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COMMENTARY & INSIGHT

High Court Upheaval Presages Conservative Shift

By Bruce E. Fein

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It seems highly probable that the Senate will confirm President Ronald Reagan's intended nominations of Associate Justice William H. Rehnquist to succeed Warren E. Burger as chief justice and of D.C. Circuit Judge Antonin Scalia to fill the associate justice seat that would be vacated. If so, these appointments will push the social and civil rights vectors of the law in a markedly conservative direction.

The revamped Court is also likely to champion strong presidential powers, pronounced deference to agency policy-making, and strict standards of justiciability to obtain access to the federal courthouse.

The Architects' Intent

Judge Scalia generally espouses the view that the Constitution and statutes should be interpreted to vindicate the intent of their architects. Moreover, Scalia strongly believes that the express words used in legal documents provide the fundamental guide to ascertaining intent. This doctrinal approach to interpretation would probably make Scalia reluctant to recognize constitutional rights that are derived from the "spirit" or "penumbra" of the Constitution, such as the right of privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). A right of privacy was invoked to create a sweeping constitutional right to an abortion in *Roe v. Wade*, 410 U.S. 113 (1973), and sequel cases.

The recent decision in *Thornburgh v. American College of Obstetricians and Gynecologists*, 54 U.S.L.W. 4618 (June 11, 1986), however, found Justices Byron R. White and Rehnquist urging an overruling of *Roe*, and Chief Justice Burger and Justice Sandra Day O'Connor voicing sympathy for that view. Scalia would likely join White and Rehnquist on the abortion issue; moreover, his powerful and persuasive mental and expository abilities might wedge Justice Lewis F. Powell Jr. into the camp of the four dissenters in *College of Obstetricians*. That would mean a Court majority permitting stricter regulation of abortion than obtains at present, even if Powell is unwilling

ing to join in overruling *Roe*.

In the area of affirmative action or racial preferences for minorities, Burger voted erratically. He ordained in *Griggs v. Duke Power*, 401 U.S. 424 (1971), that illegal employment discrimination could be proven if a test disproportionately disadvantaged a minority group, even if the test was untainted by any discriminatory intent. And in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the chief justice upheld the constitutionality of a 10 percent racial quota for minorities in public works contracting. In contrast, Burger frowned on special minority preferences in employment in *Steelworkers v. Weber*, 443 U.S. 193 (1978), *Firefighters v. Stotts*, 467 U.S. 561 (1984), and *Wygant v. Jackson Board of Education*, 54 U.S.L.W. 4479 (May 19, 1986).

Scalia, unlike Burger, will probably vote consistently against racial preferences for non-victims of discrimination. Colorblind and gender-blind jurisprudence is likely to be Scalia's theme in the area of affirmative action, and because the Court has fragmented in addressing affirmative action questions, Scalia's influence could be decisive in forging a clear

Colorblind and gender-blind jurisprudence is likely to be Scalia's theme in the area of affirmative action.

majority. That forecast is deduced in part from his vote in *Steele v. FCC*, 770 F.2d 1192, rehearing granted, Oct. 31, 1985, No. 84-1176, to invalidate gender preferences in the award of broadcast licenses.

In the area of church-state relations, Burger erected a forbidding three-pronged First Amendment test in *Lemon v. Kutzman*, 91 S.Ct. 2105 (1971), that curbed most forms of government aid to non-public schools. The chief justice later seemed to retreat from the strict separatist view of *Lemon* in voting to sustain paid legislative chaplains, *Marsh v. Chambers*, 463 U.S. 783 (1983), and public display of a nativity scene, *Lynch v. Donnelly*, 465 U.S. 668 (1984). But in 1985, Burger voted to condemn a state law that endowed employees with the absolute right to refrain from work on their chosen Sabbath, *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985), and a community education program offered in non-public schools and taught by public school employees, *Grand Rapids School Dist. v. Ball*, 105 S.Ct. 3216, 3231 (1985).

Scalia, invoking the intent of the framers of the First Amendment, will probably vote in favor of greater accommodation of religion in public life than Burger was willing to tolerate. Scalia's constitutional philosophy is likely to resemble the views Rehnquist voiced in dissent from the Court's nullification of a "moment-of-silence" statute, *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985). The Supreme Court's church-state jurisprudence is in such doctrinal disarray that Scalia's vote may frequently turn decisions in favor of enlarged government aid to religious institutions.

Scalia has been unresponsive to the idea that the First Amendment grants the media broad immunity from libel litigation. In *Olman v. Evans and Novak*, 750 F.2d 970, 1036 (1984), he dissented from a holding that columnists were absolutely immune from libel litigation bottomed on defamatory opinion. And in *Tavoulareas v. Washington Post*, 737 F.2d 1170 (1984), Scalia voted to uphold a libel judgment resting on an inference of malice drawn partially from a known reputation for investigative reporting.

Scalia is thus a good candidate for challenging the so-called actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), that shields the media from damages for libel absent clear and convincing evidence of a defamatory falsehood published with knowledge of its falsity or with reckless disregard for the truth. Burger would probably be less aggressive in questioning the *New York Times* doctrine. See *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). Scalia's vote could immediately tilt the Court to uphold

declaratory judgments without damages in libel cases based solely on proof of media negligence in publication. See *Phila. Newspapers v. Hepps*, 106 S.Ct. 1558, 1565 n.4 (1986).

Scalia is a forceful proponent of strong presidential powers. He is known to have authored the per curiam three-judge district court opinion in *Synar v. United States*, 626 F. Supp. 1374 (1986), that invalidated a provision of the Gramm-Rudman balanced budget statute. The comptroller general, Scalia reasoned, could not constitutionally be empowered to calculate and to execute automatic spending cuts because his tenure in office was in the hands of the Congress, not the president. Indeed, Scalia has voiced skepticism of the constitutionality of independent agencies that enforce laws outside the supervision of the president.

Burger has also generously interpreted executive authority. He penned opinions nullifying the legislative veto, *Chadha v. INS*, 462 U.S. 919 (1983), permitting executive revocation of passports for reasons of national security, *Haig v. Agee*, 453 U.S. 280 (1981), and recognizing a qualified constitutional privilege for the confidentiality of intra-executive branch communications, *United States v. Nixon*, 418 U.S. 683 (1974). Scalia, however, seems a more ardent tribune of presidential prerogatives, especially in the fields of foreign policy or national security. Statutes such as the War Powers Act that seek to curb the President's power to manage military affairs might be constitutionally problematic under Scalia's gaze.

In the area of administrative law, Scalia seems more deferential than Burger to agency policy-making and enforcement choices. For instance, the chief justice rebuked the Federal Reserve Board for seeking to regulate non-bank banks in *Board of Governors v. Dimension Financial*, 106 S.Ct. 681 (1986), and voted to nullify Department of Health and Human Services regulations governing treatment of the newborn handicapped, *Bowen v. American Hospital Assoc.*, 54 U.S.L.W. 4579 (June 9, 1986). In contrast, Scalia, dissenting in *Chaney v. Heckler*, 718 F.2d 1174, reversed, 105 S.Ct. 1649 (1985), and *KCST-TV v. FCC*, 699 F.2d 1185 (1983), cautioned against judicial second-guessing of agency decision-making.

Limits on Judicial Authority

Burger repeatedly complained of the caseload burdens of federal courts. Yet he subscribed to opinions that encouraged disputants to seek resolution by a federal judge. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), Burger agreed that offense to aesthetic sensibilities could confer standing to sue in federal court. He echoed that view in *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), and jettisoned traditional concepts of ripeness to address prematurely the constitutionality of a statute limiting tort liability for nuclear power plant operators. Burger also recognized standing to appeal denial of class certification in *Deposit Guaranty v. Roper*, 445 U.S. 326 (1980), despite entry of judgment on the merits in favor of the representative plaintiffs.

Scalia is likely to be scrupulous in seeking to limit judicial authority to resolving concrete disputes properly within the judicial universe. For instance, in *Ruiz v. Weinberger*, 724 F.2d 143 (1983), Scalia rejected the claim that judges had jurisdiction to enjoin U.S. military training exercises in Honduras if the exercises unconstitutionally invaded the property rights of an Honduran landowner.

Finally, Scalia is renowned for his congenial and winsome personality. He is liked by his colleagues—whether of a liberal or conservative bent—and is effective in forging coalitions in particular cases. These attributes, combined with his cogent writing and intellectual strengths, suggest an ability to persuade the centrist justices (White, Powell, and less frequently Harry A. Blackmun) to coalesce behind a more restrained or conservative jurisprudence.

The ability to persuade is exceptionally important on the High Court at present because large domains of jurisprudence—for example, affirmative action, government aid to religion, and right of privacy—are doctrinally incoherent due to fragmentation amongst the justices.

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THE SUPREME COURT: THE GAVEL PASSES

A Sampler of Judge Scalia's Writings

IN HIS TWO decades as an academic, government official and appellate judge, Antonin Scalia has been a prolific author. He has written more than 20 articles, and his 84 majority decisions and dozens of concurrences and dissents while on the U.S. Circuit Court of Appeals for the District of Columbia have established his reputation as one of the federal judiciary's wittiest and most incisive writers.

Following are excerpts from some of those decisions and articles that display the philosophy that Judge Scalia will bring with him to the Supreme Court.

Affirmative Action

My father came to this country when he was a teen-ager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history — Italians, Jews, Irish, Poles — who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority. Yet curiously enough, we find that in the system of restorative justice established by the [John Minor] Wisdoms and the [Lewis F.] Powells and the [Byron R.] Whites, it is precisely these groups that do most of the restoring. It is they who, to a disproportionate degree, are the competitors with the urban blacks and Hispanics for jobs, housing, education — all those things that enable one to scramble to the top of the social heap where one can speak eloquently (and quite safely) of restorative justice.

I am entirely in favor of according the poor inner-city child, who happens to be black, advantages and preferences not given to my own children because they don't need them. But I am not willing to prefer the son of a prosperous and well-educated black doctor or lawyer — solely because of his race — to the son of a recent refugee from Eastern Europe who is working as a manual laborer to get his family ahead...

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. I strongly favor... affirmative-action programs of many types of help for the poor and disadvantaged. The unacceptable vice is simply selecting or rejecting them on the basis of their race. "The Disease as Cure," 1979 Wash. U.L.Q. 147 (1979).



AP/Wide World Photos

CAPITAL SECRET: The first public inkling that U.S. Circuit Judge Antonin Scalia (left) was being nominated to the Supreme Court came when he appeared at a press conference with President Ronald Reagan.

Constitutional Law

A guarantee may appear in the words of the Constitution, but when the society ceases to possess an abiding belief in it, it has no living effect. Consider the fate of the principle expressed in the 10th Amendment that the federal government is a government of limited powers. "Economic Affairs as Human Affairs," *Cato Journal*, Vol. 4, No. 3 (Winter 1985).

Even with all its Frankenstein-like warts, knobs and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice. The alternative appears to be continuation of the widely felt trend toward government by bureaucracy or (what is no better) government by courts... "A Note on the Benzene Case," *Regulation*, July/August 1980.

First Amendment

It is difficult to see what valid concern remains that has not already been addressed by First Amendment doctrine and that therefore requires some constitutional evolving — unless it be, quite plainly, the concern that political publicists, even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will... Perhaps those are right who discern a distressing tendency for our political commentary to descend from discussion of public issues to destruction of

private reputations; who believe that, by putting some break upon that tendency, defamation liability under existing standards not only does not impair but fosters the type of discussion the First Amendment is most concerned to protect; and 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." *Ollman v. Evans & Novak*, 750 F.2d 970 (1984).

Political Philosophy

Surely the freedom to dispose of one's property as one pleases, for example, is not as high an aspiration as the freedom to think or write or worship as one's conscience dictates. On closer analysis, however, it seems to me that the difference between economic freedoms and what are generally called civil rights turns out to be a difference of degree rather than of kind. Few of us, I suspect, would have much difficulty choosing between the right to own property and the right to receive a Miranda warning... "Economic Affairs as Human Affairs."

Regulation

Replacing 'their' bureaucracy with 'ours' does not solve the underlying difficulty. The point is that no bureaucracy should be making basic social judgments... It is perverse to delight in our ability to change the law without changing the laws. "Advice to the President-Elect, the Federal Trade Commission," *Regulation*, November/December 1980.

Separation of Powers

In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary... The majority's disregard of jurisdictional obstacles and overriding of equitable constraints are both prompted, it would appear, by an inflated notion of the function of this court, which produces stirring rhetoric but poor constitutional law [holding that]... judicial power is at its zenith rather than its nadir when its assistance is sought against the President and his officers... *Arellano v. Weinberger*, 745 F.2d 1500 (1984).

Two Nominees, One Philosophy

No Surprises Seen With Scalia

ABRAHAM LINCOLN was let down by Salmon P. Chase; Dwight Eisenhower was shocked both by Earl Warren and William J. Brennan Jr. But in choosing U.S. Circuit Judge Antonin Scalia for his second nomination to the Supreme Court, President Reagan has ensured that he will not join the ranks of the disappointed.

To say that Judge Scalia, 50, shares the administration's judicial philosophy vastly understates the case. In his two decades as an academic, government lawyer and jurist, Judge Scalia has done far more than merely share that philosophy — he has helped create it.

In his specialty, administrative law, for example, Judge Scalia wrote during the Carter administration a series of articles that became the philosophical basis for much of the administration's regulatory-reform program.

Moreover, as a law professor, he befriended a generation of young conservative students — serving, for example, as faculty adviser to the University of Chicago's chapter of the conservative Federalist Society — many of whom now hold key Department of Justice posts.

"These guys are not dumb, they traded in 78 for 80," quipped Richard A. Epstein of the University of Chicago Law School about the administration's decision to fill the vacancy created by Chief Justice Warren E. Burger's retirement with Judge Scalia. But, as Professor Epstein went on to observe, Judge Scalia will bring to the court, and to the administration's judicial agenda, far more than just relative youth.

To conservatives tired of the on-again, off-again habits of the court in Warren Burger's years, Judge Scalia offers a combination of commitment with vigor and an incisive, often wittily sarcastic, writing style that will rally the troops even if it never commands a majority of the court. (See accompanying excerpts.)

Immediate Impact?

In the two areas in which he has shown a particular interest — administrative law and separation of powers — Judge Scalia is in a good position to have an immediate impact.

The impact, in fact, already had begun before the nomination. Although the opinion does not bear his name, Judge Scalia is widely considered to have been the chief author of the three-judge panel decision striking down the Gramm-Rudman-Hollings balanced-budget law currently under high court review.

Administrative law and separation of powers questions have not split the court deeply in recent years, but neither has the court shown any great interest in the area or inclination to resolve festering questions, such as the constitutional status of "fourth branch" or quasi-independent regulatory agencies.

On those sorts of issues, Judge Scalia could become the expert to whom others on the court defer, much as Justice William O. Douglas was on tax questions, suggests Prof. A.E. Dick Howard of the University of Virginia Law School.

In the areas in which the court has been deeply

split — particularly the high-profile "social agenda" issues of affirmative action, abortion and criminal procedure that the administration has pushed forward — Judge Scalia's writings both on and off the bench indicate that he will share the administration's — and Justice Rehnquist's — positions.

In other areas, however, the origins and development of his judicial philosophy do point toward some potentially significant differences with the new chief justice and with other well-known conservative jurists, several longtime colleagues said last week.

'Serious Intellectual'

The new nominee — the son of an Italian immigrant who taught Romance languages at Brooklyn College of the City University of New York — was raised as a "serious intellectual Catholic," said Virginia Law Prof. Edmund W. Kitch. He graduated from Georgetown University and then attended the University of Fribourg in Switzerland before moving on to Harvard Law School, from which he graduated in 1960.

After graduation, he practiced in Cleveland with the firm now known as Jones, Day, Reavis & Pogue, then moved into academia, first at the University of Virginia in 1967. He left the university to serve in a variety of posts in the Nixon administration, then moved over to become legal counsel to the Justice Department as the Ford administration worked to dig out from the debris of Watergate.

In 1977, he returned to academia, moving with his family — he and his wife have nine children — to Chicago, where he stayed, except for a one-year visiting professorship at Stanford, until President Reagan named him to the federal appellate bench in 1982.

He does not share the belief in the transcendence of free markets common to the "law and economics" conservatives he worked with at Chicago, nor has he ever expressed the concern for federalism and the independent sovereignty of the states that has been an abiding passion for Justice Rehnquist.

Instead, the word those who know him use most often to describe his views is "tradition."

Judge Scalia, said Stanford Law Prof. Robert J. Rabin, "is a cautious type of person, kind of a Burckian type, who thinks before we change the way things are working we ought to be pretty sure things will work better under the proposed reform."

Judge Scalia also is a lawyer who enjoys the give-and-take of argument and the crafting of compromises. "There are some areas in which he feels very strongly and is not going to be dislocated from where he is," said D.C. Circuit Judge Patricia M. Wald. But she added that "you can have a dialogue" and that Judge Scalia is "eminently reasonable."

Although Judge Wald is generally counted as among the most liberal members of an appeals court on which Judge Scalia has been among the most conservative, "I think we've agreed about 70 percent of the time," Judge Wald said.

Similarly, another member of the appeals court's liberal wing, Judge Abner J. Mikva, praised Judge Scalia as a "delightful colleague."

At their recent annual judicial conference, the circuit's judges voted Judges Scalia and Mikva their "most congenial" award.

What impact that personality will have on the high court already has become a topic of speculation among court-watchers.

Working together, he and Justice Rehnquist "may begin to shape conservative doctrine in a way that draws votes from the center of the court, and they will do it in a very persuasive way," suggested Professor Howard.

But, countered Harvard Law Prof. Laurence H. Tribe: "It is unlikely that strong-minded and thoughtful justices who have long-standing views diametrically opposed to those of Justice Rehnquist [and Judge Scalia] will be moved to change."

Federalism Issues

Like Chief Justice Burger, Judge Scalia has spent his public career largely concerned with the workings of the federal government, and may not share Justice Rehnquist's concern for state powers, several scholars suggested.

Whatever the ultimate impact, however, "when you're dealing with small groups, the substitution of one person for another makes a big difference," Professor Epstein said.

Simply by introducing new ideas and a new perspective, Judge Scalia will change the outlook of a court that has been remarkable not only for its collective age, but for its unprecedented stability over the past 17 years.

He also is likely to make an immediate impact on oral arguments at the high court. In his tenure at the appeals court, Judge Scalia has developed the reputation for meticulousness in preparation and ferocity in questioning.

"Pity the attorney who's not prepared," said Professor Howard. "He is tough and formidable and gives no quarter; he's fair and he's intelligent, but he's not deferential."

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LIVE WIRE ON THE D.C. CIRCUIT

By Stephen J. Adler

Mr. Adler is executive editor of The American Lawyer. This article, reprinted from that magazine's March 1985 issue, profiles Antonin Scalia, the D.C. Circuit judge who on June 17 was announced as President Reagan's next choice for a seat on the Supreme Court.

When a conservative law professor named Antonin Scalia was appointed to the District of Columbia Circuit Court in August 1982, few lawyers had heard of him. But while attorneys in Washington were asking each other, "Who's he?" lawyers at Cleveland's Jones, Day, Reavis & Pogue were celebrating.

For years the firm's lawyers had been telling stories about their former associate, a brash, instantly likable guy who lit up the firm with his legal ability and eager conservatism. And for years, Jones, Day partners had been giving Scalia an extra push at key moments in his career.

The bond between Scalia and Jones, Day was forged 25 years ago on the campus of Harvard Law. James Lynn, then a partner at Jones, Day and now the chairman of Actna, was roaming the halls of Gannett House—headquarters of the Harvard Law Review—looking for prospects. He came upon notes editor Scalia, a stocky student from Queens with wavy black hair and an almost comical intensity, hunched over a manuscript. Although Scalia was engrossed in his reading, Lynn decided to interrupt. "By one or two in the morning I had convinced him to come out for bacon and eggs in Harvard Square," Lynn says. "Then I convinced him to come out and see Cleveland and Jones, Day."

Two months later Scalia was at Lynn's home in Cleveland, mixing with Jones, Day partners and associates at a recruitment party. As partner Richard Pogue remembers it, Scalia took on a group of eight lawyers, enthusiastically defending a law review note he had edited that supported blue laws. "We argued until three in the morning, one against the eight," says Pogue. Adds Lynn, "He has those bushy eyebrows that furrow up when he's concentrating, and for 45 minutes on end, he had that furrowed look. It never bothered him that everyone was on the other side."

Scalia signed on at Jones, Day. Six years later, he moved into teaching and then into jobs in the Nixon executive office and the Ford Justice Department. All the while, he impressed colleagues with his independence, the strength of his views, his consensus-building skills—and his ability to land on his feet, even during the stormiest days of the Nixon era.



Throughout his career, Antonin Scalia has impressed colleagues with his independence, the strength of his views, and his consensus-building skills. It hasn't taken him long to shake up the D.C. Circuit.

His reputation was confined to a small circle of government lawyers and academics, however, and when he arrived at the appeals court from the University of Chicago, his forcefulness and political savvy took some of his colleagues by surprise. In a short time, he has distinguished himself by being better prepared and more activist in the exchange of ideas among the chambers than many of the other judges. Most important, his aggressively argued, deeply conservative opinions have grabbed attention and earned him a place as a leader of the court.

The biggest surprise could be yet to come. In the next four years President Reagan may have to choose as many as four Supreme Court justices; according to the three dozen top Washington lawyers interviewed for this story—a group that includes a dozen with strong administration ties—Scalia is a strong contender. Robert Bork, a fellow conservative on the D.C. Circuit, is considered the front-runner. Aside from Bork and Scalia, the names most often mentioned are 2nd Circuit judge Amalya Kearse, 7th Circuit judge Richard Posner, and William Clark, a Reagan confidant and former California supreme court justice.

Although Scalia is unquestionably an archconservative, those who "look at his social and political views [to predict how he would rule] if he's appointed to the Supreme Court will be sorely disappointed," says Ernest Gellhorn, dean of Case Western Reserve University law school. "He's a very independent thinker." Scalia has attacked the Freedom of Information Act as costly and dangerous, as a judge he has also granted several FOIA requests. He has lobbied hard to take the legislative veto away from Congress—but he has fought just as hard to take the sovereign-immunity defense away from the executive branch.

Despite his conservatism, Scalia has not become closely identified with any one school of jurisprudence—unlike Bork, a constitutional scholar and strict constructionist, or Posner, whose name is almost synonymous with law and economics. Scalia's special interest, administrative law, is limited and procedural in nature, and he has not often sought publicity for his views. In keeping with his habit of turning attention away from himself, he declined to be interviewed for this article.

This is a story of how Scalia got

where he is—with a little help from Jones, Day—and a guide to what kind of judge he might become.

Six months before Scalia arrived in Washington, President Reagan had appointed Bork to the D.C. Circuit. Bork was seen by many in the administration as a Supreme Court justice-in-waiting, an heir apparent whose leadership of the D.C. Circuit was presumed. Litigators and federal agency lawyers who argue frequently before the court say they assumed Scalia would defer—at least initially—to Bork. Scalia did nothing of the kind. Instead, he made it clear from the start that he didn't intend to ease into the job.

One of the first things the other judges noticed was that the newcomer was nosing into their opinions. Unlike most members of the court, Scalia pores over other judges' drafts, covering them with detailed and often critical marginal comments, even if he isn't on the panel deciding a case. Several of the judges say they like the attention; none admit to disliking it, although some clerks say they find it excessive.

Also in contrast to most of his peers, Scalia sometimes writes his own opinions without the benefit of a clerk's first draft, using the word processor he installed in his chambers. He always prepares for oral arguments by reading all the briefs himself. Rather than requiring his clerks to prepare bench memos summarizing the two sides, he asks them to take a position in each case and argue it with him. By the time Scalia gets to oral argument, litigators say, he is phenomenally well prepared. He asks sharply pointed questions to force counsel into admitting the weaknesses in their positions. "Scalia comes across as a knife-fighter, but a friendly knife-fighter," says a lawyer who has attended oral arguments.

Judge Harry Edwards, a Carter appointee and one of the most active questioners in arguments, finds Scalia's approach refreshing. "He thinks as do I that if you are going to have oral argument, it should have a purpose," says Edwards.

While Scalia was making his presence felt during his first term, Bork was falling behind in his case load and, according to clerks of judges on the court, seemed uninterested in the unbalanced diet of administrative law cases coming before the panel. A dozen former clerks all agreed in interviews that Scalia has been more engaged in the court's work—and more of a leader—than Bork.

Bork says he doesn't feel he is competing with Scalia for a Supreme Court nomination. "We're good friends," he

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says. "I'd be delighted if he got [a nomination] . . . He's too good a friend to get into competition with anyway." Bork says he did have a backlog, which he has cleared up. "When I first came to the court, [the case load] seemed very heavy. It hasn't eased up, but I find it easier to deal with," he says. Asked whether he is understimulated by the court's cases, he says, "I'm not bored." Then he adds that he would prefer it if the court heard a greater variety of cases, including more criminal, antitrust, and constitutional matters.

While Bork and Scalia come out on the same side in most cases, their approach to legal issues is quite different. "Bork may tend to think more jurisprudentially or globally than Nino does and has more of a record in that area," says a former top-level Justice official. "Nino has tended to look more at the procedural and administrative practice."

Top Justice lawyers who have recently left government—while denying that Bork has slipped—say they have noticed that Scalia has been particularly effective. "He is ideally suited by his intellect and his philosophy to be very carefully considered [for the Supreme Court]," says Theodore Olson, a Gibson, Dunn & Crutcher partner who headed the office of legal counsel from 1981 to 1984. "He's also within the right age range." [Scalia is now 50, Bork 59.] GTE general counsel Edward Schnulds, former deputy attorney general under William French Smith, says, "Certainly Nino is establishing a record as an outstanding judge, and I like to think of him as someone who would get extremely close consideration." And Michael Uhlmann, a former assistant attorney general who left his position as White House counsel last August for the D.C. office of Philadelphia's Pepper, Hamilton & Schectz, says of a possible Scalia nomination, "Would I celebrate such a thing? You bet. He's good stuff."

One of the things attracting attention to Scalia is how well his opinions have fared before the Supreme Court. Of the 11 cases in which he has written dissents, *cert* was requested in four and granted in three. Of the 53 cases in which he wrote majority opinions, *cert* was requested in four cases; all were denied. In other words, the High Court has sided with Scalia in seven of eight reviews.

Bork, when asked about his record, said he did not know the breakdown for his cases, but added that the Supreme Court has never granted *cert* on a majority opinion he has written.

In his 60-odd opinions so far, Scalia has revealed the outlines of his intellect and philosophy. In a 1983 case, he tangled with one of the court's liberal icons, Judge J. Skelly Wright, who had written a farfetched majority opinion requiring the Food and Drug Administration to consider whether lethal injection of condemned prisoners met FDA standards for safe and effective drugs. Scalia fired back a lawyerly dissent, arguing that the FDA has no authority over drugs used for execution because they are not the sort of consumer drugs that Congress intended the FDA to regulate. "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," he wrote caustically.

Even if the FDA *did* have jurisdiction over those drugs, Scalia reasoned, it would also have the right to decide not to exercise its authority without being second-guessed by the judiciary. In what has become a theme of his dissents, he chided his colleagues for interfering in what he sees as extrajudicial matters, complaining that the majority position had "less to do with assuring safe and effective drugs than with preventing the states' constitutionally permissible imposition of capital punishment."

The Supreme Court took *cert* in the case, hearing arguments in December 1984. [The Court—in an opinion by



Illustration by Joseph Azari

Bork: Fellow conservative

Justice William Rehnquist, President Reagan's choice for chief justice to replace Warren Burger—reversed the D.C. Circuit opinion in March 1985, agreeing with Scalia that the FDA's decision was not reviewable.] Says Case Western Law dean Gellhorn, a former colleague of Scalia's at University of Virginia law school, "Scalia's dissent was just penetrating . . . I think with the argument in the dissent the Court felt obliged to resolve the question . . . and that's what you really look at in an intermediate appellate court judge."

In another case, Scalia showed that he could position himself to the right of some of the court's other conservatives. In an appeal involving the right of protesters to sleep in Lafayette Park across from the White House, he wrote a separate dissent to the 6-to-5 en banc opinion granting First Amendment protection to the demonstrators. Rather than nitpick about when sleep might be protected, as the other dissenters had done, he took the extreme position, denying "flatly . . . that sleeping is or can ever be speech for First Amendment purposes." Although it didn't go as far as Scalia, the Supreme Court's ruling reversed the majority decision.

Officials in Reagan-controlled administrative agencies applauded the Scalia dissents in both cases. Former White House counsel Uhlmann says of the lethal-injection dissent, "It showed Nino at his best. He took a pile of very cold common sense and poured it on."

Despite the vehemence of his opinions, Scalia has managed to stay on the good side of his colleagues, who work in close quarters on two floors of the

federal courthouse. "He is a very politic person, as opposed to political . . . a hail-fellow-well-met, and an extrovert," observes Daniel Mayers, a partner at Wilmer, Cutler & Pickering who knows Scalia well. Several of the judges on the D.C. Circuit, interviewed on the condition they would not be identified, say Scalia is so personable that he has created a feeling of good will that pervades the court.

Last winter Scalia had the judges over to his house in Virginia to celebrate the appointment of the third Reagan judge to the court, Kenneth Starr. As the evening mellowed, Scalia moved to the piano, where he banged away while he, Starr, Bork, and others sang old songs. It was a far cry from the days when the open feud between now-Chief Justice Warren Burger and senior circuit judge David Bazelon put the court's members on a war footing.

Scalia has also won points among the judges for his good political instincts in not pushing anyone too far. Says Judge Edwards, "If you get to a point in discussing a thesis when he doesn't have an answer, he's not going to hard-line you just to get a result. I have never had a situation with him where he admitted what he intended to do was difficult or improbable to explain but he would do it anyway."

Lawyers who don't share Scalia's conservative philosophy now say they consider him particularly dangerous because he seems to be so widely liked and appears likely to excel at building majorities for his positions. According to one lawyer who worked with him in the ABA administrative law section, which Scalia chaired before joining the court, "The reason he was so good was that he had the way to take issues of hot dispute and come up with formulations—an amendment or a deletion—that tended to create a consensus. As a judge that will make him effective far beyond his vote."

"He would be more of a consensus builder than Justice Rehnquist," says one liberal Washington lawyer who knows Scalia well. "I would worry more about having Nino on the court [than Bork]."

No Centrist

Although Scalia may be a potential consensus-builder, he's no centrist. He has been a vociferous, argumentative, and persuasive conservative all his life, and people who have known him well say there is nothing he enjoys more than debating "issues of hot dispute." Friends and fellow members of the law review, where Scalia was notes co-editor in 1960 with now-Harvard Law professor Frank Michelman, remember Scalia as having delighted in chiding Stevenson liberals about the excesses of government regulation.

Despite political differences, however, his classmates were intrigued by Scalia's personality, a combination of scholarly seriousness and life-of-the-party gregariousness. A graduate of Georgetown University, and the son of a professor of Romance languages at Brooklyn College, Scalia loved to pull classmates aside for a spirited debate, usually managing to put a humorous spin on even the most arcane subjects. "I don't remember anyone I thought was more fun to be with and argue

with," says Michelman.

Scalia built the kind of academic record that law firms were ready to kill for, and when Jones, Day came calling he had already been actively courted by Philadelphia's Morgan, Lewis & Bockius and had all but decided to go there. But after a year in Europe on a fellowship, Scalia went to Jones, Day as an associate in 1961. There, according to Jones, Day lawyers, he did real estate, corporate financings, labor, and antitrust discovery, but little if any actual trial work.

"He was one of the last of the real generalists in the sense that he wanted to do as much of everything as he possibly could," says Jones, Day partner Herbert Hansell. "And he did damn near everything and he did it well."

If Scalia had a weakness as a lawyer in a firm, says Lynn, it was that "perhaps he wanted to spend more time on a problem than you might like in a practice. But that's part of what drove him to teach and later drove him to be a judge." Nonetheless Pogue, Hansell, and Lynn agree he was on the partnership track during his six years as an associate.

Scalia's political commitment was no secret, even to recruits. Daniel Elliott, Jr., now vice-president for law at White Consolidated Industries, Inc., and a one-time Jones, Day associate and partner, interviewed with Scalia and others at the firm in 1963. "I remember the guy vividly," says Elliott. "He was a real hard-core Goldwater person. I interviewed in the fall of 1963 before Goldwater had a head of steam, and he was a very articulate advocate." Says partner David Snow, "He was one of the first Bill Buckley-type conservatives and was a big National Review fan . . . In the sixties, I can recall him being perturbed by the liberalizations in the Catholic Church." (A Catholic, Scalia is the son of an Italian immigrant father.)

By 1967 Scalia had decided to move into academia, where he could devote more time to exploring legal problems without worrying about running up a client's bill. Scalia's tongue-in-cheek farewell, one partner recalls, captured his good humor and more-than-modulated conservatism: "I'll be glad to get away from such a liberal place," he remarked, to the astonishment of the establishment lawyers he was leaving behind.

Scalia's tenure as a law professor at the University of Virginia turned out to be more of an entree into Washington government circles than a retreat to the ivory tower. He spent only three years full-time at Virginia, where he taught contracts, commercial code, and comparative law before getting his first government job in the Nixon executive office. And he got the job only as the result of a timely push from a Jones, Day connection.

The head of the newly created Presidential Office of Telecommunications Policy, Clay Whitehead, recalls that in 1970 he had been looking without success for a first-rate general counsel and that he had lamented about his problem to James Lynn, the former Jones, Day partner who had recruited Scalia and who was then general counsel at the Department of Commerce. Lynn says he

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recommended Scalia.

The telecommunications office had been created to help break the logjam in cable TV development, to oversee the growth of the fledgling Corporation for Public Broadcasting, and to supervise telecommunications within the executive branch. But as a practical matter Whitehead's office immediately became the focal point for Nixon's attack on the autonomy of public TV, which Nixon viewed as anti-administration and antiwar.

As general counsel, Scalia had to fend off pressures from White House aides as high up as John Ehrlichman and H.R. Haldeman and still appear loyal enough to maintain his good reputation with Republican leaders. "We were on the hot seat," Whitehead recalls. "Haldeman, Ehrlichman, and crew were yammering at us to try to get the [broadcasting] board to do this or that."

One day, says Whitehead, he "received a rather incredible memo from the White House" directing that a certain TV program be eliminated: "Nino said, hell, write back a memo that says it's illegal." Scalia noted that it wasn't clearly illegal, then added, "Hell, they don't know that," according to Whitehead, who says he took Scalia's advice and wrote the memo. Whitehead says he never heard from the White House again on the subject.

At another point Haldeman, Ehrlichman, and other White House aides were circulating memos (which became part of the public record in 1979 as the result of an FOIA request) in which ideas for crippling public TV were enthusiastically discussed, including a plan to cut off all federal funds. Whitehead and Scalia, who received copies of the memos, agreed that public TV programming was too liberal, but they opposed such drastic moves. On December 23, 1971, Scalia sent an "Eyes Only" memo to Whitehead. "I have concluded that the most likely eventuality is that the plan will fail and the administration's role will become public knowledge," Scalia wrote. "Naturally, this is the worst possible development. . . . Since my initial recommendation to abandon this plan has been rejected, at the very least I urge you to point out to the White House staff all of the risks and difficulties."

Although few of Whitehead's and Scalia's warnings were heeded by the Nixon administration, officials in the Carter administration reviewed Nixon's efforts in the area and issued a report. "Scalia actually comes off looking very good," says Robert Sachs, who worked on the report as an aide in the telecommunications office under Carter. "He's about the only one."

The telecommunications job exposed Scalia to administrative law for the first time, sparking an interest that grew into a specialty. He played the leading role in negotiating a compromise among the television networks, the cable industry, and the motion picture industry to regulate the growth of cable television. Cable development had been frozen by the FCC in 1966 because cable owners and program copyright holders couldn't agree on how to compensate for retransmission of copyrighted programs on cable.

Scalia shuttled among the parties and created a formula that would allow cable to develop. After six months of meetings, he drafted the Cable Compromise of 1971, which the industries accepted and which the FCC later incorporated into rules. The compromise also helped form the basis for the 1976 amendment to the Copyright Act providing for cable retransmission. The compromise "brought out Nino's ability to deal with real people and real situations that are inherently messy," says Whitehead. Adds former Scalia aide Henry Goldberg: "Something that impressed me was that despite his academic outlook he was able to hammer out this sort of compromise. . . . Some people doubted that Nino could mix it up at this level, but he could."

Scalia left the telecommunications office in 1972 to serve as full-time chairman of the Administrative Conference of the United States, a federal interagency think tank that issues reports on legal and management issues affecting executive agencies.

'Welcome to the Job'

President Nixon rewarded Scalia for his work by appointing him to head the office of legal counsel in the Justice Department in 1974. As had happened in the telecommunications office, Scalia got a big push from a Jones, Day partner—this time Jonathan Rose, who was an associate deputy attorney general at that time. Rose recommended Scalia to then-deputy attorney general Lawrence Silberman.

The outgoing head of the office of legal counsel, Robert Dixon, "had been chewed up psychologically" by Watergate-related issues, says Silberman (Dixon left to teach at Washington University law school in St. Louis; he died in 1980.) "There was a range of potentially serious constitutional issues, and it was absolutely imperative to have a first-class legal mind and a man of courage," Silberman continues. The appointment to the office of legal counsel was so crucial, he adds, that "I did talk to Jerry Ford about it. It was a very important position."

Although nominated by Nixon in the summer of 1974, Scalia was actually appointed by Ford that August because Nixon had resigned in the interim. As the head of the office in charge of drafting opinions on the lawfulness of executive actions, Scalia faced one of the toughest and most politically charged tasks imaginable. On his first day on the job, he had to decide whether the presidential tapes and papers piled high in the White House belonged to Nixon or to the government. Remembers James Wilderotter, yet another Jones, Day partner who was then associated counsel to President Ford, "His initial day on the job the question was: Who owns the tapes and papers? Welcome to the job, Mr. Scalia."

Scalia set to work on the opinion and, drawing on historical precedents, drafted a ruling that determined that the papers belonged to Nixon. The final opinion, signed by then-Attorney General William Saxbe after top Justice Department officials tinkered with Scalia's draft, was issued on September 6, 1974. According to the opinion, "To conclude that such materials are not the

property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the government since the beginning of the Republic, and to call into question the practices of our presidents since the earliest times." Scalia cited George Washington's letters and moved through to more recent examples. Later, however, Congress passed legislation that gave the government possession of much of the material.

Scalia was soon branching into work involving intelligence agency conduct, an area in which he had shown great interest as a judge. Scalia was tapped to work with then-attorney general Edward Levi on a sweeping and potentially explosive review of the intelligence-gathering powers of the CIA and the FBI. Two congressional committees were at work on legislation seeking to curtail domestic spying and to place limits on how far covert international operations could go. The plan inside the Ford administration was to come up with an executive order that would derail more restrictive legislation.

Scalia was actively involved in developing the executive order, attending top-level White House meetings, and working on drafts, says Philip Buchen, then counsel to Ford (and now counsel in Dewey, Ballantine, Bushby, Palmer & Wood's Washington office). According to Uhlmann, who was then a legislative assistant to Ford, "You were trying to codify practices that skirt along the edge of the very meaning of nationhood and were being waged other ways. There were multiple, multiple drafts of everything."

In a later fight to prevent challenges to classification of documents—and in a recent opinion in a suit involving U.S. activities in Honduras—Scalia displayed particular deference to the goals of the military and of intelligence agencies, and consistently made separation-of-powers arguments to oppose judicial involvement. In the Central America case, a U.S. citizen who owned a cattle ranch in Honduras claimed that the United States had set up a military training school for Salvadoran soldiers on his ranch. The district court rejected his plea for an injunction on the grounds that the dispute was a nonjusticiable political question. A three-judge panel of the D.C. Circuit upheld the district court, with Scalia writing the opinion. But the full court voted to hear the case en banc, and by a 6-to-4 vote reversed the decision, saying that a suit could be heard.

Scalia responded in his dissent that in addition to the broad separation-of-powers problem, which alone should have prompted the court to stay out of the issue, there were more technical jurisdictional reasons why the plaintiff could not bring his case to court. A citizen could seek monetary compensation only—not an injunction—when making a claim that the government had taken his property. Scalia argued, and moreover the plaintiff lacked standing because his property was incorporated in Honduras.

According to one D.C. lawyer sympathetic to the plaintiff's position, "The case is illustrative of the way that he thinks in that he found a lot of reasons for courts not to get involved. . . . The standing issue was raised by Scalia for

the first time at arguments. The government's argument had been that it was a political question."

Scalia's attention to the details of standing and other procedural issues had its roots at least as far back as his work at Justice in the mid-seventies. The department, especially the civil division, had always strongly backed the legitimacy of sovereign immunity—a defense automatically claimed by the government whenever anyone sued it for injunctive relief. Although Scalia is strongly pro-executive, the administrative law professor in him felt that sovereign immunity was a medieval vestige that was intellectually dishonest and ill-suited to weeding out unwanted litigation. "The nub of his argument is [usually] not what he sees as the best substantive position, but whether all of the institutions involved were performing as they are supposed to or if one is going beyond its authority," says Walter Olson, a staffer at the American Enterprise Institute.

With much the same tenacity that he had shown in defending the law review note on blue laws 15 years earlier, Scalia now buttonholed department members and debated the sovereign immunity issue with them, bringing them over to his view. Next he wrote to Senator Edward Kennedy, then chairman of the subcommittee on administrative practices and procedures, announcing Justice Department support for the elimination of the sovereign immunity defense in suits for equitable relief. After noting that "the department in the past opposed such a change," Scalia couldn't resist a playful pat on his own back. He wrote, "In light of the tenacious and well-reasoned support of this proposal by such knowledgeable and responsible organizations as the Administrative Conference of the United States [the federal think tank that Scalia himself had headed for two years, from 1972-74] we have reconsidered that opposition."

Thomas Susman, then chief counsel of the Kennedy subcommittee and now a partner at Ropes & Gray, says that before the Scalia memo supporters of the anti-sovereign immunity legislation had been unable to get it through Congress in 1970 or 1972. "It's not a subject that had a broad constituency," Susman says, and Justice Department opposition had been enough to kill it. But after Scalia turned the department around, the legislation passed easily in 1976. "I think what probably won that sovereign immunity debate was that nobody matched him in the rigor of his argument," recalls Uhlmann, who was then at Justice.

Attacking FOIA

When President Carter took office in 1977, Scalia left Justice and moved to the University of Chicago law school to teach. He chose Chicago, according to University of Virginia professor A.E. Dick Howard and other colleagues, in part because the school paid tuition for faculty children—and Scalia had a houseful of them [he now has nine children, ranging in age from five to twenty-five].

But, as happened at Virginia, Scalia couldn't keep his attention away from

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politics and government. He soon became involved in crusading against the legislative veto, a method by which Congress reserved the right to reject individual decisions by executive agencies. He also poured hours into editing the conservative American Enterprise Institute's Regulation magazine, and into heading the ABA's administrative law section. Students say his outside efforts kept him on the plane back and forth from Washington and that he wasn't always as well prepared for class as they would have liked.

The lure of a good fight appeared to be irresistible to Scalia. He testified at least a half-dozen times against legislation that would have expanded the legislative veto. In addition, he drafted the ABA's amicus brief in the *Chadha* case, in which the Supreme Court in 1983 finally ended the debate by finding legislative veto to be unconstitutional. "He was one of the four or five people to whom that victory was ultimately attributable," says Larry Simms, who worked under Scalia as deputy assistant attorney general in the office of legal counsel [he is now an associate at Gibson, Dunn & Crutcher in Washington].

Among Scalia's many articles during the period, one stands out as an example of his stark conservatism and aggressive, lively style in stating his case. In a 1982 Regulation magazine piece, "The Freedom of Information Act Has No Clothes," he argued that the act went too far, that it was too expensive to administer, and that openness isn't always a virtue, particularly when it interferes with law enforcement, privacy, and national security. Of FOIA, he wrote, "It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Ridiculing the expansive 1974 amendments as products of an era when "public interest law," "consumerism,"

and "investigative journalism" were at their zenith," Scalia argued that "the defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press."

"On Every List"

All the while, Scalia was chalking up a record that would make him irresistible to the new Reagan Justice Department, which starting in 1981 was beginning to consider possible appointments to federal judgeships. Here was as purely conservative an academic as could be found, who had extensive experience in two Republican administrations, was likely to be sympathetic to the executive branch, and yet had managed to collect admirers from both parties—and who apparently had no enemies. Even better for Scalia, the Jones, Day connection was still alive and well in the Reagan administration.

Jonathan Rose, a Jones, Day partner, was then head of the Justice Department's office of legal policy, which screened potential candidates for judicial appointments. Rose knew Scalia from working with him in the Nixon and Ford administrations. "We were looking for outstanding academics [for the D.C. Circuit] who shared the president's political philosophy," says Rose. "He came up on every list." Says Theodore Olson, then head of the office of legal counsel: "He was a very obvious choice. There were very few people who had the expertise he had in administrative law issues that come before the D.C. Circuit."

After his nomination, however, Scalia didn't get such a resounding vote of confidence from the ABA committee that rates judicial nominees. The committee, chaired by Arnold & Porter partner Brooksley Born, gave Scalia only a

"qualified" rating, on a scale in which a nominee can get the higher ratings of "well qualified" or "exceptionally well qualified." The only lower rating is "not qualified." Born declines comment on why the committee gave Scalia only a passing grade, but a source on the committee says that members were concerned that Scalia didn't have courtroom experience.

Rose confirms that that was the committee's concern. "This was the continuing argument we had with the ABA panel. They have a rather inflexible view," says Rose. "They said that we will consider [nonlitigators] up to the point of being labeled qualified but anyone who would get highly or extremely qualified would have to have substantial litigation experience."

Scalia faced no opposition in his confirmation hearing, and he arrived at the court in time for the fall 1982 session. He was followed on to the bench by Kenneth Starr, another former Justice Department official, leaving the panel once dominated by liberals David Bazelon and J. Skelly Wright with a tantalizingly thin 6-to-5 liberal-conservative margin. [With Scalia on the D.C. Circuit, the ratio now is 6-to-5, with the conservatives in the lead. There is one vacancy, and there will be another if Scalia joins the Supreme Court.]

Scalia has begun to show that the consensus-making skills he picked up in the White House, the Justice Department, and the ABA haven't gone to waste. For example, Edwards, a much more liberal judge, joined in Scalia's recent opinion reversing summary judgment for the media defendant in *Liberty Lobby, Inc. v. Jack Anderson*. (Edwards declined comment.) In that case, in which Anderson was accused of defaming Liberty Lobby founder Willis Carto by linking him and his group to neo-Nazism, Scalia made it easier for judges to deny summary judgment to libel defendants in suits by public figures. He wrote that summary judgment may be denied to libel defendants even when it is unclear that the public-figure plaintiff will be able to show malice with "convincing clarity" at trial. The decision conflicted with the view of the 2nd Circuit and in the opinion of libel plaintiffs' lawyers also conflicted with the 1970 D.C. circuit opinion, *Wasserman v. Time Inc.*

Also, the Supreme Court had ruled in an earlier case that "actual malice" might be found in a story that was "based wholly on an unverified anonymous phone call," but in *Liberty Lobby* Scalia appeared to extend that rule to include a phone call in which the source was identified by name. Wrote Scalia: "[The reporter] never even looked [the source] in the eye until after the story was published, but spoke to him only once over the telephone." Says Robert Sack, a libel law specialist [now a partner at Gibson, Dunn & Crutcher in New York]: "That obviously misperceives how reporting is done. The vast majority of interviews—like this one—are telephone interviews."

Libel lawyers were quick to cite the opinion as evidence of Scalia's restrictive view of press freedoms and of how effective he may become in altering the direction of First Amendment law, particularly if he continues to bring along judges like Edwards. "This is an academic's opinion," complains David

Branson [now in the D.C. office of Kaye, Scholer, Fierman, Hays & Handler], who represented Anderson in the case. "His decision is a complete departure from anything that's happened in twenty years since *Times v. Sullivan* on the summary judgment test." Branson adds, "If this decision stands, it's a definite signal to trial courts not to grant summary judgment in libel cases."

[Scalia also joined the April 1985 opinion by Judge George MacKinnon reinstating a jury verdict that The Washington Post libeled Mobil President William Tavoulareas. The D.C. Circuit granted a rehearing en banc in that case; oral argument was held last October.]

Such opinions can't help but make Scalia even more attractive to the Reagan administration. And so far he hasn't provoked so much as a rumble of disapproval among administration conservatives. It doesn't hurt that he is ardently pro-executive. Says one Washington litigator who has argued before him: "He's a great believer in the powers of the presidency. . . . I think he will find significant areas where the president has done something and the courts shouldn't touch it."

But when the time comes to select a Supreme Court nominee, the vagaries of politics could play more of a role than credentials. For one thing, timing is sure to be crucial: Most of Scalia's most loyal partisans have left government, including such present and former Jones, Day lawyers as Lynn, Wilder, and Rose, as well as others such as Whitehead, Schmitts, and Silberman. While many still have strong administrative ties, they are not as well positioned to help him as they once were. The quirkiness of the decision-making process could hurt Scalia—President Reagan could, for example, decide to name a woman, a black, or a fellow Californian to the High Court—but it also might help him. For example, if New York governor Mario Cuomo was a likely Democratic presidential candidate when a Supreme Court seat became vacant, Scalia, also of Italian descent, might become more attractive politically as a counterpoint.

One thing Scalia has going for him is that, unlike Bork or Richard Posner of the 7th Circuit, he would face little or no politically embarrassing opposition to his nomination. "If you're looking for someone you're trying to confirm, maybe Posner has ruffled enough feathers, but not Scalia," says one Washington lawyer.

Of the many liberal lawyers interviewed for this article, none plays to lobby against a Scalia nomination. Indeed, it is remarkable that in as partisan a place as Washington Scalia can garner the respect and even the support of people, who find his politics repugnant. "I've known him for yea these many years and we've disagreed on many, many things, but I've never known him to be unprincipled," says Ropes & Gray partner Susman.

Remarks liberal D.C. lawyer Daniel Mayers of Wilmer, Cutler: "I think it would be an abuse of the process for the Senate to try to block a Scalia nomination. While my political views are very different from his, I'd say that of the conservative candidates for the court I think he'd be the strongest intellectual nominee and the most qualified." ■

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General Points

- ° Every specific allegation of voter harassment (one identifying a particular year and voting precinct) has been refuted by contemporaneous FBI reports and eye witness accounts, or rendered highly unlikely given internal inconsistencies and contrary testimony by others.
- ° These events had been thoroughly explored and totally discounted in the 1971 Confirmation hearings when the Committee reported "the voter harassment charges against Mr. Rehnquist are found by this Committee to be wholly unsubstantiated. Viewed in its entirety, the incident suggests at the very most a case of mistaken identify." 1971 Senate Executive Report, p. 13.
- ° All those who testified against Rehnquist at this hearing failed to make any such allegations in 1971.
- ° Much of the testimony is utterly consistent with what was already known about Justice Rehnquist's role -- that in his capacity as legal advisor to the Maricopa County Republican Party, he had occasion to visit precincts where disturbances occurred to mediate disputes and advise challengers.
- ° Of the seven who claim to have seen WHR actually challenge voters, five of those individuals did not know WHR at the time and identified him based on 1971 newspaper photographs -- seven to nine years after the alleged incident.
- ° Seven individuals -- Messrs. Staggs, Robertshaw, Turner, Marshall, Maggiore, Randolph, Bush -- testified that Justice Rehnquist, to their knowledge, did not challenge any voters in either 1962 or 1964, and that such activity would have been totally outside his responsibilities as a Republican party official.
- ° All those accusing WHR of challenging voters are committed Democratic or liberal activists. More importantly, 6 Democrats -- (including four state or federal court judges) -- refuted the harassment/challenging charges against WHR.

Bethune 1962

The evidence considered by the Committee in both 1971 and 1986 clearly indicates that Justice Rehnquist was not involved in any incident at Bethune in 1962.

- ° Contemporaneous newspaper accounts, police and FBI reports, and the entire Judiciary Committee in 1971 all confirm Rehnquist's non-involvement in any incident at Bethune in 1962.
- ° All persons interviewed by the FBI in 1962 and 1986, including Democratic party officials present at Bethune during the incident, said that Wayne Bentson was the only GOP official involved in the Bethune incident.
- ° Sergeant Edward Cassidy of the Phoenix police, who was present at or near Bethune the entire day, told the Committee that only Wayne Bentson, and not Wm. Rehnquist was involved in an altercation and that no other Republicans were engaged in challenging.
- ° Given Justice Rehnquist's role as GOP legal advisor, it is quite possible that the Justice visited various precincts -- including Bethune -- to mediate challenger disputes.

Bethune 1964

No credible evidence or testimony was presented to link Rehnquist to any improper challenges of voters at Bethune in 1964.

- ° Given the remarkable similarity between what actually happened in 1962 to what allegedly occurred in 1964, the most likely explanation is that the two dates have been confused.
- ° No police or contemporaneous newspaper accounts record any incident at Bethune.
- ° Thomas Murphy, the Democratic County Chairman in 1964, personally investigated precinct incidents that year and told the FBI no such incident occurred at Bethune.
- ° Bethune poll watchers, Republican and Democratic officials (including Murphy, Hardy and Pena) stated that they were not aware of any incident at Bethune that year.
- ° Given Rehnquist's status as co-chairman of the Republican ballot security program, it is extraordinarily unlikely that he was personally challenging voter credentials in 1964. Moreover, he has unequivocally stated that he was neither at Bethune in 1964 nor personally challenging voters.

James J. Brosnahan

- ° He had publicly stated that the precinct where he saw Rehnquist and where he investigated was Bethune in 1962 (Washington Post, July 25, 1986, p. 4 and Nation Institute press release, p. 6).
- ° The Arizona Republic, Nov. 7, 1962 states that James Brosnahan investigated complaints at the Bethune incident in 1962.
- ° Wayne Bentson in a Nov. 10, 1962 letter states James Brosnahan investigated the incident at Bethune.
- ° Carl Muecke, Brosnahan's supervisor, only mentions receiving complaints about and having the FBI investigate the Bethune incident.
- ° Before the Judiciary Committee, Brosnahan, a self-described "liberal Democrat," said he could not remember exactly what precinct it was and that he now remembers that he investigated several precincts that day.
- ° Brosnahan never saw Rehnquist challenge voters (AP Story, July 26, 1986, Baltimore Sun, July 26, 1986, National Public Radio, July 25, 1986, Nation Institute press release, Washington Post, July 25, 1986, and Testimony).
- ° Brosnahan never said or did anything in 1962 that implicated Rehnquist.
- ° The FBI investigation in which he was involved never hinted at any involvement by Rehnquist.
- ° Brosnahan failed to come forth in 1971.
- ° A number of Democrats, Maggiore, Turner, Hardy and Muecke stated that Justice Rehnquist did not challenge voters in any way.
- ° Contemporaneous newspaper accounts, police and FBI reports, and the entire Judiciary Committee in 1971 all confirm Rehnquist's non-involvement in any incident at Bethune in 1962.

- ° All persons interviewed by the FBI in 1962 and 1986, including Democratic party officials present at Bethune during the incident, said that Wayne Bentson was the only GOP official involved in the Bethune incident.
- ° Sergeant Edward Cassidy of the Phoenix police, who was present at or near Bethune the entire day, told the Committee that only Wayne Bentson, and not Wm. Rehnquist was involved in an altercation and that no other Republicans were engaged in challenging.
- ° Given Justice Rehnquist's role as GOP legal advisor, it is quite possible that the Justice visited various precincts -- including Bethune -- to mediate challenger disputes.

Charles Pine

- ° Judge Maggiore, 1962 Democratic County Chairman, knew Charles Pine and testified that neither Pine nor anyone else ever complained about William Rehnquist in 1962, although Pine claims he complained to Democratic Headquarters.
- ° Charles Pine cannot consistently recall how many voters were challenged, although his memory is clear as to the exact words William Rehnquist said to different voters.
- ° Pine told the Committee and National Public Radio the challenges occurred at Bethune in 1962 but told the Nation Institute and other reporters that he could not identify the precinct or year.
- ° Pine testified that he discussed the incident with Judge Hardy, but Judge Hardy has stated he knew of no involvement by Rehnquist.
- ° Pine did not come forward in 1971.
- ° Contemporaneous newspaper accounts, police and FBI reports, and the entire Judiciary Committee in 1971 all confirm Rehnquist's non-involvement in any incident at Bethune in 1962.
- ° All persons interviewed by the FBI in 1962 and 1986, including Democratic party officials present at Bethune during the incident, said that Wayne Bentson was the only GOP official involved in the Bethune incident.
- ° Sergeant Edward Cassidy of the Phoenix police, who was present at or near Bethune the entire day, told the Committee that only Wayne Bentson, and not Wm. Rehnquist was involved in an altercation and that no other Republicans were engaged in challenging.
- ° Given Justice Rehnquist's role as GOP legal advisor, it is quite possible that the Justice visited various precincts -- including Bethune -- to mediate challenger disputes.

Melvin Mirkin

- ° Perfectly consistent with WHR's version.
- ° Mirkin acknowledged WHR spoke in a normal tone of voice to party officials.
- ° Said he thought WHR was an "honorable man," whom he would not contradict and would vote to confirm his nomination as Chief Justice.
- ° Thought the whole issue was little more than "small potatoes."

Sydney Smith

- ° Smith does not remember the name of the precinct or the year when he saw Rehnquist challenge voters. This makes it difficult to corroborate his story.
- ° Smith is unable to remember the time or place, but he remarkably remembers verbatim quotes from Rehnquist.
- ° Smith is inconsistent as to the number and race of the people he saw Rehnquist challenge.
- ° Smith is inconsistent as to whether or not any of the challenged voters actually left the line.
- ° Smith claims he personally called Democratic Headquarters, but Judge Maggiore, County Chairman, testified that he received no complaint about Justice Rehnquist.
- ° Smith failed to come forward in 1971.

Manuel Pena

- ° Based his identification of Rehnquist solely on a newspaper photograph seen approximately seven years after the alleged incident.
- ° Judge Thomas Murphy, as Democratic County chairman in 1964, personally investigated complaints and found the charges against Rehnquist to be a "bunch of crap."
- ° Given that Rehnquist did not have challenging credentials, it seems unlikely he would be found sitting at the challengers' table at Butler.
- ° Given Rehnquist's role as legal advisor and head of the 1964 GOP ballot security program, it seems difficult to believe he would have, as Pena stated, called Headquarters concerning the legality and propriety of his challenging procedure.
- ° It seems equally unlikely that Rehnquist, in his capacity as ballot security director, would spend between 40 to 60 minutes arguing with a Democratic official at one precinct.
- ° Like all the others, it is difficult to understand why Pena did not come forward with these allegations in 1971.

Quincy T. Hopper

- ° Admits in 1986 affidavit that his memory is not clear.
- ° His only affidavit on the subject was made in 1971.
- ° He identified the challenger he claims to have seen in 1964 as Mr. Rehnquist from a photo shown him in 1971 in connection with the Rehnquist confirmation.
- ° He claims Carl Sims was with him, but Mr. Sims was involved in the dispute of Bethune in 1962.
- ° The incident he described (an aggrieved Republican challenger, an ensuing scuffle, the police escorting challenger to a car) is remarkably similar to the 1962 incident at Bethune.
- ° The Republican poll watchers at Bethune in 1964, 1964 newspaper accounts of the election, police records and Judge Thomas Murphy (1964 Democratic Party Chairman) reported no incident at Bethune in 1964.
- ° Mr. Hopper's statement was properly ignored in the 1971 hearings because it is contradictory, ambiguous, and unfounded.

Jordan Harris and Robert Tate

- ° Both were involved in the 1962 incident and gave FBI statements describing the event.
- ° In their 1971 affidavits they repeat a similar story on the 1962 incident but now say the incident occurred in 1964 and involved Rehnquist.
- ° Tate claims the challenger did not wear glasses, but Rehnquist wore glasses at all times.
- ° Neither knew Rehnquist but only identified him as the 1964 challenger from a photograph they were shown in 1971 in connection with the Rehnquist confirmation.
- ° There are no independent reports of any incidents similar to what Harris and Tate claim happened in 1964.

Snelson McGriff

- ° The incident he described (an aggrieved Republican challenger, an ensuing scuffle, the police escorting the challenger to a car) is remarkably similar to the 1962 incident at Bethune.
- ° He is not sure the incident occurred in 1964.
- ° McGriff told the Committee in 1971 that the challenger was not wearing glasses at some time during the day, but Justice Rehnquist always wears glasses.
- ° The Republican poll watchers at Bethune in 1964, 1964 newspaper accounts of the election, police records and Judge Thomas Murphy (1964 Democratic Party Chairman) reported no incident at Bethune in 1964.
- ° He identified the challenger as William Rehnquist from a photograph shown him in 1971 in connection with the Rehnquist confirmation.

FACT SHEET ON ALLEGED HARASSMENT OF VOTERS BY
JUSTICE WILLIAM H. REHNQUIST IN THE EARLY 1960's

I. General Points -

1. Every specific allegation of voter harassment by Justice Rehnquist (one which identifies a particular year and voting precinct) has been completely refuted by a contemporaneous FBI report and eye-witness accounts, or, at a minimum, rendered highly unlikely by the witness' own internal inconsistencies and contrary testimony by other persons.

2. These events were all thoroughly explored in 1971 and completely discounted at that time. In any event, this ancient history has little bearing on the qualifications of a man who has served for fifteen years on the Supreme Court.

3. All of the people testifying before the Committee failed to make any such allegations at the time of the purported harassment or at the 1971 hearing.

4. Much of the testimony placing Justice Rehnquist at a particular precinct and year is consistent with what was already well known about his role as a GOP party official -- that in his capacity as legal advisor to challengers, Justice Rehnquist had occasion to visit precincts to mediate disputes and advise challengers.

5. Of the seven people who claim to have seen Justice Rehnquist actually challenge voters, five of those individuals did not know Justice Rehnquist at the time and identified him based on 1971 newspaper photographs -- seven to nine years after the alleged incident.

6. All those accusing Justice Rehnquist of challenging voters are committed Democratic or liberal activists. More importantly, 6 Democrats -- (including four state or federal court judges) -- refuted the harassment/challenging charges against Rehnquist.

7. All the Republican officials who testified stated that Rehnquist's role was merely one of a legal advisor who was only sent to settle disputes. It is inconceivable that Rehnquist would have been challenging voters, getting into fights, and spending most of his time travelling from precinct to precinct to harass and intimidate minority voters.

II. Allegations -

A. Bethune Precinct 1962 -

It has been alleged that Rehnquist himself aggressively challenged the literacy of minority voters in 1962, which led to a heated dispute that the FBI (accompanied by then - Assistant United States Attorney James J. Brosnahan) investigated at the time.

1. With the exception of Brosnahan and Charles Pine, everyone - the contemporaneous FBI report, police report and newspaper article, Brosnahan's supervisor, then - United States Attorney Carl Muecke, Justice Rehnquist's democratic counterpart Judge Hardy, 1962 Democratic County Chairman Vincent Maggiore, all eye witnesses interviewed at the time, Senator Kennedy and civil rights leaders in 1971 -- agrees that Rehnquist was not involved in the 1962 incident at the Bethune precinct. It is clear that a Republican designate aggressively asked minority voters at this precinct to read a card containing excerpts from the Arizona Constitution, that this "challenger" was consequently involved in a scuffle and that the challenger was subsequently accompanied out of the polling place to a car by police officers. This person, the only person involved in improper challenging in 1962, was not Justice Rehnquist, but was one Wayne Bentson.

2. Those who agree that Wayne Bentson, not Justice Rehnquist, was involved in challenging minority voters at Bethune in 1962 -

a) Wayne Bentson himself - In a contemporaneous 1962 FBI report, Bentson acknowledges that he was the one involved in the challenging dispute at Bethune and identifies two other Republican officials that were present at the precinct, neither of whom was Rehnquist. He states that he has no recollection of Rehnquist being involved in any way. (1962 FBI report, page 13-15; 1971 FBI interview with Bentson).

b) Everybody interviewed by the FBI in 1962, including United States Attorney Carl Muecke -

1. Carl Muecke - Muecke's initial phone call on election day to the FBI requesting corrective action identified Bentson as the Republican challenger creating controversy at Bethune. (1962 FBI report, page 2). Muecke also interviewed Bentson at Muecke's office on election day and personally investigated, along with an FBI agent, the Bethune precinct incident on that day. (Id.

at p. 5, 8). Muecke stated that the Republican challenger was Bentson (id. at p. 2) and that he was certain that Rehnquist, whom he knew at the time, was not present at the precinct during his investigation. (1986 FBI statement).

2. Z. Simpson Cox - A Democratic party official at the precinct described the incidents involving Bentson to the FBI. (1962 FBI report, p. 5). He also stated that he was "positive" that Rehnquist was not involved in any of the problems at the precinct and that Rehnquist's role at the precinct, if any, was that of a "peacemaker". (1986 FBI statement).

3. Carl Sims - A man who had a verbal dispute with the Republican challenger, identified the challenger as Bentson. Sims also said that "everything went smoothly after the removal of Bentsen". (1962 FBI report, p. 12-13).

4. All other persons interviewed by the FBI - All the interviewees described Bentson and the incidents he was involved in. Not one person referred to Rehnquist or to any additional or unidentified Republican challengers at Bethune.

c) Judge Charles L. Hardy - Judge Hardy was the lawyer in charge of a Democratic Party Committee which served as an arbitrator of voter challenges and disputes during the 1962 elections. In his letter to the Judiciary Committee in 1971, Judge Hardy unequivocally stated that Justice Rehnquist was not involved in the Bethune precinct incident. Specifically, he stated:

I can state unequivocally that Mr. Rehnquist did not act as a challenger at the Bethune Precinct. Because of the disruptive tactics of the Republican challenger at that precinct, I had occasion to be there on several occasions. . . . About [4:00 P.M.], after a scuffle, [this Republican challenger] was arrested and removed from the polling place by sheriff's deputies. Thereafter there was no Republican challenger at Bethune. . . . Challenging voters was not a part of Mr. Rehnquist's role in 1962 or subsequent election years, nor did he have anything to do with the recruitment of challengers or their assignments to the various polling places.

(1971 Senate Rept. on Rehnquist nomination, Executive Rept. No. 92-16, p. 9)

d) Edward Cassidy - Sgt. Cassidy of the Phoenix police department was either present or near the Bethune precinct during the entire election day in 1962. More importantly, he was present during the two altercations there during the day. He distinctly recollected that Wayne Bentson was the only Republican challenger involved and unequivocally stated that William H. Rehnquist took no part in any challenges or harassment.

e) Judge Vincent Maggiore - The 1962 Democratic County Chairman for Maricopa County testified unequivocally that he personally investigated the problems at Bethune precinct in that year, and that Rehnquist, whom he knew at the time, was not involved in such problems and that he had not received any complaints at Democratic headquarters about Rehnquist in connection with any other problems at other precincts. (Hearing Transcript, August 1, 1986, p. 395, 396).

f) Bessie Sass - Democratic Marshal at Bethune in 1962, told the FBI that Rehnquist was not involved in any violation or altercation (1986 FBI Report).

g) Contemporaneous police report - A police report filed 11/6/62 by Patrolman Bolden of the Phoenix police gives a lengthy description of an altercation taking place at Bethune precinct around eleven o'clock. Wayne Bentson is the only GOP official identified as being present at Bethune and is clearly stated as to have been the person involved in the altercation. Justice Rehnquist is nowhere mentioned.

h) Contemporaneous news account - The Arizona Republic story of November 7, 1962 about the Bethune incident specifically identifies Wayne Bentson as the Republican challenger who engaged in aggressive challenging of voters and created the resulting fracas. It also states that James Brosnahan investigated complaints about the Bethune incident in 1982.

i) Ralph Staggs - Mr. Staggs, Chairman of the Maricopa County Republican Committee in 1962, also makes clear that Justice Rehnquist was not involved in any challenging at the Bethune precinct and that Wayne Bentson was the Republican challenger that was involved in the dispute. (1986 FBI Statement).

j) Jack Swift - Poll Watcher at Bethune in 1962 did not see Rehnquist challenge voters. (1986 Affidavit).

k) All the Republican officials testifying before the Committee - Messrs. Bush, Robertshaw, Marshal, Randolph and Turner - told the Committee that allegations of voter challenging let alone voter harassment, were utterly inconsistent with Rehnquist's duties on election day, 1962. Those that do recall the incident firmly fix Wayne Bentson as the only GOP official involved in the Bethune incident. Specifically, George Randolph was present at Bethune in 1962 and testified that he did not see Rehnquist challenge any voters.

l) Senators Kennedy, Bayh, Tunney and Hart in 1971 - The four Senators on the Judiciary Committee in 1971 who filed dissenting views to the majority report expressly stated that it was clear that Justice Rehnquist was in no way involved in disputed challenges of Democratic voters at Bethune in 1962. Specifically, the dissenting Senators stated (1971 Senate Rept., p. 41):

Judge Hardy only confirms what was already documented by contemporaneous news accounts and by an FBI report: that there was voter harassment and a fight at Bethune in 1962, and that Mr. Rehnquist was not involved in it.

m) Civil Rights Leaders in 1971 - Similarly, civil rights leaders conceded in 1971 that Rehnquist was not involved in any improper electoral activities at Bethune in 1962. See, e.g., National Observer, Nov. 28, 1971, p. 4, col. 1. (per Nina Totenberg) ("But civil rights leaders contend that two separate incidents occurred at Bethune: one in 1962, in which Rehnquist, they now admit was not involved, and one in 1964, in which they contend he was involved.")

3. Those who maintain that Rehnquist was challenging voters at Bethune in 1962 -

a. Mr. Brosnahan (maybe sort of) -

1. Mr. Brosnahan, a self-described "liberal Democrat", does not maintain that he saw Justice Rehnquist challenge any voters at Bethune precinct in 1962 (or anywhere else). For example, in the Associated Press story of July 26, 1986, Mr. Brosnahan states only that "I recall William Rehnquist was there. I cannot say I saw anything specifically that he did." See Baltimore Sun, July 26, 1986, p. 8A. Similarly, on Nina Totenberg's July 25th National Public Radio broadcast, Brosnahan said "My best recollection is that

[Rehnquist] was serving as a challenger of voters . . . I didn't see him do anything and I cannot testify or say what it is that he was doing as a challenger." Nor has Mr. Brosnahan ever asserted elsewhere that he ever witnessed any challenging of voters by Rehnquist. For example, Brosnahan told investigators from The Nation Institute: "In 1962 there was a group of Republicans challenging black and Hispanic voters . . . the only thing that I can say about William Rehnquist is that he was part of that effort. I cannot say exactly what he did." (Nation Institute Press Release, p. 7). Similarly, Mr. Brosnahan told the Washington Post, "my best recollection is that he [Rehnquist] was challenging voters, but that was 1962 and this is 1986." Washington Post, July 25, 1986, p. A4. He provided the same story to the Committee.

2. Brosnahan told the Judiciary Committee that he was not sure that it was Bethune precinct at which he saw Mr. Rehnquist, suggesting that it might have been some other precinct in south Phoenix. This directly contradicts what he told both the Washington Post and the Nation Institute in his first public statements concerning this incident. See Washington Post July 25, 1986, p. A4, ("Brosnahan, however, said there were enough complaints about the GOP challenges at the Bethune precinct in 1962 that he went there with an FBI agent to investigate"); Nation Institute press release, p. 6 ("Brosnahan was called to the Bethune polling place in November 1962 to investigate allegations that Republican poll challengers were obstructing minority voters . . ."). Before the Committee, however, Brosnahan conveniently changed his story to include other unidentified precincts, presumably because he discovered the overwhelming evidence conclusively establishing that Rehnquist did not act as a challenger at Bethune. (Note that Brosnahan's Committee testimony makes it clear that he was aware, before he testified, of the 1962 Arizona Republic article which places him at Bethune in 1962 and identifies Wayne Bentson as the Republican challenger involved in the dispute there. Hearing Transcript, August 1, 1986, p. 251-252.)

In any event, it is extraordinarily unlikely that Brosnahan saw Rehnquist at any other precinct in 1962. Brosnahan's superior, Carl Muecke only mentions receiving complaints about, and having the FBI investigate, the incidents at Bethune precinct in 1962. Moreover, as noted, the Arizona Republic article identifies Brosnahan as being present at the Bethune precinct. Accordingly, Mr. Brosnahan's eleventh-hour attempt to change his story in order to avoid the overwhelming evidence relating to Bethune precinct in 1962 simply cannot be given the slightest credence.

3. Brosnahan admits that he never saw Rehnquist act as a challenger, but he believes Rehnquist engaged in such activity because people at the precinct told him so and Rehnquist did

not deny it. Given Brosnahan's complete absence of personal knowledge and concededly fuzzy recollection of even the 24-year-old hearsay information upon which he exclusively relies, there is no conceivable basis upon which he can contest the 1971 Judiciary Committee's unanimous finding that the 1962 incident was, at most, a case of "mistaken identity" (i.e. confusing Rehnquist with the true Republican challenger, Bentson). Any assertion that Rehnquist was present at Bethune precinct in 1962 is, of course, completely consistent with Justice Rehnquist's statement at the 1971 confirmation hearing, where he made clear that he had gone to various precincts to help settle disputes that had arisen, which would presumably include Bethune. Brosnahan has no personal knowledge beyond that and any contention that Rehnquist challenged voters is thoroughly refuted by the overwhelming contrary evidence discussed above.

In any event, Mr. Brosnahan's credibility on this question is extremely suspect. First, he never said or did anything in 1962 which implicated Justice Rehnquist in any way in the Bethune incident, notwithstanding the fact that the FBI investigation in which he was purportedly involved never hinted at any involvement by any person other than Bentson. Mr. Brosnahan needs to explain why he never sought to correct this "glaring omission" in the FBI investigation or otherwise attempted to "expose" Rehnquist's alleged participation in these events. Nor did Mr. Brosnahan come forward in 1971, despite the notoriety these allegations received, apparently because he "decided not to bother." Washington Post, July 25, 1986, p. A4. Finally, as noted, Brosnahan has substantially changed his story to include precincts other than Bethune in an obvious attempt to implicate Justice Rehnquist.

b. Charles Pine - As with Mr. Brosnahan, Mr. Pine's assertion that Rehnquist challenged voters at Bethune precinct in 1962 cannot be given any credence in light of the overwhelming evidence described above. Moreover, Judge Maggiore testified that he did not receive any complaint from Mr. Pine, whom he knows, concerning Rehnquist's activities at Bethune or any other precinct in 1962. Moreover, although Mr. Pine is able to quote what Justice Rehnquist said to different voters, his memory in other respects is peculiarly deficient and inconsistent. For example, he cannot seem to consistently identify the number of voters Rehnquist allegedly challenged. According to Pine, former chairman of the Arizona Democratic Party, Rehnquist challenged "at least" two voters (New York Times, July 27, 1986), exactly two voters (Washington Post, July 25, 1986, Hearing Transcript, August 1, 1986, p. 293), "one or two voters" (National Public Radio broadcast, July 25, 1986) or methodically challenged an entire line of voters (Nation Institute Press Release, July 25,

1986). Moreover, Pine informed National Public Radio that these challenges occurred at Bethune in 1962, but told the Nation Institute that "[h]e could not remember the specific years or precincts" (National Institute Press Release, p. 3) and was similarly unable to identify either the time or place in his other public statements. See Washington Post, July 27, 1986; New York Times, July 27, 1986. Similarly, in his testimony before the Committee, Mr. Pine alternatively stated that the challenging occurred at Bethune in 1962 and 1964. (Transcript, p. 292)

Nor is Mr. Pine entirely clear as to where County Democratic Headquarters were located. Though he told the Committee he reported the incident to County Headquarters on East Roosevelt Street, Judge Maggiore, then chairman of the Maricopa County Democratic Party, stated that they were located on Washington Street. More important, Judge Maggiore did not receive nor hear of any complaint by Mr. Pine on the day in question. Mr. Pine also told the Committee that he discussed the Bethune incident and Justice Rehnquist's involvement with Judge Charles Hardy. Judge Hardy, however, told the Committee in 1971 that he was completely unaware of Rehnquist's involvement in any such incident.

Finally, Mr. Pine told the Committee that, quite apart from any charges of voter intimidation, he adamantly opposed Justice Rehnquist's jurisprudence, particular his "alarming insensitivity to civil liberties and the bill of rights." (Hearing Transcript August 1, 1986, p. 296). Understandably, Pine did not come forward at the 1971 hearing to present this testimony.

B. Other Allegations -

Three other people - Melvin Mirkin, Manuel Pena and Sidney Smith told the Committee that Rehnquist was involved in Republican challenges to minority voters at different (or unidentified) places in Phoenix during the early 1960's. Mr. Mirkin's testimony is fully consistent with Rehnquist's 1971 testimony. The other statements lack credibility and are contradicted by persons in the best position to know the truth.

1. Melvin Mirkin -

Mr. Mirkin, a Phoenix attorney, simply states that he saw Mr. Rehnquist advising Republican challengers at a precinct in south Phoenix one election day in the early 1960's and makes clear that Rehnquist was not personally challenging voters. Of course, Justice Rehnquist has always maintained that his role was to provide legal

advice to Republican challengers, so it would be perfectly natural (and perfectly consistent with his 1971 testimony) for him to so advise challengers before the polls opened or in response to a call, as Mr. Mirkin's testimony suggests. (See Hearing Transcript, August 1, 1986, p. 273.) This is particularly true since Mr. Mirkin's memory is that Rehnquist was only at the precinct for 10 to 15 minutes. Id. at 286. Accordingly, the testimony of Mirkin and Rehnquist is fully consistent.

Mr. Mirkin also opined that Rehnquist was speaking to the challengers so that voters in the line could hear his instructions. Mr. Mirkin also makes clear, however, that Rehnquist was speaking in a "room in which normal conversation could be heard from one end to the other" (id. at 278) and would not characterize Rehnquist's speaking voice as "unnecessarily loud". (Id. at 281.) So there is no reason to infer that Rehnquist's intended audience included more than the challengers. In any event, there is obviously nothing wrong with alerting voters that those "persons who were improperly registered" (id. at 273) would be subject to challenge.

Mirkin further stated that Mr. Rehnquist is an honorable man and that he "would not contradict him if he believes something other than what I have said happened". (Id. at 283.) He accurately characterizes this incident as "small potatoes" and states that he believes that Justice Rehnquist should be confirmed. Finally, Mr. Mirkin makes it clear that he never saw any of the challengers allegedly advised by Rehnquist actually challenge voters, through literacy tests or otherwise, let alone engage in any harassment or other improper conduct.

2. Manuel Pena -

Mr. Pena, a Democratic State Senator, testified that in 1964 Justice Rehnquist personally challenged voters at the Butler precinct, which, by Mr. Pena's estimate, is 60% Anglo. Rehnquist was allegedly checking each person's residency, but not their ability to read. Mr. Pena's testimony strains credulity beyond the breaking point for several reasons.

First, Mr. Pena admits that he never met Rehnquist in 1964 (or in subsequent years) but was able to identify him solely on the basis of a newspaper picture he saw approximately seven years later. Second, Pena testified that he called Democratic headquarters in 1964 and asked them to dispatch someone to resolve his dispute with the Republican challenger. However, Thomas Murphy, Democratic County Chairman in 1964, told the FBI that he personally investigated such complaints in 1964 and that the allegations against Justice Rehnquist are a "bunch of crap". Further, it is undisputed that

Justice Rehnquist did not have challenging credentials, a legal prerequisite to engage in challenging, in 1964, but Mr. Pena maintains that he was permitted to sit at the election table without any precinct official, apparently including Mr. Pena, seeking any such identification. Nor did Mr. Pena ask him his name during their nearly hour-long confrontation. Third, Mr. Pena states that Rehnquist called Republican headquarters and returned to inform Pena that his challenging activities were legal and correct. It is simply incredible to suggest that Rehnquist, the Republican legal advisor during this period, would need to call headquarters to determine the propriety and legality of his challenging activities. Finally, of course, Mr. Pena made no effort in 1971 to bring these very serious allegations to the Committee's attention, despite the notoriety this issue received.

3. Sydney Smith -

Sydney Smith, a Democratic poll watcher in 1962, testified that he saw Justice Rehnquist aggressively inform black voters that they were illiterate and therefore could not vote. Smith can remember neither the year nor precinct in which this incident allegedly occurred. Remarkably, however, he is able to positively identify Rehnquist and even supply verbatim quotes of what Rehnquist said to the voters. Given Mr. Smith's complete inability to remember either the time or place of the incident, it is difficult, if not impossible, to specifically demonstrate that his allegations are untrue. However, like the others, Mr. Smith has not succeeded in developing a consistent version of his story.

For example, he told both the FBI and National Public Radio that he saw Rehnquist challenge a group of people, both black and Chicanos. But he testified before the Committee that he had only seen Rehnquist challenge two people, both of whom were black. Similarly, he told National Public Radio that "some of [the challenged voters] had actually left" the voting line after Rehnquist challenged them. Yet he informed the Committee that none of the voters actually left. Hearing transcript August 1, 1986, p. 319. Again, although Smith testified that he personally called Democratic Headquarters, Judge Maggiore testified that he had received no such complaint about Justice Rehnquist. Finally, when asked to explain why he never testified about this in 1971, Smith told the Committee that he had been negligent back then and had subsequently been shamed by his children into testifying. Hearing transcript August 1, 1986, p. 310, 321. However, he informed National Public Radio that he had contacted Senator Carl Hayden's staff about this incident in 1971, but they never got back to him. This is understandable, since Carl Hayden was not the senator from Arizona in 1971.

III. Rehnquist Lacks Integrity Because He Was Involved In
Republican Party Election Efforts In the Early 1960's .

A minority of Senators maintained in 1971 that simply because Rehnquist was involved in Republican party efforts to ensure electoral integrity in the early 1960's, he is not qualified to be a Supreme Court justice, regardless of whether he engaged in any improper harassment of minority voters. This nonsensical charge was properly rejected by a majority of the Senate in 1971 and should be again by any fair-minded Senator.

There is nothing improper about a party seeking to prevent electoral fraud by monitoring the bona fides of potential voters. It is a well-documented political fact that where, as in Phoenix in the early 1960's, one party controls the electoral machinery, voting abuse is common. Accordingly, it was perfectly appropriate for the Republican party to assign officials to check voter residency in order to dissuade the voting of tombstones and vacant lots. This was clearly the thrust of the Republican Party's efforts in the 1960's.

Similarly, until 1964, Arizona electoral law prohibited any illiterate person from voting. Thus, so long as literacy tests were not applied indiscriminately or in a harassing manner, the party was fully within its legal rights to engage in such practices. Justice Rehnquist made clear that he opposed, then and now, any indiscriminate use of literacy testing or other actions designed to discourage qualified voters. Judge Hardy confirms this:

Mr. Rehnquist met with all of the challengers to explain the voting laws to them. All of these persons insist that the instructions given by Mr. Rehnquist did not in any way suggest that challenges be conducted in a manner to prevent properly qualified persons from voting. . . . He expressed strong disapproval of the [harassment] tactics which I have mentioned above. I felt then and I feel now that his expressions of disapproval were genuine. 1971 Senate Rpt., p. 9.

Thus, the argument of the Senators in 1971 constitutes nothing more than guilt by association: Mr. Rehnquist lacks integrity, not because of any personal wrongdoing, but merely because he was involved in a ballot security effort in which one or more lower-level functionaries behaved improperly.

Additional Information Regarding Voter Harassment Charges

A. Bethune Precinct 1964 -

There is also no credible testimony linking Rehnquist to any improper challenges of minority voters at Bethune in 1964 or even any such testimony indicating that these sort of challenges took place at all in that year. Indeed, by far, the most likely explanation of any statements to that effect are that the persons so stating have confused the 1964 election with the events that occurred at Bethune during the 1962 election.

1. Four persons - Robert Tate, Jordan Harris, Quincy Hopper, and Rev. McGriff - apparently pursuant to solicitations by the Southwest Chapter of the N.A.A.C.P., stated in 1971 that a person who resembled Rehnquist's 1971 newspaper photos was involved in a 1964 incident at Bethune in which minority voters were challenged for literacy. The story told by each of the 1971 affiants concerning the 1964 election is remarkably similar to the dispute in which Bentson was involved at Bethune in 1962. These people state that a Republican challenger aggressively asked minority voters to read a card containing excerpts from the Arizona Constitution, that this action resulted in a scuffle and that two police officers subsequently arrived and accompanied the Republican challenger to a car. Of course, this is precisely what occurred in 1962 and which led the majority of the Judiciary Committee to conclude that the allegations concerning the 1964 election were, at most, a case of mistaken identity.

2. There is ample additional evidence which strongly indicates that, at a minimum, the 1971 affiants were confused concerning the year in which this occurred and, in any event, their identification of Justice Rehnquist as the Republican challenger.

a. Both Rev. McGriff and another 1971 affiant, Robert Tate, maintained that the Republican challenger they described was not wearing glasses. (McGriff said that the Republican challenger was wearing glasses earlier in the day, before he was removed by police). It is undisputed, however, that Justice Rehnquist wore glasses at all times during the relevant period.

b. The Phoenix police have no record indicating any disturbance or dispute at the Bethune precinct in 1964. (See Arizona Republic, Nov. 16, 1971, p. 1.) Nor is there any other record of any such dispute with the FBI or elsewhere.

c. A Phoenix newspaper article the day after the 1964 election concerning disputed challenges to the credentials of Democratic voters lists a number of election precincts where this occurred, but does not indicate that any such incident took place at the Bethune precinct. (Arizona Republic, Nov. 4, 1964, p. 17.)

d. Judge Thomas Murphy, Acting Democratic Chairman in 1964, personally investigated disturbances during the 1964 election and recalled no incident at Bethune or any complaints about Justice Rehnquist.

e. Manuel Pena told the Committee that he was at Bethune on numerous occasions throughout the day in 1964 and does not recall any complaints in that year. (Hearing Transcript August 1, 1986, p. 346).

f. Odessa Curry, a GOP poll watcher at Bethune in 1964, recalled no incidents at the precinct. (1971 FBI Report).

g. Rev. McGriff admits that he is "not positive" that the incident he described occurred in 1964. (Washington Post, July 29, 1986)

h. Robert Tate and another 1971 affiant, Jordan Harris, were both involved in the 1962 incident at Bethune. Tate was interviewed by the FBI in 1962 and related a story quite similar to his 1971 affidavit's account of what occurred in 1964.

i. In his 1971 statement to the FBI, Bentson said that he does not believe Rehnquist was involved in any challenges in 1964 and that he was unaware of any incidents at Bethune. In addition, Messrs. Bush, Staggs, Randolph, Turner, Marshall and Robertshaw all testified that Rehnquist was not involved in any challenges in 1964.

j. It is undisputed that Rehnquist was co-chairman of the Republican's ballot security program in 1964. Given this elevated status, it is extraordinarily unlikely that Rehnquist was personally challenging voter credentials at Bethune or elsewhere. Moreover, Rehnquist unequivocally states that he was neither at Bethune in 1964 nor personally challenging minority voters.

k. Judge Hardy unequivocally stated that "challenging voters was not a part of Mr. Rehnquist's role in 1962 or subsequent election years." (1971 Senate Rept., p. 9.)

l. In 1964, unlike 1962, it was unlawful under the Civil Rights Act to give literacy tests to voters.

B. Bethune 1964 - Additional Facts About Witnesses

A number of individuals who did not appear before the Committee resserted charges they made in 1971. Both the Rev. Snelson McGriff and Quincy Hopper again alleged Rehnquist's participation

in voter harassment during the early 1960's. Their claims, along with those of Jordan Harris and Robert Tate, were dismissed by the Committee in 1971 as contradictory, ambiguous and unfounded.

1. Rev. Snelson McGriff - In addition to telling a story remarkably similar to the incident occurring at Bethune in 1962, the Reverend's story is full of a number of inconsistencies seriously undermining its credibility. Rev. McGriff, for example, is not sure whether the incident took place in 1962 or 1964 (see Washington Post, July 29, 1986); he has given contradictory statements concerning whether he "stood around" at the precinct (1971 affidavit) or immediately left the scene (1986 FBI); whether the police entered the precinct and brought out the challenger (1971 affidavit) or remained outside (1986 FBI Report). In addition, McGriff stated in 1971 that the challenger, when leaving the precinct, was not wearing his glasses -- highly unlikely given the fact that Rehnquist always wears glasses. Finally, Odessa Curry (Republican poll watcher at Bethune in 1964), contemporaneous newspaper accounts, police reports, George Randolph (present at Bethune in 1964 as part of the GOP lawyers' committee) and Judge Thomas Murphy (1964 Democratic Party Chairman) all reported no incident at Bethune in that year. It seems likely, therefore, that Rev. McGriff's recollections are those of the '62 Bethune incident involving Wayne Bentson.

2. Quincy J. Hopper - The incident Mr. Hopper describes as occurring in 1964 is remarkably similar to the incident that occurred at Bethune in 1962. Mr. Hopper claims Carl Sims was involved in trying to settle the dispute at Bethune in 1964, but Mr. Sims' own statement in a 1962 affidavit, two years before Hopper says the incident even occurred, describes the incident involving Bentson. At no time has Mr. Sims described an incident occurring at Bethune in 1964. Hopper also claims that "he saw two policemen escorting the challenger to his car." Mr. Sims describes the similar incident as occurring in 1962, and furthermore, Mr. Sims makes no reference to Mr. Rehnquist. Mr. Hopper admits his memory is fuzzy, and it wasn't until 1971 that he made an affidavit. Carl Sims submitted an affidavit in 1962 immediately after the incident. While there is no police report or newspaper account of any incident at Bethune in 1964, there is a police report and news account of the incident in 1962. The election commissioners and poll watchers present at Bethune in 1964 described no such incident.

Finally, when contacted in 1986, Mr. Hopper now says he did not see the police escort Mr. Rehnquist out but that he had only heard that the incident had occurred. He also didn't know Rehnquist at the time but was shown a photograph in 1971, which is how he identified the challenger as Justice Rehnquist.

3. Jordan Harris and Robert Tate - These two men described an incident occurring at Bethune in 1964. According to their statements, the challenger was involved in a scuffle with various voters. The police had to escort the challenger out of the building. From these facts, it is again apparent that they are describing the incident that occurred in 1962, not 1964. In fact, both Tate and Harris were interviewed by the FBI in 1962 regarding the Wayne Bentson incident. Their statements of 1971 are remarkably similar to the statements they gave the FBI in 1962. The only real difference between the two statements is that in 1971 Tate claims the incident occurred at Bethune in 1964, while in his earlier statement he claimed the incident was for Bethune in 1962. It is apparent that after 9 years, Mr. Tate had forgotten the year and the real identity of the challenger.

There are a couple of other problems with the Harris and Tate testimony. Neither of them knew Rehnquist at the time, but only identified him from a photograph they were shown in 1971 in connection with the Rehnquist confirmation hearing. Tate states the challenger was not wearing glasses. This is consistent with McGriff, but seems to be describing Bentson, because Justice Rehnquist wore glasses at all times. Finally, there is no police record, newspaper account, or FBI report describing an incident occurring at Bethune in 1964.