived at a position, he would hold to it, even at the risk of future advancement.

"He was a strident opponent of the legislative veto," Mr. Simms said, referring to a law that permitted Congress to overturn some Presidential decisions. "After he became a private citizen, he testified against it before legislative committees, notwithstanding President Reagan's support

of them at first. He was prepared to express a view of the unconstitutionality of legislation at a time when he had nothing to gain. A lot of people would have kept their mouths shut."

As it turned out, Judge Scalia's view prevailed, with the Supreme Court ruling such legislative vetoes unconstitutional.

William Stern, the former chairman of Urban Development Corporation in New York State, said of Judge Scalia, his former classmate at Xavier High School, a Catholic military academy in Manhattan:

"This kid was a conservative when he was 17 years old. An archconservative Catholic. He could have been a member of the Curia. He was the top student in the class. He was brilliant, way above everybody else."

Antonin Scalia (pronounced AN-tuh-neen Skuh-LEE-yuh) was born March 11, 1936, in Trenton, to Catherine and S. Eugene Scalia, both of whom died in the past year. His mother was born in the United States and his father in Italy, and the White House was careful to include in his official biography today that his father was an immigrant. If confirmed, Judge Scalia would become the first Italian-American to serve on the Supreme Court.

Mr. Scalia graduated summa cum laude from Georgetown University in 1957. He was valedictorian and first in his class. In 1960 he graduated from Harvard Law School, where he had been an editor of the Law Review, and the following year he held a Sheldon Fellowship at Harvard.

He has taught law at the University of Chicago, Stanford University, Georgetown University and the University of Virginia, served as an Assistant Attorney General 1974 to 1977.

In 1982, President Reagan named Judge Scalia to the appeals court, which is second in importance only to the Supreme Court.

Judge Scalia lives with his wife, the former Maureen McCarthy, and the younger of their nine children in the nearby suburb of McLean, Va.

Some Key Court Decisions by Judge Scalia

128

Here are some important decisions by the United States Court of Appeals for the District of Columbia Circuit in which Judge Antonin Scalia took part:

Budget-Balancing Law — Last February, a three-judge panel ruled unanimously that a key provision of the new law violated the constitutional principle requiring the separation of powers among the branches of Government. The court ruled that it was unconstitutional for Congress to have delegated authority over the budget to the Comptroller General of the United States or anyone else removable by Congress itself. Although the decision was unsigned, it is considered largely Judge Scalia's work.

Trial Documents — Last September, in a 2-to-1 decision written by Judge Scalia, the panel ruled that the public and the press had no constitutional right to see documents in civil trials in which such data were used as evidence. The ruling upheld a decision in the 1982 trial of a libel suit by William P. Tavoulareas, president of the Mobil Oil Company, against The Washington Post.

Nicaraguan Policy — In August 1985, a decision written by Judge Scalia upheld the dismissal of a lawsuit accusing the United States of illegally supporting the Nicaraguan insurgents. In the absence of explicit

Congressional restrictions, the court ruled that it could not entertain a lawsuit challenging the Government's support for rebel attacks even if the plaintiffs were correct in alleging that the support violated the Constitution, acts of Congress and international law.

Libel — In a 2-to-1 decision in April 1985, the panel reinstated a jury's verdict that The Post libeled Mr. Tavoulareas in a 1979 news article. The opinion, written by Judge George E. MacKinnon and joined by Judge Scalia, said, "Evidence that a newspaper followed a sensationalistic policy, because it provides a motive for knowing or reckless falsehood, is evidence of disregard for truth or falsity."

Anti-Reagan Poster — In December 1984, the court held that an artist had a right to lease space in subway stations in the District of Columbia to display a poster critical of the Reagan Administration. The panel said the Metropolitan Transit Authority had violated the First Amendment by barring the poster while allowing other political advertising. Judge Robert H. Bork and Judge Scalia held that "a scheme that empowers agencies of a political branch of government to impose prior restraint upon a political message because of its falsity is unconstitutional."

REVIEW & OUTLOOK

The Next Supreme Court

The Supreme Court is about to enter a new era, and it could be a very interesting one. Chief Justice Warren Burger will step aside to devote his considerable energies to the celebration of the bicentennial of the Constitution in 1987. If the Senate concurs, Associate Justice William Rehnquist will become the new chief justice. Judge Antonin Scalia, one of the most forceful intellects in the law, will join the high court. It's too soon to predict what changes all this will bring, but it's safe to say that the Constitution will be carried into its third century in respectful hands.

Justice Rehnquist will bring a special talent to administering the court. His opinions are famous for going to the heart of issues. There is rarely any doubt among lower courts about what a Rehnquist opinion means. His colleagues need some restraint on their increasingly long and complex opinions. Some recent divided opinions have actually made the state of the law less clear.

As to substance, Justice Rehnquist will keep reminding his colleagues that careful attention to the text and principles of the Constitution can answer many hard questions. His opinions often stand for the refreshingly modest principles that judicial discretion is limited and that "judicial activism" often means judges are making, not interpreting, the law.

Although we might not agree with Antonin Scalia on every issue, on the whole he is an excellent choice. Even before he joined the District of Columbia Court of Appeals in 1982, he had come to our attention as the editor of *Regulation* magazine and as one of the crew of bright scholars teaching at the University of Chicago Law School. His specialty is separation of powers, the delicate balance among the president, Congress and courts.

Although the Warren Court era led legal scholars to study the Bill of

Rights almost exclusively, Judge Scalia is part of a young group of scholars who have concentrated on the Constitution itself, which is primarily concerned with dividing up the powers of the government into separate branches. Judge Scalia is an expert on how the post-New Deal regulatory system works, and especially on how it fits—and doesn't fit—into this careful system of checks and balances.

Judge Scalia is best known for February's opinion invalidating part of the Gramm-Rudman budget bill. Although that opinion was unsigned, Judge Scalia was immediately credited with its writing because its separation-of-powers arguments so closely reflect what he'd said as a commentator and academic. The Constitution, the court said, allows for only one way for a budget bill to become law. It must originate in the House, be passed by both houses and then be submitted to the president for his signature or veto. Gramm-Rudman ran afoul of this system by having the comptroller-general, a legislative-branch official, make automatic sequestrations without the budget being presented to the president.

These changes on the court will not bring any huge political realignment. Judge Scalia, Justice Rehnquist and Chief Justice Burger are all "conservatives." The addition of Judge Scalia could provide a new philosophical approach to separation-of-powers issues, but these are as nonpartisan as the Constitution itself. The real significance of changes on the court are never as simple as political labels.

The Senate will now consider the nominations of Justice Rehnquist and Judge Scalia. This is a serious responsibility, which we hope won't collapse into the highly partisan treatment of some of President Reagan's other nominees.

Judicial Shakeup

Changes on High Court Are Likely to Increase Conservatives' Clout

Rehnquist Picked to Succeed Retiring Warren Burger; Scalia Is Named to Bench

Effect on Abortion Cases 1289

By STEPHEN WERMIEL

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — The surprise retirement of Chief Justice Warren Burger and President Reagan's new judicial nominations increase the firepower of the Supreme Court's conservative wing and put in greater jeopardy the liberal decisions of the 1960s.

The nominations of Associate Justice William Rehnquist to be the new chief justice, and of appeals court Judge Antonin Scalia to the high court, don't alter the court's general ideological balance. But the change means that Justice Burger, a frequent but never a constant conservative, will be succeeded as chief justice by one ardent conservative and replaced on the court by another.

Close court watchers anticipate that the personally popular Mr. Rehnquist will be a much more effective political leader for the conservative cause than was Chief Justice Burger, who was never a strong force within the court either ideologically or personally. Both Mr. Rehnquist's and Mr. Scalia's nominations seem almost certain to win Senate approval.



William Rehnquist

Legal scholars and close watchers of the Supreme Court said the change of personnel isn't likely to immediately alter the voting lineup among the nine justices, who have been deeply divided on many important political and social issues.

Speculation focused immediately on the controversy over abortion and whether the Supreme Court will in the future overrule the 1973 *Roe vs. Wade* decision giving women the right to abortions. But the appointment of Judge Scalia isn't likely to change the Supreme Court's narrow, but unwavering, support for abortion.

In its most recent ruling last week, striking down a Pennsylvania law restricting abortions by a 5-4 vote, Chief Justice Burger joined the dissent, along with Justice Rehnquist. Judge Scalia is almost certain to share that view. Only if one of the high court's liberal or moderate justices retires or dies will the overall impact of the abortion ruling be threatened.

Abortion Outlook

But even in the area of abortion, the change could make a difference. Chief Justice Burger had generally supported abortion in a variety of rulings; last week's was the first time he had suggested considering review of *Roe vs. Wade*. Judge Scalia, on the other hand, adds a strong fourth vote to the minority and increases the likelihood that one more change could lead to the demise of the abortion right. Those familiar with Judge Scalia's writings and record say he would have no hesitation in voting to overrule *Roe vs. Wade*.

In a variety of other areas as well, the effect of Justice Rehnquist's elevation and Judge Scalia's nomination will be to solid-

ify the court's right wing. While the new appointments won't force an immediate shift of course on affirmative action, school desegregation, separation of church and state and the rights of criminal suspects, they are expected to intensify the court's internal debates over these difficult issues.

Chief Justice Burger has been widely viewed by court observers as using his vote politically to join the winning side of many issues. When in the majority, it is the chief justice's prerogative to decide who will write a decision. As a result, Justice Burger has sometimes joined the winning liberal or moderate factions of the court over the 17 years in which he has presided.

But both friends and critics of the 50-year-old Judge Scalia, a member of the U.S. Court of Appeals for the District of Columbia, say that he is more conservative and much more rigid in his views. While Chief Justice Burger has sometimes voted on the side of the news media in First Amendment cases, for example, Judge Scalia has written strong opinions restricting media protections.

'Intellectual Voice'

"He will be a strong added intellectual voice to the conservative wing," says Gerald Gunther, a constitutional law expert at Stanford University Law School. "It's that much more energy and brainpower."

Chief Justice Burger, who is 78, has sometimes engendered personal animosity from some of the other justices who have viewed him as manipulative and aloof. His opinions have sometimes been the object of scorn in other justices' chambers, and he has been accused of giving insignificant assignments to justices who are out of favor.

By contrast, the justices—even Justice William Brennan, the court's most ardent liberal—regard Justice Rehnquist warmly. Judge Scalia, too, is regarded as outgoing and engaging. He and Justice Rehnquist are both regulars at a monthly poker game in Washington.

Personal charm is a considerable factor on the court, where justices must work together to build majorities. Court observers have often credited Justice Brennan's congeniality and ability to build coalitions as a major reason why most of the major decisions of the Warren Court have been criticized but not overruled by the court under Chief Justice Burger.

It will take more than personality, though, to move the court in a more clearly conservative direction. Justice Rehnquist has often been at the far right end of the court's spectrum, sometimes voting by himself against the other eight. But if he is to provide intellectual leadership, he will have to move more to the court's middle. That center ground may itself become more conservative, however, owing to the presence of Judge Scalia and of Justice Sandra Day O'Connor, who was appointed by President Reagan in 1981.

Yesterday's nominations may also make the high court better able to confront its own administrative problems, such as the growing caseload and increasing number of lengthy, separate opinions of the justices. Chief Justice Burger has been praised in many circles for his efforts to improve the efficiency of the federal court system generally. But some critics say this has left too little time for internal solutions to the Supreme Court's own specific problems.

Justice Rehnquist, says Kenneth Geller, a former deputy solicitor general and longtime court watcher, "is a very strong administrator, very organized. He has been very concerned at keeping things moving up there, and produces his opinions very quickly."

Chief Justice Burger's retirement, which is effective July 1, is a surprise mainly because of its timing. There has been widespread speculation for several years that he would remain in the job until Sept. 17, 1987, when he will celebrate his 80th birthday and preside over the 200th

anniversary of the signing of the Constitution as chairman of its bicentennial commission.

But the chief justice also complained in recent months of being overburdened by his court duties, the administrative problems of the court system and his obligations for the bicentennial. For the second time in several years, he also developed a bad case of walking flu that he had a hard time shaking.

Once he decided to retire and devote his energies to the bicentennial, Chief Justice Burger asked former White House counsel Fred Fielding to arrange a meeting with President Reagan. The meeting took place on May 27.

In addition to feeling overburdened, sources familiar with the process say, Justice Burger was concerned about the coming Senate elections and the possibility that Republicans could lose their majority. A Democratic-controlled Senate would be far less amenable to confirming conservative Reagan-appointed jurists.

Presidential Discussions

Two days after his meeting with the chief justice, President Reagan discussed the impending vacancy with Attorney General Edwin Meese and White House Chief of Staff Donald Regan. President Reagan said he preferred to draw on sitting judges and justices for the openings. One source said some consideration was given to promoting Justice O'Connor. But after another discussion on June 9, the president met with Justice Rehnquist on June 12 and offered him the elevation. Mr. Reagan met with Judge Scalia on Monday to offer him the Supreme Court vacancy.

A senior administration official called the nominations "the most significant move" of Mr. Reagan's presidency and said they will have an "enormous influence on the court for years to come."

If Justice Rehnquist is confirmed, he will be only the 16th chief justice in the court's history, and only the third sitting justice to be elevated. A graduate of Stanford Law School and a former Supreme Court law clerk, he was nominated by President Nixon to be a justice in 1971 after a two-year stint as an assistant attorney general. He has been the court's most consistent conservative, sometimes drawing criticism from legal scholars for basing decisions more on desired results than on points of law—a practice cited in the court's liberal members.

In January 1982, Justice Rehnquist was hospitalized, at first secretly, for treat-

2012

ment of the effects of drugs he had been taking to relieve severe back pain. While he refuses to discuss his health publicly, a senior administration official said yesterday that he told the White House that "he had had a physical—he was pronounced to be in good health."

Rehnquist's Book

In recent months, he has been writing a book based on his experiences as a law clerk, and including a discussion of court history and some explanation of the way the high court runs. He has said the book is at least a year away from publication.

Judge Scalia has been regarded as a leading contender for a Supreme Court seat since Mr. Reagan nominated him to the court of appeals in 1982. A first-generation Italian-American and father of nine children, he graduated from Harvard Law School, taught at the Universities of Chicago and Virginia and was general counsel to the White House Office of Telecommunications Policy under President Nixon and

legal counsel to the Justice Department under President Ford.

Although well-known to Reagan administration officials, he was largely overshadowed by his prominent appeals-court colleague, Robert Bork, until last February. Then, Judge Scalia wrote the three-judge court ruling striking down the automatic spending-cut provision of the Gramm-Rudman deficit reduction law. A Supreme Court ruling in the case is expected shortly.

As a judge, he has been skeptical of claims that federal agencies abuse their authority and has strongly questioned whether the press ought to have special protection under the First Amendment. He is widely thought to have been the moving force behind a strongly anti-press decision in a libel suit filed against the Washington Post by former Mobil Corp. President William Tavoulareas.

In other writings, he has attacked the Freedom of Information Act and affirmative action based on race.

Reagan Relied On His Instincts

By David Hoffman
Washington Post Staff Writer

1288

WASH. POST: 6-18-86

When Associate Justice William H. Rehnquist arrived at the Oval Office last Thursday for an interview with President Reagan, the team of three top administration officials who had been secretly searching for a new chief justice was uncertain what would happen.

The group consisted of White House chief of staff Donald T. Regan, White House counsel Peter J. Wallison and Attorney General Edwin Meese III. They had come to a "consensus," as one recalled it, that Rehnquist was the best choice to lead the Supreme Court.

Rehnquist was the first candidate Reagan had wanted to interview.

After talking with Rehnquist about his health, about his willingness to serve and about his legal philosophy, but not about specific cases or issues such as abortion, Reagan surprised his advisers by offering Rehnquist the position on the spot. "He liked the answers," recalled a White House official who participated.

Thus Reagan completed the selection of a nominee to be the 16th Chief Justice of the United States in a matter of days by relying on his own broad principles, one interview and a minimum of written material, including a digest of Rehnquist opinions and some newspaper and magazine articles about the court, White House officials said.

In selecting Rehnquist, they added, Reagan's primary goal was a chief justice who shares his philosophy of "judicial restraint"—that the courts interpret the law but should leave to the elected politicians as much as possible the business of creating or repealing the laws.

The president then repeated the process to fill the court seat vacated by Rehnquist's elevation. Reagan acted in concert with a consensus of his three advisers. The only candidate he interviewed was Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia. Reagan offered him the job at the end of an Oval Office interview Monday afternoon in which they did not talk about specific cases—just overall philosophy, according to participants.

In making these two nominations aimed at leaving a conservative imprint on the court for many years after his presidency, Reagan appears to have relied on his instincts and philosophy rather than on detailed analysis. He also relied on his advisers to bring him candidates who largely shared his views.

From the beginning of the search, Reagan also made a decision that excluded his longtime adviser, Meese, from becoming a candidate for the second opening on the court during his presidency. Officials said Reagan instructed them to search for candidates among the ranks of sitting Supreme Court justices and judges already on the bench. That stipulation removed Meese from consideration.

The president's decision to narrow the field to judges and justices

CHIEF JUSTICES OF THE UNITED STATES

Name	Served	Appointed by	From
John Jay	1789-1795	Washington	New York
John Rutledge	1795*	Washington	South Carolina
Oliver Ellsworth	1796-1800	Washington	Connecticut
John Marshall	1801-1835	J. Adams	Virginia
Roger B. Taney	1836-1864	Jackson	Maryland
Salmon P. Chase	1864-1873	Lincoln	Ohio
Morrison R. Waite	1874-1888	Grant	Ohio
Melville W. Fuller	1888-1910	Cleveland	Illinois
Edward D. White	1910-1921	Taft	Louisiana
William H. Taft	1921-1930	Harding	Connecticut
Charles E. Hughes	1930-1941	Hoover	New York
Harlan F. Stone	1941-1946	F. Roosevelt	New York
Fred M. Vinson	1946-1953	Truman	Kentucky
Earl Warren	1953-1969	Eisenhower	California
Warren E. Burger	1969-1986	Nixon	Minnesota

*Appointed by Washington but not confirmed by the Senate.

BY JAMES SCHWARTZ—THE WASHINGTON POST

was taken partly because it would be easier to assess the record of the candidates from their written opinions, a White House official said. But another presidential aide said, "It may have also been driven by confirmation politics. Someone who has been confirmed once is going to be almost certain to be confirmed again."

Meese, by contrast, experienced a stormy and difficult Senate confirmation as attorney general.

Meese told reporters yesterday, "I've always consistently said I was never interested. I said definitively,

I think several months ago, it was reported in several of the papers, that I've never had any interest in being a judge and don't have any interest now and don't ever anticipate any interest in the future."

Chief Justice Warren E. Burger's plans to retire came to the attention of the White House late last month when, using former White House counsel Fred F. Fielding, he arranged a meeting with Reagan for May 27, officials said. Burger spent most of the meeting telling Reagan about his concern for the celebration of the 200th anniversary of the Constitution, of which he is chairman, participants said. At the end of the meeting, he announced to Reagan that he wanted to retire after this session of the court is over in July.

Two days later, the officials said, Reagan met with the three advisers who would secretly carry out the search for a replacement. "We didn't discuss candidates with him," said one, but Reagan told them to look at justices on the court and sitting judges.

The group of advisers, using material from the Justice Department, produced a list of 10 or 15 possible candidates for chief justice. For the most part, officials said, these candidates shared Reagan's broad philosophy.

The group then met with Reagan again on June 9. Wallison had prepared digests, about 15 pages long,

of the judicial views of some potential candidates, including Rehnquist.

The president was also provided with newspaper and magazine articles about the court, including essays in the Sept. 29, 1984, edition of *The Nation* commenting on Burger's tenure as chief justice, officials said.

The opening essay by Herman Schwartz, a professor at American University's Washington College of Law, reported that the court, which Rehnquist joined in 1972, had in recent years taken a conservative turn, particularly in cases involving individual rights.

"Its direction is away from concern for individual liberties and toward the imperial perspective that says, 'Don't question authority,'" Schwartz wrote, attributing the shift in part to the addition of "the rigidly ideological" Justice Sandra Day O'Connor to the conservative Rehnquist.

By the account of those involved, Reagan quickly zeroed in on Rehnquist early last week. On June 9, one participant said, some candidates "clearly stood out in the discussion. The president began to focus on a relatively few" candidates, this official said.

"Reagan liked what he heard" about Rehnquist, another participant said, and a meeting with him was set for last Thursday, with the president, the justice, Meese, Wallison and Regan in attendance.

2012

"I didn't know what would happen," recalled one of them, "whether he would decide on Rehnquist or say continue the process. At the meeting he liked Rehnquist a good deal. The president made inquiries generally . . . how he saw the direction of the court, how he felt he could deal with the job."

When Rehnquist accepted the president's offer and left the White House, Reagan then turned to a short list of other candidates to find a successor for him. Again, he settled on one candidate, Scalia, and

invited him to the Oval Office for an interview, at which he offered him the job on the spot. Again, officials said, Reagan was impressed with Scalia's general agreement about a philosophy of "judicial restraint" and did not question him about specific cases or opinions.

In May, Burger told administration officials that he would wait for a White House signal about the announcement. That signal went out yesterday when Reagan telephoned, asking him to come to the White House for the announcement.

Burger Quits; Rehnquist Chosen to Lead Court

President Intends to Nominate Appellate Judge Scalia

By Al Kamen
Washington Post Staff Writer

Warren E. Burger, the 15th chief justice of the United States, will retire next month after 17 years on the court and 61-year-old Justice William H. Rehnquist will be nominated to replace him, President Reagan announced yesterday.

At an unexpected news conference, Reagan said he would nominate Antonin Scalia, 50, a conservative activist on the U.S. Court of Appeals here, to fill Rehnquist's seat if he is confirmed as chief justice by the Senate.

The change of Scalia for Burger is expected to have little ideological impact on a closely divided court that has for years been dominated by a group of moderate, centrist justices. Burger and Rehnquist have consistently voted together on most issues, although constitutional specialists expect that Scalia, an outspoken conservative on virtually every issue, from abortion to criminal rights to executive branch power, will be even more in tune with Rehnquist's views.

Rehnquist, immensely popular and respected by his colleagues, may prove more intellectually adept than Burger at building and holding conservative majorities and thus sway the court further to the right. In his 17 years as chief justice, Burger had limited success in molding the court to his conservative model.

Burger informed Reagan of his decision to retire on May 27, telling the president—as he said again yesterday—that his sole reason for leaving the court was to devote full time to his job as head of the Bicentennial Commission of the United States, which is planning to celebrate the 200th anniversary of the Constitution beginning on Burger's 80th birthday, Sept. 17, 1987. Reagan appointed Burger chairman of the commission a year ago.

Burger, who has been in excellent health recently except for a severe case of the flu this winter, said health played no part in his decision to resign. Asked if he was resigning now so that Reagan would be able to appoint his successor, Burger said that if that had been his goal, he could have waited another year or longer.

The announcement yesterday afternoon came as a shock even to the other justices. The justices had met yesterday morning but neither Burger nor Rehnquist had said anything to their colleagues.

A court messenger delivered copies of the 78-year-old Burger's brief resignation letter approximately 15 minutes before the news conference. The messenger invited the justices, their clerks and staff to the justices' conference room, where two television sets had been set up.

Only when they saw him on television standing at the lectern of the White House news room did Rehnquist's colleagues realize that he had been selected to be their new chief. Similarly, they had no advance

warning that Scalia, an appeals court judge for four years and a law professor and justice department official before that, would be nominated as their new colleague. The crowd of about 50 was "flabbergasted" according to one of those there.

Burger, who had been devoting dozens of hours a week to bicentennial activities, had confided that the work was taking up too much of his time and that he might have to give up one job or the other.

Although his choice struck court observers as unusual, several of Burger's longtime acquaintances said that Burger was a natural politician who has always preferred the political and administrative aspects of his job to the drier, intellectual aspects.

Burger cared deeply about the bicentennial and viewed it as the capstone of a judicial career that began when President Dwight D. Eisenhower appointed him to the federal appeals court here in 1956. Burger was known to be deeply troubled that the bicentennial effort was lagging in terms of fund-raising, visibility and public support.

Burger may have felt that he had accomplished about all he was going to on the court, according to one source who has known him for years. He may have already made a choice to retire in the next year or so, that source said, so a central question for him was whether he would retire to head a successful bicentennial celebration or a failure.

There also has been speculation in the last two years that Burger would retire during Reagan's second term to give the president the choice of a new chief justice.

In an evening news conference, a relaxed Burger spoke casually about his future plans to write, paint and spend more time with his wife. "I'm not going to let you guys write all the books," he told the assembled news media throng. "I've got three or four books I want to write."

"I have a lot of other things I want to do," he said at another point. "I have some pictures to

paint." He added, "I never had any ambition to be a judge. I loved practicing law. If tradition didn't prohibit it, I'd love to go back to practicing law."

President Nixon, who had made the Supreme Court's liberal reign under Chief Justice Earl Warren a campaign issue, appointed Burger to replace Warren in 1969.

But under Burger's leadership the court has left the great bulk of the Warren Court legacy in civil rights, federal power over the states and other areas virtually intact. Headed but never really led by Burger, the court continued to expand on many of those rulings, ordering school busing for desegregation and establishing a constitutional right to abortion.

As chief, Burger devoted his energies to modernizing the judiciary and encouraging improvements in a creaky administrative structure. He presided over the growth of a federal judiciary with a handful of employees to one with a budget of over \$1 billion.

Burger also continued his many outside activities such as his membership on the Smithsonian board of directors and his leadership with the American Bar Association. His major projects for years were prison reform and court modernization.

Asked yesterday what he regretted not finishing during his tenure, Burger selected an administrative goal, not a legal one. He singled out his inability to convince Congress, after substantial lobbying, to set up an intermediate court between the courts of appeal and the Supreme Court to relieve the high court of some of its workload.

Knowledgeable sources said yesterday that they expect substantial changes in both substance and style under Rehnquist. Rehnquist is not expected to devote nearly as much time to travel, speeches, politics and the ceremonial trappings of office as Burger did.

Rehnquist has privately expressed objections to taking on those extrajudicial duties because he has felt they were irrelevant.

The only formal power the chief justice has over his eight colleagues on the court is the right, when in the majority, to assign the drafting of opinions.

2012

Burger had provoked the lasting resentment of several justices who accused him of trying to manipulate the court by reserving his vote until after the others had indicated their leanings, so that he could say he was in the majority and assign the opinion to the most conservative justice in the majority. He was also known to occasionally harangue his colleagues in criminal cases.

Sources yesterday said it was inconceivable that Rehnquist would pass rather than state his views on a case, even though he, like Burger, will often find himself dissenting from majority opinions.

To fundamentally alter the ideological coloration of the court, Reagan will have to have an opportunity to replace one of the liberals or moderates with another appointee of the Rehnquist-Scalia stripe.

The two most liberal justices are William J. Brennan Jr., 80, and Thurgood Marshall, who will be 78 in three weeks. Two other justices regarded as moderates are also in their late 70s—Lewis F. Powell Jr., 78, and Harry A. Blackmun, 77.

Senate Republicans yesterday hailed Reagan's choices of Rehnquist and Scalia and predicted confirmation for both nominees, while Democrats, acknowledging the president's prerogatives to select whomever he wished, promised a "fair but thorough confirmation process."

The nominations come at a time when Republicans control the Senate but fear they could lose that control in November.

Senate Majority leader Robert J.

Dole (R-Kan.) said, "I would guess they would be confirmed by this body without a great deal of delay."

Conservatives yesterday hailed the nominations, predicting the changes will lead the court in a more conservative direction. Bruce Fein, a private legal consultant, said Rehnquist has a "congenial personality," and that he would be more of a consensus builder on the court than Burger had been. "He will be an emollient rather than an inflammatory," Fein said. In close cases, he said, Rehnquist's personal diplomacy may bring the court together.

In that way, Fein said, Rehnquist is very similar to Scalia, whose colleagues, even when strongly disagreeing with him, find him a charming and likeable colleague.

Liberal Harvard Law School professor Laurence H. Tribe said both were "distinguished and bright men" and "men of tremendous affability." But Tribe urged the Senate to focus on their positions on individual issues—such as separation of church and state—something that is not easy to focus on given that each nominee's "intellectual power is so great."

Tribe said the Senate also should take into account the timing of Burger's departure, which he said was "obviously timed for the November elections, not the bicentennial." Tribe said Burger could not have expected anyone to believe the resignation was for the bicentennial commission. "If anyone does" believe that explanation, Tribe said, "there is a bridge in Brooklyn that is for sale."

Judge a Favorite With Conservative Lawyers, Activists

By Ruth Marcus
Washington Post Staff Writer

1288

Antonin Scalia, a gregarious, piano-playing federal appeals court judge whom President Reagan plans to nominate to the Supreme Court, is a vigorous conservative whose relative youth, sharp intellect and outgoing personality made him a favorite for the post among conservative lawyers and activists.

Scalia, 50, was appointed to the U.S. Court of Appeals for the District of Columbia in 1982 and was described by those familiar with his work there as a brilliant legal scholar and effective consensus-builder who is likely to try to edge the high court farther to the right.

"There will be a more conservative jurisprudence—tangibly but not dramatically so," if the Senate confirms Scalia's nomination, said Bruce Fein, who runs a legal consulting firm here. Scalia, he said, "is not going to be a surprise" for the administration. "He's got a well-developed, articulated philosophy."

In his opinions while on the appeals court, Scalia, who worked in both the Nixon and Ford administrations and has taught at four law schools, appeared to go out of his way to express views consistent with those of the Reagan administration, often writing lengthy concurring opinions to explain his reasoning. That practice fueled speculation in legal and political circles that he was actively campaigning for a high court nomination.

"For someone who's spent his whole personal life in the law, being nominated for the Supreme Court is the culmination of a dream," Scalia said. In announcing Scalia's nomination, Reagan said his "great personal energy, the force of his intellect, the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court."

If confirmed, Scalia would become the youngest member of the Supreme Court.

Scalia's opinions were often cited by conservative legal activists, and yesterday they hailed his nomination to fill the vacancy created by Justice William H. Rehnquist's elevation to chief justice to replace retiring Chief Justice Warren E. Burger.

Scalia, said Washington Legal Foundation director Paul Kamenar, is "an excellent choice who will fit in well with the Rehnquist court."

The only child of a Sicilian immigrant and the first Italian American nominated to the Supreme Court, Scalia is a graduate of Harvard Law School and was well-positioned to snare the nomination. He is, for example, 10 years younger than Judge Robert H. Bork, his conservative colleague on the appeals court here who was considered to be a top contender for the high court.

"To the extent these things are ever knowable . . . Scalia is probably more predictable on particular issues than either Bork or [7th Cir-

cuit Judge Richard A.] Posner," another front-runner, said University of Chicago Law Professor Geoffrey R. Stone, a former colleague of Scalia's. "On abortion, on affirmative action, on criminal procedure and on church and state, Scalia is ore likely to take views that are consistent with the administration," Stone said.

A Roman Catholic who is the father of nine children, Scalia is personally opposed to abortion and believes that the Supreme Court's 1973 decision legalizing abortion "is not supported by the constitution," Stone said.

Scalia specialized in administrative law while teaching at the University of Chicago, Stanford, and the University of Virginia. He headed the Justice Department Office of Legal Counsel from 1974 to 1977, and served in other government posts during the Nixon administration.

He has been active with the Federalist Society, a group of young, conservative lawyers whose members fill the ranks of the Justice Department, serving as an adviser to the organization while teaching law at the University of Chicago.

Scalia, known to his friends as Nino, "is not what you think of as a typical conservative Supreme Court justice who scowls at the world," said Abner J. Mikva, a liberal colleague of Scalia's on the D.C. circuit, which is often described as second in importance only to the Supreme Court. "He's a got a good sense of humor, lots of human qualities, an uproarious laugh—he's a good storyteller."

Scalia, Mikva said, "is the kind of person you can pop in on and say, 'What do you think about this?' He'll drop what he's doing and start to kibbitz with you."

Mikva said that once Scalia makes up his mind about a case, "He'll plant his flag and go down in flames with it if he needs [to]." But Mikva added that if Scalia is "still groping for a position . . . he's much more likely to reach out for consensus than to look for the furthest extrapolation he can make of a point."

Said Judge Patricia M. Wald, another liberal on the appeals court, "He's fun to work with . . . I think he does listen, he has an open mind, he enjoys the dialogue going back

10/2

20/2

and forth. Even when you're on opposing sides, the process usually is enjoyable I do have the sense he has strong feelings about particular things, but that he does come to each case willing to listen to both sides."

In his four years on the appeals court, Scalia has written about 100 opinions and is credited with writing the unsigned three-judge panel opinion this February striking down the Gramm-Rudman-Hollings budget balancing law.

Scalia keeps a word processor on the desk in his chambers and, unlike many colleagues, writes most of his own opinions, employing a flashy, distinctive style.

In his opinions, Scalia has taken an extremely narrow view of the proper role of courts in mediating disputes and of the permissible scope of government regulation. In a 1983 case in which Judge J. Skelly Wright found that the Food and Drug Administration must consider whether lethal injections in capital punishment cases met the standards for safe and effective drugs, Scalia criticized the majority position, saying it had "less to do with assuring safe and effective drugs than with preventing the states' constitutionally permissible imposition of capital punishment."

Scalia has also ruled against the press in several important cases, prompting conservative columnist William Safire of The New York Times, in a column a year ago, to describe him as "the worst enemy of free speech in America today."

In a majority opinion last September, Scalia ruled that the public has no First Amendment right to see documents filed and admitted in civil court suits until after there has been a final decision in the case. On behalf of himself and Judge George E. MacKinnon, Scalia said reporters have "no First Amendment entitlement to a document-by-document determination of the need for confidentiality" until a trial is over.

Scalia joined MacKinnon in overturning U.S. District Court Judge Oliver Gasch's 1983 ruling that The Washington Post did not libel former Mobil Corp. President William P. Tavoulareas. He joined MacKinnon's dissent from the decision of the full court to rehear the case, which is still pending.

Scalia also dissented when a six-judge majority ruled in December 1984 that a Marxist professor seek-

ing a job at the University of Maryland could not sue syndicated columnists Rowland Evans and Robert Novak for disparaging statements. The majority said the statements were "entitled to absolute First Amendment protection as expressions of opinion. Scalia, in a dissent, said the Evans and Novak statements constituted "a classic and coolly crafted libel."

Scalia's cases on the appeals court here have not touched on some of the most contested issues that come before the high court: affirmative action, abortion, separation of church and state, and other politically-charged questions.

But those familiar with his views said Scalia shared the Reagan administration's approach on them.

In a 1979 law review article, he expressed harsh criticism of affirmative action programs for minorities and women. "I am in short opposed to racial affirmative action for reasons of both principle and practicality," Scalia said. "Sex-based affirmative action presents somewhat different constitutional issues, but it seems to me a poor idea"

Scalia acknowledged that "a person espousing the views I have expressed . . . exposes himself to charges of, at best, insensitivity or, at worst, bigotry."

However, he said, "I must content myself with the observation that it must be a queer sort of bigotry indeed since it is shared by many intelligent members of the alleged target group Some of the most vocal opposition to racial affirmative action comes from minority group members who have seen the value of their accomplishments erased by the suspicion—no, to be frank, the reality—of a lower standard for their group in the universities and the professions.

"This new racial presumption, imposed upon those who have lifted themselves above the effects of old racial presumptions, is the most evil fruit of a fundamentally bad seed. From racist principles flow racist results."

Scalia was born March 11, 1936 in Trenton, N.J. He graduated summa cum laude and first in his class from Georgetown University in Washington and magna cum laude from Harvard Law School, where he served as an editor of the Harvard Law Review. In 1960, he married Maureen McCarthy.

Utterly Consistent In Conservative Votes and Opinions

By Fred Barbash
Washington Post Staff Writer

128P

10/2

President Reagan nominated as chief justice yesterday a man whose conservative views are well-formed, well-known and nearly identical to the president's beliefs on virtually every fundamental social and legal issue of the day.

In 14 years as an associate justice, William Hubbs Rehnquist has been utterly consistent, even predictable, in his votes and opinions.

He has opposed busing and the right to abortion; he has fought expanded constitutional protection for blacks, women, criminal defendants and the news media. He has voted to allow religious exercises in public schools, for state aid to parochial schools and for nativity scenes in city parks. At the same time, Rehnquist has worked to limit access to the federal courts for those who object to such practices, as well as for those challenging presidential authority or controversial actions of federal administrative agencies.

Rehnquist has done these things in the belief, voiced consistently, that the role of the Supreme Court should be extremely limited, that it should restrain itself from intervening in the business of state and federal government and that the Constitution should be interpreted narrowly, and rarely.

Of all the chief justices in recent history, Rehnquist, 61, appears to bring to the job the most clear-cut ideological agenda.

He also brings unique talents. He is universally regarded as one of the smartest justices on the court; when speed and semantic skill are required in an opinion, he has often been chosen to write it.

He is friendly and unusually accessible, and is fond of engaging in off-the-record debates with reporters. In contrast to his hard-line views, he brings a light touch to his work, inserting pithy rhymes and wisecracks in some of his opinions and in his comments from the bench.

It has been just this combination of attributes—intellectual prowess, an ability to get along with his colleagues and a firm

ideological agenda—that has engendered such admiration from conservatives and such fear from liberals.

The late civil rights leader Roy Wilkins told the NAACP in a speech in 1971 that Rehnquist "may accept you as a buddy, but his philosophy will kill you."

The same combination could potentially make him a stronger leader of the court than Chief Justice Warren E. Burger has been. Burger's relationships with other justices have sometimes been awkward and his intellectual skills doubted. While Burger and Rehnquist subscribe to many of the same views, many legal experts think Rehnquist is potentially more capable of molding the alliances necessary to implement them.

Rehnquist's appointment to the court by President Richard M. Nixon in late 1971 was almost accidental. He was an assistant attorney general but apparently was so little known to the president that, according to Watergate tapes released later, Nixon referred to him as "Renchburg" and described him as one of a "group of clowns" in the Justice Department.

At that time, Rehnquist was helping the Justice Department choose Supreme Court nominees to replace retiring Justices John Harlan and Hugo Black. After Nixon's first two choices—Clement Haynsworth and G. Harrold Carswell—were rejected in a storm of controversy, Rehnquist and other top department officials met to consider new candidates.

As Rehnquist later described it, the others suddenly asked Rehnquist to leave the room, telling him that he had now become a possible candidate for the court and that if a particular senator turned down the job, the president would tap Rehnquist. Shortly thereafter, Nixon announced the appointments of Rehnquist and Lewis F. Powell Jr.

Rehnquist's conservative credentials were already well established. After graduating first in his class from the Stanford Law School (Justice Sandra Day O'Connor was a classmate), Rehnquist clerked in 1952 for Justice Robert Jackson, writing a memorandum for Jackson urging him to vote against desegregation of the public schools in the South.

After Rehnquist settled into a law practice in Arizona, he began writing articles about his experiences at the court—then entering the activist Earl Warren Era. The court, he wrote, was being steered by the bias of law clerks who held views that were "to the left" of both the court and the country.

"Some of the tenets of the liberal point of view which commanded the sympathy of a majority of the clerks I knew," he wrote, "were extreme solicitude for the claims of communists and other criminal defendants, expansion of federal power at the expense of state power, great sympathy toward any government regulation of business, in short, the political philosophy now espoused by the court under Chief Justice Earl Warren."

2012

friendly with Richard Kleindienst, who brought Rehnquist with him to the Justice Department after Nixon was elected in 1968. As legal counsel to the department, Rehnquist was instrumental in forming the tactics the administration used to combat antiwar demonstrations. In a 1969 speech, he referred to demonstrators as "the new barbarians," declaring that they constituted a "threat to the notion of a government of law which is every bit as serious as the crime wave in our cities."

Rehnquist's record on civil rights, including his memorandum for Justice Jackson, his opposition to a Phoenix public-accommodations law and allegations that he had harassed black voters while a poll-watcher in Phoenix, was the main point of controversy during his confirmation hearings. He denied the harassment allegations.

Since Rehnquist joined the court, only one issue of a personal nature has arisen. In 1982, he entered George Washington University Hospital for what the court officially said was treatment of severe and chronic back pain. Further inquiry revealed that, in an effort to withdraw from a powerful prescription drug he had been taking to reduce pain, he had suffered a significant drug reaction that caused "disturbances in mental clarity."

Observers at the court had noticed Rehnquist slurring his speech and taking long pauses between sentences, but they were unable to determine the cause. After the hospitalization, his speech seemed normal, and no further health problems have come to public attention.

He did, however, generate a brief flurry of publicity in 1984 when he decided to preside as a trial judge in a federal court in Virginia in order to refresh his understanding of the trial process. He dodged reporters at the trial.

Some observers attributed Rehnquist's restlessness to boredom. He has demonstrated slight interest in the more mundane cases that crowd the high court's docket, and there has even been talk that he might retire from the court prematurely. Although he denies being bored, in recent years he has undertaken demanding speech-making obligations and is writing a book on the history of the court.

No boredom has been reflected in his opinions and dissents on major controversies before the court.

He has said he believes that goals and quotas and other forms of "reverse discrimination" are blatantly unconstitutional.

Dissenting in a case in which the court upheld a voluntary affirmative-action plan, Rehnquist said that "there is perhaps no device more destructive to the notion of equality than the . . . quota."

"Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another No discrimination based on race is benign No action disadvantaging a person because of his color is affirmative."

He also dissented bitterly in 1977 when the court overturned a New York law making it a crime to sell contraceptives to persons under 16.

If "those who valiantly but vainly defended the heights of Bunker Hill in 1775," he wrote, "could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors . . . it is not difficult to imagine their reaction."

In numerous opinions, he has objected to expanding constitutional rights of women as brought about in a series of court rulings, and he wrote the opinion upholding their exclusion from the draft.

Rehnquist generally believes that the court should not create rights not explicitly mentioned in the Constitution, no matter who the beneficiaries are.

Such exercises of power by the court, he said in objecting to the right of the press to attend trials, are "basically unhealthy." It is, he wrote, "basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and enjoy virtual life tenure"

Rehnquist has almost always voted in favor of narrowing the church-state gap, favoring, among other things, much greater aid to nonpublic schools than the court as a whole has allowed.

"The court," he has written, "apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this court . . . throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing . . . requires such an extreme approach."

Recent tallies have shown that, in criminal cases, he votes against defendants and for police more than any other justice. He objects to the controversial "exclusionary rule" under which illegally seized evidence may be thrown out of court, saying it hinders the search for truth.

He has written several opinions narrowing the reach of the Miranda rule, designed to protect suspects in police custody from interrogation outside a lawyer's presence.

He also consistently votes in favor of implementing the death penalty in the states.

Confirmation of Justices Predicted by End of Year

Reactions of Key Senators Suggest Rehnquist Nomination May Be the More Controversial

By Edward Walsh
Washington Post Staff Writer

128

Senate Republicans reacted with enthusiasm and Senate Democrats with caution yesterday to President Reagan's nominations of Justice William H. Rehnquist to be chief justice and Court of Appeals Judge Antonin Scalia to be an associate justice of the Supreme Court.

Initial comments of key senators suggested that the proposed elevation of Rehnquist to chief justice could be the more controversial of the two appointments, with the confirmation battleground centered on his politically conservative views.

But Republicans and Democrats praised the nominees' legal qualifications amid widespread predictions that both will be confirmed by the Senate this year.

Senate Judiciary Committee

Chairman Strom Thurmond (R-S.C.), calling for an expedited confirmation process, said he will schedule hearings on the nominations as soon as they are formally submitted by the White House. Republican sources said hearings are not likely to begin until Congress returns from its July 4 holiday recess on July 14, with the length of the hearings dependent on developments.

However, some Democrats and outside groups that may be critical of the nominations urged a cautious approach.

An unusually subdued Sen. Joseph R. Biden Jr. (D-Del.), ranking Democrat on the Judiciary Committee, said he could offer "no opinion" on either nomination immediately.

"I think we should spend some time looking into them thoroughly," Biden said. "I don't think you should take such a significant judgment by

the president and reach any immediate conclusions."

The issue of Rehnquist's conservative philosophy was raised by Senate Minority Whip Alan Cranston (D-Calif.), who suggested that Rehnquist is "an ideological extremist" who would not administer the court's business impartially.

"The question is: Can a man who has an extreme right wing ideology manage the court in a fair and balanced way," he said.

Of Scalia, Cranston said, "I gather he is intellectually brilliant and quite conservative." He said he had not made a final judgment on the Rehnquist nomination, but added:

"I'm not talking about a conservative. The court can take a conservative. It can take a liberal. But if you are off to the ideological extremes—and my impression is that is where Justice Rehnquist is—then there really are questions about

whether you can lead this court and produce decisions that will be accepted by the American people."

Most Democrats, including Sen. Edward M. Kennedy (D-Mass.), the second-ranking Democrat on the Judiciary Committee, said they would "reserve judgment" on both nominations, but Sens. Russell B. Long (D-La.) and William Proxmire (D-Wis.) endorsed Reagan's choices.

"He's a conservative, which is all right," Proxmire said of Rehnquist. "What the hell, everybody's got to be something. But he's extremely well-qualified and very bright intellectually."

Republicans said they doubted an assault on Rehnquist's well-known conservative philosophy would succeed in denying him the position of chief justice. "You need more than ideological differences to give a rough time to two men this eminent," Sen. Orrin G. Hatch (R-Utah),

8/20/86

a member of the Judiciary Committee, said. "It would be a disgrace to fight them on ideological purposes."

Sen. Charles McC. Mathias Jr. (R-Md.), the most liberal Republican on the Judiciary Committee, did not endorse either nominee but suggested that Rehnquist's confirmation as chief justice was all but a foregone conclusion. "Justice Rehnquist is well known to the nation and we should not anticipate radical change under his leadership," Mathias said.

However, others in Congress predicted a move to the right by the court as a result of the nominations. Hatch said Scalia is more conservative than retiring Chief Justice Warren Burger and could make a significant difference in close decisions.

On the surface, neither Rehnquist nor Scalia should face major difficulties in winning confirmation. Rehnquist's 1971 appointment to the Supreme Court was confirmed by a then Democratic-controlled Senate by a vote of 68 to 26. Only three current senators—Cranston, Kennedy and Daniel K. Inouye (D-Hawaii)—were among those who opposed the nomination.

Scalia's appointment to the U.S. Court of Appeals here in 1982 breezed through the Judiciary Committee and the full Senate with virtually no opposition.

Asked about this, Biden said there are important differences between the Supreme Court and lower courts. While Scalia is "unquestionably qualified to sit on the circuit court and Court of Appeals, it is an open question whether he is qualified to sit on the Supreme Court," Biden said.

In pressing for quick confirmation hearings, Republicans appeared intent on disposing of the nominations well before the fall congressional elections, when control of the Senate, where the GOP now enjoys a 53 to 47 majority, will be at stake. There were no suggestions that Democratic critics will attempt to delay confirmation votes until after the elections, but Cranston said that it "would certainly be an option" depending on the outcome of the Judiciary Committee hearings.

Hatch said delaying tactics "would also be a disgrace," adding: "That won't happen."

Rehnquist for Burger

128P

While yesterday's proposed changes on the Supreme Court seem unlikely to produce any abrupt ideological shift, the elevation of Justice William Rehnquist to chief justice and the addition of Judge Antonin Scalia almost certainly will have an effect eventually. Warren Burger is no liberal evangelical in the mode of the late Earl Warren, as witness the dearth of billboards urging his impeachment. Yet it is hard to believe that a man of Mr. Rehnquist's intellectual energy would not, as chief justice, nudge the court one way or another over time.

How soon might depend on the durability of his more senior brethren, a few of whom are getting a bit long in the tooth. One, William Brennan, is 80; another, Lewis Powell, is 78; and two more, Thurgood Marshall and Harry Blackmun, are 77. No one will think it macabre, perhaps, if we offer the thought that Judge Scalia may not be Mr. Reagan's last appointment.

One more appointment might be significant if only because of *Roe vs. Wade*, the

court's 1973 decision on abortion. Yesterday's news came hard on the heels of Chief Justice Burger's surprising footnote last Wednesday, in which he questioned the court's reasoning in *Roe* — surprising because Mr. Burger had sided with the majority in that case, as in all subsequent abortion rulings. The time may have come, said a newly skeptical chief justice last week, to re-examine the court's position.

It makes a marvelous exit line for Mr. Burger, seeming to diminish, if not erase, his culpability in what *Newsweek* magazine this week dubbed "the most divisive issue in American politics." And while the five-man abortion majority seems likely to endure for the present despite the proposed new lineup, the prospect of reversing *Roe* is slightly enhanced. Mr. Scalia is probably a "no," Mr. Burger no more than a "maybe."

Yesterday's news was short of revolutionary, but welcome nonetheless, and one more change could, on the abortion issue, put the Constitution aright.

Scalia: An 'advocate of principled jurisprudence'

By David Sellers
THE WASHINGTON TIMES

128 P

Antonin Scalia — an unabashed conservative who receives high marks for fairness, enthusiasm and depth of knowledge — has been nominated for a seat on the Supreme Court.

If confirmed by the Senate, Judge Scalia, 50, will be the first Italian-American to serve on the high court and the youngest member of the current court.

It is the first change on the court in nearly five years, when President Reagan nominated Sandra Day O'Connor to replace Justice Potter Stewart.

In his four years on the U.S. Court of Appeals for the D.C. Circuit, Judge Scalia has earned a reputation as an expert in administrative law who is well-prepared for oral arguments and a tough but fair questioner of lawyers.

During his tenure on the appeals court, Judge Scalia has been viewed as a coalition builder, often bringing together opposing sides to reach a consensus ruling. Judge Scalia has long been mentioned as among the top five candidates for a vacancy on the high court.

"The force of his intellect and the depth of his understanding of our constitutional jurisprudence uniquely qualify him for elevation to our highest court," Mr. Reagan said yesterday in making the announcement at the White House.

The president also announced his choice of Justice William Rehnquist to succeed Chief Justice Warren Burger, who said he will step down July 10 after 17 years.

"Getting nominated to the Supreme Court is the culmination of a dream," said Judge Scalia, whose nickname is Nino.

Solicitor General Charles Fried, who argues the administration's po-

sition before the high court, said in a telephone interview that "the great thing it [the Scalia nomination] does is bring to the court one more person of very high intellect and great clarity of thought who knows what he thinks and is unlikely to be overly swayed by external circumstances."

"Antonin Scalia is a brilliant advocate of principled jurisprudence," said Patrick McGuigan, director of the Judicial Reform Project. "The president has made an outstanding selection."

Despite Judge Scalia's conservative views, some expect that he will have little impact on court voting patterns.

ACLU national staff counsel George Knarr said that while the ACLU does not take positions on specific judicial candidates, "we don't think it's likely to change things a great deal." Mr. Knarr noted that Justice Burger and Justice Rehnquist already voted together most of

the time and that Judge Scalia simply might be viewed as a substitute for the chief justice's vote.

"There will be no meaningful change in the swing of the court," said Jesse Choper, dean of the University of California Law School at Berkeley.

One court observer who is rarely aligned with the Reagan administration nevertheless had praise for Judge Scalia. "I think he is an extraordinarily bright man; a person of real intellectual horsepower," said the source, who asked that his name not be used.

He predicted that Judge Scalia will be more effective than Justice Burger and "will be able to persuade more people by the sheer sway of his logic."

Some liberals, who do not share Judge Scalia's philosophy, have found him to be particularly dangerous because he is so well-liked by those on all sides of the ideological

spectrum. His sense of humor and his active bantering with lawyers who appear before him have made Judge Scalia popular with many attorneys who do not necessarily agree with his rulings.

Liberals also note that Judge Scalia received only a "qualified" rating from the American Bar Association.

He was the senior judge on the panel that earlier this year struck down a key provision of the Gramm-Rudman deficit reduction law.

In a major 1985 First Amendment case involving access to trial records, Judge Scalia wrote a ruling denying reporters and the public the right to see documents and exhibits before or during trials.

The 2-1 panel ruling came in a challenge to the sealing of documents in a libel trial against The Washington Post by former Mobil Oil chief William Tavoulareas.

And just last month Judge Scalia

joined with the four other Reagan appointees on the appeals court in voting to review a panel ruling that gave Japanese Americans detained in camps during World War II the right to sue the United States for damages in court.

The father of nine children, Judge Scalia has taught at the University of Virginia, the University of Chicago, Georgetown University and Stanford University. He was graduated from Harvard Law School in 1960 where he was an editor of the law review.

A native of Trenton, N.J., Judge Scalia worked for the Cleveland firm of Jones, Day, Cockley & Reavis from 1961-67. In 1970 he joined the Nixon administration as general counsel in the president's office of telecommunications policy.

He later served as an assistant attorney general and as a visiting scholar at the American Enterprise Institute.

Rehnquist a representative of 'new legal conservatism'

By George Archibald
THE WASHINGTON TIMES

128P

William Hubbs Rehnquist, named yesterday by President Reagan to be the 19th chief justice of the United States, was described by a former political opponent as "the best representative of the new legal conservatism."

Mr. Rehnquist, 61, is "the best possible choice" to succeed retiring Chief Justice Warren E. Burger, said Phoenix lawyer John P. Frank, one of Arizona's leading liberal Democrats. Mr. Rehnquist will lead the court "in a craftsman-like way" toward philosophically-oriented decisions in the tradition of great former Supreme Court justices, Mr. Frank said.

Mr. Rehnquist, a former Arizona lawyer, often battled the state's Democrats in his capacity as a Republican party activist and election official before his appointment as the Justice Department's chief lawyer in 1969 and to the Supreme Court in 1971, Mr. Frank said.

Mr. Rehnquist's former political foe described him as one of the country's best jurists "in the tradition of [John M.] Harlan, [Hugo L.] Black and [Felix] Frankfurter."

"I'm a strong believer in pluralism," Mr. Rehnquist said in a rare interview last year with *The New York Times*. "Don't concentrate all the power in one place. . . . You don't want all the power in the government as opposed to the people. You don't want all the power in the federal government as opposed to the states."

His contribution to the court, he said, is "a sense of judicial restraint, for want of a better word." The court's constitutional function of overriding federal, state and local laws "is a very delicate one [to be carried out] only with great caution and circumspection," he said.

A group of Senate liberals opposed Mr. Rehnquist's nomination to the high court in 1971 on the grounds that he was not sufficiently committed to racial desegregation. The Senate finally confirmed him 68-26.

The conservative Mr. Rehnquist



Chief Justice Warren Burger (left) and his designated successor, Justice William Rehnquist, talk to reporters at the White House yesterday.

UPI

has since been a driving force on the court in overturning many of the landmark liberal rulings of the 1950s and 1960s.

In recent years, his role as the court's conservative conscience has taken on a new importance with Mr. Reagan's appointment of Justice Sandra Day O'Connor and a more conservative voting pattern by the court's two moderate justices — Byron R. White and Lewis F. Powell Jr.

Two years ago, Mr. Rehnquist wrote the court's 5-to-4 decision weakening the 1966 Miranda ruling by permitting a public safety exception to the rule, which requires police to read suspected criminals their rights before questioning.

In the court's 1984 term, Mr. Rehnquist was in the majority in 17 of 28 cases decided by a vote of 5-to-4.

He voted with the majority in a 6-3 decision that the search-and-seizure requirements of the Fourth Amendment do not apply to searches of students by school officials. He also wrote a 7-2 opinion making it easier for prosecutors in capital cases to exclude prospective jurors who oppose the death penalty.

Mr. Rehnquist is described as a

quick worker, who pushes himself and his staff to complete first drafts of opinions in 10 days. He has enjoyed relatively good health on the bench, but was hospitalized briefly in 1977 with chronic back problems. He was again hospitalized for a week in 1982 with the same back ailment and to overcome dependency on a pain-killing drug.

Mr. Rehnquist declined to answer reporters' questions about his health yesterday, saying it was a private matter. However, a senior administration official said the justice recently completed a thorough physical examination and received a clean bill of health from his doctors.

The son of Swedish parents, Mr. Rehnquist is a first-generation American. He grew up in a middle-class suburb of Milwaukee. He was an Army Air Corps weather observer during World War II and graduated Phi Beta Kappa from Stanford University in 1948.

After obtaining master's degrees in political science from Stanford and Harvard, he graduated at the top of his Stanford law class in 1952. He then served for 18 months as clerk for the late Supreme Court Justice Robert H. Jackson, a conservative.

Scalia picked for vacancy

By Jeremiah O'Leary
and Mary Belcher
THE WASHINGTON TIMES

128P

President Reagan yesterday accepted the resignation of Supreme Court Chief Justice Warren Burger, and swiftly named Associate Justice William Rehnquist to replace him and tapped a conservative appellate judge to fill the vacancy on the nation's highest court.

The promotion of Justice Rehnquist and nomination of Judge Antonin Scalia of the U.S. Court of Appeals here is "one of the most significant decisions" of the Reagan presidency, a senior administration official said.

"These appointments are ones

which I think will have enormous influence on the direction of the court over many years," said the official, who spoke on condition that he not be identified.

If the Senate confirms Judge Scalia's nomination, he will, at 50, become the youngest member of the Supreme Court. Mr. Reagan's only other appointment to the court is Sandra Day O'Connor, who is 56.

"We are putting on the court today a judicial philosopher [Mr. Scalia] ... who shares the president's philosophy and is young enough to remain on the court many, many years," the official said.

On Capitol Hill, the new appointments received an endorsement from Sen. Strom Thurmond, the South Carolina Republican who heads the Judiciary Committee.

He called Justice Rehnquist a "logical appointment" — a fairly young man and a "true scholar" who shares the views of the White House.

"He will make an outstanding chief justice," Mr. Thurmond said in a speech on the Senate floor shortly after the announcement.

Mr. Thurmond, 83, later said he "had a feeling" the 78-year-old Justice Burger would resign because he was carrying a heavy load and "looked very tired."

Senate Majority Leader Robert Dole predicted early action on the nominations.

"During his tenure on the Supreme Court, he has helped to define the court's proper role in the federal government," Mr. Dole said of Justice Rehnquist. "And I am confident that in his new position he will continue to adhere to these principles of judicial restraint."

Sen. Alan Cranston, California Democrat, made it clear that Justice Rehnquist will face some tough questions during his confirmation

hearings.

"I have grave doubts whether someone with the extreme right-wing views of Justice Rehnquist can properly manage the court as chief justice," Mr. Cranston said.

The White House began its search for a new chief justice May 27, when Justice Burger told the president in a personal visit that he wanted to devote full time to the Commission on the Bicentennial of the U.S. Constitution.

Administration officials denied that Justice Burger was pressured to resign to allow the president to make a new, younger appointment to the court.

Mr. Reagan on May 29 asked Attorney General Edwin Meese, White House Chief of Staff Donald Regan and White House Counsel Peter Wallison to draw up a list of candidates for the nation's highest judiciary post.

The president asked that the candidates be either Supreme Court associate justices or judges from lower courts. Administration officials refused to discuss other candidates on the list, which included between 10 and 15 names.

Mr. Reagan received synopses of the candidates' legal opinions and other writings reflective of their philosophies.

Justice Rehnquist, who was the president's first choice for the chief justiceship, accepted Mr. Reagan's job offer June 12, according to the administration official.

Judge Scalia also was Mr. Reagan's first choice to fill the court seat Justice Rehnquist will vacate. The president asked Judge Scalia to accept the nomination Monday afternoon, and he did so on the spot.

White House officials denied that Judge Scalia had to pass a "litmus test" on abortion or other specific issues of major importance to the administration. Instead, the president was interested in the judge's "overall philosophy," based on the body of his work, according to a

senior official.

In his four years as a federal appeals judge, Judge Scalia has not had to rule on an abortion case.

Mr. Reagan was especially impressed with Judge Scalia's record on judicial restraint, in which the courts defer to the elected branches of government instead of overturning or modifying laws, the official said.

Judge Scalia called the opportunity to serve on the Supreme Court "the culmination of a dream."

Mr. Reagan entered the White House press room at 2 p.m. yesterday, accompanied by Justices Burger and Rehnquist and Judge Scalia.

Justice Burger said he plans to step down July 10, if Justice Rehnquist has been confirmed by the Senate Judiciary Committee. The Scalia nomination will be forwarded to the Senate after action on the Rehnquist nomination.

Court observers said Mr. Burger will be remembered for his efforts to limit the scope of many of the decisions handed down by the liberal court headed by his predecessor, Earl Warren.

Many of those decisions involved the rights of criminal defendants and latitude allowed to law enforcement.

Mr. Burger sought to impose limits on the power of the judicial branch to legislate through the interpretation of law.

Justice O'Connor, appointed by Mr. Reagan in 1981, is the first woman to serve on the high court. The presence of three Reagan choices on the Supreme Court — with the possibility that three other justices in their 70s might soon retire — has given the president the opportunity to place a conservative mark on the court for perhaps 20 years after his second term ends.

The president praised all three judges in the highest terms. He said of Justice Burger, "He has led the Supreme Court for 17 years, a time

of great change and yet a period also of consolidation and stability in the decisions of the court. Under Justice Burger's guidance, the court has remained faithful to precedent while it sought out the principles that underlay the framers' [of the Constitution] words."

Mr. Reagan said Justice Rehnquist has served with great distinction and skill since 1971. At 61, Justice Rehnquist is the same age Justice Burger was when he was nominated 17 years ago.

"He is noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues," Mr. Reagan said of the man he nominated as chief justice.

Mr. Reagan said Judge Scalia, an appellate judge here since 1982, is noted for the force of his intellect, personal energy and the depth of his understanding of constitutional jurisprudence.

Justice Burger said one thing he did not accomplish was his goal of the creation of a new intermediate court, a measure now before Congress, to take cases from the overloaded calendar of the Supreme Court.

"There are nearly 100 filings a week and we have got to have some relief," Justice Burger said. "I'm surprised someone hasn't fallen down with coronary thrombosis. I have been logging 105 hours a week. I can do 90 hours, but at my age. . ."

Justice Burger said the court has not become more divided under his stewardship. "You have nine people there for an interchange, and it goes on all the time," he said. "We can disagree in a civilized way, and we do."

Neither Justice Rehnquist nor Judge Scalia would answer questions of substance, pleading that they would be questioned by the Senate Judiciary Committee in the confirmation process. Judge Scalia said he had no idea what the screening process was by which he was chosen.

Rehnquist chosen to lead court

Long-run impact is the target

By Tom Diaz
THE WASHINGTON TIMES

128P

Ronald Reagan brought the liberal nightmare to reality yesterday, stamping the Supreme Court with a conservative mark almost certain to last into the next century.

Rep. Patricia Schroeder, a liberal Colorado Democrat, found the proposed elevation of Justice William

NEWS ANALYSIS

Rehnquist to chief justice and the nomination of Judge Antonin Scalia to the high court "very frightening."

No wonder — it was the consummation of what Walter Mondale preached in the last presidential election was to be most devoutly feared: Mr. Reagan's men on the Supreme Court.

Even so, it may take a while for the significance of Mr. Reagan's nominations to sink in. For, according to the simple short-run analysis with which the Supreme Court usually is treated, not much will change in its voting lineup on issues like abortion, school prayer and criminal procedure.

That placid analysis may be correct in the short run, but it misses the point.

Since the members of the Supreme Court can be counted on the fingers, analysts are tempted to view them as if they were part of a nine-ball pool game:

One starts with the conventional assumption that the court is roughly divided into four "liberals" (Justices William Brennan, Thurgood Marshall, Harry Blackmun and John Paul Stevens), four "conservatives" (Chief Justice Warren Burger and Justices Sandra Day O'Connor, Lewis Powell and Rehnquist), and one "swing" voter (Justice Byron White).

Justice Burger's retirement will take one conservative off the table. Moving Justice Rehnquist up to chief justice puts another conservative in the top slot, but leaves the table down one conservative. Replacing Justice Rehnquist with federal appellate Judge Scalia, another conservative, evens the count.

The net result, according to this analysis, is a wash. Assuming Justice Rehnquist and Judge Scalia are confirmed by the Senate — a foregone conclusion in the minds of most observers except diehard liberals like Democratic Sen. Alan Cranston of California — the basic composition of the court will remain unchanged.

But the high court isn't, after all, a pool table.

It is a complex, extraordinarily stable institution that moves slowly,

in increments of legal precedent decided at a deliberate pace that is maddening to those who crave the quick fix of legislative politics.

It is the long view of the Supreme Court that counts, the dimension of the years it takes for legal concepts to be fashioned in lower courts and in legislatures, developed in laws or court cases, brought up to the high court in appeals, handed down in its decisions, and refined in follow-on cases.

And it is over time — perhaps decades — that the elevation of Justice Rehnquist and the appointment of Judge Scalia will have a profound impact.

By his appointment of these two, who are regarded even by their political opposites as scholarly men of precise intellect, Mr. Reagan will anchor the court's right to a solid bedrock of a renaissance conservative jurisprudence. Each has a vigorous view of the law and the properly restrained role of the courts as instruments of social change.

Justice Rehnquist summed that view up in an interview published in The New York Times last year.

"I don't know that a court should have a sense of mission," he said. "I think the sense of mission comes best from the president or the House of Representatives or the Senate. They're supposed to be the motive force in our government."

The relative youth of the two men on the conservative wing will also count. Retiring Justice Burger is 78 — Justice Rehnquist, 61, and Judge Scalia, 50. (Justice O'Connor is 56, and Justice Powell, 78.)

Although the powers of intellect may be as keen among the court's aging liberals (Justice Brennan is 80, Justice Marshall, 77, Justice Blackmun, 77, and Justice Stevens, 66) as among its relatively youthful conservative wing-to-be, the common experience of humanity is that vigor and stamina count in the realm of intellect.

Burger, Rehnquist and Scalia

1288

The morning after a chief justice retires is probably not the best time to try to weigh his role in history or predict the future of the court under his successor. But certain generalizations can be made. In 1969, Warren Burger replaced Chief Justice Earl Warren, a man whose judicial activism he deplored and whose tenure as chief produced many decisions Mr. Burger would like to overturn. It is a paradox of the law, however, that conservative jurists' adherence to precedent make it difficult for them easily or quickly to divert or reverse a tide. The "Burger court" expanded many of the "Warren court's" civil rights decisions and only minimally narrowed its criminal rights decisions. The Burger court will also be remembered as the one that produced *Roe vs. Wade* and the Pentagon Papers decision, neither of which was applauded then or now by many conservatives.

The Burger court did all this even while advocating, often in dissents and concurrences written by the chief justice, essentially conservative legal ideas. Mr. Burger particularly objected to the idea that courts should routinely overrule presidents and legislatures — depriving the majorities who had elected them of rights in order to protect minorities.

This view is also strongly held by Justice William Rehnquist, who will now become the chief, and Court of Appeals Judge Antonin Scalia, who will fill the resulting Rehnquist vacancy. Arith-

metically, this suggests no change on the court. But Mr. Rehnquist and Mr. Scalia are both considered to be more forceful and convincing legal scholars than Mr. Burger, so the conservative side may well be stronger now.

Also, Mr. Burger was not regarded as an effective chief in terms of imposing discipline on his colleagues. Thus the many splintered decisions of recent years. If Mr. Rehnquist is more effective in that regard, it could help make the court more conservative. Yet he may be less effective. Some court experts believe elevating an associate justice to chief justice, which is a rarity, is bad for morale and collegiality.

Judge Scalia's credentials as a legal thinker are as impeccable as his credentials as a conservative. We question his marketplace approach to the law — is this or that constitutional right worth the price paid to protect it? We certainly question his view that the press does not deserve the freedom to probe and write about important individuals and institutions. He may not be, as one columnist called him last year, "the worst enemy of free speech in America today," but he's no Warren Burger, either. Mr. Burger doesn't like the press. He is famous for saying so, and for his feuds with broadcasters. Though he dissented in the Pentagon Papers decision, over his 17 years on the court, the retiring chief justice's First Amendment record is a good one.

Merit plus conservatism marks nominees to court

Personnel change is so rare among the nine justices of the U.S. Supreme Court that announcements such as President Reagan's yesterday cannot help but be dramatic. Yet it would be a mistake to presume too much about imminent change in legal doctrines emanating from the highest court. Philosophically, this appears to be a game of musical chairs in which all the players dance to the same conservative tune — though to be sure, some are better dancers than others.

Warren E. Burger will be remembered primarily as the chief who followed Earl Warren. His most consistent impact on legal policy came in the area of criminal law; under Mr. Burger the court tilted the balance back toward police after the Warren court's emphasis on rights of the accused. Chief Justice Burger chose to put his greatest emphasis upon court administration, and if, in so doing, he failed to dominate his fellow justices, he did provide a predictable, consistently conservative vote.

The only vote more rigorously conservative than his was cast invariably by the man designated as his successor, Justice William H. Rehnquist, a Nixon appointee who has been on the court since 1972. By virtue of superior intellectual force, Mr. Rehnquist may be more successful than Mr. Burger at steering the court to the right, but that remains to be seen. The Senate must take care to assure that the back problems and medication that troubled Mr. Rehnquist a few years ago will not impede his ability to move up. Barring disclosure of now-unknown causes for reservation, Mr. Rehnquist's confirmation seems assured and deserved.

The same applies to Judge Antonin Scalia, who will be President Reagan's second appointee to the court if he passes Senate muster. Judge Scalia possesses a distinguished record as a legal scholar, law professor, public servant and jurist. Like Mr. Rehnquist, his qualifications serve a diamond-hard conservatism, but excellence is the Senate's proper focus, not ideology.

Gentle or Prosecutorial Persistence: Questioners Take On Range of Roles

By LINDA GREENHOUSE

Special to The New York Times

WASHINGTON, July 31 — For perhaps the only time in two days questioning by the Senate Judiciary Committee, Associate Justice William H. Rehnquist appeared at a hearing for words.

Senator Paul Simon, a Democrat from Illinois, had just described what he called the "struggle" going on in his own mind over the Justice's "above average" professional qualifications on the one hand and his conservative ideology on the other.

"If you were Paul Simon," the Senator said to the man nominated by President Reagan to be Chief Justice of the United States, "how would you vote?"

Justice Rehnquist asked for a moment to think about the question. The moment stretched on.

A Very Difficult Question

"That's a very difficult question," he said finally. "It would be presumptuous of me to say, except that you've asked. It boils down to, basically, what this confirmation process is all about."

Despite the television lights and the crowded hearing room, there was an intimate quality to the exchange. As the confirmation hearing ended a third day, the differing roles and styles of the members of the Judiciary Committee, 10 Republicans and eight Democrats, have become sharply etched.

Senator Simon, a liberal who is a former newspaper publisher, is a persistent yet gentle inquirer. He appears to have distanced himself from three more senior Democrats who have sought to use the hearings to find inconsistencies or potential sources of embarrassment in Justice Rehnquist's public and private life. For months Senator Simon has been trying to establish a position for the Senate Democrats in what role ideol-



The New York Times

Senator Strom Thurmond, South Carolina Republican, with Democratic Senators, from left, Joseph R. Biden Jr. of Delaware, Edward M. Kennedy of Massachusetts and Howard M. Metzenbaum of Ohio at break in hearing.

ogy should play in the judicial confirmation process. The question is a fundamental one that has never in the history of the country received a definitive answer.

A Quest for an Answer

Now, the man with the most at stake was joining the Senator in that inquiry, and both appeared intrigued by the process.

"You probably have to say," Justice Rehnquist continued, "that a

Senator should not simply say that this is not the person I would have appointed, that he does not share my views.

"Putting myself in your place, which is very, very difficult, I suppose the question is, have I fairly construed the Constitution in my 15 years as an Associate Justice?"

Senator Simon did not commit himself, but he appeared satisfied by the interchange. "Thank you," he said.

More aggressive in their questioning were the committee's three most

senior Democrats, Joseph R. Biden Jr. of Delaware, Edward M. Kennedy of Massachusetts and Howard M. Metzenbaum of Ohio. They have used much of their time to try to validate the position Senator Kennedy staked out when the hearings opened Tuesday: that Justice Rehnquist is "too extreme to be Chief Justice."

Manner Is Prosecutorial

Mr. Kennedy, his face flushed, took on a prosecutorial manner in questioning the nominee about discriminatory clauses in deeds to property the Justice now owns in Vermont and had owned 17 years ago in Arizona. The Senator continued long after Senator Patrick J. Leahy, the Vermont Democrat who first raised the issue, said he was satisfied with the Justice's response that he was unaware of the language and would act quickly to have it removed in the Vermont deed.

Senator Metzenbaum was a stern lecturer, telling Justice Rehnquist that he not only disapproved of the Justice's views on such questions as race and religion, but also doubted his "candor and forthrightness."

At one point, Mr. Metzenbaum led Justice Rehnquist through a discussion of hypothetical church-state controversies. "How would you feel," he asked, if government officials came into a school and announced that "all persons should go to church."

"I would be outraged," Justice Rehnquist replied.

This was evidently not the answer the Senator expected, because he appeared taken aback. After a moment

he said, "So would I."

Senator Biden assumed the role of a student, probing Justice Rehnquist for detailed explanations of his views on equal protection. Eventually it was the Senator, rather than the Justice, who appeared exhausted by the effort. "I've read more cases in preparing for these hearings than I did in three years of law school," Mr. Biden said at one point.

Hatch as the Defender

Strom Thurmond, the South Carolina Republican who heads the committee, did not take an active role in the questioning, and Justice Rehnquist's principal defender was Senator Orrin G. Hatch, Republican of Utah, himself mentioned as a possible Reagan Administration nominee to the Supreme Court.

Mr. Hatch occasionally derided the Democrats' questions as "ridiculous" and accused them of engaging in a "fishing expedition."

He praised Justice Rehnquist for his dissent in a 1985 case that struck down a law providing for silent prayer in the Alabama public schools. Mr. Metzenbaum had criticized Justice Rehnquist's position as "extreme." Senator Hatch noted that the Judiciary Committee voted 12 to 6 last October for a constitutional amendment to permit a "moment of silence" for prayer in the schools.

"What you have been labeled 'extreme' for," Mr. Hatch told the nominee, "is something a majority of this committee supports."

Justice Rehnquist smiled and shrugged. "We're all extremists to gether," he said.

PRESERVATION COPY

Excerpts From Questioning of Rehnquist in Senate Committee

PRESERVATION COPY

See in Washington yesterday on the nomination of Associate Justice William H. Rehnquist to be Chief Justice of the United States, recorded by The New York Times:

SENATOR HOWARD M. METZENBAUM, Democrat of Ohio: Mr. Justice: as this hearing develops I think it's on a double track. One part of the track — maybe a triple track has to do with your ability to lead the court, to be that individual who can weld the court together. The second part relates to whether indeed you are an extremist and respond to some of your opinions. But there's a third part that probably disturbs me as much as anything else — maybe more than any of the first two points. That has to do, and I want to use the most sensitive language I can, with your ability, with the honesty of your representations to this body in 1971 and at the present time as well.

On the voter-challenge issue we have the matter of your making a specific representation to the committee at that time, and then you have the total disavowal yesterday with respect — as pertains to the facts, and that's an issue that is still left unanswered because the witnesses won't be here until tomorrow. It has to do not with whether you did or didn't do something but whether you did or did not represent the facts correctly to this body.

Then the second part of that whole credibility question relates to your answers to Senator Leahy yesterday that you didn't know of a typed-in restrictive covenant. This was a fill-in form, had a typed-in restrictive covenant with reference to selling or leasing our property to any member of the Hebrew race.

Well, just as a — on its face sometimes typed in — a good lawyer, excellent scholar — certainly would have been normal to expect you would have noted that. And I guess, as one of the most knowledgeable people at probably graduated Stamford — high honors — everybody agrees you're extremely intelligent, you don't have to be a — this whole thing almost stands out — Hebrew race. No such thing as a Hebrew race. It's a Jewish religion. I mean that would obviously, a point that almost would stand out, and so when you say you didn't know about it, that concerns me. It's bad enough that it's in the deed. It's worse if it was in the deed and if you knew about it in your representation to the committee.

And the third aspect having to do with the matter of credibility relates to your claim that the memo to Jackson was not representative of your views but were those of the Justice himself.

1961 Purchase Recalled

SENATOR EDWARD M. KENNEDY, Democrat of Massachusetts: Justice, the Senator from Vermont brought up some questions yesterday about the restrictive covenants in certain titles. The F.B.I. report indicates that also on Oct. 24, 1961, you obtained a title to Lot 3, which is in Palm Croft subdivision in Phoenix, Ariz. Are familiar with that?

A. Certainly we owned property — we owned the home in Palm Croft, Ariz. from about 19 —

Q. Well, did you buy it in 1961?

A. Yes, that sounds right.

Q. And Oct. 24 sounds about the time?

A. That sounds right.

Q. Do you still own that?

A. No.

Q. You sold it. When did you sell it?

A. I believe early in 1969.



Associate Justice William H. Rehnquist, right, talking with one of his law clerks while there was a break in the questioning at hearing yesterday before Judiciary Committee.

Q. I see. On that particular provision is a report by Mrs. Gladys Cavette who is the customer service department, Arizona Title Company, advised that that further research of the records by the title company revealed a warranty, Deed No. 328623 dated July 30, 1928, relating to Lot 3 of the Palm Croft subdivision, and the Article II of the warranty deed is as follows: "No lot nor any part thereof within a period of 99 years from the date of filing of the record on the plot of Palm Croft shall ever be sold, transferred or leased to, nor shall any lot be a part thereof within said period be inhabited by or occupied by any person not of the white or Caucasian race." Were you familiar with that particular provision?

A. I certainly don't recall it, no.

Q. Well would you have read through the various — the warranty deed on — you bought the land. Do you have any recollection. It's a long time ago, but —

A. It's 1961. I simply can't answer that Senator. It was a title company transaction I think and one relies on the title company for the sufficiency of the deed. I simply can't answer whether I read through the deed or not.

Q. But you have no knowledge whether in that warranty — you didn't examine the warranty about any restrictions on the property?

A. I certainly have no recollection of it.

Q. Would you now examine the warranty if you purchased property today?

A. Well, if a lawyer were handling the thing for me — or any sort of a complicated warranty — I think I would tend to rely on the lawyer.

Examination of Deed

Q. Even when you're familiar that there were those kinds of restrictions in many

parts of the country, I expect, even in my own part, with regards to either Caucasians, whites or blacks or Jews?

A. Your question is would I examine a warranty deed now?

Q. Yes, to see if there's any restriction. Would you care if you joined a country club or something like that that restricted women or Jews.

A. No, certainly not.

Q. Or blacks?

A. No.

Q. Well you'd know about that then. You would find out about that before you made application I assume.

A. Yes, I would.

Q. Well, would you check and see if there were any restrictions in terms of the purchase of that property.

A. Oh, in terms of — yes, I think I would.

Q. Well, when — you didn't before evidently. You didn't in 1961.

A. It simply hadn't occurred to me.

Q. Well, when did it start occurring to you?

A. Well, the discussion today or last evening has certainly brought it up.

Earlier Knowledge Sought

Q. Well you don't think that you should have before or any time? You don't think you should have before today, before yesterday?

A. Well, I must say my normal approach in looking at a statement of title was, you know does it convey good title and that sort of thing. I certainly not only thought but knew that this sort of a covenant is totally unenforceable and had been for years. Since the Supreme Court decision a long time ago. So, while very offensive, it has no legal effect.

Q. Well, did you sign the deed of transfer when you sold the property?

A. I can't answer from my own knowledge, but I certainly — we had done nothing to remove it as I recall in the years we — I would think it probably was.

Hatch Sees Red Herring

SENATOR ORRIN G. HATCH, Republican of Utah: This is the biggest red herring I've seen in the whole hearing, and there are a number of them. It's this business of these titles. He didn't know about it, he found out about it through this process. It's good that he has. Under Shelley v. Kramer everybody in the world who understands constitutional law knows that these provisions are unconstitutional, may not be enforced by the courts in this country.

I just wonder if I could ask my two colleagues from Arizona and from Vermont if they'd just ask the public officials to strip those deeds of those provisions and let's just get rid of them, or I suppose you could go to a quit-claim process and just get them stripped off.

As I understand it he said he didn't know about them, he's going to take them off. I think it's ridiculous to make a big brouhaha about something this ridiculous.

It is ridiculous. Well, of course it's ridiculous. You know it's ridiculous, I know it's ridiculous. It isn't enforceable. Come on. (VOICES)

SENATOR STROM THURMOND, Republican of South Carolina, the committee chairman: Senator Hatch has the floor.

SENATOR HATCH: My gosh, you're jumping on every little possible detail you can. Let's be honest about it. I don't know a lawyer alive who goes through a house closing who reads every one of those documents if he's got another lawyer doing it for him. I never have. I don't think you have.

SENATOR KENNEDY: If the Senator will just yield on that point. I think part of the question is that this nominee was an official of the Justice Department, the Justice Department of the United States. In 1969 when he transferred a property that had that kind of restrictive provision in it. And I think that (VOICES) transfers a home who has not that particular responsibility.

SENATOR THURMOND: I might make this statement. We've had numbers of nominees here that have been involved this way. They bought property and did not realize it had certain restrictions. But whether it had restrictions or not, they aren't enforceable and they don't amount to anything and that's all been acknowledged so why waste more time.

SENATOR DENNIS DECONCINI, Democrat of Arizona: I wonder how many of us on this committee could say that we have never owned a piece of property, either in trust or in escrow or in our names, that we have looked at every piece of the title. Maybe the Senator from Ohio can say that.

SENATOR KENNEDY: I think the point has to be made is the real question of the sensitivity of this nominee. The issue of civil rights.

Simon's Fundamental Issue

SENATOR PAUL SIMON, Democrat of Illinois: Let me pose kind of the fundamental question for me. And you have been through this process. I don't mean just the last two days or the last time you were up, but you have reflected upon this, you've written. Here is my struggle, as I look at this.

On the positive side we have a nominee of above-average ability by any standard. We have a nominee who has good writing skills. Most people may not count that as an impor-

tant as a symbol. And then the other area where I come down on a different side on decisions that you would make, is in the area of civil liberties particularly church-state relations. I note that you quoted Chief Justice Story and in summation of where we are, favorably in our decision. I don't think it is, with all due deference to Chief Justice Story, I don't think it is an accurate summation of the church-state history. Anyway, I come down on a different side than you would in these areas. I have great respect for you, if you were a member of this body, faced with that kind of a dilemma, how would you vote if you were Paul Simon?

A. That's a very difficult question, Senator. May I take a moment to think before I answer?

Obviously, I cannot give you any very good answer. All I can perhaps give you is two or three reactions to what you have just said. I think it's for you to decide, obviously Senator, the extent to which you're differing with me about my constitutional views is a ground for voting against me as a nominee. I might add just parenthetically that my reference, I think, in the Wallace against Jeffrey dissent to Justice Story was not to adopt his view of the church-state, but to simply show that he as a respected and contemporaneous commentator back in the first half of the 19th century took a view quite different than Jefferson's wall of church and state.

I think that if it boils down to basically a difference between — in the mind of a Senator, and as I say, it would be presumptuous of me to say this to the Senators except you've asked me to say it. What is this confirmation process all about? The President obviously has his role in it, but surely the Senate has its role too.

And the President is a sole individual. He alone nominates, whereas a hundred Senators end up voting whether or not to confirm. And I suppose the question is, how is the Senate's power to be exercised? And I know a lot of people have spoken on it and written on it. I think you probably have to say that a Senator should not simply say this is not the person who would have appointed. I would have rather have someone who was First Amendment should be much different. Therefore, since this nominee does not share my views, I'm going to vote against his confirmation. And yet, obviously the Senate certainly I don't think is limited to any particular qualifications.

I think, again, putting myself in your place which is very, very difficult: Have I fairly construed the Constitution in my 15 years as an associate justice?

Q. I thank you.

PRESERVATION COPY

CLASSIFIED
ARTS ON PAGE 8D
ELIGION
PAGE 5D

COMMENTARY

D
SECTION

PRESERVATION COPY



PRESERVATION COPY

Who deputized Ted?

PRESERVATION COPY

Dear Sen. Kennedy:
You don't know me, though often you claim to speak for people like me.
I am your constituent — a black American.

Just the other day, you spoke in my name. You denounced the nomination of William Rehnquist to be the Supreme Court's 16th chief justice.

Mr. Kennedy, you said that Justice Rehnquist is "too extreme to be chief justice." You blasted what you described as an "appalling record on race" issues.

"Mainstream or too extreme," that was your question. And I must say, it was well taken. But pose it to yourself, Mr. Kennedy, as the lone liberal, defending justice for black Americans.

The real extremist is not Justice Rehnquist nor the ideas he represents. Those ideas are shared by the most beloved president since Franklin Roosevelt.

The extremist is you, Mr. Kennedy.

Your views are extreme for most Americans and far too extreme — even dangerous — for many black Americans.

Consider your criticism of Justice Rehnquist for voting "against the individual 77 percent of the time in cases involving individual rights."

Among those you include the "rights" of burglars, muggers, rapists, even murderers. "Rights" of the scum who prey on decent, law-abiding black Americans.

The "individual" rights you defend in my name are the "rights" of hoodlums who kill so often that today a young black man has one chance in 21 of being a murder victim.

They are the so-called rights of the young Washington monsters who robbed, beat, sodomized, and murdered a defenseless mother of six. Defend those rights, Mr. Kennedy, before the family of Catherine Fuller.

You'd champion the so-called rights of the drug-crazed man who broke into my parents' home and

...you and let your mother at
gunpoint. If you really knew the folk
you claim to defend, you'd know such
crimes are commonplace.

You'd know, Mr. Senator, why most
blacks — unlike you — support the
death penalty.

You'd also know that many blacks,
like many whites, dislike busing for
school integration. They know no
educational magic occurs when you
seat black children next to white

children. But you know that too,
Mr. Kennedy. But were your children
bused to public schools? Why hound
Mr. Rehnquist for his opposition to
extremist integration?

And if you spoke honestly for
folk like me, you'd know
many black Americans
dislike the notion that
without affirmative action they
couldn't compete with whites.

...often-quoted poll from *Public Opin-*
ion magazine showing 77 percent of
blacks are opposed to affirmative ac-
tion. But other polls reveal similar
opposition.

The evidence is clear, Mr. Ken-
nedy, who the real extremist is on
issues over which you've attacked
Justice Rehnquist. William Rehn-
quist may have opposed desegrega-
tion at one time, but so did most

...posture as a spokesman for all for-
mer segregationists.

On the other hand, liberals like
you claim to know what's best for all
black Americans. And for two dec-
ades now, black progress has been
limited by your "compassion."

The Great Society that you sup-
ported has wrecked the lives of poor
black families. The so-called rights
of criminals that you defend rain ter-

...nities.

So now it's about time that some-
one asked, Ted Kennedy, who chose
you to speak in the Senate for me, all
blacks, all minorities, and women?

I'm part of your constituency
against my will. And we've a name
for that sort of employment.

Justice Rehnquist no doubt would
oppose it.

It's called slavery.

PRESERVATION COPY

24 July 1986

Peter,

Attached are some
articles which may
be useful for your
meeting with Justice
Rehingerist.

Alan

'50s Memos Illustrate Rehnquist Consistency

By George Lardner Jr.
Washington Post Staff Writer

When Julius and Ethel Rosenberg were facing death in the electric chair in the early 1950s for passing atomic secrets to the Soviet Union, their sentence was the subject of repeated petitions to the Supreme Court.

At least one of the clerks there had no doubt that the penalty was correct.

"In my opinion," the clerk, William H. Rehnquist, wrote his boss, Supreme Court Justice Robert H. Jackson, "if they are going to have a death sentence for any crime, the acts of these petra [petitioners] in giving A-bomb secrets to Russia years before it would otherwise have had them are fitting candidates for that punishment. It is too bad that drawing and quartering has been abolished."

The observation is contained along with many others in the late Justice Jackson's papers at the Library of Congress. With the permission of Jackson's heirs, the documents were examined by The Washington Post.

A Supreme Court justice since 1972, Rehnquist was nominated by President Reagan last month to be the next chief justice of the United States. The memos he wrote as a Supreme Court clerk reveal that at a time when Ronald Reagan was still a Democrat, Bill Rehnquist was Bill Rehnquist.

They show Rehnquist to be an extraordinarily consistent conservative, a man of the right whose thinking has changed little in more than 30 years. He was a law-and-order man before it was widely perceived as an issue. He was denouncing the "ivory-tower jurisprudence" of the court well before Earl Warren got there. He was even complaining of the weakening of "lo-



WILLIAM H. REHNQUIST
... an early law-and-order man

cal law enforcement" in an era when third-degree methods and coerced confessions had not been ruled unconstitutional by the court.

In his 14 years, Rehnquist has earned a reputation as an outspoken conservative who generally sides with government authority over individual liberties, who is determined to stick to the "original intent" of the framers of the Constitution, and who has a distaste for any judicial expansion of it to deal with contemporary problems.

Those same views stand out clearly in the memos that Rehnquist wrote in 1952 and 1953 when he was one of Jackson's clerks after graduating from Stanford Law at the top of his class.

Rehnquist obtained the prized clerkship with Jackson as the result of a summertime meeting with the justice in the offices of Phil Neal, then a professor at Stanford Law and a former Jack-

See REHNQUIST, A14, Col. 1

Rehnquist Lone Dissenter in 47 Cases

WHILE 15 MEN so far have served as chief justice of the United States, none has represented an ideological extreme of the court to the extent that Chief Justice-designate William H. Rehnquist would.

Perhaps the best indication is a look at the 47 cases in which Justice Rehnquist — standing alone — has dissented from a decision of the court. In the 14 years in which he has served, no other justice has so often filed solo dissents. What follows is a list of those cases and the holding of the court from which Justice Rehnquist alone dissented.

Administrative Procedures

Dunlop v. Bachowski, 421 U.S. 560 (1975) — A Department of Labor decision not to file an enforcement action is subject to judicial review.

Civil Procedure

Baker v. Gold Seal Liquors, 417 U.S. 467 (1974) — Uniform bankruptcy procedures are upheld.

Parklane Hosiery v. Shore, 439 U.S. 333 (1979) — Plaintiff's use of collateral estoppel is upheld.

Boeing v. Van Gemert, 449 U.S. 472 (1980) — A class action may proceed despite a lack of finality.

Civil Rights

Butts v. Finney, 437 U.S. 678 (1978) — Federal courts may order a state jail to limit confinements to remedy unconstitutional conditions.

Schloch v. Redbell, 423 U.S. 236 (1978) — The Con-

stitution protects a fundamental right to marry.

Bob Jones University v. U.S., 461 U.S. 574 (1983) — Racially discriminatory private religious schools may be denied tax exemptions.

Criminal Procedure

Chambers v. Mississippi, 410 U.S. 284 (1973) — Evidentiary rules may not prevent a defendant from cross-examining a witness who repudiates a confession.

Dennett v. Hogan, 414 U.S. 513 (1973) — The inadvertent denial of the right to counsel requires a remand.

Taylor v. Louisiana, 419 U.S. 322 (1975) — The Constitution guarantees the right to a jury venire that is a "reasonable cross-section" of the community.

Gardner v. Florida, 430 U.S. 349 (1977) — A death penalty is reversed because of the trial judge's error in reviewing the presentencing report.

Simpson v. U.S., 432 U.S. 904 (1978) — The double jeopardy clause forbids sentencing for both a crime and its included offense.

Lockett v. Ohio, 438 U.S. 586 (1978) — A death-penalty law must allow the defendant broad scope for submitting mitigating evidence.

Mincey v. Arizona, 437 U.S. 385 (1978) — The Fourth Amendment does not provide a "homicide scene exception" to the warrant requirement.

Delaware v. Prouse, 440 U.S. 648 (1979) — Police may not make random stops of motorists without some "articulable suspicion."

Adams v. Texas, 448 U.S. 38 (1980) — The exclusion

of jurors in death-penalty cases is limited.

Hicks v. Oklahoma, 447 U.S. 343 (1980) — A defendant sentenced under an unconstitutional mandatory offender law must be resentenced.

Carter v. Kentucky, 450 U.S. 288 (1981) — A jury must be instructed not to draw adverse inference from the defendant's silence.

Equal Protection

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) — A state may not deny illegitimate children the right to recover workers' compensation payments.

Frontiero v. Richardson, 411 U.S. 677 (1973) — Unreasonable discrimination on the basis of sex violates the Constitution.

Sugarman v. Dougall, 418 U.S. 634 (1973) — Laws discriminating against aliens are subject to equal-protection review.

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) — A state residency requirement for medical internships is struck down.

Jimenez v. Weinberger, 417 U.S. 628 (1974) — The Social Security Administration may not discriminate against illegitimate children.

Stanton v. Stanton, 421 U.S. 7 (1975) — A state may not provide a different age of majority for men and women.

Turner v. Department of Employment Security, 423 U.S. 44 (1975) — A law establishing a conclusive pre-

sumption that pregnant women are unable to work violates the Constitution.

Examining Board of Engineers v. Otero, 426 U.S. 572 (1976) — Puerto Rico may not forbid non-citizens from becoming engineers.

Duren v. Missouri, 439 U.S. 357 (1979) — A state may not automatically exempt women from jury duty.

Wongler v. Druggists Mutual, 444 U.S. 142 (1980) — Gender-based distinctions in the Missouri workers' compensation law are invalidated.

Bobel v. Williams, 487 U.S. 85 (1982) — Alaska may not make payments to citizens based on their length of residency.

Bernal v. Fainter, 81 L.Ed. 2d 175 (1984) — A law forbidding aliens to be notaries is struck down.

Federalism

Allenberg Cotton v. Pittman, 419 U.S. 20 (1974) — A state may not require state authorization to run a cotton warehouse.

Van Lake v. Hurley, 421 U.S. 335 (1975) — New York's welfare regulations are pre-empted by federal law.

Japan Line v. County of Los Angeles, 441 U.S. 434

(1979) — A state tax on shipping containers infringes on foreign commerce.

Armco v. Hardesty, 81 L.Ed. 2d 540 (1984) — A state wholesale gross-receipts tax exempting local manufacturers violates the commerce clause.

First Amendment

Cruz v. Beto, 405 U.S. 319 (1972) — A state may not deny a prisoner reasonable opportunities to pursue his faith.

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) — A state may not criminalize the broadcasting of a rape victim's name.

Virginia Board of Pharmacies v. Virginia Consumer Council, 425 U.S. 746 (1976) — The Constitution protects commercial speech.

In Re Primus, 436 U.S. 412 (1978) — A state may not discipline an attorney for seeking members for the American Civil Liberties Union.

Richmond Newspapers v. Virginia, 448 U.S. 855 (1980) — The press and public have a right of access to criminal trials.

Central Hudson Gas & Electric v. PSC, 447 U.S. 557 (1980) — A state may not ban promotional advertising by a regulated utility.

Schaumburg v. Citizens for a Better Environment, 449 U.S. 485 (1980) — A city may not forbid charities to solicit money if they fail to meet regulations.

Thomas v. Review Board, 450 U.S. 707 (1981) — Workers forced to quit jobs for religious reasons may not be denied unemployment benefits.

Larkin v. Grendel's Den, 459 U.S. 116 (1982) — A church may not exercise veto power over the granting of liquor permits in its neighborhood.

Minneapolis Star v. Commissioner of Internal Revenue, 460 U.S. 575 (1983) — A state may not levy a special tax on publications.

Indian Law

U.S. v. Sioux Nation, 448 U.S. 371 (1980) — The U.S. government is liable for \$100 million in damages for the 1887 taking of Sioux land in the Black Hills.

Taxation

Diedrich v. Internal Revenue Service, 457 U.S. 191 (1982) — Gift tax regulations are upheld.

Voting Rights

Bathorn v. Lovorn, 457 U.S. 255 (1982) — Local election procedures are subject to the federal Voting Rights Act.

BOOK REVIEW

CONSTITUTIONAL PERILS—REAL AND OTHERWISE

OUR ENDANGERED RIGHTS—THE ACLU REPORT ON CIVIL LIBERTIES TODAY. Edited with an Introduction by Norman Dorsen. Pantheon Books, New York, N.Y., 1984. pp. 333. \$22.50.

*Reviewed by Gene R. Nichol, Jr.**

What is the state of individual freedom in the United States today? How fully have the majestic promises of the Declaration of Independence been realized? No doubt Americans have experienced vast changes in the relationship between the individual and government over the past half century. The compassionate energy of Franklin Roosevelt, the terrors of cold war McCarthyism, the call to progress of the Kennedy brothers, the moral force of Martin Luther King Jr., the activism of the Warren Court and the Great Society, the abuses of Richard Nixon, the ambivalence of the Burger Court, and a first term of Ronald Reagan all have left their marks. By any standard, guarantees of liberty and equality have undergone major expansions. Yet constitutional protection is hardly a static process. New problems arise,¹ old ones are resurrected.² Even in the Orwellian year of 1984, all of our constitutional crises cannot be considered behind us.

*Our Endangered Rights: The ACLU Report on Civil Liberties Today*³ offers both an assessment of the present status of American freedom and an examination of perceived future battlegrounds over individual liberties. Edited by Norman Dorsen, the book is a collection of essays by noted constitutional authorities and civil liberties experts measuring the vitality of various constitutional guarantees. It offers a glimpse not only of the broad panoply of the rights we do enjoy, but

* Professor of Law, University of Florida.

1. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (minority set-aside provision in public contracts).

2. See, e.g., *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (resurrection of the contracts clause).

3. OUR ENDANGERED RIGHTS: THE ACLU REPORT ON CIVIL LIBERTIES TODAY (N. Dorsen ed. 1984) [hereinafter cited as OUR ENDANGERED RIGHTS].

also what Dorsen calls the "darker side"⁴ of the human rights equation in this country. Authors characterize the birthright of freedom for all Americans as "continually under siege,"⁵ and the title of the work is said to sum up well the present situation. Past civil liberties victories are now "endangered" and future technological developments pose unforeseen perils to individual autonomy. The social agenda of the New Right, the use of executive authority by the Reagan administration, and continuing economic scarcity threaten traditional movements towards toleration and equality. In short, progress on the civil liberties front cannot be assured. As we approach the close of the twentieth century, efforts to secure fundamental freedoms in both legislative and judicial arenas must, if anything, be redoubled.

There is much that is good in *Our Endangered Rights*. In particular, Professor Emerson's chapter on academic freedom outlines significant applications of constitutional law to protect the rights of faculty members and students and, more recently, to assure a measure of curricular diversity.⁶ More importantly, he argues that government attempts to control information on national security grounds and the commercial exploitation of academic research constitute threats to true academic liberty that are at least as great as more direct means of control.⁷ The former serves to diminish the information needed by the public to participate in decision making, and the latter is at odds with the academic community's traditional commitment to the free and unskewed pursuit of knowledge. Norman Redlich carefully examines the mounting pressures placed on Madison's wall separating church and state in an era of renewed religious fundamentalism⁸—pressures that have hardly decreased since publication of the book.⁹ Stanley N. Katz's concluding chapter lends a refreshing historical perspective to civil liberties struggles which, by their very fervor, tend to eschew relativism.¹⁰ By reminding us that future civil rights battles must be conducted without the support of a unified traditional New Deal political coalition, Katz makes clear that the issues of the eighties are not the

4. Dorsen, *Introduction*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at ix, ix.

5. *Id.*

6. Emerson, *Academic Freedom*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 179, 179.

7. *Id.* at 194-200.

8. Redlich, *Religious Liberty*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 259, 259.

9. Since publication, the Supreme Court upheld the constitutionality of a municipality's Christmas creche in *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The United States Senate also considered, and rejected, a "school prayer" amendment to the Constitution. See S.J. Res. 73, 98th Cong., 2d Sess., 130 CONG. REC. S2425 (daily ed. March 8, 1984) (proposing an amendment relating to voluntary school prayer).

10. Katz, *An Historical Perspective on Crises in Civil Liberties*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 311, 311.

issues of the sixties. Accordingly, his chapter proves to be an effective counterweight to the often unbalanced tone of other selections.

The book, in a variety of ways, documents both the logical inconsistency¹¹ and general undesirability¹² of recent attempts to roll back long established constitutional guarantees. Measures to withdraw the jurisdiction of the federal courts or to legalize orchestrated school prayer, for example, get ample attention. But perhaps the strongest single feature of *Our Endangered Rights* is its effort to signal flash points of future constitutional controversy that existing bodies of law are ill-suited to handle.

Professor Bender, for example, argues that although the Constitution has been interpreted to protect individual privacy in some particulars, "meaningful protection of informational privacy rights at present . . . largely depends upon the good faith and vigilance . . . of governmental and private agencies. . . ."¹³ Given the virtual explosion of technologies available to obtain and compile information, constitutional silence will become increasingly difficult to maintain. Further, as Morton Halperin argues, the traditional judicial deference accorded to presidential claims of national security may well insulate much mischief.¹⁴ Recent executive branch efforts to limit foreign travel, to bar foreign visitors, to stigmatize various publications, and to censor former government officials bode ill for a robust national debate on foreign affairs.¹⁵ John Shattuck makes an analogous point concerning executive authority and domestic affairs.¹⁶ Reagan administration moves to curtail civil rights enforcement and to alter existing civil rights policies through executive order have proven relatively impervious to attack.¹⁷ Finally, in a perceptive essay, Sylvia Law demonstrates

11. Shattuck, *Congress and the Legislative Process*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 46, 53. Shattuck criticizes the Reagan administration's position in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983) (calling for deference to local governments in abortion cases) as inconsistent with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

12. Shattuck similarly discusses jurisdiction-stripping legislation, antibusing legislation, anti-abortion legislation, and acts to abolish the exclusionary rule and limit habeas corpus review. Shattuck, *Congress and the Legislative Process*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 46, 46-67.

13. Bender, *Privacy*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 237, 251.

14. Halperin, *National Security*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 281, 286-92.

15. *Id.* at 290-92.

16. Shattuck, *Congress and the Legislative Process*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 46, 60-67.

17. *Id.* at 65-67. See, e.g., Exec. Order No. 12,333, 3 C.F.R. 200 (1982) (granting CIA new authority to conduct surveillance inside the United States); Exec. Order 12,356, 3 C.F.R. 166 (1983) (classifying information held by executive agencies); Civil Rights Enforcement for Federal Contractors, 47 Fed. Reg. 17,770 (1982) (to be codified at 41 C.F.R. §§ 60-1, 60-2, 60-4, 60-30) (cutting back affirmative action guidelines for federal contractors). But see *Bob Jones Univ. v.*

the inseparability of civil liberties and economic justice. Once fusion of the two concepts is accomplished, the need to recognize not only certain claims for subsistence but, at the other end of the spectrum, to render concentrations of economic power democratically accountable becomes clear.¹⁸ Law's arguments remind us of the continuing validity of Franklin Roosevelt's assertion that political equality can all too easily be rendered "meaningless in the face of economic inequality."¹⁹ None of these flash points is apt to be brought under the umbrella of constitutional protection overnight. Each author, however, makes a strong case that presently asserted constitutional values cannot be indefinitely maintained if such important areas of friction are ignored.

Despite these strengths, however, *Our Endangered Rights* ultimately provides something less than its advertised claim: "a lucid review of the state of American freedom."²⁰ In no small part its shortcomings result from defects common to much liberal discourse. Accordingly, they merit attention.

I. ON LIBERAL HYPERBOLE

It is not uncommon in constitutional scholarship to attempt to make things more complicated than they are.²¹ It is not uncommon in politics to attempt to make things more simple than they are. Much of *Our Endangered Rights*, although under the rubric of constitutional analysis, follows the latter theme.

Consider a few examples. Much has been written²²—no doubt too much²³—concerning the antidemocratic nature of judicial review. However one feels about that debate, it is difficult to deny, for example, that the judicial enforcement of nontextual substantive rights against popularly elected branches of government is at odds with democratic theory. Professor Neuborne, nevertheless, dismisses such claims by arguing that "allowing judges to check . . . a powerful transient minority in the name of an existing consensus concerning individual rights is

United States, 103 S. Ct. 2017 (1983) (affirming IRS decision denying tax exemptions to racially discriminatory private schools).

18. Law, *Economic Justice*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 134, 134-59.

19. Address before the Democratic Convention (June 27, 1936).

20. This claim appeared on the cover of the paperback edition.

21. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *passim* (1978) (discussing the philosophies of individual rights, and criticizing the "ruling theory of law" as espoused by Jeremy Bentham).

22. See generally, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 704-06 (1976).

23. See generally Nichol, *Giving Substance Its Due* (Book Review), 93 *YALE L.J.* 171 (1983).

hardly a serious challenge to democratic political theory."²⁴ One could, of course, counter Neuborne's claim by pointing to persuasive arguments that either there is no discernible consensus on individual rights to instruct the bulk of modern constitutional decisions, or that the judiciary is particularly ill-suited to discover it.²⁵ It is perhaps simpler, however, to point out a subsequent paragraph of Professor Neuborne's: "We turn to judges to define and enforce individual rights not because no real choices are necessary, but precisely because hard choices cannot be avoided."²⁶ True enough. But choices are hard precisely because they are not rooted in societal consensus. Further, it is my guess that Neuborne would be among the last to advocate that the judiciary wait for broad popular agreement before protecting, for example, the rights of Nazis to march in Skokie or poor women to obtain government funding for abortions. Rather, arguments for an activist modern judiciary based upon perceived consensus boil down to the unrealistic and ethnocentric claim that the bulk of the country sees the world through the eyes of the political left.

Professors Estrich and Kerr's attack on the gender cases, on the other hand, is overblown. *Michael M. v. Superior Court*,²⁷ sustaining the constitutionality of a California gender-biased statutory rape law, is indeed a regrettable step backwards in the Supreme Court's treatment of sex discrimination. The decision's shortcoming is surely not that "the non-physiological consequences of pregnancy—the 'punishment' of pregnancy itself as well as the additional constraints that punishment may place on female sexuality—are socially created, as much the product of governmental action as the criminal sanction imposed on Michael M."²⁸ There may be a multitude of causes leading to a teenage girl's fear of pregnancy, but government is not on the list. Nor does it further the understanding of privacy analysis to characterize the

24. Neuborne, *The Supreme Court and the Judicial Process*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 27, 28.

25. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 63-69 (1980).

26. Neuborne, *The Supreme Court and the Judicial Process*, in OUR ENDANGERED RIGHTS *supra* note 3, at 27, 41.

27. 450 U.S. 464 (1981).

28. Estrich & Kerr, *Sexual Justice*, in OUR ENDANGERED RIGHTS, *supra* note 3, at 98, 115. Estrich and Kerr correctly recognize that *Rostker v. Goldberg*, 453 U.S. 57 (1981) (male-only draft registration), *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (affirming California statutory rape law which imposed criminal liability only on men), and *Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding state disability scheme excluding pregnancy coverage), reflect a lingering judicial acceptance of separate spheres for male and female. Surprisingly, however, they criticize cases denying custody to lesbian parents because such rulings "devalue the importance and difficulty of the nurturing activity that has been assigned to women." Estrich & Kerr, *supra*, at 127. Lingerings are apparently widespread.

troubling case of *Harris v. McRae*²⁹ as granting to states the power "to assert control over the reproductive lives" of poor women.³⁰ Labelling sensitive human rights disputes as something other than what they are may indeed ease the decisionmaking process. I doubt, however, that it leads to better results. Unfortunately, *Our Endangered Rights* is replete with such hyperbole.³¹

In a perhaps similar vein, the book too often treats difficult constitutional crises as if they were merely problems of motivation. Constitutional cases would be easily decided and civil liberties easily protected if we just all believed in freedom and progress, or so the theory goes. In short, you are either for the Constitution or against it.

This theme is reflected in a number of ways. First, the book frequently succumbs to a we/they world view. Ira Glasser, for example, argues that the future of civil liberties depends not on "what *they* do: what counts is what *we* do in response."³² The New Right is consistently pictured as a modern-day version of Niebuhr's "children of darkness."³³ That temptation may be compelling, but it also probably misreads the appeal of Reaganism to the American people. No doubt traditionally respected characteristics such as reliance on individual virtue and industry, fear of centralized government, and belief in the moral progress of society have much to do with the "new" conservatism. It ill serves liberalism to disregard completely such broadly shared sentiments.

Nor is it useful to ignore the genuine *absence* of consensus on many of the perplexing constitutional issues of the day. Persons of profound integrity and compassionate outlook can reasonably disagree, for example, on the propriety of "benign" racial preference or the exclusion of evidence obtained in violation of the fourth amendment albeit in good faith. Nor, in a broader sense, is it possible to maintain a clearly agreed-upon civil liberties agenda amid rising expectations of

29. 448 U.S. 297 (1980). *Harris* upheld the Hyde amendment which restricted funding for medically necessary abortions. The Court subjected the statute, the impact of which fell exclusively on indigent pregnant women, to no more rigorous scrutiny than had been applied in cases presenting distinctions between economic interests.

30. Estrich & Kerr, *Sexual Justice*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at 98, 122-23.

31. I will limit myself to a single example: "By late 1980, [the New Right] had achieved substantial political power. Suddenly, no freedom seemed safe. Book banning became epidemic. Women's rights were threatened. Homosexuals were attacked. Voting rights were endangered. And ominous new laws to weaken the federal courts and to breach the separation of church and state were widely proposed." Glasser, *Making Constitutional Rights Work*, *OUR ENDANGERED RIGHTS*, *supra* note 3, at 3, 17.

32. *Id.* at 25 (emphasis added).

33. See generally R. NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* (1944).

civil and economic rights in an era of shrinking available resources.³⁴ The explosion of constitutional protection ushered in by the Warren Court—through its very success—has rendered future progress in the guarantee of civil liberties a more formidable enterprise. On the one hand, a sizeable portion of American society has come to see itself as the victim of the Supreme Court. On the other hand, early victories often lead to subtler, more persistent problems. It was, for example, perhaps easier to announce *Brown v. Board of Education*³⁵ than to bring its promises to fruition. Brushing such problems aside, *Our Endangered Rights* too often suggests that if we would all stop being bigots everything would be fine. In reality, of course, most of our present constitutional problems are sufficiently tenacious that they would likely remain even if bigotry and ill will were to depart suddenly. Forging human rights strategies despite these difficulties is the challenge of the next decade. Painting over complexities does little to further that process.

II. CONSTITUTIONAL CROSSROADS

Our Endangered Rights claims in major part to be an examination of "where we seem to be heading"³⁶ in terms of civil liberties protection in the United States. Despite its often strident tone, an argument can be made that the book actually understates the extent to which we face a major constitutional crossroads in the remainder of this decade. One way or the other, the role of the United States Supreme Court in the protection of civil liberties is apt soon to undergo a substantial transformation. The impact of such a shift in judicial perspective on the rights we enjoy may well be significant.

Recent Supreme Court history bears this out. The Warren Court accomplished a significant change in the direction of constitutional decisionmaking. Landmark decisions such as *Brown*,³⁷ *Reynolds v. Sims*,³⁸ *Engel v. Vitale*,³⁹ and *Miranda v. Arizona*⁴⁰ in effect resurrected an institution previously rendered silent by its battles with the New Deal and the revelations of legal realism. The reemergence was accomplished primarily on behalf of egalitarianism. Although its vision was not always articulated, the Warren Court at least behaved as if it

34. Professor Katz makes this observation in the concluding chapter. Katz, *An Historical Perspective on Crises in Civil Liberties*, *OUR ENDANGERED RIGHTS* *supra* note 3, at 311, 321-23.

35. 347 U.S. 483 (1954).

36. Dorsen, *Introduction*, in *OUR ENDANGERED RIGHTS*, *supra* note 3, at ix, ix.

37. 347 U.S. 483 (1954).

38. 377 U.S. 533 (1964).

39. 370 U.S. 421 (1962).

40. 384 U.S. 436 (1966).

had a clear view of its role in our system of government. Substantially broadening the participatory base of our democracy, the Warren Court shook the dust from old tools of judicial activism in an effort to accomplish more fully the goal of equal dignity for all. The result, in no small degree, was the development of an institution that viewed its primary responsibility as the protection of individual liberties against majority intrusion.

The Burger Court has been less predictable.⁴¹ Its decisions have hardly reflected the levelling fervor of those of its predecessor. Still, its record is far from passive. The cornerstones of the Warren Court jurisprudence remain firmly in place.⁴² New nontextual rights have been recognized.⁴³ The electoral process has been aggressively supervised,⁴⁴ and the Court has shown a surprising willingness to measure the powers of the legislative and executive branches.⁴⁵ In short, the Burger Court has placed itself firmly within the activist tradition more commonly associated with its predecessor.

But its activism cannot be as readily ascribed to any particular view of the Constitution or of judicial authority. Unlike the Warren Court, the present Court is dominated by centrists. Neither William Rehnquist and Warren Burger on the one hand, nor William Brennan and Thurgood Marshall on the other can be considered the heart of the Burger Court. No particular ideology consistently prevails. The result has been a marked ambivalence in the civil liberties arena. The "rootlessness"⁴⁶ has manifested itself in two principal ways. First, the Court has repeatedly been unable to fashion majority opinions in major human rights cases.⁴⁷ Second, when it has spoken, the Justices often

41. See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi ed. 1983).

42. Blasi, *The Rootless Activism of the Burger Court* in *id.* at 198, 198-217.

43. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *In re Griffiths*, 413 U.S. 717 (1973) (rights of aliens); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion rights).

44. See, e.g., *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (protecting, on first amendment grounds, a corporation's right to make expenditures for the purpose of influencing referendum voting); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (striking down various sections of the Federal Election Campaign Act of 1971, as amended in 1974, as violative of the first amendment).

45. See, e.g., *INS v. Chadha*, 103 S. Ct. 2764 (1983) (striking down provision of Immigration and Nationality Act that authorized one house of Congress to veto executive's decision to suspend deportation of an alien); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (prohibiting the imposition of federal minimum wage provisions on state entities as being violative of the tenth amendment); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (striking provisions of the Voting Rights Act Amendments of 1970 establishing the 18-year-old vote in state and local elections).

46. Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 37, at 198, 210.

47. See, e.g., *Board of Education v. Pico*, 457 U.S. 853 (1982) (three Justices on opinion of the Court and three concurring Justices) (removal of books from public school libraries); *Clements v.*

have tended to construct compromise doctrines rather than make the fundamental value choices necessitated by the dispute.⁴⁸ The Court's decisions concerning the establishment clause,⁴⁹ affirmative action,⁵⁰ the rights of aliens,⁵¹ the right to privacy,⁵² and desegregation remedies⁵³ provide fertile examples. Though the Court apparently has a strong concept of its power—witness the decision in *INS v. Chadha*⁵⁴—it has been unsure of its posture on civil liberties. Thus the Burger

Fashing, 457 U.S. 957 (1982) (four Justices on the opinion of the Court, one Justice concurring) (Texas resign-to-run election provisions); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (four Justices formed the opinion of the Court, one Justice concurred, and one concurred in part and dissented in part) (commercial speech case); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (five separate concurrences on a first amendment claim); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (three Justices on the opinion of the Court, three Justices concurring in a separate opinion) (minority set-asides for government contracts); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (four Justices on the opinion of the Court, two separate concurrences) (voting rights); *Lalli v. Lalli*, 439 U.S. 259 (1978) (three Justices on the opinion of the Court, one of whom filed a concurrence, two separate concurrences) (inheritance rights of illegitimate children); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (a four-one-four split with Powell, J. as the swing vote and delivering the opinion of the Court) (minority quotas for medical school admission); *McDaniel v. Paty*, 435 U.S. 618 (1978) (four Justices on the opinion of the Court, four Justices split among three concurrences) (exclusion of ministers as state legislators); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (three Justices on the opinion of the Court, two Justices concurring in a separate opinion) (state aid to sectarian colleges); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (four Justices on the opinion of the Court, three Justices on two concurrences) (housing ordinance defining family to exclude certain extended relatives); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (four Justices on the opinion of the Court, one separate concurrence) (political advertising).

48. Blasi, *supra* note 41 at 198, 216. See generally also Nichol, *On Ambivalent Activism* (Book Review), 98 HARV. L. REV. — (forthcoming 1984).

49. Cf. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984) (allowing the city to construct a Christian nativity scene); *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting the posting of the Ten Commandments in public schools); *Meek v. Pittinger*, 421 U.S. 349 (1975) (prohibiting state provision of auxiliary services to nonpublic schools); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (prohibiting a state salary supplement to teachers of secular subjects in nonpublic schools as involving excessive entanglement).

50. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (allowing minority set asides on government contracts); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (disallowing racial quotas in admission policies when mandated by only the faculty of the school).

51. See, e.g., *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding requirement of United States citizenship for public school teacher certification); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking down a durational residency requirement before an alien may qualify for welfare).

52. See *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd mem.*, 578 F.2d 1374 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978) (upholding employer's right to dismiss employees living in open adultery); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) (upholding sodomy statute regarding homosexual males), *aff'd mem.*, 425 U.S. 901 (1976).

53. See, e.g., *Independent School District v. United States*, 429 U.S. 990 (1977) (remanding for further inquiry a multi-district desegregation plan); *Milliken v. Bradley*, 418 U.S. 717 (1974) (disallowing a multi-district school desegregation plan).

54. 103 S. Ct. 2764 (1983) (holding a portion of the Immigration and Nationality Act unconstitutional).

Court has produced a strong activist record without promoting a clear vision of the role of the Supreme Court in protecting human rights.

The Burger Court era, however, rapidly draws to a close. Five members of the Court are in their late seventies. A major change of personnel almost surely awaits the next president. Moreover, it seems quite unlikely that the next series of justices will be ambivalent about the role of the Supreme Court in American government. Battle lines are clearly drawn. A Democratic president, following on the heels of six Republican appointees, would have felt heavy pressure to select justices in the egalitarian-activist tradition. For such a court, issues of economic justice, individual autonomy, racial and sexual discrimination, and constitutional accountability of the executive branch might have provided a fruitful agenda.

President Reagan's reelection seems to assure a quite different course. Depending upon the individuals chosen, a Reagan bench might be expected to move the Supreme Court in either of two directions. At the least, it appears likely that a strong majority employing a true philosophy⁵⁵ of judicial restraint would be achieved. If the last Term is any indication, the Burger Court itself has taken a marked turn in this direction—pursuing deference to other institutions of government as the highest value in constitutional adjudication.⁵⁶ Such a Court exacerbates the dangers to individual liberties presented by a strong executive or a Congress dominated by the New Right. A working majority of strong judicial conservatives, in short, would start the Court on a slow march toward inactivity. The eventual result would likely be the return of a sleepy federal judiciary similar to that presided over by Chief Justice Vinson after World War II.

A second course would be even more disturbing. New Justices in the Rehnquist⁵⁷ mold could help comprise an activist Court seeking to

55. The Burger Court has often employed the language of judicial restraint. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (denial of standing on the basis of absence of injury, thereby supporting executive action).

56. *See, e.g.*, *INS v. Lopez-Mendoza*, 104 S. Ct. 3479, 3490 (1984) (exclusionary rule not applicable to deportation proceedings); *Massachusetts v. Sheppard*, 104 S. Ct. 3424, 3428 (1984) (creating an exception to the exclusionary rule where the police are relying on a judicially issued warrant obtained in good faith); *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 104 S. Ct. 3348 (1984) (upholding denial of financial aid to those failing to register for the draft); *Allen v. Wright*, 104 S. Ct. 3315, 3329 (1984) (no standing to challenge IRS guidelines to determine tax exempt status for private schools); *Hudson v. Palmer*, 104 S. Ct. 3194, 3200 (1984) (no privacy interest in prison cell); *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984) (upholding a ban on sleeping in national park against first amendment challenge); *INS v. Delgado*, 104 S. Ct. 1758 (1984) (upholding INS factory surveys); *Lynch v. Donnelly*, 104 S. Ct. 1355, 1356 (1984) (upholding government display of Christian nativity scene).

57. *See, for example*, Justice Rehnquist's opinions in *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 307-13 (1981) (Rehnquist, J., concurring) (commerce clause not applica-

further conservative political values. Then not only would traditional civil liberties guarantees be called into question, but the constitutional protection of, for example, property interests and states's rights could be reinvigorated. In either case, history may well come to see the Burger Court as transitional—keeping alive the tools of activism until a new course is set for judicial authority. If that course incorporates either a heavy dose of political conservatism or an overriding predilection for judicial restraint, the civil rights battles of the next generation may well have to be fought without the assistance of, or even in direct opposition to, the decisions of the United States Supreme Court. In that unhappy event, our rights may be truly endangered.

ble absent a showing that regulated activity has a *substantial effect* on interstate commerce) (emphasis in original); *Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 681-82 (1980) (Rehnquist, J., concurring) (arguing for resurrection of the nondelegation doctrine); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138-53 (1978) (Rehnquist J., dissenting) (designation of building as official landmark by city constituted taking of property without just compensation in violation of the fifth amendment); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (upholding states' rights under the tenth amendment). See also Justice O'Connor's opinion in *FERC v. Mississippi*, 102 S. Ct. 2126, 2145-57 (1982) (O'Connor, J., concurring in part and dissenting in part) (tenth amendment requires invalidation of Titles I and III of the Public Utility Regulatory Policies Act of 1978); *Ruckelshaus v. Monsanto*, 52 U.S.L.W. 4886, 4895 (U.S. June 26, 1984) (O'Connor, J., concurring in part and dissenting in part) (disclosure of data by Environmental Protection Agency constituted a taking of property without just compensation in violation of the fifth amendment).

Another March on Richmond

SUPREME COURT Justice William H. Rehnquist presided over his first trial last week and got good marks on his courtroom manner.

"He has a good temperament, worked well with the attorneys and did a lot to expedite the trial," said S. Keith Barker, who represented the plaintiffs in a two-day civil rights case presided over by Justice Rehnquist at the invitation of U.S. District Judge D. Dortch Warriner of the Eastern District of Virginia. (NLJ, May 28.)

On June 18 and 19, Justice Rehnquist slipped quietly out of Washington, D.C., and traveled to Richmond, Va., to try *Heislup v. Town of Colonial Beach*, Civ. 83-340-R. He had been scheduled to hear the case two weeks earlier but had canceled because of the publicity it attracted. (NLJ, June 4.)

Justice Rehnquist's courtroom appearance marked the first time in this century that a sitting justice had presided over a trial, according to Supreme Court officials, although such trials were commonplace in the 1800s.

The justice heard the case in Richmond's federal courthouse, just one block from the state Capitol, where in 1807 Chief Justice John Marshall presided over the treason trial of Aaron Burr. While that trial ended in a hung jury and Mr. Burr eventually was acquitted after Chief Justice Marshall ruled there was insufficient evidence, last week's case was concluded more easily.

After less than four hours of deliberation, six jurors awarded Colonial Beach, Va., police patrolman Julian D. Heislup Sr. \$16,000 in damages and police dispatcher Linda Dixon \$12,500. The two had claimed their rights were violated when they were suspended from the force following a 1981 incident in which they filed affidavits against another member of the force accused of striking a teen-ager without provocation.

Mr. Barker of Richmond's Tuck, Freasier & Herbig said that Justice Rehnquist — addressed by both attorneys as "judge" during the trial — was "very efficient" and "got to the heart of the matter very quickly." He also was very patient and courteous with the lawyers — "not the kind of a judge you expected to yell at you," said Mr. Barker.

While defense attorney Joseph E. Blackburn Jr. of Richmond's White & Blackburn, P.C. was not available for comment, his opponent said he does not expect an appeal.

Mr. Barker said the defendants appeared to be satisfied that they got a fair trial and had no complaints about the way the presiding judge handled it. "I don't think the 4th Circuit would either," he added.

— Kathleen Sylvester

Justice Rehnquist to Try Case

SUPREME COURT Justice William H. Rehnquist will get his first taste of being a trial judge next month, when he presides over a civil rights case in Richmond, Va., at the invitation of U.S. District Judge D. Dortch Warriner.

Justice Rehnquist has said in several public appearances over the last year that he would like the experience of sitting as a trial judge. Apparently, Judge Warriner extended the invitation after the justice mentioned that desire during a speech in February to the Richmond Bar Association. The case will be the first time since the 19th century that a U.S. Supreme Court justice has sat in federal district court.

The case, *Heislup v. Town of Colonial Beach*, Civ-83-340-R, is set for trial June 5 and 6. According to the plaintiff's attorney, S. Keith Barker, the complaint alleges that patrolman Julian D. Heislup Sr. and dispatcher Linda Dixon were suspended from the Colonial Beach, Va., police force after providing affidavits about an incident in which another member of the force beat up a 15-year-old boy.

The youth, who was being questioned following a disturbance on the town's boardwalk, later sued Colonial Beach and received \$15,000 in a settlement. Mr. Barker, a 29-year-old associate in Richmond's Tuck, Freasier & Herbig, represented him.

The two police officers charge in their suit that the suspension was a violation of their First Amendment rights and an attempt to coerce them into not testifying on the youth's behalf. The coercion, they charge, violated Sec. 1985 of federal civil rights law.

Justice Rehnquist has a reputation for being unsympathetic to Sec. 1985 claims, but Mr. Barker says he is unconcerned: "I don't think [the justice] fits any particular mold. I think he takes his cases as they come."

— David Lauter

U.S. News & WORLD REPORT

JUNE 30, 1986

\$1.95

Reagan's Man in Court

Chief Justice-designate
William Rehnquist

South Africa:
Would sanctions
succeed?

'Game Plan'
for U.S.-Soviet
relations

Teaching kids
about money

What's behind
Hollywood's
violent films





For 5½ years, conservatives looked for a chance to make an imprint on society that would endure. With Chief Justice Warren Burger suddenly bowing out, opportunity knocked at the White House

Reagan's Court: Two steps to the right

■ The first major shake-up on the U.S. Supreme Court in 17 years will speed a shift to the right that could last well into the 21st century.

President Reagan's elevation of Associate Justice William Rehnquist to the job of Chief Justice—coupled with the choice of Appeals Judge Antonin Scalia to fill the seat of retiring Warren Burger—will solidify and prolong a conservative trend in the Court's decisions that has been building gradually for years.

Appointment of conservatives to the courts could turn out to be Reagan's most enduring legacy, overshadowing foreign and economic policies that a future President might quickly alter.

On the surface, the President replaced one member of the tribunal's three-member conservative bloc with a like-minded jurist. But analysts said the forceful Scalia could join with Rehnquist to prod the Court into shifting gears on a number of key legal issues. "They could make a formidable team in persuading colleagues to adopt their well-shaped conservative philosophies," says A. E. Dick Howard of the University of Virginia Law School.

With four of the Justices more than 77 years old, any other vacancy Reagan is able to fill would likely set the Court's course for decades, as Franklin Roosevelt did with his nine appointments over a six-year span in the 1930s and '40s. Comments Senator Orrin Hatch (R-Utah): "The next appointment could turn the balance of power decisively."

No abrupt reversals of doctrine are likely in the months ahead by an institution that reveres precedent. Yet the Reagan appointments might well eventually alter the precarious balance among the Justices on such contentious issues as abortion, affirmative action, criminal defendants' rights and the relationship between church and state.

Even though personnel changes had long been forecast for a Court that was near to setting a record as the oldest group of Justices in the nation's history, Reagan's June 17 announcement of Burger's departure still came as a surprise. Friends expected the Chief Justice to remain until his 80th birthday next year. But Burger concluded that 30 years on the Supreme Court and a lower court was "long enough for anybody," preferring to devote full time to planning a 1987 celebration of the Constitution's 200th anniversary.

After Burger told Reagan in late May of his decision, a team led by Atty. Gen. Edwin Meese and White House Chief of Staff Donald Regan started searching for the best candidates to advance the President's campaign for "judicial restraint"—the doctrine that, in Meese's words, judges "should act as interpreters of the law, rather than as lawmakers." The secret review led Reagan to decide within two weeks that the nation's 16th Chief Justice should be Rehnquist—a 61-year-old, 15-year veteran of the Court who the President said "is noted for his intellectual power, the lucidity of his opinions and the respect he enjoys among his colleagues."

The man filling the vacant seat, Scalia, a 50-year-old judge on the federal appeals court in Washington, D.C., also has amassed accolades among Reagan backers for his spirited advocacy of conservative doctrines.

White House aides were ecstatic about the turn of events. One top adviser proclaimed the shift "one of the most significant decisions of the Reagan Presidency."

How could the naming of Rehnquist and Scalia trigger sweeping changes down the road? The answer lies partly in the closeness of the fragile philo-



"Regardless of Congress's failure to legislate, we are not constitutionally empowered to act for them"

William Rehnquist

sophical splits among the judges and partly in the crucial role of personal chemistry in the making of decisions by the nine-member Court.

Between 1953 and 1969, Chief Justice Earl Warren was able to assemble liberal coalitions of Justices who interpreted the Constitution to order far-reaching alterations in the law, from desegregating schools to expanding suspects' rights. President Richard Nixon tried to halt such "judicial activism" when he chose Burger—a "strict constructionist" of the Constitution—to succeed Warren. Though the Burger Court has modified some of the Warren Court's pronouncements, the Burger era has continued much of the activism of the Warren years, most notably in declaring that women have a constitutional right to abortions.



'Courts have a subsidiary, background role . . . but certainly not to lead the society forward'

Antonin Scalia

In a new book, David O'Brien of the University of Virginia reports that the Burger Court has struck down 229 federal, state and local laws—38 more than did the Warren Court.

One reason the turnaround sought by Nixon didn't happen has been Burger's inability to persuade other conservatives to form a consistent majority. Two other Nixon appointees—Harry Blackmun and Lewis Powell—often align themselves with the liberal wing, as does John Paul Stevens, an appointee of Gerald Ford. The result can be splintered opinions in which a majority is unable to agree on its reasoning for deciding a case.

One recent case, for example, dealt with a "reverse discrimination" allegation in which senior white teachers protested their layoffs while more-recently-hired blacks kept their jobs. The



layoffs were voided, but the five-member majority broke into three groups in explaining the decision.

The outcome was the one sought by the White House, but the Court's failure to adopt a broad stance on racial quotas and other issues has frustrated the administration. Now Reagan, who has made screening of judicial candidates a high priority, finally has a chance to make a bigger and more lasting impact. He expanded the conservative camp by one crucial vote in 1981 when he named Sandra Day O'Connor, who has regularly sided with Burger and Rehnquist.

The new appointments will strengthen that base, analysts predict, mostly because of both Scalia's and Rehnquist's

ability to influence colleagues to adopt their viewpoints. Decision making in close cases can turn on lobbying among Justices. Colleagues report that the gregarious, intellectually quick Scalia is a persuasive advocate for his stands. As presiding judge on the panel that recently struck down key parts of the Gramm-Rudman budget-cutting law, Scalia reportedly played a big role in forging a unanimous finding that the measure violated the Constitution's separation of powers among government branches.

Rehnquist, who frequently has stood alone in dissent as the Court's most conservative member, has less of a reputation as a coalition builder. But the new Chief Justice will have a potent advantage: The power, when he is part of the Court majority, to designate the Justice who drafts the opinion explaining the decision. Burger did not use that authority to promote a broad philosophical agenda. The Chief Justice also has the first word in choosing the 150 cases that the Court will review out of the 5,100 filed each year.

The new appointments, says Senator Slade Gorton (R-Wash.), "will change some of the dynamics of leadership on the Court. Justice Rehnquist may become a stronger leader than Chief Justice Burger has been."

Some Court watchers predict Rehnquist will frequently call on Scalia to write opinions, in the same way that Chief Justice Warren counted on William Brennan and Hugo Black as reliable allies in making new law during the 1950s and 1960s. Remarks Ronald Rotunda of the University of Illinois Law School:

"Rehnquist may become the Brennan of the Court's other side—and that may bring about change."

Aware of the strong challenge the Court's newly fortified conservative wing may present, some civil-rights leaders and civil libertarians will fight the nominations. Julius Chambers of the NAACP Legal Defense and Educational Fund said Rehnquist "has shown an implacable hostility to civil-rights gains." Alan Dershowitz of Harvard University Law School, a criminal-defense specialist, assailed the nominees as "two of the finest 19th-century minds in America."

Still, Rehnquist and Scalia sport such impeccable credentials that they

are likely to sail through Senate confirmation proceedings. Democrats oppose many of the philosophical views of Rehnquist and Scalia, but they could cite no grounds for blocking Reagan's choices. Senator Joseph Biden of Delaware, senior Democrat on the Judiciary Committee, said, "Were I President, I would not have chosen Mr. Rehnquist as Chief Justice, but Reagan won the election, and he has the right to make the choice." Said Senator Patrick Leahy (D-Vt.): "Both are very competent, highly qualified men."

Burger's last term presiding over the Court ends in July. Rehnquist and Scalia will likely be in their new jobs by the time the Court starts its next session October 6. Among prickly issues likely to confront the new lineup in years to come—

Job-bias remedies: The Justices have disagreed sharply over affirmative-action plans that give preference to minorities or women in hiring, promotion and other areas. Two more rulings are due before Burger leaves, but other disputes are sure to arise. Scalia has strongly opposed "racial affirmative action for reasons of both principle and practicality," a sign that he will lend his weight to the Reagan administration campaign for "color blind" civil-rights policies. Given the closeness on the issue, Reagan may need another vacancy on the Court to insure that his views win out.

Church and state: The Court has issued several 5-to-4 rulings in recent years, some increasing church-state

separation, others lessening it. For example, the Justices have allowed tuition tax credits for parents of parochial-school students but struck down "moments of silence" for prayer in public schools. Rehnquist favors less separation between government and religion in cases where no preference is given to particular beliefs, and Scalia is likely to back that view.

Abortion: The Court reaffirmed in mid-June its landmark 1973 abortion ruling, but the vote was 5 to 4, with Burger calling for fresh review of the issue. Scalia is expected to say the courts should leave the abortion question to lawmakers. Still, it will take the departure of a Justice on the prevailing side to tip the balance against abortion. Even if that occurs, Scalia and other conservatives on the Court probably would not ban abortion outright but rather leave the issue to the states, as was the case before 1973.

Government powers: The Burger Court has tended to uphold decisions made by the President, Congress and federal agencies, and this trend promises to accelerate with the addition of Scalia. He believes in limiting the role of judges, which he says is "certainly not to lead the society forward." Scalia, like Rehnquist, will be reluctant to interfere with actions of elected officials unless they blatantly violate the Constitution.



President Reagan introduces Jus

Business: Rehnquist and Scalia both tend to oppose government intervention in the economy, preferring a "free market" approach to economic and trade questions. Over all, the Supreme Court likely will keep to its probusiness path of recent terms. For example, the Justices may make zoning officials liable for damages that result from rezoning private property arbitrarily.

The press: Scalia could prove to be a major influence on cases involving libel and press freedoms. Close decisions in recent terms have mostly favored

WILLIAM REHNQUIST

From 'lone dissenter' to Chief

Once there was confusion over his name. He was known before naming him to the Supreme Court as "Renchburg." But never has there been the slightest question about William Rehnquist's views. The 61-year-old jurist is a down-the-line conservative.

On almost every issue, from busing and abortion to states rights and the death penalty, he holds an opinion nearly identical to that of the President who is now making him Chief Justice. For years, Rehnquist's stands often were as lonely as they were predictable, seemingly confirming the claims voiced by Senate Democrats at his 1971 confirmation hearing that he was "outside the mainstream of American thought." Today, the ideological wind seems to be blowing his way.

More than just a firm philosophical fix has accounted for Rehnquist's rise. He is widely seen as one of the brightest Justices. "No one on the Court writes with more style, force or assurance," observes A. E. Dick Howard, a University of Virginia law professor, in the American Bar Association's *ABA Journal*. "It is hard to match his ability in shaping a record and marshaling arguments to reach a conclusion." He gets along well with colleagues, makes a point of learn-



GARY L. WATKINS (INMAN)

ing law clerks' first names and once tried to let them eat in the Justices' dining room—though he wrote an article 29 years ago de-

ploring the liberal "bias" of most clerks. Born in Milwaukee, Rehnquist served in World War II as an Army weather observer, then earned political-science degrees from Stanford and Harvard. He finished first in the Class of '52 at Stanford Law, which he attended with Sandra Day O'Connor, now his Court colleague. He clerked for 18 months at the Supreme Court, then flipped a coin in picking Phoenix over Albuquerque as the spot to hang his shingle. A Goldwater Republican in Arizona, Rehnquist returned to Washington shortly after Nixon's election in 1968. As Justice Department legal counsel, he publicly scorned antiwar protesters as "the new barbarians"—a phrase that pleased Nixon and helped to make Rehnquist a member of the Supreme Court in 1972 at age 47.

Last month, "to enjoy life more," Rehnquist urged Villanova's new law graduates to develop interests outside the law. "If variety is indeed the spice of life, you will want to make sure you add some of that spice to your own life." He, himself, swears regularly, is writing a history of the Supreme Court and recently donned a black robe and a white wig to portray Reginald Bunthorne's solicitor in Gilbert and Sullivan's operetta "Patience."



Rehnquist as Chief Justice Burger looks on

the press. Bruce Sanford, a lawyer for news-media clients, charges that Scalia is "relentlessly one-sided" against journalists. In a 1982 interview with *U.S. News & World Report*, Scalia said the federal Freedom of Information Act allowed too much data to be released to the public.

Criminal law: The Burger Court scaled back Warren Court rulings—usually siding with police and prosecutors in restricting defendants' rights—with Rehnquist on the prevailing side. Scalia's views on criminal issues are little known, but conservatives expect him to continue the trend. Bruce Fein, legal

analyst for the American Enterprise Institute, thinks Scalia is "likely to try overturning *Miranda*"—the 1966 ruling that guarantees the rights of suspects under police questioning. Rehnquist advocates speeding review of death-penalty cases and cutting down on repeated appeals by convicts—issues likely to get attention when he heads the Court.

Because Rehnquist and Scalia were chosen on the basis of their track records on the bench or in academia, there's little doubt the Court will edge further to the right. Still, the extent of the shift may not be clear for years. "You have nine people on the Supreme Court—trying to read tea leaves is a feckless exercise," says Senator Alan Simpson (R-Wyo.).

For one thing, the Court only rarely reverses itself on fundamental issues in a short period—and this is especially true of conservative jurists. As Burger put it, "We have been doing some adjusting . . . but we haven't done a fraction of the adjusting that was done in the 15 years before my tenure began."

Also, Presidents have discovered time after time that there's no guarantee that their appointees will reflect their views. Dwight Eisenhower chose Brennan in part to appeal to Roman Catholic voters and did not anticipate that he would become one of the Court's most liberal members. Among other current Justices, Byron

White, a choice of Democrat John Kennedy, often votes with the conservatives, and Harry Blackmun, a Nixon pick, frequently votes with the liberals.

Although Reagan aides studied Scalia's scholarly articles and judicial rulings carefully, they insist he was given no "litmus tests" on specific issues. On abortion, for example, Charles Alan Wright of the University of Texas Law School remarks that Scalia "may be personally opposed to abortion, but he may also feel the Court's decision is sound constitutional law."

By the same token, there is no guarantee Rehnquist and Scalia will form a lasting alliance. Such bonds depend not only on similarity of views, but also on personal chemistry. If this proves to be lacking, a Rehnquist-Scalia team may never materialize.

Yet experts say the odds are good that Chief Justice Burger's retirement has put President Reagan well on the way to remaking the Supreme Court into an institution that will reflect his views long after he leaves Washington.

Says Geoffrey Stone of the University of Chicago Law School: "If the Republicans hold the White House and the Senate through 1992, we're likely to have five Rehnquists on the Supreme Court—and that would be an extraordinary state of affairs." ■

by Ted Gest with Jeffery L. Sheler, Clemens P. Work and Brian Duffy



ANTONIN SCALIA

A conservative since age 17

It's not just Ronald Reagan and his conservative aides who marvel over Antonin Scalia's judicial skills. Even liberal lawyers are impressed.

"I have enormous respect for his intellectual ability," says one public-interest attorney who found the conservative Scalia ruling against him in case after case before the U.S. Court of Appeals for the District of Columbia. "He's going to be one of the really fine Justices."

In nearly four years on the appeals court, this son of a Sicilian immigrant and the first Italian American named to the Supreme Court has crafted an array of opinions as stylish and forceful as any in the federal judiciary.

Lawyers still talk about Scalia's role in a 1983 case in which the appeals court ordered the Food and Drug Administration to consider whether lethal injection of death-row inmates met consumer-drug safety standards. Declared Scalia in a vigorous dissent: "The condemned prisoner executed by injection is no more the 'consumer' of the drug than is the prisoner executed by firing squad a consumer of the bullets." The Supreme Court agreed and overturned the ruling.

Scalia has relished sharp but friendly arguments since his days at Xavier High, a Roman Catholic military academy in

law firm to a teaching post at the University of Virginia. He spent most of the 1970s in federal jobs under Richard Nixon and Gerald Ford before Reagan pulled him from the University of Chicago for the bench.

Over the years, Scalia has staked out positions as conservative as any Justice. His beliefs resemble Reagan's on abortion, busing and the rights of women and minorities; his views favoring curbs on the media are at least as strong as Reagan's. But those who know him say not all of his votes will please conservatives. "He's an independent thinker and may be hard to predict," says Murray Weidenbaum, the first head of Reagan's Council of Economic Advisors. "He's for less government intervention, but it is not necessarily a probusiness view." Example: Scalia thinks critics of federal regulations should look for relief not to the courts but to legislators, a consistent theme on other issues.

In his spare time, Scalia plays the piano and enjoys poker with friends, who call him "Nino." He leads a busy family life as father of five sons and four daughters, ranging in age from 5 to 25.

by Lewis J. Lord with Clemens P. Work

Six Presidents have had a hand in selecting the current nine members of the Supreme Court, who hold lifetime appointments. Shown below are the



philosophical alignments of the Court, including Antonin Scalia, who would replace Chief Justice Warren Burger, a Nixon choice, in the conservative camp

COURT'S MAKEUP—A DELICATE BALANCE

LIBERALS	IN THE MIDDLE	CONSERVATIVES
William Brennan, 80 by Eisenhower, 1956	Lewis Powell, 78 by Nixon, 1971	William Rehnquist, 87 by Nixon, 1971
Thurgood Marshall, 77 by Johnson, 1967	Byron White, 69 by Kennedy, 1962	Sandra Day O'Connor, 55 by Reagan, 1981
	John Paul Stevens, 66 by Ford, 1975	Antonin Scalia, 50 by Reagan, 1982

Abortion ruling



Picking up three moderate votes, liberals prevailed, 5 to 4, in a June 11 ruling that reaffirmed the right to an abortion. A Reagan opportunity to replace a liberal could tip the balance on a question first resolved by a 7-to-2 vote in 1973.

Affirmative action



With support from two moderates, conservatives engineered a 5-to-4 ruling on May 19, striking down a layoff plan giving blacks priority over senior whites. Additional personnel shifts on Court could void similar job-bias remedies.

WHO WILL BE NEXT TO GO?

Death or retirement of only one liberal or moderate on the Supreme Court in the next 2½ years would give President Reagan a chance to tip decisively to the right the balance among the Justices.

If the Senate confirms his nomination as expected, Antonin Scalia will be joining a Court that is splintered into three camps; with Justices William Brennan and Thurgood Marshall on the left; William Rehnquist, Sandra O'Connor, and Scalia on the right; and four Justices in the middle. Depending on the issue, moderate Court members join one faction or the other to form a majority.

Though the liberals are among the oldest members of the High Court, they may be the least likely to retire soon. Brennan, 80, and Marshall, 77, know that many of the doctrines they have fought for could be abandoned if Reagan has the chance to replace them.

Brennan was treated for a cancerous throat tumor in 1978 but got a clean bill of health in



Possible future Court members:
Robert Bork and Richard Posner

April. "As long as the good Lord lets me stay here, you can expect to see me sitting right where I am now," he said.

Marshall suffered a heart attack a decade ago and has had several respiratory ailments, but he reportedly is in good health, and he has denied rumors that he might step down.

Lewis Powell, 78, has had the most recent health problems: His cancerous prostate was removed 18 months ago. Though he has said that he won't wait "until they carry me out feet first," he has given no retirement date.

Harry Blackmun, 77, underwent a similar prostate operation in 1977. He has complained of being tired at the conclusion of recent Court terms but has given no hint as to when he may leave.

The other four Justices—all under 70—are not known to have serious ailments.

President Reagan has compiled a list of staunch conservatives ready to fill any vacancy. The White House won't make the candidates' names public, but believed to be near the top are lawyers with academic backgrounds named by Reagan to federal appeals courts, including Robert Bork of Washington, D.C.; Richard Posner and Frank Easterbrook of Chicago; Ralph Winter of New Haven, and Pasco Bowman of Kansas City.

The President could also reach into the ranks of state appellate judges—as he did when he named Sandra Day O'Connor from an Arizona appeals court—or simply pick someone with judicial experience, such as former Interior Secretary William Clark or FBI Director William Webster.

JUNE 30, 1986

\$1.95

TIME

Reagan's Mr. Right



Supreme Court Justice
William Rehnquist



COVER: Reagan shuffles the court and steers the brethren to the right

24

As Warren Burger steps down, William Rehnquist is nominated as Chief Justice. Along with another Reagan appointee, Conservative Antonin Scalia, the new chief will try to reverse three decades of judicial activism. Once a lonely dissenter, the brilliant and affable Rehnquist may become Reagan's most enduring legacy if he wins the struggle for the soul of the court. See NATION.



WORLD: South Africa tensely marks the tenth anniversary of the Soweto riots

46

Despite state-of-emergency restrictions and a crackdown on press coverage, millions of blacks observe the day with job boycotts, slowdowns and prayers. More and more governments are considering tough economic sanctions. ► Bitter religious fights and a heated debate over an alleged cover-up rattle Israel. ► A changing style in the Soviet press.



BUSINESS: Corporations are fighting to hold down rocketing medical costs

64

U.S. companies spend about \$91 billion each year to provide health insurance for their workers, and the price is high. Businesses are starting crash programs to cut costs without sacrificing quality of care. ► An upstart Boston ad agency shows Madison Avenue how to win big. ► Canon unveils a computerized still camera that may make conventional equipment obsolete.



36 Nation

The Senate wrangles over special tax favors, but victory still looms for Bill Bradley, who "kind of suggested the idea" of reform.

78 Medicine

Cases of whooping cough are on the rise, but some parents worry about a vaccine that can have dangerous side effects.

62 Press

A broad but ominously vague set of restrictions in South Africa stifles reporting on the anniversary of the bloody Soweto riots.

84 Video

The latest twist in TV ratings is the people meter, a device that reveals not just what is being watched but who is watching.

63 Computers

Laser printers and Macintoshes are making struggling periodicals more profitable and new ones, like *Balloon Life*, easier to launch.

87 Cinema

Summertime, and the grinning is sleazy. Four fresh comedies feature cop-outs, dropouts, gaffes and some good laughs.

72 Sport

The most popular game on the planet, the World Cup, comes to a climax. ► The saddest loss of the basketball season: Len Bias.

88 Theater

The London stage may not boast a major new play, but it sparkles with two British specialties: star turns and rich ensemble acting.

- 21 Letters
- 22 American Scene
- 71 People
- 74 Health & Fitness
- 75 Science
- 77 Education
- 77 Milestones
- 79 Books
- 83 Music
- 90 Sexes

Cover:
Illustration by
Richard Hess

TIME/JUNE 30, 1986

COVER STORY

Reagan's Mr. Right

Rehnquist is picked for the court's top job

When William Rehnquist was appointed to the Supreme Court by Richard Nixon in 1971, he believed that the court was "heeling" to the left and felt obliged, as he later put it, "to lean the other way." He was not much of a counterweight. The high court at the time was still dominated by liberals from the Earl Warren era, and Rehnquist often found himself in lonely dissent against the Justices' rulings upholding the constitutional rights of blacks, women and the poor. Indeed, Rehnquist was on the short end of so many 8-to-1 votes that his law clerks presented him with a small Lone Ranger doll, which still sits on the mantel in his chambers.

But William Rehnquist is the Lone Ranger no longer. To his brethren he will henceforth be known as "the chief." Last week President Reagan announced that Rehnquist will succeed Warren Burger, 78, who will step down after 17 years as the highest jurist in the land when the court's term ends next month. On the first Monday in October, when the nine Justices emerge from behind the red curtain to take the high bench, William Hubbs Rehnquist will become the 16th Chief Justice of the United States.

To fill Rehnquist's seat as an Associate Justice, the President picked Antonin Scalia, the son of an Italian immigrant, who has served since 1982 as a Reagan appointee on the U.S. Court of Appeals for the District of Columbia. Brilliant, engaging, tenacious and solidly conservative, Scalia (pronounced Skuh-lee-uh) will be a valuable ally for the new Chief Justice (who is already his crony in a floating monthly poker game in Washington) as well as a force on the court in his own right.

"This is the end of an era and the beginning of a new one," exulted Dan Popeo, general counsel of the conservative Washington Legal Foundation. "Judicial restraint is going to be fashionable." Liberals were downcast. The nominations of

Rehnquist and Scalia "signal an effort by the President to impose his own narrow ideological views onto the Supreme Court," protested Julius Chambers, director of the NAACP Legal Defense and Educational Fund.

Reagan's triple play will not, of

course, transform the court overnight. By losing Burger and gaining Scalia, Reagan is in a narrow sense simply replacing one conservative with another. Nevertheless, Rehnquist, a shrewd intellect and popular figure on the court, promises to be a much more forceful leader than the plodding,



standoffish Burger. "The Rehnquist-Scalia duo is infinitely more dynamic than the conservative wing was with Burger at the helm," says Constitutional Scholar Laurence Tribe of Harvard Law School. "I would be extremely surprised if over the next several years the effect is not to push the court to the right considerably."

The Burger Court was a disappointment to conservatives. The six Justices appointed by three Republican Presidents from 1969 to 1981 failed to undo the extraordinary record of judicial activism compiled by the liberal Warren Court of the '60s.* Most galling to the right, the Burger Court gave women a constitutional right to abortion in 1973. Divided and unpredictable, the court was Burger's in name only. The most controversial cases were decided, often with confusing split opinions, by a shifting center of five or six Justices (see box).

By their formidable intellect and persuasiveness as well as their personal charm, Rehnquist and Scalia stand at least a chance of making the court more cohesive and coherent. Their judicial

opinions will be more sprightly and readable than the turgid fare churned out by most of their brethren.

Reagan has made it clear that he wants to remake the federal judiciary in his own conservative image, not just on the high court but in the lower federal courts as well. Judicial appointments can be a President's most enduring legacy. Federal judges, appointed for life and removable only for "treason, bribery, or other high crimes and misdemeanors," often serve long after a President's term expires. Future vacancies on the high court may offer Reagan a back-door means of achieving the New Right social agenda—including permitting prayer in schools and banning abortion—that elected politicians in Congress have so far rebuffed. Time, certainly, is on the conservatives' side: the leading liberals on the court, William Brennan and Thurgood Marshall, are respectively 80 and 77 years old. Rehnquist is 61 and Scalia 50.

The high-court shuffle was an unusually well-kept secret by Washington standards. Even within the marble temple of the Supreme Court, the Justices were not tipped off. Only 15 minutes before the President went on national television last Tuesday,

the Chief Justice's clerks fanned out to other chambers bearing copies of Burger's resignation letter. The Justices and their staffs were then invited to the court's paneled conference room, where a pair of TVs had been set up. Only when the President appeared on the air with Rehnquist and Scalia standing beside him did the brethren learn the identity of their new chief and new colleague.

The selection process had begun quietly three weeks earlier. In late May, Burger asked for an appointment with the President, ostensibly to discuss the 1987 celebration of the 200th anniversary of the Constitution. Reagan's aides were reluctant; as chairman of the Commission on the bicentennial of the U.S. Constitution, Burger was constantly complaining that the celebration was short of funds and understaffed. Still, Burger was invited down to the White House. Only after he had chatted with Reagan for 20 minutes about the bicentennial did Burger drop the bombshell that he was resigning, a year earlier than most expected.

Burger, who was just recovering from a persistent case of the flu, explained that his chores on behalf of the anniversary celebration were so time consuming that he could not fulfill them and still do justice to the court. According to his aides,

* In addition to Rehnquist, Nixon appointed Burger in 1969, Harry Blackmun in 1970 and Lewis Powell in 1971; Gerald Ford appointed John Paul Stevens in 1975; and Reagan appointed Sandra Day O'Connor in 1981.



THE NEW CHIEF JUSTICE

A lonely dissenter against liberal activism when he first came on the court, William Rehnquist has the chance to use his forceful intellect and personal affability to move the court to the right. If he succeeds, Rehnquist could be Reagan's most enduring legacy

CONSERVATIVE REINFORCEMENT

The newest Justice, Antonin Scalia, is Rehnquist's ideological twin. The Reagan Administration could not have invented a jurist whose views are more consistent with its own political philosophy. Engaging and energetic, he will be the first Italian American on the court

the President was somewhat taken aback that Burger wanted to give up the court to keep the celebration. But he did not try to talk the Chief Justice out of his decision. At least one reason was that Burger's timing was politically opportune. The Republicans stand a real chance of losing control of the Senate this fall, and a Democratic leadership might bitterly resist a Reagan-appointed Chief Justice.

White House Chief of Staff Donald Regan was determined to keep the choice of Burger's successor under tight control. He was afraid that leaks would set judges and politicians scrambling to lobby Reagan for their favorite choices. Instead, Regan wanted to present Reagan with a very few carefully screened names.

After the Burger meeting, the President instructed Regan that all candidates to succeed the chief should be sitting Justices or federal judges with well-established judicial track records. The Reaganauts did not want to be rudely surprised. They were mindful that Dwight Eisenhower's choice of Chief Justice, Earl Warren, had seemed like a moderate Republican as Governor of California and promptly turned out to be an innovative liberal as a jurist. A short list of half a dozen contenders was drawn up. It did not include any of Reagan's old political buddies, such as Nevada Senator Paul Laxalt and former Interior Secretary William Clark. The President's instructions had the effect of eliminating Attorney General Edwin Meese from consideration. Meese later insisted that he was not interested in joining the court, but his friends think he will be available for any future openings.

At first a tight little screening committee of Regan, Meese and White House Counsel Peter Wallison considered recommending Justice Sandra Day O'Connor as the new chief. She was Reagan's sole high-court appointee, and to name a woman as the nation's top judge would be a political masterstroke. But O'Connor, now in her fifth year on the court, was deemed too inexperienced. Reagan's aides may have also been disturbed because she seemed to show mild symptoms of the Earl Warren syndrome, lately developing a disconcerting streak of independence. In the last year or so, for instance, she voted for expanded libel protection for the press and against prayer in schools, contrary to Administration dogma.

There were no such ideological qualms about Rehnquist. On June 12 he was summoned to the White House for an interview with the President. Reagan got on well with the affable Justice, but the President was worried about Rehnquist's health. Five years ago Rehnquist was hospitalized to overcome an addiction to a powerful painkiller he had been taking for his chronically bad back. At the time, court employees noticed that Rehnquist's speech was slurred and that he seemed to

be having mental lapses. In his interview with Reagan, however, Rehnquist volunteered that he had long since kicked his addiction and could offer a clean bill of health from his doctors. Somewhat to his aides' surprise, the President offered Rehnquist the job as Chief Justice then and there. Rehnquist did not hesitate: "It would be an honor," he replied.

The contest to fill Rehnquist's seat quickly narrowed to Scalia and a fellow judge on the appeals court in Washington, Robert Bork. A respected former Yale Law School professor, Bork had been lured from a lucrative law-firm job in Washington to the federal bench with strong hints from the Administration that he would be first in line for the next available spot on the court. But Bork carries some political baggage: as acting Attorney General in 1973, he obeyed Nixon's order to fire Watergate Special Prosecutor Archibald Cox; Elliot Richardson had resigned as Attorney General rather than fire Cox. Scalia offered Reagan the chance to place the first Italian American on the high court. He is nine years younger than Bork, an important consideration for a President who wants to leave a lasting mark on the judiciary. The energetic Scalia was perceived by White House aides as more of a true believer than Bork. Indeed, a few of Scalia's colleagues on the Court of Appeals suspect that he wrote an inordinate number of strongly worded dissenting and concurring opinions on the conservative side of cases simply to advertise that he was 100% in accord with Reagan's views.

Scalia was given first crack at an interview with Reagan, and again the President wasted no time. After trading a few anecdotes with the congenial jurist about old judges they had known, Reagan offered, and Scalia accepted. The tidiness of the selection process pleased the President's advisers; Reagan was spared from ever having to say no.

The Senate is expected to confirm both Rehnquist and Scalia by late summer. Still, both will undergo sharp and searching questioning by liberal Senators. Their nominations raise basic questions about the role of Congress in choosing Supreme Court Justices. Is the Senate's job merely to say whether a President's choice has the intellectual qualifications and experience to sit on the federal bench? If so, Scalia and Rehnquist are above reproach. Both men, declared Senate Majority Leader Robert Dole last week, have "the experience, the background, the integrity, the intelligence and the right stuff."

But some scholars argue that Senators are justified in opposing court appointments on ideological grounds as well. When the Founding Fathers were framing the Constitution, they considered giving the Senate the power to appoint judges. Instead, a compromise was struck: the President would make the choices with the "advice and consent" of the Senate. Throughout the 19th century, this was taken to mean that the Senate could balk on ideological grounds, and indeed, the Senate refused to confirm some 20 Supreme Court nominations. But in the past



50 years, the only serious challenges (such as the rejection of Nixon Appointees Clement Haynsworth and G. Harrold Carswell) have occurred when political objections were linked to questions of fitness and competence. Some liberals feel that it is time for the Senate to reassert its political prerogatives. In that case, Scalia and Rehnquist make inviting targets. "My own view is that the Senate's role is to be a partner in the appointment process and examine the views of the nominees, at least when the President is so self-consciously trying to shape the court," asserts Yale Law School Professor Paul Gewirtz. Democrat Alan Cranston of California, who voted against Rehnquist's confirmation as a Justice in 1971, last week asked, "Can a man who has an extreme right-wing ideology manage the court in a fair and balanced way?"

The man Reagan chose to remake the high court shares many of his roots and values. Like Reagan, Rehnquist left his boyhood home in the Midwest to head for the Far West, where he embraced the frontier verities of rugged individualism and a respect for law-and-order. The son of a paper salesman, Rehnquist grew up in the quiet Milwaukee suburb of Shorewood. After serving three years in the Army Air Corps during World War II, he used the G.I. Bill to go to Stanford. Graduating first in his class from Stanford Law (a classmate was Sandra Day O'Connor), he was selected to clerk on the Supreme Court for Justice Robert Jackson.

As a law clerk in 1952, Rehnquist wrote a memo for Justice Jackson stating that "separate but equal" public education for blacks was "right and should be

reaffirmed." Questioned about this at his confirmation hearings in 1971, Rehnquist insisted that he was expressing the Justice's views, not his own. But University of Chicago Law School Professor Dennis Hutchinson, who is writing a biography of Jackson, calls Rehnquist's explanation "absurd." Jackson always instructed his clerks to express their own views, not his, says Hutchinson. Last year Rehnquist stated that he now believes that the Supreme Court's 1954 landmark decision *Brown vs. Board of Education* outlawing school segregation is correct, but added, "I think there was a perfectly reasonable argument the other way."

Following his clerkship, Rehnquist set up a law practice in Phoenix. There he became a Goldwater conservative who opposed an integration plan for Phoenix public schools in 1967. Brought back to Washington to the Nixon Justice Department by another Phoenix lawyer, Deputy Attorney General Richard Kleindienst, Rehnquist was enlisted in the Administration's battle against student radicals, whom Rehnquist described in a 1969 speech as "the new barbarians." He helped devise legal grounds to round up and detain antiwar protesters during the 1971 May Day demonstrations. Later that year Nixon rewarded Rehnquist for his efforts by putting him on the high court.

In a revealing interview last year with John Jenkins for the *New York Times* Magazine, Rehnquist described his political philosophy. "I'm a strong believer in pluralism: don't concentrate all the power in one place. You don't want all the power

in the Government as opposed to the people. You don't want all the power in the Federal Government as opposed to the states."

As a Justice, he has been a consistent defender of states' rights against federal intrusion. At the same time, however, he has strongly resisted the efforts of other Justices to protect individual rights by broadly interpreting the Constitution. He is a staunch opponent of the controversial "exclusionary rule," under which illegally seized evidence is thrown out of court. A consistent proponent of the death penalty, he has railed against drawn-out legal appeals that delay executions.

Rehnquist was one of two dissenters (the other: Byron White) from *Roe vs. Wade*, the court's 1973 decision creating a constitutional right to abortion, and he has repeatedly dissented from court decisions banning prayer in schools. Court decisions upholding affirmative action have regularly drawn his scornful dissents. "There is perhaps no device more destructive to the notion of equality than the ... quota," Rehnquist wrote in *United Steelworkers and Kaiser Aluminum vs. Weber* in 1979. He adamantly opposes court-ordered busing to remedy school segregation. The Constitution, he wrote in a dissent from a 1979 decision upholding busing in Columbus, does not require local school boards to "follow a policy of integration *über alles*."

Rehnquist holds himself out as an apostle of judicial restraint. Federal judges, he asserts, should not impose their personal views on the law or stray beyond the intent of the framers by reading broad meaning into the Constitution. Yet judi-



STEPPING DOWN

Courtly and formal but at times aloof and overly concerned with ceremony, Warren Burger lacked the intellectual heft and collegiality to forge a unified court. His greatest contribution may have been to improve the administration of the lower federal courts

THE BURGER COURT

With Reagan at the White House, from left: Stevens, Powell, Blackmun, White, Burger, Brennan, Marshall, O'Connor and Rehnquist. Divided and unpredictable, neither liberal nor conservative, the Justices affirmed Warren Court precedents even as they diluted them



PRESSURE POLITICS

Antilabor demonstrators protest outside the court's marble temple

SCREENING THE CANDIDATES

Attorney General Meese helped choose the Justices. He may be next

THE ALSO-RAN

Judge Bork lost out to Scalia, who was a more energetic true believer

cial restraint has another meaning: judges are also supposed to respect stare decisis, the established precedent handed down by past judges. Rehnquist has been less respectful of Supreme Court precedent, especially the decisions of the liberal Warren Court. His critics sometimes accuse him of disingenuously twisting history to fit his own views. "Don't forget, Rehnquist is a radical," says Columbia Law School Professor Vincent Blasi. "Nobody since the 1930s has been so niggardly in interpreting the Bill of Rights, so blatant in simply ignoring years and years of precedent." Rehnquist retorts that such attacks come from liberal academics and that "on occasion, they write somewhat disingenuously about me."

The Justice is a lively and facile writer whose literate prose stands out on a court undistinguished by the eloquence of its opinions. In one dissent he borrowed from Gilbert and Sullivan to twit his colleagues for arrogating too much power to the federal courts: "The law is the true embodiment/ Of everything that's excellent/ It has no kind of fault or flaw/ And I, my Lords, embody the law."

Unlike some of his colleagues who agonize over each opinion and stagger under the court's case load, Rehnquist is known for quickness and efficiency. On most days he leaves the court at 3 p.m. to go swimming. He finds time for stamp collecting and oil painting (indeed, he skipped the President's State of the Union speech last February to go to his painting class in Arlington, Va.). He once even tried his hand at writing a novel about the intrigues of a federal appeals court in the Southwest (it was rejected by several publishers). At times Rehnquist has appeared slightly bored with the insular routine of the high court. Two years ago, to "refresh" himself, he sat as a judge on a two-day jury trial in federal district court in Richmond, a highly unusual move for a sitting Justice.

Witty and relaxed, Rehnquist gets on well with the other Justices and their

staffs. Clerks from other chambers sometimes invite him out to a local pub for beer and burgers, and he invites his former clerks to his house in Arlington to challenge them at croquet. A rumpled dresser, he prefers Wallabees and sweaters to wing tips and pinstripes.

Rehnquist's easy manner and informality stand in stark contrast to his predecessor as Chief Justice. Burger could be courtly, but mainly he was pompous and aloof. There is little doubt which Justice is more popular with his brethren.

Personal charm and amiability are hardly trivial considerations for a Justice who wants to influence the court. The Chief Justice is merely first among equals on a court that Justice Powell once described as "nine one-man law firms." To sway his sometimes fiercely independent colleagues, a chief must be both intellectually forceful and collegial.

Burger, by almost all accounts, was seldom either. In part this was because he was distracted. Burger liked to remind reporters that he was Chief Justice of the U.S., not of just the Supreme Court, and more than any other chief he worked to improve the somewhat rickety administration of the federal courts. His great ambition, which he never realized, was to create a "super court" of appeals to siphon off some of the burgeoning case load of the Supreme Court.

The Chief Justice has only one real institutional prerogative. When he is in the majority, he can assign the task of writing the opinion. If he is in the minority, then the most senior Justice in the majority assigns the opinion. The opinion-assigning power is important, particularly when the court is narrowly divided, because the Justice who writes the court's opinion can set the terms of the debate. Burger repeatedly irked his colleagues by changing his vote to remain in the majority, and by rewarding his friends with choice assignments and punishing his foes with dreary ones. "Rehnquist is too intellectually hon-

est to do this," says a former Brennan clerk. For Rehnquist the real question is whether he can be flexible enough to win over less dogmatic conservatives.

As a Justice, Rehnquist usually refused to budge from his perch on the far right edge of the court. "By and large he is consistent," says Law Professor Herman Schwartz of American University. "That's why I don't think he should be chief. I wonder about the choice of a man consistently on the fringes." But Columbia's Blasi contends, "Rehnquist is an excellent court infighter—certainly better than Burger and maybe even better than Earl Warren. He's an intensely political person. Some people see him sitting out there in his own world with his principles, but I think he really likes to win."

To forge majorities, Rehnquist will have to reach into the court's shifting, fluid middle. Although she has grown more independent of late, Justice O'Connor usually votes with her old Stanford Law School classmate. Justice Byron White, a Kennedy appointee, can often be counted on as a conservative vote, especially on criminal-rights cases. A careful balancer, Justice Lewis Powell is a pragmatic statesman who tries to find a middle way for the court on controversial cases. It was Powell, for instance, whose opinion striking down explicit quotas but permitting race to be a "factor" in university admissions achieved the court's Solomonian compromise in the famed 1978 affirmative-action case *Regents of the University of California vs. Bakke*. Justice John Paul Stevens is a thoroughly unpredictable maverick, and Justice Harry Blackmun, once derided as Burger's "Minnesota Twin," is now often allied with the court's liberal duo, Brennan and Marshall.

If Rehnquist is looking for a model as consensus maker, he can find one in Brennan. Like Rehnquist, Brennan is popular with his colleagues. But unlike Rehnquist, Brennan has often swallowed his ideological scruples to pick up the votes of more moderate colleagues. His ability to pre-

serve the legacy of the Warren Court on a bench well stocked with G.O.P. presidential appointees is testimony to his persuasiveness and collegiality.

Some court watchers think they see a recent willingness in Rehnquist to be more accommodating. This spring he joined the court's majority in *Wygant vs. Jackson Board of Education* to strike down racial quotas in laying off school-teachers, even though the language of the opinion included a guarded endorsement of affirmative action.

Last week Rehnquist was the surprising author of a high-court decision recognizing that sexual harassment in the workplace is a violation of the civil rights laws. Rehnquist tried to strike a balance in the case, which involved a woman who said she had been harassed by sexual advances by her boss at a Washington bank. Writing for a unanimous majority, Rehn-

quist ruled that businesses could be held liable for sexual harassment but that they could defend themselves with such evidence as an employee's "provocative" dress or conduct.

Slow though it may be in coming, a tilt to the right by the Rehnquist Court may emerge in some critical areas. A thumbnail preview:

Abortion. Two weeks ago, in *Thornburgh vs. American College of Obstetricians*, the court reaffirmed its 1973 abortion decision, *Roe vs. Wade*, but the vote was a slim 5 to 4. Burger, who originally sided with the majority in *Roe*, dissented and indicated that the time had come to "review" the controversial 1973 ruling. It was not entirely clear whether Burger would vote to throw out *Roe* or, more likely, just shade it at the margins to uphold some state laws that make it more difficult for women to obtain abortions. The

same uncertainty surrounds Justice O'Connor, who also dissented in *Thornburgh* but did not call for the outright reversal of *Roe*. Scalia, a strong Catholic, is believed to be a surer vote to overturn *Roe* and thereby return the decision on whether or not to permit abortions to the state legislatures.

Race. Burger has a mixed record on racial-discrimination cases. He has voted both for and against affirmative action and busing, depending on the circumstances. Significantly, however, he wrote the majority opinion in *Fullilove vs. Klutznick*, a 1979 case explicitly upholding the use of quotas to set aside 10% of federal contracts for minority-owned businesses under a public-works act passed by Congress. Supreme Court Expert Bruce Fein of the American Enterprise Institute suggests that Scalia would not "cotton to" such a decision and pre-

Warm Spirits, Cold Logic



Scalia at Xavier

It is not your typical Washington dinner party. After dessert at the Scalia home in McLean, Va., guests are often found grouped around an upright piano in the living room. At the bench, banging out old tunes and in his hearty baritone, leading the crowd of amateur songsters (which often includes such regulars as Justices Rehnquist and O'Connor), is the master of the house, Antonin Scalia, known to friends and family as Nino.

The evenings are evidence of Scalia's engaging sociability, but it is his combination of affability and acumen, of energetic fervor and astringent intellect, that makes him potentially one of the most influential of Justices. The Reagan Administration could hardly have invented a jurist whose views are more perfectly consistent with its own philosophy—or a sharper advocate of that philosophy.

Scalia, a father of nine ("He always said he was going to have a baseball team," confides his aunt), has a deeply developed philosophy based on the principles of strict separation of powers and a disdain for far-reaching federal remedies for social problems. He has a peppery prose style and an acid pen: he once called the Freedom of Information Act "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." In a caustic critique of affirmative action, he facetiously proposed a system he dubbed "R.J.H.S.—the Restorative Justice Handicapping System," in which individuals would be awarded points based on their ethnic backgrounds to determine how much they owed society.

Born in Trenton, the only child of a Sicilian immigrant, Scalia was raised in a household that was close, religious and intellectually challenging. His mother was a grade-school teacher, his father a professor of Italian literature. Scalia attended St. Francis Xavier High School, a Jesuit school in Manhattan, where he was an officer in the JROTC, directed the marching band and played the title role in the school production of *Macbeth*. ("Don't let the ribbing get to you," he told the mortified younger boy playing Lady Macbeth, who still remembers this small act of kindness.) He tied for first in his class. He went on to Georgetown University, becoming

valedictorian, and then attended Harvard Law School, where he made *Law Review*. His classmates remember the gregarious Scalia as being heavily influenced by his Roman Catholic education.

After graduation Scalia married Maureen McCarthy and spent six years at an associate with a large Cleveland law firm, where he expertly juggled a wide variety of cases. He left to take a job teaching at the University of Virginia Law School. In 1971 he became general counsel of the White House Office of Telecommunications Policy, where he resisted the attempts of Nixon aides to tamper politically with public television and began to develop his academic specialty, the rather arcane field of administrative law. After several years in the Justice Department, Scalia went back to teaching in 1977, at the University of Chicago Law School. Scalia's high-profile, high-octane conservatism made him a favorite of the Reagan Justice Department, and in 1982 he was selected by Reagan to be on the U.S. Court of Appeals for the District of Columbia Circuit, the second most powerful court in the land.

Some of his recent decisions at the Court of Appeals highlight his distaste for what he calls the "imperial judiciary" and his abiding belief in Executive over Legislative power. Scalia was the probable author of the unsigned opinion striking down a key provision of the Gramm-Rudman-Hollings budget-balancing law on the ground that the Comptroller General, responsible for implementing its trigger mechanism, is not under the executive branch of Government. An unwavering apostle of judicial restraint, he may give pause to conservatives seeking a more activist judicial agenda. As he wrote last year: conservatives "must decide whether they really believe ... that the courts are doing too much, or whether they are actually nursing only the less principled grievance that the courts have not been doing what they want."

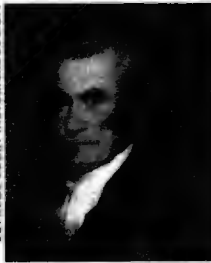
—By Richard Stengel

Reported by David Beckwith/
Washington

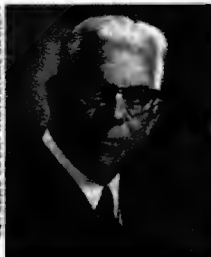


Playing Macbeth

SUPREME COURT HISTORICAL SOCIETY



SUPREME COURT HISTORICAL SOCIETY



TED THAI



THE FOURTH CHIEF

John Marshall established the court as the guarantor of the Constitution

LIBERAL ACTIVIST

Under Earl Warren, the court became the guardian of society's victims

THE HIGH BENCH

The marble courtroom where the Justices hear oral arguments

dicts a "move to a more color-blind jurisprudence." In a 1979 article in the *Washington University Law Quarterly*, Scalia bluntly stated his views: "I am, in short, opposed to racial affirmative action for reasons of both principle and practicality. Sex-based affirmative action presents somewhat different constitutional issues, but it seems to me an equally poor idea."

Scalia would make it much harder for blacks to win a discrimination case. Burger was the author of *Griggs vs. Duke Power Co.*, a 1971 decision holding that employment tests that have the effect of barring blacks are unconstitutional. Scalia, by contrast, has argued that blacks must show direct evidence that the employer was motivated by racial bias against them.

Free Speech. Although the Burger Court has often been accused by editorial writers of an antipress bias, the Rehnquist Court may make the pundits positively nostalgic. Burger wrote a number of pro-press decisions during his tenure. In the 1980 case of *Richmond Newspapers Inc. vs. Virginia*, for instance, Burger held that under the First Amendment the press and the public have the right to attend most criminal trials. Rehnquist dissented, as he usually does in cases protecting press freedom.

As an appeals judge, Scalia has been almost gratuitously antipress. He dissented from an opinion by his rival for the high court, Judge Bork, that threw out a suit by Bertell Ollman, a New York University professor who had been vilified as a Marxist by Columnists Rowland Evans and Robert Novak. Bork held that the column was merely opinion and thus protected speech; Scalia argued that it was "a coolly crafted libel." In his 100-page dissent, Scalia wondered why columnists, "even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will." Describing Scalia as "the worst enemy of free speech in America today," New York Times Columnist William Safire implied that he seemed

to be running for the Supreme Court by writing press-bashing opinions, though Safire noted that at least Scalia's animus against the press was sincere.

Religion. Burger could be found on both sides of the separation between church and state. In 1984 he wrote the decision permitting Pawtucket, R.I., to erect a crèche as part of its Christmas display but struck down a Connecticut law giving workers the right to a day off on their Sabbath. Scalia is expected to agree with Rehnquist's view that there is no "wall" between church and state.

In some areas, Burger and Scalia are close. Burger has been a foe of elaborate procedural safeguards for the criminally accused, and so has Scalia. But in many areas of the law, the effect of last week's appointments is simply unknowable. There is no doubt, however, that Reagan is hoping to provide Rehnquist with reinforcements. "The selection of Rehnquist is a selection for the future," contends Sheldon Goldman, professor of political science at the University of Massachusetts at Amherst. "The Reagan Administration is counting on being able to make another one or two appointments before the President's term ends. When they do that, they're going to have their court."

Justices Brennan and Marshall are determined not to give Reagan that opportunity. "They will have to be carried out," says a former Brennan clerk, who adds that both of the old liberals are in reasonably good health. Powell, 78, and Blackmun, 77, are said to be a bit weary, yet neither has given any indication that he is ready to retire. Some court watchers say the elderly Justices are afraid the next Reagan appointee will have Scalia's ideological bent without his judicial skills and acumen. Though A.E.I.'s Fein contends that the Justices should be reassured that the White House has so far picked jurists of quality, Harvard's Tribe argues the op-

posite. "More likely," he says, "they feel that having made a nomination of such distinction, the President will think he has a free ride" to appoint a crony like Meese or Senator Laxalt. The choices made by Reagan, or his successor after 1988, will be immensely important, not just to the court but to the country. For the Rehnquist Court appears poised at the sort of historic divide that occurs only once every few decades.

Mr. Dooley's old saw is that the Supreme Court follows the election returns, and indeed most courts have been reluctant to get too far out of line with the national mood. In its groping but at times statesmanlike way, the Burger Court tried to balance disparate demands, to ride the confusing currents of its time. Yet once in a great while, the Supreme Court does more than merely reflect the national consensus; it helps shape it. In 1954, when the court handed down *Brown vs. Board of Education*, many Americans still accepted racial segregation. Today, because the Supreme Court ruled that separate was inherently unequal, integration is far more the norm. By serving as guardian of the victims of society, the Warren Court became a kind of conscience to the nation.

Presidents come and go regularly, but there have been only 15 Chief Justices in the past 200 years. Some have been non-entities, many mere caretakers. But a few—most notably John Marshall, Charles Evans Hughes and Earl Warren—have played a vanguard role in determining what justice and equality mean in an evolving democratic society. For better or worse, Justice Rehnquist has the vision and the sureness of purpose to redefine the Constitution radically. The question is whether, given his powers of persuasion and collegial style, he will be able, with the aid of his new associate Scalia, to win the struggle for the soul of the court. —By Evan Thomas. Reported by David Beckwith and Arne Constable/Washington

The Court That Tilted and Veered

When Warren Burger was made Chief Justice in 1969, there were those who saw the potential for a revolution against the activism of the Earl Warren Court. Seven years and five more Republican appointments later, the Burger Court has not undone the Warren legacies so much as consolidated them, affirming the earlier rulings even as it modified and diluted them. It was a court that could move boldly when it needed to. It upheld the right of the press to publish the Pentagon papers. It ruled unanimously that Richard Nixon could not withhold the damning White House tapes sought by the Watergate special prosecutor. But it did not reverse outright a single one of the major Warren doctrines.

"The Burger Court will be remembered, if it's remembered at all, as a moderate court, neither retrenching nor avant-garde," says Duke University Law Professor William Van Alstyne. Its prudence derived from the respect it, like previous courts, accorded to the precedents set by predecessors. Thus the Warren rulings became the basis upon which the Burger Court built its reasoning. It left standing the chief emblem of the Warren era's expansion of defendants' rights, the *Miranda* decision, which requires police to inform suspects of their rights before interrogation. But it allowed police to dispense with *Miranda* warnings in emergency situations, weakened the rights of suspects during pretrial procedures and identified some circumstances in which illegally obtained evidence could be admitted in court.

The Burger Court was expected to apply the provisions of the Constitution narrowly rather than find in them an opportunity to mandate its own far-reaching solutions to social problems. Even so, it practiced its share of judicial activism. It upheld busing as a legitimate tool for desegregating schools and overturned laws that discriminated on the basis of sex. In its most difficult advance into new territory, it ruled that women have a right to abortion. "This court has moved into areas the Warren Court never came near," says

American University Law Professor Herman Schwartz.

Yet when it moved, it was typically with a lumbering tread, tilting and veering with the shifts of the Justices at its center. Blackmun, Powell, Stevens, White and the late Potter Stewart. The Burger era may be remembered as one in which the centrists played the crucial role as swing votes in a court that was always swaying. But durable voting blocs were hard to forge among Justices who faced the divisive task of implementing broad principles that the Warren Court had merely sketched out: first the aggressive axioms of equality, then the waging arithmetic of affirmative action. So in the landmark *Bakke* case, five Justices voted to invalidate a racial quota at a California medical school but five (Powell was the swing vote) also approved the use of race-conscious affirmative action programs. In a series of decisions since then, the shifting coalitions on the court have tilted back and forth on when and how affirmative action can be applied.

The Burger Court also dithered with the barrier between church and state, though again it was not as much divided as the Warren Court. The same is true of its social treatment of race discrimination. The court is true to its record of its reticence and the point that while the conservatism of its rulings has been noted, the Court's liberal wing, says that he had written more opinions favorable to the press than any other Justice. The first amendment, that was damn it! more important to him than a 1000.

"The court had a sense of justice with reason," says University of Michigan Law Professor Yale Kamisar. "Innovation on the left and right was not there. But nobody had the guts." In a sense, the legacy of the Burger Court, modest as it makes some to speak of the Burger Court, lies mainly in the details. "It went and did what it should," says a former justice and didn't push things along any further," says University of Texas Law Professor Scott L. Cummings. "It was rapid and thus often heated social change, that amounts to a respectable epitaph."

—By Michael L. Ransby, Reported by David

Blackwell and Ann Gossel/Washington

ILLUSTRATION BY JAMES H. HARRIS

HOW THE BURGER COURT VOTED ON KEY ISSUES



JUSTICE YEAR APPOINTED	Marshall, 77 1967	Brennan, 80 1956	Blackmun, 77 1970	Stevens, 66 1975	Powell, 75 1972	White, 68 1962	O'Connor, 56 1981	Burger, 78 1969	Rehnquist, 61 1972
ABORTION	Roe vs. Wade (1973) Does a woman have a constitutional right to decide whether to have an abortion?								
	➡	➡	➡	*	➡	➡	**	➡	➡
PORNOGRAPHY	Miller vs. California (1973) May a carefully circumscribed criminal statute completely ban works it defines as obscene?								
	➡	➡	➡	*	➡	➡	**	➡	➡
DEATH PENALTY	Gregg vs. Georgia (1976) May the death penalty be imposed constitutionally under certain circumstances?								
	➡	➡	➡	➡	➡	➡	**	➡	➡
LIBEL	Herbert vs. Lando (1979) Does the First Amendment ever prevent a libel plaintiff from obtaining internal communications about the editorial process?								
	➡	➡	➡	➡	➡	➡	➡	➡	➡
RELIGION	Lynch vs. Donnelly (1984) Does a publicly funded crèche in a Christmas display violate the constitutional separation of church and state?								
	➡	➡	➡	➡	➡	➡	➡	➡	➡
CRIMINAL LAW	U.S. vs. Leon (1984) Can evidence be used in a criminal trial if it was seized by police in good-faith reliance on an improper warrant?								
	➡	➡	➡	➡	➡	➡	➡	➡	➡

☒ Liberal vote
☒ Conservative vote

*William Douglas

**Potter Stewart