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Civil Rights, Women's Groups To Fight Rehnquist Confirmation

Senate Hearings on Chief Justice Nominee to Begin Today

By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

Civil rights and women's organizations vowed yesterday to ignore the odds and wage an all-out battle to block William H. Rehnquist's confirmation as the 16th chief justice of the United States.

The Senate Judiciary Committee will begin hearings late today, with Rehnquist scheduled as the lead witness. The hearings were to have begun this morning, but were delayed until 4 p.m. to accommodate senators wishing to attend services for the late W. Averell Harriman.

Rehnquist is expected to face prolonged questioning, according to both Senate advocates and opponents of his nomination. The hearings are expected to last through Thursday.

In Phoenix, meanwhile, the FBI is inquiring into recently renewed allegations of voter harassment involving Rehnquist in the late 1950s and early 1960s.

"It's a priority item," an FBI spokesman said yesterday. "If they [agents in Phoenix] have to work all night, they will."

Organizations opposing Rehnquist's nomination are united under the Leadership Conference on Civil Rights, whose officials assailed Rehnquist in unusually harsh language at a news conference on Capitol Hill yesterday.

Benjamin L. Hooks, chairman of the liberal coalition, denounced Rehnquist as "an extremist . . . an enemy of civil rights" whose rulings in cases involving segregation show a consistent hostility to minorities.

Eleanor Smeal, president of the National Organization for Women, charged that Rehnquist's record on women's rights reflected "a 19th-century view of people." Responding to one question in heated tones, she said it was not Rehnquist's Republicanism that was at issue—"I testified for [Justice] Sandy Day O'Connor," she interjected—but his fundamental views on vital issues.

"He's not just reactionary on our issues," Smeal protested. "It's more than that. It's frightening . . . . He is an advocate of the view that the state can do anything it wants in sex discrimination . . . . His viewpoint is one of unlicensed state behavior. He's a disaster for women."

Despite the vocal opposition, Senate Judiciary Committee Chairman Strom Thurmond (R-S.C.) has said he expects Rehnquist to be confirmed without trouble. The committee's ranking Democrat, Joseph R. Biden Jr. (Del.), has agreed to have the committee vote on the nomination Aug. 14.

A key Republican staff member dismissed the controversy over Rehnquist's role as a Republican activist in Phoenix as "Act One of a liberally orchestrated effort to, at the least, make life miserable for Bill Rehnquist and slow down, if not try to stop, his nomination. At the core of all this is the fact that they don't like the fact that Justice Rehnquist is an unabashedly conservative man, pure and simple."

About half a dozen individuals from Phoenix have said recently that they saw Rehnquist personally challenging black and Hispanic voters in statewide elections, most particularly in 1962. Their statements conflict with a 1971 account by Rehnquist, who said, in response to similar allegations, that he had never "personally engage[d] in challenging the qualifications of voters."

Sens. Howard M. Metzenbaum (D-Ohio) and Paul Simon (D-Ill.) asked yesterday that all witnesses who might have relevant information about Rehnquist's role as chairman of "ballot security" and similar programs for the Phoenix GOP be asked to testify, it was learned.

Mark Goodin, a spokesman for Thurmond, said the FBI should first be given time to interview these people. "It would seem wise not to put the cart before the horse," Goodin said when asked if they would be called to testify.

Goodin said Thurmond "has approved a routine follow-up by the FBI . . . . They do this all the time. It's as routine as a summer thunderstorm."

In a related development, the Justice Department rebuffed a request from committee Democrats for all records bearing Rehnquist's name as assistant attorney general in charge of the Office of Legal Counsel (OLC) between 1969 and 1971 and dealing with any of four subjects: executive privilege, national security, civil rights and civil liberties, and two of President Richard M. Nixon's Supreme Court nominations.

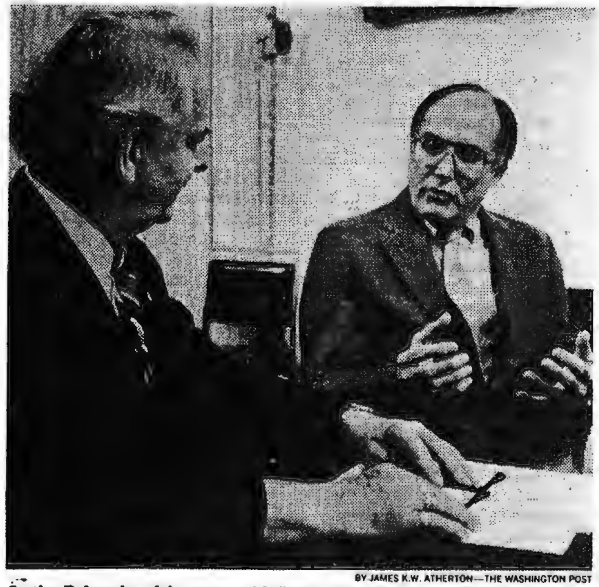
Assistant Attorney General John R. Bolton, citing attorney-client privilege, said the OLC was "not at liberty to disclose confidential memoranda, opinions and other deliberative materials" concerning its advice to the executive branch.

Opponents of Rehnquist's nomination were asked at yesterday's news conference whether they were upset by the nomination because of the justice's reputation for possessing formidable intellect.

Washington attorney Joseph L. Rauh Jr., one of Rehnquist's chief opponents at the 1971 hearings on his nomination as an associate justice, responded with exasperation.

"Oh sure, he's got a high IQ," Rauh said. "So what? Let them appoint [conservative lawyer] Roy Cohn. He's got a high IQ. Everyone I know has a high IQ. This man is disqualified for the job because he doesn't believe in individual rights."

Rehnquist, 61, has declined to comment to reporters since his nomination. His opening testimony this afternoon will mark his first public statement since President Reagan ushered him into the White House press room June 17 to announce the nomination.



BY JAMES K.W. ATHERTON—THE WASHINGTON POST

Justice Rehnquist, right, meets with Senate Minority Leader Robert C. Byrd.

ASSOCIATED PRESS

Benjamin Hooks, center, head of liberal coalition opposing Rehnquist, consults with Eleanor Smeal and Joseph Rauh Jr.

THE WASHINGTON TIMES
Monday, August 11, 1986
editorial page

Why Ted fears Rehnquist

Sen. Edward Kennedy's drilling of William Rehnquist has focused on the justice's supposed threat to women and minorities and is based on events a quarter-century old. But Mr. Kennedy has personal reasons for fearing a Rehnquist court. Under consideration for Supreme Court action is a case that directly challenges Mr. Kennedy's last election, and Mr. Rehnquist would not shy from it as Warren Burger has.

The case, *Hopfmann* vs. *Connolly*, challenges Massachussetts's "15 percent" rule, which was used to keep one of Mr. Kennedy's potential challengers off the ballot. Having been written by the Massachusetts Democratic Party and made into quasi-law by an advisory opinion, the rule is an affront to the Constitution, though a boon to election-steering insiders. Mr. Rehnquist's views on a similar case (which involved only a state official) make it apparent that he would incline to give *Hopfmann* its day in court.

The Hopfmann case is one of several challenging party insiders, including cases from Connecticut, New Jersey, and California. The complaints center on the practice of steering elections via ballot selection. In Massachusetts, for example, a candidate must get 15 percent of the vote in a state convention. Because convention delegates tend to be cogs in the Kennedy machine, a meaningful challenge is nearly impossible.

A big boost for the underdogs came in the recent *Davis* vs. *Bandemer* redistricting case. Besides finding that political groups, like racial groups, are deserving of civil rights protection, the court speaks directly to the *Hopfmann* situation: "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process ... this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates . . . and hence their chance to directly influence the election returns and to secure the attention of the winning candidate."

Those currently locked out of the process complain, rightly, that they have been relegated to second-class citizenship, allowed to vote only for candidates chosen by party bosses, not by democratic processes.

In short, Mr. Kennedy and his cronies have been harassing and intimidating voters in a big way. With Mr. Rehnquist at the head of the Supreme Court, this could change.

THE WASHINGTON TIMES
Monday, August 11, 1986
page 3A

Minority know of Rehnquist in journal's poll

NEW YORK (UPI) — Most Americans don't know who Justice William Rehnquist is, despite his well-publicized nomination to replace retiring Chief Justice Warren Burger.

According to a public-opinion poll released yesterday by the National Law Journal, a weekly paper for lawyers, during the American Bar Association convention, 59 percent of 1,004 respondents said they do not know who Justice Rehnquist is.

Twenty-six percent correctly identified him as a justice.

Only 16 percent identified federal appeals court Judge Antonin Scalia as the nominee to fill Justice Rehnquist's seat on the court, while 74 percent were unfamiliar with him.

Even though the survey suggests there is little public awareness of how the Supreme Court operates or who its members are, a majority of respondents said Supreme Court justices should be picked by the voters instead of the president.

The survey showed 59 percent said high court justices should be elected, compared with 39 percent who said they should be appointed and 2 percent who didn't know.

Conducted by Penn & Schoen Associates, the poll has a margin of error of 3 percent. The survey was released in conjunction with the ABA convention in New York this week.

Almost three-fourths of those surveyed, 73 percent, said federal district and appeals court judges should be elected, while 24 percent said they should be appointed and 3 percent were unsure.

Under the Constitution, the president is responsible for nominating federal judges — including Supreme Court justices — and the Senate must confirm them.

Ninety-one percent of those surveyed said the terms of federal judges should be limited, while 7 percent approve of life tenure. The Constitution specifies that federal judges serve for life.

The survey shows wide support for the Sixth Amendment, which guarantees that lawyers will be appointed to represent poor defendants. Ninety-four percent of the respondents said people too poor to hire a lawyer are entitled to one, while 5 percent disagreed and 1 percent did not know.

The poll also shows that lawyers do not get much respect — only 12 percent of those responding said they would recommend a law career to their children.

Fifty-five percent of those polled said there are too many lawyers in the United States, compared with 21 percent who said there are too few, 9 percent who said there are just the right number and 15 percent who were unsure.

The survey respondents also identify lawyers as a major causein the nation's litigation explosion, which has prompted Congress and state legislatures to consider bills to cap awards or attorney fees in damage cases.

The poll is likely to be ammunition for the ABA's Commission on Professionalism, which studied the public perception of lawyers and issued a lengthy report in time for this week's gathering.

"There's an unease, particularly among lawyers, that the profession's image is suffering," said ABA President William Falsgraf. "Among lawyers, there is a feeling that perhaps we've become more concerned with the business aspects of law rather than the service aspects. If people are feeling uneasy about it, it behooves us to take a long, hard look."

THE NEW YORK TIMES
Sunday, August 10, 1986
page 24

Reagan, in Radio Talk, Assails Rehnquist Critics

By NEIL A. LEWIS
Special to The New York Times

WASHINGTON, Aug. 9 — President Reagan today denounced Congressional critics of Justice William H. Rehnquist, his nominee for Chief Justice of the United States, saying that they were motivated by political considerations.

Mr. Reagan, in his weekly radio address, said that efforts by some members of the Senate Judiciary Committee to find damaging evidence that would enable them to deny Justice Rehnquist the post had failed. He said Justice Rehnquist and Judge Antonin Scalia, his nominee to be an Associate Justice if Justice Rehnquist becomes Chief Justice, "emerged unscathed from last week's hearings." He said he was "confident" that they would be confirmed by the Senate.

Mr. Reagan said documents written by Mr. Rehnquist when he was an official in the Justice Department in the Nixon Administration demonstrated that the criticisms of him were unfounded and politically motivated.

"There were dark hints about what might be found in documents Judge Rehnquist wrote while a Justice Department official many years ago," Mr. Reagan said. "To deal with these unfounded charges, I took the unusual step of permitting the Senate committee to see the documents themselves. Of course there was nothing there but legal analyses and other routine communications."

Dispute Over Documents

"The hysterical charges of cover-up and stonewalling were revealed for what they were — political posturing."

Mr. Reagan at first refused a request from some committee members that they be allowed to see documents written by Mr. Rehnquist when he was head of the Office of Legal Counsel in the Justice Department from 1969 to 1971. The President, through a spokesman, said he would refuse under the doctrine that the executive branch has the privilege of withholding information from Congress and the courts.

Some Committee members said they were interested in finding out if Mr. Rehnquist had counseled the Nixon Administration about possible illegl activiities involving wiretapping or surveillance of domestic groups.

On Tuesday the Justice Department announced that the Administration would release the materials sought by the committee. Committee members who viewed the documents under an agreement not to disclose their contents said they contained nothing that could be used to discredit Mr. Rehnquist.

"I was sorry to have to release these documents," Mr. Reagan said today, "but Supreme Court nominees are so important I did not want my nominees to enter upon their responsibilities under any cloud."

Today was the second time this summer that Mr. Reagan has used his radio speech to defend his appointments to the Federal courts and lash out at what he has described as partisan manipulation.

In June the Senate Judiciary Committee for the first time rejected one of his nominees, Jefferson Sessions 3d, to be a Federal district judge in Mobile, Ala. On July 23, after a long battle, the Senate narrowly approved the nomination of Daniel A. Manion to be a judge on the United States Court of Appeals for the Seventh Circuit in Chicago.

Today Mr. Reagan promised to continue to name more conservative lawyers to the Federal bench.

"During the last few election campaigns, one of the principal points I made to the American people was the need for real change in the makeup of our judiciary," he said. "I argued the need for judges whok would interpret law, not make it."

Mr. Reagan praised the legal qualifications of Judge Scalia and Justice Rehnquist and said, "I can assure you, we will appoint more judges like them to the Federal bench."

THE WASHINGTON POST
Sunday, August 10, 1986
front page

Rehnquist Hearings Leave Question of Veracity

By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

NEWS ANALYSIS

When the Senate Judiciary Committee meets Thursday to vote on William H. Rehnquist's nomination to become chief justice of the United States, its members will have an uncomfortable question to settle—or avoid.

That question is whether Rehnquist was telling committee members the truth when he testified late last month on controversies about his conduct as a law clerk in the 1950s, a Phoenix lawyer in the 1960s and finally as a Supreme Court justice in the 1970s, in his early years on the court.

Rehnquist has suggested that the central question for the senators ought to be: "Have I fairly construed the Constitution in my 15 years as a justice?"

His critics on the committee maintain that it is not his conservative jurisprudence that counts as much as his truthfulness.

Rehnquist's veracity, not his philosophy, was at issue in the senators' persistent questioning of him about a controversial 1952 memo he wrote as a Supreme Court law clerk, upholding the separate-but-equal doctrine. And his truthfulness was contested repeatedly by a parade of witnesses who said they saw him challenge and intimidate minority voters in Phoenix in the early 1960s.

Committee Democrats were also plainly skeptical of Rehnquist's assertions that he was unaware of a restrictive covenant banning Jews from buying the vacation house he bought in Vermont in 1974. And they were similarly dissatisfied with Rehnquist's limited explanations of why he did not disqualify himself from voting in a 1972 Army surveillance case that he had publicly downgraded the year before.

See REHNQUIST, A14, Col. 1

THE WASHINGTON POST
Sunday, August 10, 1986
Outlook Section
page B5

Voting Rights and Rehnquist

Maybe What He Did Was Legal, but Was It Right?

By Garrett Epps

IT'S A SCENE that Norman Rockwell wouldn't have painted, but it's as American as any that he did: a long line of blacks waiting to vote, a small knot of whites trying to stop them.

I've been there. On election day 1976, as a "hauler" for the Democratic Party in Richmond, I picked up a black 18-year-old who was hoping to cast his first vote for Jimmy Carter and against Sen. Harry F. Byrd Jr. He tried to vote earlier, but had been told there was some mixup with his registration. We checked with the office of the registrar at City Hall and were told that the young man could vote.

But at the polling place, an elderly white official quizzed the young man: How did he know that the registrar who took his voter card had really been an *official* registrar? Did he know that vote fraud was a criminal offense? After much hesitation, the young man dejectedly decided to go home.

I think of that young man often, wondering whether he carries scars because his first vote was denied to him by the threat of prison. And I can see before me the face of that election official. It is the authoritarian face of the old South—a society that did not protect the right to vote. Is it also the face of our chief justice-designate, William H. Rehnquist?

In hearings before the Senate Judiciary Committee, witnesses identified Rehnquist as the man they saw harassing black and Hispanic voters, demanding that they read from a card to prove their literacy, asking to see documents that proved they had the right to vote.

One witness described a shoving match in which Rehnquist allegedly took part.

Rehnquist doesn't deny that he was part of a Republican "ballot security" campaign; he simply says that he himself never "harassed or intimidated voters" and that he did not "personally engage in challenging the qualifications of any voters." There is no serious question that Republican functionaries did try to scare blacks away from Arizona's polls; Rehnquist simply insists that he was not out front in the effort. Further, his defenders say, this kind of challenge to voters was legal in Arizona until 1964.

Observers agree that Rehnquist will be confirmed unless senators become convinced he has lied. Surely there is a larger question here.

The right to vote is fundamental to a just and democratic government. What do we make of a man, favored with the best education our system can offer, who uses his intellect to intimidate—or to help others intimidate—poor people and take away that basic right? That kind of thing was wrong, whatever the laws were at the time. And what difference does it make whether Rehnquist shoved and humiliated blacks and Hispanics himself or just helped those who did the dirty work?

Voting rights for minorities were systematically denied for many years in this country. This practice was ended only by federal law, enforced by the federal judiciary. Because of the Voting Rights Act, overt intimidation has begun to go out of style. But harassment lives, and not just in the South: A federal court recently ruled that "the right of some Indians to register and to vote has been seriously interfered with" by county officials in Big Horn County, Montana who repeatedly refused to give out registration cards or illegally struck Indian voters from the rolls.

Will the judiciary, with Rehnquist at its head, be vigilant in voting-rights cases? Or will it tolerate the use of federal power against those who seek access to the polls? That's not a moot question: Here in North Carolina, U.S. Attorney Samuel Currin, a former aide to Sen. Jesse Helms, warned on the eve of Helms' reelection face-off with Gov. Jim Hunt—no one is quite sure on what legal grounds—that campaign workers who accepted cash to drive voters to the polls might face prosecution. Now Helms is pushing Currin for a federal judgeship.

In Greene and Perry counties, Alabama, U.S. Attorney Jefferson Beauregard Sessions III prosecuted eight civil-rights activists on vote-fraud charges for helping absentee voters mark their ballots. Though one person was convicted, Sessions' role in the prosecution was a factor in his rejection by the Judiciary Committee for a federal district judgeship.

What would happen to another 18-year-old, threatened or even prosecuted by white officials because of a registration mixup, if his case came before the Rehnquist court? Will our country enter the 21st century with a chief justice whose belief in the right to vote is in question?

Garrett Epps, the author of "The Floating Island: A Tale of Washington," is a columnist for The North Carolina Independent.

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Friday, August 8, 1986
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Senators Are Given More Rehnquist Data

Democrats Make No Attempt To Question Him Further

Senate Democrats studying the nomination of Chief Justice-designate William H. Rehnquist obtained additional documents yesterday from Rehnquist's tenure during the Nixon administration, but made no move to recall him for further questioning.

Sen. Paul Simon (D-Ill.) said Judiciary Committee Democrats sought 10 to 20 more documents from the Justice Department. The administration provided the first set of documents—which cover Rehnquist's 1969-71 service as head of the Justice Department's Office of Legal Counsel—after dropping a presidential claim of executive privilege.

Spokesman Terry Eastland said the Justice Department provided four more Rehnquist documents and told the senators that the rest could not be found.

Simon said the new material was requested to clear up "uncertainty" about some references in the initial set of Rehnquist papers, which dealt with such subjects as wiretapping and surveillance of antiwar protesters. But Simon said he did not think it would be "productive" to recall Rehnquist for questioning.

Sen. Edward M. Kennedy (D-Mass.) said, "There's no question Mr. Rehnquist was very much involved in fashioning and shaping the government policies on spying on domestic groups and individuals during the antiwar period, and the use of the Army and FBI during the May Day period . . . . It gets back to the issue of how forthcoming he was with the committee."

Sen. Joseph R. Biden Jr. (D-Del.) said that he had "lingering doubts" about the nomination and that Rehnquist should decide whether he wants to return to the committee and clarify disputed testimony.

A conservative group disclosed yesterday that Biden's parents' Delaware home, in which Biden lived when he first ran for the Senate in 1972, has an old deed prohibiting its sale to blacks. It was disclosed last week that Rehnquist has owned two properties with covenants barring sale to blacks or Jews.

Biden said that his parents did not know about the language in the 1940 deed when they bought the house in 1969, and that they filed papers yesterday disavowing the restriction.

THE WASHINGTON POST
Friday, August 8, 1986
page A14

LETTERS TO THE EDITOR

That Vermont Deed: A 'Nonissue'

I am the lawyer who represented the sellers and prepared the deed that conveyed to Justice William Rehnquist and his wife their summer home in rural Greensboro, Vt. The readers in our national capital—that center of the best and worst in American politics—ought to know the story of the transaction.

Today there is a lingering perception that Justice Rehnquist is anti-Semitic and/or anti-minorities because of the restriction mentioned in his deed. We can blame this on our political system, with its sometimes vicious ways, and the apparent willingness of the media to make sensational mountains out of insignificant molehills regardless of the consequences for the official involved.

In the spring of 1974, the sellers retained me to represent them in the sale to the Rehnquists. The parties had already discussed the sale, so I wrote the justice in Washington to pursue negotiations further. He replied, indicating that he expected that we could complete the transaction promptly.

The Rehnquists then retained David Willis, a competent St. Johnsbury lawyer whom I knew well, to represent their interests. David and I had no difficulty in negotiating a sales contract.

After that David searched the title to the property and prepared a title option. In this part of Vermont it is still an accepted practice for lawyers to search titles personally.

He wrote me on July 2, 1974, about his search and mentioned several restrictions he found, including the one to prevent a sale to Hebrews. He went on to discuss an old undischarged mortgage that encumbered the title and concerned us both. A copy of the letter was sent to Justice Rehnquist.

At that point it was my job to prepare the deed. Trying to be a careful draftsman, there were three things that I wanted to do. First, I included a description so that the buyer or his lawyer could read the deed and physically locate the premises. Second, I mentioned earlier deeds in the chain of title so that anyone could more easily check the record title at some time in the future. Third, I set forth the convenants and restrictions contained in prior deeds to put the buyers on notice about them.

When lawyer Willis wrote me about the restriction on selling to Hebrews, he did nothing more than to note its existence. We didn't worry about it because we both knew that it was unconstitutional and of no legal effect because of a U.S. Supreme Court decision.

What was in the records was there to stay and nothing could be or needed to be done about that. Of course, if the restriction would have caused any legal problems for the Rehnquists, it would have been David's obligation to try and do something about it.

The closing took place as scheduled and all the parties lived happily ever after until all hell broke loose at the confirmation hearing. We all know how some senators badgered the justice about the restriction that had been mentioned in an FBI background report.

Of course, everyone wants to know whether Justice Rehnquist knew the restriction was in *his* deed. He knew that it was in an *earlier* deed because he had read David Willis' letter of July 2, 1974, to me. If a busy Supreme Court justice never got around to reading the fine print in *his* five-page deed, I wouldn't be surprised. After all, he had a good Vermont lawyer to represent him.

However, from a strict legal point of view, it is immaterial to the anti-Semitic issue whether he knew the restriction was in *his* deed or *any* deed because it had no legal effect.

Now, writing with the benefit of hindsight, I wish, and I'm sure David Willis wishes too, that the deed had been shorter and simpler, without specifically quoting the restrictive language in the prior deed. It would have been just as legally effective, and this nonissue would never have surfaced.

JOHN H. DOWNS
St. Johnsbury, Vt.

THE NEW YORK TIMES
Friday, August 8, 1986
front page

Senators Gain Access to More Rehnquist Memos

Continued From Page A1

with the request late today, providing four additional documents under the same conditions of secrecy by which it gave the committee access to the initial 24 documents. The Reagan Administration, facing the likelihood of a vote by the Judiciary Committee to subpoena the original group of documents, backed down Tuesday from its position that it would not supply the material.

"Thus far I have not found a smoking gun," Senator Joseph R. Biden Jr. of Delaware, the committee's ranking Democrat, said today.

Senator Patrick J. Leahy, a Vermont Democrat, said, "I don't see anything there that would lead to having anyone run down shouting, 'Look at this!' "

The Rehnquist and Scalia hearings: A comparison. Washington Talk, page A8.

Senator Arlen Specter, a Pennsylvania Republican, said he saw "no reason to question the ultimate confirmation" of Justice Rehnquist. Senator Specter provided key support for the committee's Democrats in the effort to obtain the documents.

The documents at issue were prepared by or for Mr. Rehnquist in the period from 1969 to 1971 when he served as an Assistant Attorney General in the Nixon Administration. As head of the Office of Legal Counsel, he provided legal advice to the Attorney General, John N. Mitchell and other Administration officials.

For example, there is a memorandum from Mr. Rehnquist to John W. Dean 3d, then the White House counsel, discussing executive orders dealing with access to classified information. Another memorandum to Mr. Dean summarizes Supreme Court cases dealing with the constitutional rights of criminal defendants.

Reaction by Kennedy

None of the documents have been made public, and senators have been noticeably circumspect in describing the material in any detail. The most vivid description was provided by Senator Edward M. Kennedy, who has been the strongest opponent of the Rehnquist nomination.

Senator Kennedy said that after reviewing the material he had "no question" that Mr. Rehnquist "was very much involved in fashioning and shaping Government policy in spying on domestic groups and individuals during the antiwar period and in the use of the Army and the F.B.I. during the May Day period."

The Massachusetts Democrat said his staff would spend the next few days determining precisely what the documents showed about Mr. Rehnquist's role in those activities and how that portrait compared to various statements he made over the years. "It gets back to the issue of how forthcoming he has been before committees of Congress," Senator Kennedy said.

Senator Howard M. Metzenbaum, an Ohio Democrat, said he also had unresolved questions about Justice Rehnquist's "candor." He said that some Democrats might move to have Justice Rehnquist called back to the committee for further questioning.

But Senator Strom Thurmond, the South Carolina Republican who heads the Judiciary Committee, said that while Justice Rehnquist was welcome to come before the committee, his appearance would not be requested.

REHNQUIST PANEL GETS MORE MEMOS

Key Senators Doubt Threat to Nomination Will Emerge

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Aug. 7 — Democratic members of the Senate Judiciary Committee today requested and received access to additional documents dating from William H. Rehnquist's service as head of the Justice Department's Office of Legal Counsel.

But despite the widening inquiry, several key senators said that nothing now appeared likely to emerge that could threaten Justice Rehnquist's confirmation as Chief Justice of the United States. It seemed unlikely that Justice Rehnquist would be asked to appear again before the committee, which is scheduled to vote next Thursday on his nomination and that of Judge Antonin Scalia to be an Associate Justice.

Senator Paul Simon, an Illinois Democrat, said the new request was prompted by references in the initial 24 documents, delivered to the committee Tuesday night, to other conversations and memorandums.

Senator Simon, who played a key role in pressing the initial request, described the request for some two dozen additional documents as a "follow-up," adding, "I don't anticipate there will be anything sensational."

The Justice Department complied

Continued on Page A28, Column 1

Index to Unreleased Justice Department Documents in Rehnquist Hearing

Special to The New York Times

WASHINGTON, Aug. 7 — Following is an index to unreleased Justice Department documents in response to the Aug. 4 request of the Senate Judiciary Committee for information relative to Justice William H. Rehnquist, whose nomination to be Chief Justice of the United States the panel is considering:

I. Laird v. Tatum — military surveillance

1. 3/25/69 memo to the Attorney General from WHR: "Draft memorandum to the President on Civil Disturbance Plan"

The memo describes a plan which covers four distinct chronological phases of a civil emergency. It provides certain procedures for coordination and planning for such an emergency, as well as suggestions for the use of Federal troops by the President in response to requests for assistance in suppressing such a disturbance.

2. 12/14/70 memo to Kleindienst from WHR: "Proposed DOD directive relating to civil disturbances"

This is a cover note to a draft letter to General Exton commenting on the legal aspects of the directive regarding the use of Federal troops to control civil disturbances. Draft and final copies of letter are attached.

3. 3/17/71 memo to WHR from a staff attorney: "Preparation for second Senate Appearance March 17, 1971 relating to constitutional and statutory sources of investigative authority in the Executive Branch."

The memo provides for WHR a quick summary of First Amendment cases relating to Government investigations and the "chilling effect" on First Amendment rights.

II. Reform of the Classification System And Investigation Of Leaks

1. 7/24/69 memo to Hoffman, Legis. and Legal Section from WHR: "Legislative Program Nbr. 142 — Internal Security Division's proposal to prohibit transmission of unclassified strategic information."

This is a comment on proposed legislation to amend espionage laws allowing the President to reclassify certain information as vital to national security and prevent its release to certain foreign governments. The memo discusses legal problems with broad language and makes recommendations for further study.

2. 7/8/71 memo to John Dean from WHR in his position as chairman, Interdepartmental Security Committee.

The memo discusses several Executive Orders dealing with access to classified information. Memo discusses the committee's recommendations re adoption of a "need to know" basis for allowing access to certain information and need for revision of relevant Executive Orders.

3. 7/8/71 cover memo to members of the Interdepartmental Security Committee from WHR.

This is a letter describing the various draft documents that have been circulated or written by the committee which cover the subject of access to classified information.

4. 6/24/71 OLC draft report from WHR: "Report of Justice Department working group concerning review of security procedures pursuant to NSSM-113"

The report examines the law and discusses the problems of how to prevent and punish unauthorized leaks of classified information.

5. 6/29/71 draft memo to WHR from staff attorney: "Analysis of Defense Working Group recommendations for amendment of E.O. 10501"

This is a legal analysis of suggested amendments to the Executive Order governing the system for classifying documents.

6. 8/10/71 draft memo to WHR from a staff attorney: "Some thoughts on revision of E.O. 10501"

These are general comments on the goals of the Administration to simplify the classification system and reduce the amount of classified material and delegating the authority to classify information.

7. 9/17/71 draft memo to WHR from a staff attorney: "Potential constitutional problems involved in prosecutions for disclosing classified information."

Comment on a proposed misdemeanor statute which would punish the unauthorized release of information. The memo discusses the First Amendment problems with such criminal prosecution.

8. 1/7/71 memo to John Dean from WHR: "Executive authority to classify defense information and material and to invoke sanctions for disclosure."

This memo reviews possible measures available to the Government to punish people for leaking classified information, including a discussion of civil, criminal and administrative remedies, as well as Executive Order 10501, which describes the classification system.

9. 7/13/71 memo to Mardian from a staff attorney; copy to WHR: "Possible constitutional defenses to be asserted by various corporate officers and employees of newspapers in Boston grand jury investigation of the publication of the Pentagon Papers."

This is a discussion of possible constitutional objections in response to a subpoena *duces tecum* that might be served on members of the press.

10. 2/3/71 memo to Mardian from WHR: "Disclosures of classified information and coordination and clearance of official statements."

This memo forwards a classified memo prepared for the White House outlining steps that can be taken through agency regulation and procedures to safeguard classified information.

III. May Day Arrests

1. 10/5/71 draft memo to WHR from a staff attorney: "Present posture of the *Sullivan* case in the District of Columbia Circuit."

The memo provides a history of the case so far, and a few suggestions as to legal motions that might be taken by the Government to obtain a rehearing of the case.

2. 4/28/71 memo to DAG from WHR: Re: May Day "What tactics on the part of law enforcement personnel are permissible to prevent the planned disruption of ingress and egress to Washington?"

Memo examines bases under D.C. and Federal law for control of May Day demonstrations.

3. 4/28/71 draft memo to WHR from a staff attorney: "Criminal liability and possible injunctive relief under the Civil Rights Acts for the planned May Day disruptions of traffic."

The memo discusses the possibility of obtaining an injunction against the upcoming May Day demonstrations.

IV. Kent State Killings

1. 8/26/71 letter to John Mitchell from Sen. Kennedy.

The letter confirms a request to investigate why no grand jury was called for Kent State killings.

V. Judicial Nominations

1. 11/19/69 memo to Belew, White House, from WHR; attaching memo with rebuttal re Judge Haynsworth participation in *Brunswick* cases.

The attached memo discusses the background of allegations that Judge Haynsworth acted improperly in participating in post-judgment motions in the *Brunswick* case.

2. 4/20/70 memo to Landau from a staff attorney.

This memo summarizes the history of Senate opposition to Supreme Court appointments on the basis of political philosophy.

VI. Wiretapping

1. 4/1/69 memo to John Dean from WHR: "Summary of memorandum re: constitutional decisions relating to criminal law," with attachment, "commission to evaluate recent constitutional decisions in the field of criminal law."

The memo contains a summary of Supreme Court cases dealing with the constitutional rights of criminal defendants, including cases on electronic surveillance, and discussing the possible appointment of a commission to consider constitutional changes.

2. 1/28/70 memo to William Ruckelshaus from WHR: "Indemnification of person sued as a result of their cooperation or participation in F.B.I. electronic surveillance."

The memo discusses recommendations made with respect to guaranteeing reimbursement to F.B.I. agents and to private persons who are sued as a result of their participation in F.B.I. electronic surveillance.

3. 2/4/70 memo to WHR from William Ruckelshaus: "Payment by the United States to private parties involved in electronic surveillance activities with the Federal Bureau of Investigation."

This memo discusses reimbursement procedures as well as summarizes pending litigation concerning persons being sued for participation in F.B.I. surveillance activities.

4. 1/26/70 memo to WHR from a staff attorney: "Reimbursement of persons sued as a result of their cooperation or participation in F.B.I. electronic surveillance."

This memo describes the various recommendations for reimbursing Government employees and private parties who are sued as a result of their participation in F.B.I. surveillance activities.

5. 2/20/70 memo to Ruckelshaus from WHR: "Black v. Sheraton Corp."

This memo responds to an inquiry about an OLC consideration of matters involved in *Black*, a suit about F.B.I. surveillance.

VII. Ellsberg Matter

See documents numbers 7 and 9 in category II above.

THE WASHINGTON TIMES
Friday, August 8, 1986

Records show Biden also lived in house with restrictive clause

By Theo Stamos
THE WASHINGTON TIMES

Sen. Joseph Biden Jr., who criticized chief justice-designate William Rehnquist for purchasing a home with a racially restrictive covenant, lived in a house with a similar restriction when he first ran for the Senate in 1972.

James McClellan, president of the Center for Judicial Studies, a conservative think-tank, said at a news conference yesterday the deed to the house in which Delaware senator was living at the time barred ownership by blacks. The house was owned by his parents.

Mr. McClellan, a Republican who supports the nomination of Justice Rehnquist to be chief justice, said documents sent to him from a Delaware citizen "suggest perhaps an element of hypocrisy" on the part of Mr. Biden.

During last week's hearings on Justice Rehnquists's nomination, Mr. Biden, and other Democats on the Senate Judiciary Committee, criticized the Justice for owning two homes with similar covenants.

Democrats used the existence of two separate covenants — one on Mr. Rehnquist's former house in Phoenix, Ariz., and another covenant in the deed to the justice's Vermont summer home — to cast doubt on his commitment to civil rights.

The covenant on the Phoenix home barred ownership or rental by blacks. The Vermont deed prohibits ownership by Jews. Such restrictions have been unenforceable since a 1948 Supreme Court ruling.

On Monday, Justice Rehnquist told committee chairman Strom Thurmond that he had probably read about the provision in the Vermont deed in a 1974 letter from his attorney, but did not recall it during last week's hearings.

The deed to the Biden home located at 2309 Woods Road in Faulkland, Del., prohibits "any Negro or person of Negro extraction" from ever owning or occupying the house.

"The American people have a right to know about the existence of these documents in judging the worth and sincerity of accusations that have been raised concerning Mr. Justice Rehnquist's property holdings," Mr. McClellan said.

Mr. Biden told a news conference yesterday the restrictive language was contained in a 1940 deed that conveyed the property to his parents when they bought the home in 1969.

The Delaware Democrat said neither he nor his parents were aware of the language because the deed to the Biden family home did not contain the actual language, but made reference to the prior deed containing the restrictive terms.

He said that he had been notified by a Delaware Republican two days ago the existence of the racial covenant would be made public. Mr. Biden's parents have since taken steps to remove any reference to the covenant from the deed.

The existence of the covenant on the Biden home "does not indicate that he [Mr. Biden] has anti-racist views of any kind," any more than similar restrictions on Justice Rehnquist's property show he is a racist, Mr. McClellan said.

Copies of the deed provided by Mr. McClellan show Mr. Biden Sr. and his wife Jean purchased the house in 1969. Mr. Biden Sr. and his son swapped houses in 1971, when the younger Biden was preparing to run for the Senate. He lived in the house between August 1971 and October 1974.

Members of the Senate Judiciary Committee said yesterday they have completed their review of confidential memos written by Justice Rehnquist while a Justice Department lawyer and have found nothing to prevent his confirmation as chief justice.

After a committee meeting yesterday morning, Mark Goodin, the panel's chief spokesman, said "there is no official interest in calling him [Mr. Rehnquist] back."

The committee, which yesterday completed two days of hearings on the nomination of Judge Antonin Scalia to replace Mr. Rehnquist as an associate justice, is expected to approve the nomination of both men when members vote Aug. 14.

THE WASHINGTON TIMES
Thursday, August 7, 1986
front page

Panel finds no 'smoking gun' in Rehnquist's secret memos

By Theo Stamos
THE WASHINGTON TIMES

Members of the Senate Judiciary Committee yesterday examined confidential documents written by Justice William Rehnquist while he was a Justice Department lawyer and said they found nothing to prevent Mr. Rehnquist's confirmation as chief justice of the United States.

Several senators, including Sen. Joseph Biden of Delaware, one of Mr. Rehnquist's harshest Democratic critics, said staff members told them there were no "smoking guns."

"The memos basically contain advice to a client," Sen. Orrin Hatch said after reviewing material turned over to the Senate panel Tuesday.

"No true lawyer would find anything objectionable," Mr. Hatch, Utah Republican, said.

He said there had been the "appearance" that the contents of the documents written by Justice Rehnquist, when he was a Justice Department lawyer from 1969 to 1971, were leaked to reporters.

Justice Rehnquist, who would be the nation's 16th chief justice, last week faced tough questioning by Democrats on the Senate panel. A

see **PANEL**, *page 10A*

PANEL

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compromise that allowed the committee to see the Rehnquist documents was negotiated after the White House first cited executive privilege in denying the request to see the memos.

The possibility of a leak — a violation of that compromise — was disclosed during the second day of hearings on the confirmation of Judge Antonin Scalia, named by Mr. Reagan to fill the vacancy that would be created if Justice Rehnquist is confirmed as the successor to Chief Justice Warren Burger.

"This is a serious breach of the agreement we reached on the review of these documents," said Sen. Strom Thurmond, South Carolina Republican and judiciary chairman, interrupting a panel of witnesses testifying in support of Judge Scalia's nomination.

"That is precisely why the president was reluctant about turning over these documents in the first place," Mr. Thurmond said.

Mr. Thurmond did not identify which news organizations had received the information or the nature of the disclosure.

Mr. Biden, the panel's ranking Democrat, said the subject of a leak was "a tempest in the teapot."

The Reagan administration initially had refused to allow access to the memoranda, arguing that they were privileged communications concerning government wiretapping operations and domestic surveillance of anti-war demonstrators.

A compromise was later worked out between the administration and the eight Democrats and two Republicans on the committee who had threatened to issue a subpoena for the documents.

Mr. Hatch said late yesterday that "men of good will" on the committee had met during a closed session and had resolved questions about a leak, and the confirmation process would continue.

He said the committee staff was reminded again of the confidentiality of the documents.

News of the leak overshadowed the committee's consideration of Judge Scalia, whose confirmation seems assured.

Yesterday, a panel of law professors and former colleagues of Judge Scalia hailed him as a man of impeccable integrity and intellectual precision.

Lloyd Cutler, former counsel to President Carter, said Judge Scalia "possesses a special kind of quality that can never be in oversupply on the Supreme Court." Mr. Cutler said that Judge Scalia "was nearer to the center than the extreme on the major issues."

Sen. Dennis DeConcini, Arizona Democrat, complained to several of the witnesses who were close friends and former colleagues of Judge Scalia that the nominee had been "evasive and illusive" on a number of issues when he appeared before the panel Tueday.

"He was one of the most evasive witnesses I have ever seen," Mr. DeConcini said.

One witness, Gephart Casper, dean of the University of Chicago Law School where Judge Scalia taught from 1977 to 1982, countered that Judge Scalia's reluctance to answer questions "shows what a judicious man he is."

Judge Scalia had declined to answer questions about his views on numerous issues — from abortion to freedom of the press — explaining that he might have to confront them as a member of the court and he did not want his objectivity called into question.

During the afternoon session, Eleanor Smeal, president of the National Organization for Women, testified against Judge Scalia's nomination.

A review of law journal articles and numerous opinions written by Judge Scalia "reveal a hostility toward the enforcement of remedial anti-discrimination laws passed by the Congress," Mrs. Smeal said.

She said Judge Scalia's views on abortion and affirmative action threaten to reverse two decades of advances achieved by women and minorities on matters of individual rights.

But the nominee won a solid endorsement from the conservative Concerned Women for America.

"His vigilant philosophy of judicial restraint will help protect the Constitution from judge-made erosion," said Beverly LaHaye, the group's president.

"We need judges who live by an active commitment to judicial restraint," she said.

Staff writer Rita McWilliams contributed to this report.

THE WASHINGTON TIMES
Thursday, August 7, 1986
page 9A

Here come the judges

So far, the confirmation hearings for Supreme Court Justice-designate Antonin Scalia are proceeding as such hearings should. After opening with an only-in-America display of ethnic politics, celebrating Judge Scalia's Italian background, the Senate Judiciary Committee got down to an orderly exchange of views, notwithstanding such unedifying spectacles as the judge's ideological foes doing their rain dances in the media, and Sen. Kennedy lecturing on sensitivity to women.

The Rehnquist confirmation hearings were appallingly different. Disgraceful, Chairman Strom Thurmond rightly called them, as certain gentlemen on the committee expressed uncivil resentment at the fact that their ideas, deemed so forward-thinking when first adopted, are anachronistic — at best.

As a tactical measure, the administration has yielded to the committee's request to inspect memos written by Chief Justice-designate Rehnquist while at the Justice Department. We trust this will have the intended effect of minimizing hitches in confirmation; but it is important that the administration not yield one particular point, namely, that it did not in fact have to hand over the documents.

The Office of Legal Counsel, the division of the Justice Department that Mr. Rehnquist worked in, is in a very literal sense the executive branch's lawyer. The attorney-client privilege should be in full force as regards legal interpretations made by that office. Further, lawyers in that office should be able to give advice without nervous glances toward possible future Senate hearings. There's an indelible principle here, one that even Kennedy/Biden/Metzenbaum should recognize.

THE NEW YORK TIMES
Thursday, August 7, 1986
front page

REHNQUIST MEMOS FROM NIXON YEARS STUDIED BY PANEL

First Day's Access to the Data Under Secrecy Vow Gives No Hint of Wrongdoing

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Aug. 6 — A day after the Justice Department turned over 25 documents to the Senate Judiciary Committee, two members of the committee said nothing was emerging to suggest that Justice William H. Rehnquist was involved in questionable activities at the Justice Department in the Nixon Administration.

"There doesn't appear to be anything dramatic or spectacular," Senator Charles McC. Mathias Jr. told reporters today.

Senator Paul Simon, Democrat of Illinois, said tonight that the documents contained "nothing sensational, but perhaps the basis for some additional questioning."

Pledges of Secrecy

The senators and the small number of committee staff aides who received access to the documents were pledged to secrecy by the terms of the agreement reached Tuesday between the committee and the Justice Department. As a result, none of the documents became public in a day punctuated by partisan sniping.

Meanwhile, President Reagan's choice to fill the vacancy on the Supreme Court, Judge Antonin Scalia, received both praise and criticism at his confirmation hearing. [Page A19.]

There was a brief uproar this afternoon when Senator Strom Thurmond, the South Carolina Republican who is chairman of the Judiciary Committee, announced that "there has been an apparent leak of information" from the documents. He said the "leak" represented a "serious breach" of the secrecy agreement.

F.B.I. Called In

Senator Thurmond, who had strongly opposed the request for the documents, said he had asked the Federal Bureau of Investigation to investigate the purported disclosure. The Senator gave no indication of what had been disclosed or to whom.

Senator Mathias, who is from Maryland, was one of two Republicans who joined the committee's eight Democrats in insisting that the Reagan Administration make available the documents that date to Justice Rehnquist's service as head of the Office of Legal Counsel from 1969 to 1971.

He said today that the documents

Continued on Page A19, Column 5

REHNQUIST MEMOS STUDIED BY PANEL

Continued From Page 1

contained "nothing that could be characterized as a smoking gun."

The Administration had resisted disclosure of the documents, but backed down Tuesday when it learned that there were enough votes on the committee to issue a subpoena. Senator Arlen Specter, a Republican from Pennsylvania, was prepared to join Senator Mathias in backing the Democratic request.

Some Democrats on the committee had expected that the documents might indicate involvement by Mr. Rehnquist in the activities that preceded the Watergate scandal. The request was for legal opinions, memorandums or notes prepared by or for Mr. Rehnquist on seven subjects: surveillance by the military of radical political groups; investigations of leaks and treatment of classified documents, arrests of antiwar protesters, the 1970 shootings at Kent State University, judicial nominations, wiretapping and the investigation and prosecution of Daniel Ellsberg after publication of the Pentagon Papers.

It could not be learned today whether all these subjects were represented among the 25 documents.

Senator Joseph R. Biden Jr. of Delaware, the Judiciary Committee's ranking Democrat, said tonight that he and any other interested senators would read the documents throughout the evening. He said senators would consult informally, probably Thursday morning, on whether anything had emerged to warrant recalling Justice Rehnquist for further testimony before the committee.

Votes Later in Month

The Judiciary Committee held four days of hearings on Justice Rehnquist's nomination last week. A vote is scheduled for Aug. 14, with the full Senate to vote next month.

Only six committee staff members, three Republicans and three Democrats, in addition to any senators who were interested, were supposed to see the material. The staff members spent Tuesday night, in a session that ended at midnight, reading the one copy of each document that the Justice Department had provided.

Democratic senators were skeptical that an unauthorized disclosure had occurred. "It is possible this is just a game," Senator Biden said. The allegation of a disclosure originated with Mark Goodin, Senator Thurmond's press secretary. He said that both he and Terry Eastland, a Justice Department spokesman, had received a telephone query from a news organization indicating specific knowledge of the contents of one or more documents.

The Justice Department responded by briefly taking the documents back from the committee. A closed meeting of the committee was hastily called, with the result that the allegations of a breach quietly evaporated and the documents were returned.

THE NEW YORK TIMES
Thursday, August 7, 1986
page A19

Liberals Portray Scalia as Threat But Bar Group Sees Him as Open

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Aug. 6 — Some civil rights and feminist groups today assailed Judge Antonin Scalia as hostile to the concerns of women, the poor and members of minorities, and the A.F.L.-C.I.O. said he seemed to favor a "profound" shift from Congress to the President of the power to set national policy.

But the American Bar Association and several lawyers, both Democratic and Republican, said the judge had an outstanding legal mind whose conservative views would be tempered by openness to opposing arguments and zest for intellectual debate.

Conservative groups, including Concerned Women for America, also strongly supported President Reagan's nomination of Judge Scalia to the Supreme Court. They seemed enthusiastic, much as liberal groups seemed alarmed, by the prospect that confirmation of Judge Scalia would shift the Supreme Court markedly to the right on such issues as affirmative action, separation of church and state and women's rights.

As the Senate Judiciary Committee's relatively tepid two-day hearing on the Scalia nomination ended late this afternoon, some Democrats said they would probably vote for him, and it seemed likely that his nomination would be approved with few dissenting votes.

Vote Scheduled for Aug. 14

A committee vote on the Scalia nomination, along with that of Associate Justice William H. Rehnquist to become Chief Justice of the United States, is scheduled for Aug. 14. The President appointed Judge Scalia, who had been a law professor, to the United States Court of Appeals for the District of Columbia Circuit in 1983.

The Rehnquist nomination is also expected to be approved by a comfortable margin, although it has met with more opposition.

Senators Howell Heflin of Alabama, Dennis DeConcini of Arizona and Patrick J. Leahy of Vermont, all Democrats regarded as moderates, complained today that Judge Scalia had been "evasive" and unresponsive when asked to state his views on various issues in testimony Tuesday.

But their complaint was that he had been overly cautious in his efforts to avoid expressing a view on any issue that might come before him as a judge, and not as some other senators said of Justice Rehnquist, that it was difficult to believe his sworn testimony about his past activities because at least four other witnesses had contradicted him.

Some Criticism and Praise

The criticisms of Judge Scalia by liberal groups, including the National Organization for Women, which denounced his narrow view of the Bill of Rights and civil rights laws, alternated in today's testimony with encomiums by lawyers and law professors who have worked with him.

The supporters of the nomination included Carla Hills and Sally Katzen, both partners at major Washington law firms. They said they had worked professionally with Judge Scalia and maintained that his conservative views on women's rights were founded on his legal philosophy, not any personal bias.

The American Federation of Labor and Congress of Industrial Organizations announced today that it opposed the nomination of Justice Rehnquist and that, while it had no position on the nomination of Judge Scalia, it was concerned about what it said was his narrow view of "the role of Congress in setting national policies and the role of the judiciary in enforcing the Bill of Rights."

Laurence Gold, general counsel of the labor federation, told the committee that Judge Scalia's writings on various legal issues, including the independence of Federal regulatory agencies, the relevance of legislative history to judicial decisions and legal standing to sue the executive branch, all demonstrated an inclination to make it more difficult for Congress to force the executive branch to obey and enforce its laws.

'Right-Wing' Views Assailed

Joseph L. Rauh Jr., testifying against the Scalia nomination on behalf of the Leadership Conference on Civil Rights and Americans for Democratic Action, said it "would be a tragedy for our country" if the Supreme Court were to move toward Judge Scalia's "right-wing" views.

"Your affirmative action cases will be overruled, your school prayer cases will be overruled, your abortion cases will be overruled," Mr. Rauh said.

Eleanor Smeal, head of the National Organization for Women, said Judge Scalia's confirmation would have "disastrous" consequences for women who depend on the Supreme Court to use the Constitution and civil rights laws to combat sex discrimination.

But Beverley LaHaye, President of Concerned Women for America, a conservative group dedicated to preserving family values, praised the nomination in the highest terms.

So did the bar association's 14-member Standing Committee on Federal Judiciary, which said today that it had unanimously voted Judge Scalia "well qualified," the highest of three possible ratings for Supreme Court nominees.

The New York Times / Jose R. Lopez

Senator Strom Thurmond, right, chairman of the Senate Judiciary Committee, conferring with Mark Goodin, chief spokesman for the committee, at confirmation hearing yesterday for Judge Antonin Scalia.

THE WALL STREET JOURNAL
Thursday, August 7, 1986
page 18

The Questions Rehnquist Hasn't Had to Answer

By Bruce S. Ledewitz

The character assassination seen at Justice William Rehnquist's confirmation hearings has obscured the most depressing aspect of his nomination. We are about to elevate to chief justice of the Supreme Court the greatest judicial skeptic since Oliver Wendell Holmes. How truly ironic it is that Ronald Reagan, Jerry Falwell and Pat Robertson so strongly support Justice Rehnquist, a man who does not believe there is such a thing as right and wrong.

Justice Rehnquist's jurisprudence may be characterized as legal positivism founded upon moral skepticism. He is unable to affirm any substantive value as true or good, and so his constitutional interpretation retreats to the search for an unobtainable, objective analysis of the "original intention" of the framers of the Constitution. Justice Rehnquist represents not a triumph of conservatism, but a triumph of modernism. As such, he is merely the most extreme and intellectually honest representative of the skepticism of 20th-century American law.

In a 1976 article, Justice Rehnquist formally set forth the ideas he has implicitly championed throughout his judicial career. In the article, he formally endorsed Justice Holmes's call for "skepticism" about moral values. Notions of right and wrong are, according to Justice Rehnquist, merely "personal moral judgments" until enacted into law. Conscience is subjective, again echoing Holmes, like a love for "granite rocks and barberry bushes." Because moral judgments cannot be proved, they cannot serve as a basis for a judge's decisions.

Justice Rehnquist's skepticism about values extends to the Constitution itself. This can lead to jarring results. In a 1980 speech, Justice Rehnquist noted that in one poll, 70% of those surveyed supported repeal of the Bill of Rights. Rather than decry such a state of affairs, Justice Rehnquist argued that under our system of government, "[T]here is nothing . . . which would make this an illegal, an immoral, or an improper act." He did have the grace to add that repeal "might well be . . . unwise."

Can one seriously imagine any of our great justices—Marshall, Jackson or Harlan, for example—taking such pains to demonstrate no personal commitment to any constitutional values? That is because most of the justices who have sat on the Supreme Court have been devoted to the Constitution, not just as a document of popular sovereignty, but as intrinsically right.

Historically, American jurisprudence never embraced moral skepticism. While no one wishes law to be based entirely on the moral values of judges, we have not heretofore sought to banish morality entirely from the courtroom. We have, at least until now, allowed our judges to condemn injustice that "shocks the conscience." Consider the Nazi war crimes trial at Nuremberg. Chief Counsel Robert Jackson did not deny that some of the Nazis' actions might not have violated positive law when perpetrated. Jackson relied, in part, on the notion of "reason" as a ground for prosecution and asked sarcastically, "Does it take these men by surprise that murder is treated as a crime?"

Contrast the majesty of that commitment to the moral skepticism of Jackson's law clerk, William Rehnquist, during his later tenure on the Supreme Court. The moral skeptic would say that there are no objective standards of right and wrong, even as regards mass murder. There is conscience, of course, but it is only private and personal. The skeptic must conclude that since genocide violated no law of the time, there were no grounds to prosecute at Nuremberg.

In the realm of constitutional interpretation, Justice Rehnquist translates his moral skepticism into the search for original intent. This approach defines the reach of the Constitution by reference to the particular judgments of the framers. Justice Rehnquist does not rely on original intent out of any moral commitment to democracy. For the moral skeptic, democracy reflects merely the status quo and the will of the powerful. Nor does original intent necessarily yield judicial restraint, as demonstrated by Mr. Rehnquist's consistent attacks on congressional authority.

The advantage of original intent for a moral skeptic is that the method purports to resolve cases of obvious moral significance without considering right and wrong. The judge simply looks up in a history book what Madison, Jefferson and Hamilton said about the issue at hand and decides accordingly.

Justice Rehnquist's devotion to original intent must seem to him a responsible method that allows him to avoid making choices among endless moral claims. But original intent is both incoherent and inconsistent. It is incoherent because of the familiar difficulties of identifying who counts as a framer, what sort of view is to be treated as authoritative intent, and how to deal with the changes in circumstances occurring in the past 200 years. The inconsistency of original intent stems from its failure to ascertain whether the framers wanted their intentions to control future constitutional interpretation. If the framers' views on substance are to be given weight, their approach to interpretation should be similarly valued.

Justice Rehnquist cannot follow the framers' view of what a Constitution represents. As demonstrated by the Ninth Amendment's reference to non-enumerated "rights . . . retained by the people," an acceptance of the general notion of fundamental natural rights was part of 18th-century political thought. The framers were not skeptics. And that fact raises a disturbing question. If skeptics did not create this constitutional tradition, what makes us think skeptics like Justice Rehnquist can sustain it?

Justice Rehnquist's supporters should be wary of him. For he actually shares none of their moral commitments. Even in regard to abortion, President Reagan's apparent litmus test for judicial appointees, Justice Rehnquist has never spoken of a fundamental right to life of the unborn child. As the moral skeptic he is, Justice Rehnquist could not make such a claim. And if tomorrow someone should discover a letter by James Madison supporting a woman's right of privacy, *Roe vs. Wade* would gain an unexpected supporter.

Mr. Ledewitz is a professor of law at Duquesne University in Pittsburgh.

THE WASHINGTON POST
Thursday, August 7, 1986
front page

Rehnquist Not in Danger Over Papers

Sen. Mathias Finds 'Nothing Dramatic'

By Howard Kurtz and Al Kamen
Washington Post Staff Writers

Senate Judiciary Committee members said yesterday that Supreme Court Justice William H. Rehnquist's papers from the Nixon administration, which the White House provided to the panel after a battle over executive privilege, contain no disclosures that would block his elevation to chief justice.

Their assessment came as the committee finished its hearings on Judge Antonin Scalia's nomination to fill Rehnquist's seat as an associate justice. Those proceedings ended with relatively little opposition to Scalia's appointment. Barring unforeseen developments, the committee is expected to approve both nominations by comfortable margins next Thursday.

A Justice Department index to Rehnquist's papers, a copy of which was obtained by The Washington Post, supports the view of several senators that the documents appear to contain no information that would derail Rehnquist's confirmation. The documents consist of Rehnquist's papers from his days as head of the Justice Department's Office of Legal Counsel from 1969 to 1971.

The index was not covered by an agreement with the administration in which the panel promised to keep the documents confidential. The index lists legal memoranda from Rehnquist to then-Attorney General John N. Mitchell, then-White House counsel John Dean and other officials on such issues as wiretapping, leak investigations and military surveillance of antiwar protesters.

Sen. Charles McC. Mathias Jr. (R-Md.) told reporters that there was "nothing dramatic or spectacular" in the papers, "nothing that could be characterized as a smoking gun." The committee's ranking Democrat, Sen. Joseph R. Biden Jr. (Del.), said "there wasn't anything particularly revealing."

Senate sources said yesterday

See REHNQUIST, A14, Col. 1

Rehnquist Papers Not Expected to Bar Confirmation

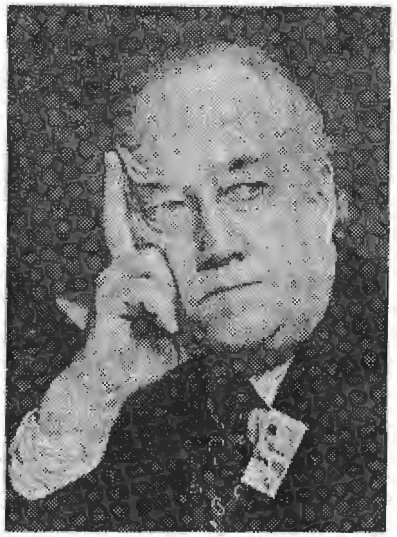
REHNQUIST, From A1

that the committee is unlikely to ask Rehnquist to testify again, but might send him written questions on issues raised by the documents and by witnesses at his confirmation hearings last week. Some of the witnesses swore that Rehnquist personally challenged the credentials of minority voters in Phoenix in the late 1950s and early 1960s, a claim that Rehnquist repeatedly denied.

Committee Chairman Strom Thurmond (R-S.C.) interrupted yesterday's hearing on Scalia to charge that someone on the committee had apparently leaked information about the Rehnquist papers to the news media.

Thurmond called this a "serious breach of the agreement reached" with the administration, under which senators and six specified staff members were allowed to read the documents under tight security. Thurmond said he has asked the Federal Bureau of Investigation to look into the matter.

Thurmond spokesman Mark W. Goodin said the allegation was based not on published or broadcast accounts but on media inquiries to his office and the Justice Department that indicated that one or more reporters had obtained details about the Rehnquist papers.



SEN. CHARLES McC. MATHIAS JR. ... reports finding "nothing dramatic"

Biden said that was "no evidence that such a leak occurred" and that "it is possible that this is just a game."

Justice Department spokesman Terry Eastland said his office had received one inquiry about the documents, dealing with Rehnquist's role in the arrests of antiwar protesters. Eastland echoed several senators' assessments that "there is really nothing in these memos."

The documents were retrieved by Justice Department officials yesterday afternoon but were returned to the committee after protests by senators who had not yet seen them, sources said.

Scalia appeared assured of strong bipartisan support despite grumbling from two conservative Democrats, Sens. Howell Heflin (Ala.) and Dennis DeConcini (Ariz.), that he was "evasive" during his testimony. Both said they would likely vote to confirm him, as did Sen. Paul Simon (Ill.), one of the committee's more liberal Democrats.

Scalia, a judge on the federal appeals court here since 1982, won praise from witnesses ranging from former Harvard Law School dean and solicitor general Erwin Griswold to Lloyd Cutler, counsel to President Jimmy Carter.

But Eleanor Smeal, president of the National Organization for Women, accused Scalia of "hostility to remedies against sex and race discrimination" and said he believes that antidiscrimination laws "are at best a nuisance and at worst unworthy of his consideration."

Laurence Gold, general counsel of the AFL-CIO, said Scalia would vote to "hobble Congress and aggrandize executive [branch] power," and to reduce the power of the courts to enforce the Bill of Rights.

American Bar Association officials told the panel that Scalia had received their highest rating, but Democrats criticized the ABA's review as inadequate.

Sen. Howard M. Metzenbaum (D-Ohio) said the ABA had not questioned Scalia about his former membership in Washington's Cosmos Club, which excludes women. Scalia, who joined the club in 1971, resigned about six months ago.

Rehnquist notified Simon in a letter yesterday that he has resigned from the all-male Alfalfa Club here.

Joseph L. Rauh Jr., representing Americans for Democratic Action, pointed to President Reagan's comments Tuesday that his judicial appointees would pursue his views on abortion, pornography and other issues.

Rauh said Scalia "is either fooling the president of the United States or he is trying to fool this committee" in asserting that he has no conservative agenda.

THE WASHINGTON POST
Thursday, August 7, 1986
page A15

Rehnquist Memos Described

By Howard Kurtz
Washington Post Staff Writer

The Justice Department index to William H. Rehnquist's papers from the Nixon administration portrays an assistant attorney general steeped in the most controversial issues of the day, from wiretapping to surveillance of antiwar protesters.

The papers provided to the Senate Judiciary Committee, from Rehnquist's tenure as head of the Justice Department's Office of Legal Counsel, are broken into seven categories. The index shows that:

- Rehnquist passed on suggestions for cracking down on leaks of sensitive information, a subject that preoccupied the Nixon administration. In 1971 memos to White House counsel John Dean, Rehnquist "reviews possible measures available to the government to punish people for leaking classified information" and recommendations for restricting access on "a need-to-know basis."
- Rehnquist was occupied with containing the antiwar demonstrations then engulfing Washington. In a 1969 memo to Attorney General John N. Mitchell, for example, he describes planning for "a civil emergency," including "suggestions for the use of federal troops by the president in response to requests for assistance in suppressing such a disturbance." In a memo two years later on upcoming May Day demonstrations, Rehnquist reviews available legal measures "to prevent the planned disruption of ingress and egress to Washington."
- Rehnquist issued several memos on the use of wiretapping, including a 1969 memo to Dean that discusses the possible appointment of a commission to consider constitutional changes in this area. In another memo he discusses reimbursement for FBI agents and private citizens who are sued for engaging in wiretapping.
- Rehnquist played a role in the Nixon White House's unsuccessful strategy to win confirmation for Supreme Court nominee Clement F. Haynsworth. Ironically, in light of liberal criticism of Rehnquist's nomination, a 1970 staff attorney's memo in Rehnquist's files "summarizes the history of Senate opposition to Supreme Court appointments on the basis of political philosophy."

THE WASHINGTON POST
Thursday, August 7, 1986
page A23

Richard Cohen

Rehnquist's 'Brilliance'

You must know the story about the city icker who stops on a country road to ask a rmer directions. To each question, the farmer plies, "Don't know," until the city slicker ys, "You don't know much, do you?" "Maybe ," the farmer replies, "but I ain't lost."

Well, pardon me if I play the part of the rmer in the on-going confirmation hearings of illiam Rehnquist to be chief justice. I have ard Rehnquist described as "brilliant," an tellectual whiz, learned and, of course, distinished. If he's so smart, the farmer in me ks, how come he's so often wrong?

Take civil rights. From the memos he wrote a Supreme Court law clerk, there is every dication that Rehnquist did not agree with the cision that found school segregation uncontitutional. That does not mean that Rehnquist mself favored segregation. It means only that ter peering real hard into the Constitution, he uld find nothing that could serve to strike own school segregation. "I think *Plessy v. erguson* was right and should be affirmed," ehnquist wrote, referring to the seperate but ual doctrine that prevailed until 1954.

This was the conventional conservative opinion of the time, and some conservatives still hold to it. As legal theories go, it's not the silliest you are likely to ever encounter, but neither is it particularly profound. Had the Supreme Court itself accepted it, some states might still have school segregation and other aspects of Jim Crow as well. In short, the nation would be even more racially divided than it now is and further from the goal of a just society. History rebukes Rehnquist on this one issue alone—and vindicates both the wisdom and the tactics of Chief Justice Earl Warren.

Unfortunately for Rehnquist, what was true for school desegregation remains true for other issues that affect minorites and women. He seems almost always to side with authority, with the government and against the individual. Each and every Rehnquist opinion, lawyers will tell you, is witty and erudite—an intellectual tour de force. Maybe.

But in Rehnquist we have a most peculiar brilliance. It is one that seems to have no relevance to results. It rights no wrongs, expands no rights, champions no oppressed and seems to accept things as they are. As a school of thought, it has been on the sidelines or opposed to the movements—civil rights, feminism—whose achievements have been historic and beyond debate. (Do we anymore debate whether married stewardesses should have to quit work or whether schools can be racially segregated?)

At the confirmation hearings, Sen. Edward Kennedy called the likely chief justice an "extremist." Kennedy is entitled to his views, but extremism, as Barry Goldwater once maintained in a different context, is hardly a vice. Indeed, if over the years either the court or society had substantially moved Rehnquist's way, his "extremism" would be praiseworthy. After all, abolitionists were once extremists, but today there would be nothing extreme about their views—unless, of course, you happen to think slavery is a good idea.

But Rehnquist's extremism, if that is what it is, is hardly prescient. It does not foreshadow the future, but instead reiterates the past. As for his brilliance, it seems to be unconnected to his memory and, especially when it comes to embarrassing incidents, he has been an observer, not a participant, in his own life. He cannot account for witnesess who allege he once harassed minorities at the polls, and he allows that he must have seen a restrictive covenant to his own house, but memory fails him here too. He does, though, remember the house.

Just as history rebukes Rehnquist on *Plessy v. Ferguson*, it has made him seem small and mean when it comes to the executions of Julius and Ethel Rosenberg for espionage. Rehnquist was so much in favor of their executions he rued the absence of drawing and quartering (oh, what brilliance!). Years later, though, we have reason to question whether the punishment actually fit the crime and whether, in Ethel Rosenberg's case, the actual crime was not her own execution.

The brilliance of William Rehnquist is a cold thing. It shimmers without the warmth of wisdom. Like the city slicker who mocks the farmer, Rehnquist knows everything but where he happens to be at the moment. Less brilliant people can provide him the answer. It's the 20th century.

THE NEW YORK TIMES
Wednesday, August 6, 1986
front page

The New York Times/ Paul Hosefros

ALIA CONFIRMATION HEARINGS BEGIN: Sena- Strom Thurmond and his wife, Nancy, greeting part amily of Judge Antonin Scalia, left. Mrs. Thurmond shook the hand of Christopher, 10, as the Senator greeted John, 21. Also on hand were Mr. Scalia's wife, Maureen, and his 5-year-old daughter, Meg. Page A13.

SENATE UNIT WINS ACCESS TO MEMOS REHNQUIST WROTE

ADMINISTRATION RETREAT

Move Made as the Bipartisan Majority of Judicial Panel Threatens Open Revolt

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Aug. 5 — The Reagan Administration backed down today and agreed to give the Senate Judiciary Committee access to memorandums and legal opinions prepared by William H. Rehnquist when he was a Justice Department official in the Nixon Administration.

The action came in the face of an open revolt by a bipartisan majority of the Judiciary Committee against the Administration's refusal to release the documents. Ten Senators — all eight Democrats on the committee and two of its 10 Republicans — were prepared to vote to issue a subpoena for the material. The vote had been scheduled for Thursday.

The two Republicans who were prepared to vote for a subpoena were Charles McC. Mathias Jr. of Maryland, who is retiring, and Arlen Specter of Pennsylvania, who faces a tough reelection battle in November. They are liberal Republicans and have sometimes joined the committee's Democratic minority in key committee votes in the past.

Confrontation Averted

The agreement, announced shortly before 6 o'clock after a day of closed negotiations, averted a constitutional confrontation that threatened to delay a vote on President Reagan's nomination of Justice Rehnquist to be Chief Justice.

The Administration agreed to provide access to all the documents the senators sought in a final, narrowed request late last week. Senator Joseph R. Biden Jr., the ranking Democrat on the committee, said, "We're getting everything we asked for," adding, "They're not holding back anything relevant to our inquiry."

Issue of Vermont Deed

The request was for legal opinions and memorandums Mr. Rehnquist might have prepared on domestic surveillance of suspected subversive groups, plans for dealing with antiwar protesters and civil rights and civil liberties issues.

In another development on the Rehnquist confirmation, Justice Rehnquist informed the Judiciary Committee Monday night that his lawyer had informed him in 1974 that the deed to the Vermont property he was then in the

Continued on Page A12, Column 1

SENATE UNIT WINS ACCESS TO MEMOS

Continued From Page A1

process of purchasing contained a restriction against ownership by "members of the Hebrew race."

From 1969 until he joined the Supreme Court in 1971, Mr. Rehnquist was Assistant Attorney General in charge of the Office of Legal Counsel, a unit of the Justice Department that provides legal advice to the Attorney General. The Attorney General at the time was John N. Mitchell. The Democratic senators who initiated the request believe that the files may reveal some knowledge by Mr. Rehnquist of questionable activities.

Initially, the senators asked for all documents prepared by Mr. Rehnquist in his tenure in the office. The Administration responded by asserting the doctrine that the executive may withhold information from Congress and the courts. The senators then narrowed their request to particular subject areas. Senator Strom Thurmond, the South Carolina Republican who heads the Judiciary Committee, appointed Senator Paul Laxalt, Republican of Nevada, to try to negotiate a compromise.

Senator Laxalt received warm praise for his role from Senator Biden and the two other Democratic senators who pressed the request, Edward M. Kennedy of Massachusetts and Howard M. Metzenbaum of Ohio.

Under the agreement, six staff members of the committee, three Republicans and three Democrats, were to be given access to the material beginning tonight. Any senator who wants to look at the documents will do so beginning Wednesday.

The timetable after that is unclear. If the senators find some reason to call Justice Rehnquist back for further questioning, that would presumably be scheduled after the committee finishes its hearing on the nomination of Antonin Scalia to be an Associate Justice of the Supreme Court. A vote on both nominations has been scheduled by the committee for Aug. 14.

Hearings on Nomination

The committee held four days of hearings on Justice Rehnquist's nomination last week, and excused him subject to recall.

Justice Rehnquist told the committee last week that he had no objection to release of the documents. Members of the committee have also requested documents prepared by Judge Scalia, who served as head of the Office of Legal Counsel from mid-1974 through 1976. He said today that he had no personal objection to the request. There had been no official response by the Justice Department to the request as of this evening.

In a letter to the Judiciary Committee, which was made public today, Justice Rehnquist said that after the hearing on his confirmation to be Chief Justice concluded last week, he reviewed his file on the purchase of the Vermont property. In the file was a copy of a letter from his lawyer, David Willis of St. Johnsbury, Vt., to the lawyer for the sellers of the property. In the letter, Mr. Willis noted all the restrictions and liens on the property, including the restrictive covenant that briefly became an issue at the hearings.

Scalia Returns Soft Answers to Senators

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Aug. 5 — Judge Antonin Scalia gave glimpses of his conservative views on such issues as constitutional interpretation today in low-key testimony before the Senate Judiciary Committee, which is considering his nomination to the Supreme Court.

But he declined to answer most of the questions in which the senators were most interested, those bearing on his views on such specific issues as abortion rights.

Asked by Senator Edward M. Kennedy, Democrat of Massachusetts, whether, if confirmed, "you expect to overrule" the Supreme Court's 1973 decision legalizing abortion in certain circumstances, Judge Scalia said, "I don't think it would be proper for me to answer" because, he said, he could later be accused of "having a less than impartial view of it."

He added: "I assure you I have no agenda. I am not going onto the Supreme Court with a list of things that I want to do. My only agenda is to be a good judge."

Contrast to Rehnquist Hearing

Today's calm, although occasionally punctuated by partisan jibes among Democratic and Republican committee members, contrasted with last week's sometimes turbulent four-day hearing on Associate Justice William H. Rehnquist.

Judge Scalia is President Reagan's nominee to take Justice Rehnquist's seat on the Supreme Court if the latter is confirmed as Chief Justice of the United States. Judge Scalia has served on the United States Court of Appeals for the District of Columbia Circuit since Mr. Reagan appointed him in 1982.

The 50-year-old nominee, displaying occasional flashes of his widely acclaimed sense of humor, testified for several hours before the Senate Judiciary Committee as his wife, Maureen, and nine children sat behind him.

Some Republicans on the committee used their opening statements today to denounce Democrats for what Senator Alan K. Simpson of Wyoming described as "the attempted evisceration of William Rehnquist" at last week's hearing.

But the questioning of Judge Scalia was far less aggressive. Although his record places him, like Justice Rehnquist, well to the right of the Supreme Court's present ideological center, liberal Democratic senators said today they knew of no basis for raising [illegible] of questions about his views on racial equality or character that they said were raised by the Rehnquist nomination.

At one point, after Judge Scalia jokingly noted that he was trying in today's testimony "to fight against" his usual inclination to challenge the views of his audience, Senator Joseph R. Biden Jr., Democrat of Delaware, said, "Well, let yourself go, because it's been pretty boring so far."

In general, Judge Scalia took the position that as a judge his function was to apply laws written by others, not to work for his own views of what the right policy should be.

"You write it, and I'll enforce it," he said at one point to Senator Dennis DeConcini, Democrat of Arizona.

Judge Scalia did express views on two issues that seemed at least superficially to contrast with those of Attorney General Edwin Meese 3d, one of those who participated in his selection.

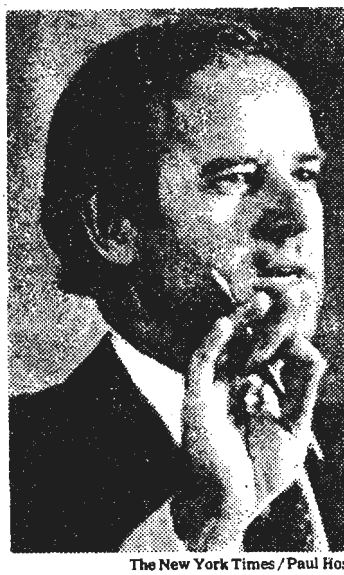
The first was raised by Senator Strom Thurmond, the South Carolina Republican who is the committee chairman, who asked Judge Scalia's view of the Supreme Court's requirement, in its 1966 decision in Miranda v. Arizona, that the police warn arrested suspects of their rights to remain silent and to have a lawyer present at any interrogation.

Judge Scalia responded, "As a policy matter I think — as far as I know everybody thinks — it's a good idea to warn a suspect what his rights are as soon as practicable." Mr. Meese has repeatedly attacked the Miranda decision as an "infamous decision" that prevents the police from obtaining information from criminls.

When asked by Senator Biden whether he agreed with the view, most often identified with Mr. Meese, that judges interpreting the Constitution should stick to the original intent of those who framed the provisions, Judge Scalia seemed to suggest only partial agreement.

He said he thought the original intent was a very important guide, but he said that, for example, he did not believe that lashing and other antiquated forms of punishment would be constitutional now just because they were widely used in 1789, when the Eighth Amendment's prohibition of "cruel and unusual punishment" was adopted.

At the end of a discussion of his attitude toward affirmative action programs mandating the elimination of discrimination in employment, he said: "There should be no doubt about my commitment to a society without discrimination."



The New York Times / Paul Hos

Senator Joseph R. Biden Jr. during confirmation hearing yesterday for Judge Antonin Scalia.

Highlights From Testimony by Sc

WASHINGTON, Aug. 5 (UPI) — *Following are highlights of testimony by Antonin Scalia today at a hearing by the Senate Judiciary Committee on his nomination to be a Supreme Court Justice.*

Abortion

Senator Edward Kennedy, the Massachusetts Democrat, asked if he would vote to overrule Roe v. Wade, the 1973 Supreme Court decision that legalized abortion.

Mr. Scalia said: "Senator, I don't think it would be proper for me to answer that question. I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view."

When Mr. Kennedy expressed concern that Mr. Scalia was nominated to the Court by President Reagan because of his antiabortion views, the judge said, "I assure you I have no agenda. I am not going on to the court with a list of things that I want to do. My only agenda is to be a good judge and decide the cases that are brought before me according to the law as I can best figure it out."

First Amendment

Judge Scalia said those who criticized his opinions on the First Amendment, including one in which he wrote that investigative reporting could be evidence of malice, misunderstand his views. "I don't know of anything from my opinions or my writings that would display anything other than a high regard and desire to implement to the utmost the requirements of the First Amendment," Judge Scalia said.

"I spent my life in the field the First Amendment is most designed to protect," Judge Scalia said, noting that he worked for many years as a scholar and was once editor of a magazine. "If I were to have a skewed view of the First Amendment, it would be in the opposite direction," he said.

Criminals' Rights

Judge Scalia declined to comment on whether the 1966 Miranda ruling requiring the police to inform suspects of their rights was based on proper legal reasoning. But Judge Scalia said he supported the dec as a policy matter.

"I think, as far as I know e body thinks, it's a good idea to w suspect of his rights as soon a practical," he said. "I don't anyone who thinks it should be c wise."

Death Penalty

Judge Scalia said he could not ment on whether Supreme Cour ings on the death penalty gave er guidance to states on how to carr decisions in a constitutional fash

He said voting on death pe cases was sure to be one of his difficult tasks if he became an A ate Justice. "It's something I r have not given thought to an scary, isn't it?" he said. "I don' forward to that as the most enjo part of the job."

Affirmative Action

Judge Scalia was asked wheth believed the Supreme Court reached a consensus that affirm action was an appropriate re even in cases where there we specific victims of discriminati

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Reagan Predicts Impact Of Judicial Appointees

By BERNARD WEINRAUB
Special to The New York Times

WASHINGTON, Aug. 5 — President Reagan said today that by the end of his second term 45 percent of all Federal judges would be his appointees whose decisions on abortion, pornography, crime and other issues would have a long-range impact.

In a speech from the Oval Office that was transmitted by satellite to the 104th annual convention of the Knights of Columbus in Chicago, Mr. Reagan reaffirmed his opposition to abortion. He also expressed concern that Congress would take its summer recess next week before the Senate could act on a $100 million aid package for the counterrevolutionary forces in Nicaragua.

"We need that assistance now," Mr. Reagan said. "Further delay is risking the lives of the Nicaraguan patriots."

In the text of the President's remarks, which was distributed before the speech, Mr. Reagan said, "For Congress to go home without providing the necessary support for the contras would be to risk the permanent loss of Nicaragua to the Soviet bloc."

Mr. Reagan's remarks to the world's largest Catholic laymen's organization, with 1.4 million members, included praise for John Cardinal O'Connor of New York and Bernard Cardinal Law of Boston. The two Cardinals have offered the resources of the Church to women who decide to bring an unwanted pregnancy to term.

Although Mr. Reagan signed a liberal abortion law as Governor of California, he has opposed abortion in recent years. The President said he had been criticized for "mixing religion and politics" because he supported "pro-life legislation."

"It is not our heritage as Americans to turn our backs on massive, legalized abortion," he said. "Today we proclaim what our heritage has always maintained: that all life is sacred."

The President said that "family values" rested at the heart of many of his programs.

Mentions Court Nominations

Citing his recent Supreme Court nominations of Justice William H. Rehnquist as Chief Justice and Judge Antonin Scalia as Associate Justice, Mr. Reagan said he was "especially delighted" about Mr. Scalia because he is "the first Italian-American to be nominated to the Supreme Court in history."

Mr. Reagan's comments on Nicaragua came amid concern in the White House that Senate opponents of the proposed aid package for the Nicaraguan rebels — $70 million in military assistance and $30 million in "humanitarian" help — would be the thwarted by parliamentary tactics before the summer recess, which starts Aug. 14. The aid package was approved by the House on June 25.

Reagan News Conference

WASHINGTON, Aug. 5 (AP) — President Reagan will hold a news conference next Tuesday in Chicago, the White House spokesman, Larry Speakes, said today. Mr. Speakes said the President would answer questions from the White House press corps and local reporters in a session that would be made available for live broadcast by television networks. The news conference will be held at 7 P.M. (8 P.M. Eastern time).

THE WASHINGTON POST
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front page

Rehnquist Told in 1974 Of Restriction in Deed

Reagan Permits Access to Some Documents

By Al Kamen and Howard Kurtz
Washington Post Staff Writers

Chief Justice-designate William H. Rehnquist was informed in writing by his attorney a decade ago that the Vermont property Rehnquist was buying contained a covenant barring its sale to any member of the "Hebrew race," according to correspondence made public yesterday.

Rehnquist sent a copy of the 1974 letter to the Senate Judiciary Committee on Monday but continued to assert, as he did during his confirmation hearings last week, that he did not recall anything about the restrictive covenant.

Hours after releasing the letter, the committee struck an agreement with the Reagan administration on a dispute that could have delayed Rehnquist's confirmation indefinitely. The administration agreed to a narrowed request by the panel for access to some of Rehnquist's papers from his days as head of the Justice Department's Office of Legal Counsel during the Nixon administration.

President Reagan invoked executive privilege last week in withholding the documents, saying that they reflected confidential legal advice. The claim was waived after the panel limited its request to documents Rehnquist sent or received on seven specified issues from 1969 to 1971. The panel's original request was for all of Rehnquist's papers on such broad issues as "civil rights" and "civil liberties," but the agreement narrows the scope to 25 to 30 documents, which senators were to begin reviewing last night.

Sen. Joseph R. Biden Jr. (D-Del.), ranking Democrat on the committee, said the deal was struck after a bipartisan majority on the committee—all eight Democrats and two moderate Republicans—indicated support for subpoenaing the material. "We got access to all we asked for," Biden said. Sen. Edward M. Kennedy (D-Mass.) called the agreement "a substantial victory."

Justice Department spokesman Terry H. Eastland disagreed, saying that the documents would be reviewed under tight security and

See REHNQUIST, A6, Col. 1

BY JAMES K.W. ATHERTON—THE WASHINGTON POST

Supreme Court nominee Antonin Scalia emerges unscathed from light verbal sparring with senators on first day of confirmation hearings. Details on Page A6.

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Photo by Stephen Crowley-The Washington Times

Ohio Democratic Sen. Howard Metzenbaum leans over to introduce himself to Margaret Scalia as her parents, Judge Antonin and Maureen Scalia, look on before the start of confirmation hearings yesterday on Judge Scalia's appointment to the Supreme Court.

Scalia declines to say how he'd vote on abortion

By Theo Stamos
THE WASHINGTON TIMES

Judge Antonin Scalia, in the opening day of confirmation hearings on his nomination to the Supreme Court, yesterday declined to say whether he would vote to overturn a 1973 decision legalizing abortion.

"I don't think it would be proper for me to answer that," Judge Scalia said in a response to Sen. Edward Kennedy, Massachusetts Democrat. "I would be in a very bad position to adjudicate the case without being accused of having a less than impartial view."

Judge Scalia, who since 1982 has sat on the U.S. Circuit Court of Appeals for the District of Columbia, was nominated June 17 by President Reagan to fill the vacancy on the nation's high court.

He told the panel his personal views would not interfere with impartiality.

"There are doubtless laws on the books... not only abortion, which I think are misguided," said Judge Scalia, a Roman Catholic. "But if I couldn't separate my repugnance of the law from what the Constitution requires me to do, I would recuse myself in such a case."

The hearing yesterday stood in marked contrast to last week's often hostile questioning of Justice William Rehnquist, Mr. Reagan's nominee to become the 16th chief justice.

The early questioning was so cordial that Sen. Joseph Biden, the Delaware Democrat who was critical of Justice Rehnquist, said the proceedings were too dull.

"Let yourself go," Mr. Biden told the judge. "It's pretty boring so far."

Accompanied by his wife, Maureen McCarthy Scalia, and their nine children ran-

see **SCALIA**, *page 10A*

Reagan administration agrees to give memos on Rehnquist to Senate Judiciary Committee. Page 4A.

SCALIA

From page 1A

ing in age from 6 to 25, Judge Scalia sought to assure the Senate panel that he would not bring a conservative agenda to the Supreme Court.

"I can assure you I have no agenda," said Judge Scalia, "My only agenda is to be a good judge."

In opening statements by the panel's 10 Republicans and eight Democrats, Judge Scalia received high praise for his keen intellect, integrity and his deft ability to write clearly and convincingly on complex legal issues.

Judge Scalia, a 50-year-old former law professor, is the first Italian-American and the first academic in nearly 50 years to be named to the high court.

Felix Frankfurter, appointed to the Supreme Court by President Franklin Roosevelt, also was a law professor.

Mr. Kennedy, who last week led a spirited attack on Justice Rehnquist, said Judge Scalia's nomination "presents none of the troubling issues with respect to truthfulness, candor, judicial ethics, and full disclosure that have marred the nomination of Justice Rehnquist."

Nevertheless, Mr. Kennedy said, "Judge Scalia has been on the bench only four years and has not ruled on many basic constitutional issues . . . On the available record, I disagree with Judge Scalia on women's rights, and it is fair to say his position on this issue seems as insensitive as Justice Rehnquist."

Meanwhile yesterday, the Senate panel announced that an agreement had been reached regarding a request by eight Democrats and two Republicans on the committee to examine confidential memoranda written by Justice Rehnquist while he served as the Justice Department's chief legal adviser between 1969 and 1971.

Justice Rehnquist's role as legal adviser and the opinions he gave regarding domestic surveillance of anti-war demonstrators and other controversial matters became an issue during last week's confirmation hearings.

On another matter, Justice Rehnquist yesterday submitted a letter to Committee Chairman Strom Thurmond regarding a provision in the deed to the justice's Vermont summer home which bars Jews from ever owning the property.

The restriction, though unenforceable under current law, was the subject of intense controversy at last week's hearings. Justice Rehnquist has asked his attorney to remove the restrictive language from the title.

He acknowledged yesterday in a letter to the panel that he had probably read about the provision in a 1974 letter from his attorney, but did not recall it during last week's hearings.

During an afternoon of questioning yesterday that led into the evening, Judge Scalia declined to give his specific views on affirmative action, noting that like the abortion issue, he was likely to have to confront such questions as a member of the Supreme Court.

Judge Scalia, also declined to comment on whether the Supreme Court's 1966 Miranda decision requiring police to advise suspects of their constitutional rights was a proper decision.

Still, he said, "As a policy matter, I think and I think everybody agrees, it's a good idea to warn a suspect of his rights as soon as practical."

The nominee, when asked about his membership in the all-male Cosmos Club, said he did not think social groups that limit membership to one sex are practicing "invidious discrimination."

"I certainly would not belong to a club that practices racial discrimination because I don't think there is any basis for socialization on the basis of race," said Judge Scalia, who resigned from the Cosmos Club last year.

First Day of Questioning Leaves Scalia Unscathed

Nominee Praised as Brilliant Legal Scholar

By Howard Kurtz and Al Kamen
Washington Post Staff Writers

Supreme Court nominee Antonin Scalia engaged in light sparring over legal issues with members of the Senate Judiciary Committee yesterday, emerging unscathed and with little of the controversy that surrounds the nomination of William H. Rehnquist to become chief justice.

Questioning during the first day of Scalia's confirmation hearings was far less rancorous and personal than that during last week's marathon interrogation of Rehnquist. Scalia, 50, a judge on the U.S. Court of Appeals here since 1982, was lavishly praised as a brilliant legal scholar and the first Italian American nominated to the high court.

With his wife and nine children behind him, Scalia was direct and seemed confident in his answers, although he declined to discuss several legal issues and some of his writings on grounds it would undermine his impartiality as a judge. He refused to tell Sen. Edward M. Kennedy (D-Mass.) how he views the Supreme Court's 1973 decision legalizing abortion, although he has criticized the ruling.

Responding to Kennedy's suggestion that President Reagan may have nominated him to fill Rehnquist's court seat because of his opposition to abortion, Scalia said: "I assure you I have no agenda. I am not going onto the court with a list of things I want to do. My only agenda is to be a good judge."

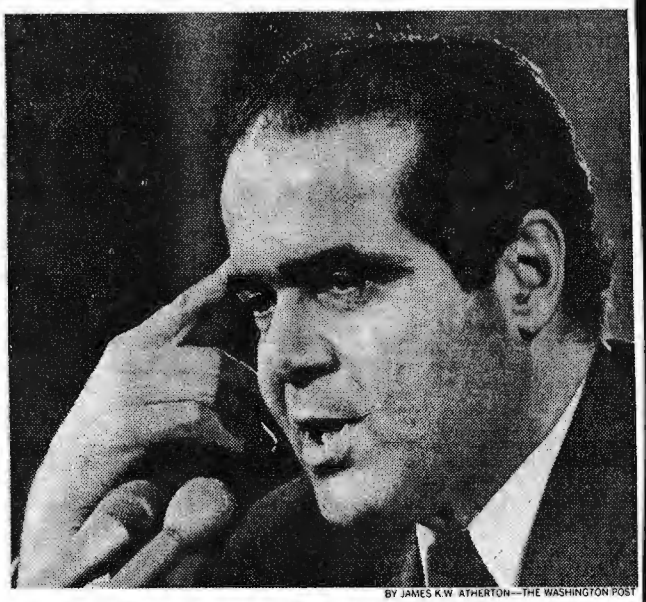
Scalia also told Kennedy, "I will not say that I will never overrule a prior Supreme Court precedent."

Pressed on the abortion issue by Sen. Charles McC. Mathias Jr. (R-Md.), Scalia said: "There are countless laws on the books that I might not agree with, aside from abortion, that I might think are misguided, even immoral. In no way would I let that influence how I might apply them."

Kennedy and other Democrats who had criticized Rehnquist as too extreme took a more understated approach yesterday. "The nomination of Judge Scalia presents none of the troubling issues with respect to truthfulness, candor, judicial ethics and full disclosure that have marred the nomination of Justice Rehnquist," Kennedy said. On most issues, he said, "It is difficult to maintain that Judge Scalia is outside the mainstream."

At one point Sen. Joseph R. Biden Jr. (D-Del.) pronounced the hearing "pretty dull." Most of the liberal and civil rights groups that vigorously oppose Rehnquist's confirmation have declined to take a position on Scalia, although they regard him as equally conservative.

Committee Chairman Strom Thurmond (R-S.C.) said Scalia, who would become the court's youngest member, has "the qualities to be a great Supreme Court justice." Sen. Orrin G. Hatch (R-Utah) noted that the high court has upheld six of the seven decisions it has reviewed that were written by Scalia.



BY JAMES K.W. ATHERTON—THE WASHINGTON POST

Judge Scalia: "I am not going onto the court with a list of things I want to do."

Scalia, who headed the Justice Department's Office of Legal Counsel in the Ford administration and later became a University of Chicago law professor and American Enterprise Institute scholar, has written that the courts "have gone too far" in carving out new rights in areas such as abortion, school busing and affirmative action. Even when senators quoted from his writings, he declined to elaborate yesterday on these issues or his view of the limits of federal regulatory agencies.

Scalia would not tell Sen. Dennis DeConcini (D-Ariz.) his view of the equal protection clause of the 14th Amendment, saying that it might influence DeConcini's vote on his confirmation. DeConcini responded that "I've pretty well decided to vote for you" and for Rehnquist.

Scalia disputed suggestions that he has been hostile to press freedoms in libel cases, saying that he has "a high regard" for the First Amendment. "You can be criticized for coming out against the First Amendment . . . [but] there is always some important interest on the other side," such as national security, "or there wouldn't be a case," he said.

Scalia said he leans toward strictly interpreting the Founding Fathers' meaning in writing the Constitution but added that there must be room for modern evolution. He said "lashing" might now be considered cruel and unusual punishment under the Constitution, although it may have been an acceptable 18th century practice.

Rehnquist Informed in 1974 of Restriction in Vermont Deed

REHNQUIST, From A1

that the agreement ensures a committee vote Aug. 14 on both Rehnquist and Supreme Court nominee Antonin Scalia. "Their first request was basically an effort to fish in the biggest sea possible," Eastland said of the committee. "They are now reduced to a pretty small pond."

The panel has separately requested Scalia's papers from his tenure as head of the same Justice Department office in the Ford administration.

Some of the Rehnquist documents relate to a Supreme Court case on the Army's surveillance of antiwar demonstrators, in which Rehnquist cast the deciding vote after testifying about the matter as a Justice Department official. The other categories are wiretapping, leak investigations, judicial nominations, arrests during May Day protests, the 1970 shootings of antiwar protesters at Kent State University and the 1971 break-in at the office of the psychiatrist of Daniel Ellsberg.

On the Vermont property, Rehnquist testified last week that "I was amazed" to learn of the covenant barring sale to Jews when it turned up in an FBI background check on his nomination. He said he thought he had read the deed when he bought the vacation house in Greensboro, Vt., but did not recall the covenant.

In his letter to Thurmond, however, Rehnquist said he had searched his files and found a July 2, 1974, letter from his attorney, David L. Willis, to John H. Downs, lawyer for the seller of the property. The letter indicates that a copy was sent to "Justice Rehnquist."

The second sentence of the two-page letter says: "The property is also subject to restrictions relative to use, width of rights-of-way, construction on the various parcels, and ownership by members of the Hebrew race."

"While I do not doubt that I read the letter when I received it, I did not recall the letter or its contents before I testified last week," Rehnquist told Thurmond.

Some Democratic senators were said by aides to be concerned about the disclosure, which is likely to rekindle the debate over Rehnquist's credibility as a witness.

Rehnquist testified last week that he was unaware of a similar covenant barring sale to minorities—which is also illegal and unenforceable—on the deed of his former house in Phoenix, which he bought in 1961 and sold, with the restriction, eight years later. Rehnquist, a Supreme Court justice since 1972, told Thurmond he has asked Willis to have the restrictive covenant removed from the deed on his Vermont house.

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Kennedy may seek subpoena of Rehnquist Justice papers

UNITED PRESS INTERNATIONAL

Sen. Edward Kennedy may ask the Senate Judiciary Committee to subpoena documents that Justice William Rehnquist wrote as a government lawyer in the Nixon administration if a compromise is not worked out soon, a spokesman for the Massachusetts Democrat said yesterday.

Mr. Rehnquist's nomination as chief justice has been stalled since last week by a dispute between Congress and the White House over material he wrote and received as a high-ranking Justice Department official and legal adviser to the president and the attorney general in the early 1970s.

Democrats on the Senate Judiciary Committee have threatened to try to get the committee to issue a subpoena for documents that President Reagan has refused to release on grounds of "executive privilege."

The dispute may affect the confirmation hearing scheduled to begin today for another conservative, federal appeals court Judge Antonin Scalia, tapped to succeed Mr. Rehnquist as an associate justice.

Mr. Reagan nominated Mr. Rehnquist, a member of the Supreme Court since 1971, to succeed retiring Chief Justice Warren Burger.

If the documents are not produced, Mr. Kennedy said Friday it might undo the Democrats' pledge to Senate Republican leaders that they won't block a vote on either Mr. Rehnquist or Mr. Scalia.

A spokesman for Mr. Kennedy said the Democrats are hopeful an agreement will be reached to get the material, but if not, the Democrats will ask the committee to subpoena the material.

Six members of the Senate Judiciary Committee met for 1½ hours yesterday to try to resolve the dispute over documents, but one senior Democratic staff aide said "nothing new was offered and nothing was resolved."

Kennedy spokesman Bob Mann said, "The feeling is that nothing took place at that meeting that will alter Sen. Kennedy's intention to go forth and to seek a subpoena for those records."

In a letter to the Senate Judiciary Committee yesterday, the Justice Department noted it had already turned over 40 documents relating to Mr. Rehnquist's tenure at the Justice Department. The letter said the department could not turn over everything requested because that would compromise the department's "continuing ability to provide objective legal advice to the executive branch."

The Justice Department's letter said there had been widespead misconception that the department had made a blanket refusal to turn over the material.

Mr. Kennedy and Sen. Joseph Biden, Delaware Democrat, both have suggested they may have enough votes in the 18-member committee to issue a subpoena for the documents.

Sen. Paul Laxalt, Nevada Republican, a member of the Senate Judiciary Committee, worked with Democrats and the administration over the weekend in an effort to work out a compromise that could allow Democrats to see some of the material.

The administration could refuse to comply with a subpoena, which would then force the committee to adopt a contempt citation that would need approval from the full Senate, which is controlled by the Republicans. If the administration's resistance continued, the citation would have to be tested in court.

The documents relate to such areas as civil rights, civil liberties, executive privilege, national security, domestic surveillance, anti-war demonstrations, wiretapping, leak investigations and the May 1970 killings at Kent State.

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Senate Panel Turns to Scalia; Rehnquist Papers Still Sought

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Aug. 4 — With questions still unresolved about the nomination of Associate Justice William H. Rehnquist of the Supreme Court to be Chief Justice of the United States, the Senate Judiciary Committee is to begin consideration Tuesday of President Reagan's other Supreme Court nominee, Judge Antonin Scalia of the Federal appellate bench.

Both nominations could become embroiled in a dispute between a bipartisan group of Senators and the Reagan Administration over access to internal documents of the Office of Legal Counsel, a unit in the Justice Department that provides legal advice to the Attorney General. Both nominees have served as Assistant Attorney General in charge of that office.

Last week President Reagan, invoking the doctrine that the executive branch has the privilege of withholding information from Congress and the courts, denied a request by Democrats on the Judiciary Committee for opinions and memorandums written by William Rehnquist when he headed the Office of Legal Counsel from 1969 to 1971. Although there have been efforts by some senators and department officials to reach a compromise, the impasse was unresolved as of this evening.

The Democratic senators' initial request for Rehnquist documents was open-ended. A subsequent, narrower request asks for memorandums relating to several specific issues, including wiretapping and domestic surveillance of civilians by the military. The new request also specifies documents from a particular time period, officials said. The exact period was not clear.

Scalia's Memos Also Sought

When the Judiciary Committee convenes at 11 Tuesday morning to begin confirmation hearings on Judge Scalia, the Democrats may try to force a vote on issuing a subpoena for the documents. The Democrats hold only eight seats on the 18-member committee, but at least two Republican senators have indicated some dismay at the Administration's position.

Democratic Senators are also seeking the memorandums and opinions written by Antonin Scalia when he was head of the Office of Legal Counsel from August 1974 until January 1977. The nominee has been a member of the United States Court of Appeals for the District of Columbia Circuit since 1982.

Terry Eastland, a spokesman for the Justice Department, said tonight that the department would take the same position on the request for the Scalia documents as it has on the request for the Rehnquist memorandums: that documents in the "public domain" would be made available but those reflecting internal deliberations in the department would be withheld.

Using this distinction, the department released 40 documents last week in response to the request for the Rehnquist papers, and withheld others.

The Democrats do not know precisely what the Office of Legal Counsel files contain. But, given the issues in which the Justice Department under President Nixon and Attorney General John N. Mitchell eventually became enmeshed, some Senators think there is at least a chance that the files could contain material that could endanger the Rehnquist nomination in the form of legal opinions on the wiretapping of radical political groups or the treatment of antiwar protesters.

Files Not Sought in '71

The files were not requested in 1971, when the Senate confirmed Mr. Rehnquist as an Associate Justice. Justice Rehnquist told the committee last week that he had no objection to release of the material.

If a subpoena were voted and the Justice Department refused to honor it, the next step would theoretically be for Congress to cite the department for contempt. But with Republicans controlling the Senate, such a step appears fairly unlikely, and most people seem to expect the dispute to be resolved short of a constitutional confrontation.

The hearings on Judge Scalia are expected to last about two days; the Rehnquist hearings last week took four days. About 40 people have asked to testify. Votes on both nominations are scheduled for Aug. 14.

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Senators to Push for Rehnquist Memos

Democrats May Seek Subpoena for Nixon-Era Documents

By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

Democratic members of the Senate Judiciary Committee are expected to press this week for a subpoena of internal documents that Supreme Court Justice William H. Rehnquist wrote as a high-ranking Justice Department official during the Nixon administration.

Reagan administration officials, claiming executive privilege, have refused to yield all the records the Democrats want, but were reportedly willing to negotiate some concessions, with Sen. Paul Laxalt (R-Nev.) acting as broker.

If the negotiations founder, sources said last night, the dispute could bottle up Rehnquist's nomination to become chief justice of the United States.

The Judiciary Committee has 10 Republicans and eight Democrats. If the Democrats hold ranks, they will still have to pick up at least two Republican votes to force a subpoena out of the committee.

The battle over the documents may come up late today after the committee begins confirmation hearings for President Reagan's second nominee to the high court, Judge Antonin Scalia of the U.S. Court of Appeals here. About 40 witnesses are expected to testify today and Wednesday.

Committee Democrats had agreed with the GOP majority to vote on both the Rehnquist and Scalia nominations Aug. 14, but sources said the Democrats would probably insist on a delay unless agreement can be reached on the papers from the Justice Department's Office of Legal Counsel, which Rehnquist headed from 1969 to 1971.

A spokesman for Judiciary Chairman Strom Thurmond (R-S.C.) charged that the Democrats were simply making "a grab for headlines."

"If there's a move to break the time agreement, it's because they intended to break it all along and they're using this as an excuse," the aide, Mark W. Goodin, said.

The Democratic attempt to obtain Justice Department memoranda Rehnquist may have written on domestic surveillance of antiwar demonstrators and related issues escalated in the wake of testimony last week about a controversial 1972 Supreme Court decision in which Rehnquist cast the deciding vote as a newly appointed justice.

Rehnquist told a Senate subcommittee in 1971, when he was still at the Justice Department, that the case, ***Laird v. Tatum,*** a dispute over Army surveillance of political dissidents, had no place in the courts because the targets of the spying had not been hurt. But when questioned last Thursday by Sen. Edward M. Kennedy (D-Mass.) about whether he had not made his mind up before taking part as a justice in the pro-government high court decision, Rehnquist refused to respond.

"I was performing a judicial act," he said, "and I ought not to be called on somewhere else to justify it."

Rehnquist said, however, that he had no objection to release of his Justice Department memos on such issues. That night, Reagan invoked executive privilege, saying release of the papers would set a precedent that would chill internal government deliberations.

Goodin said the initial Democratic request for the records was so broad that it amounted to nothing more than "a partisan romp through the files." But the Democrats narrowed it late last week, and sources said administration officials responded Friday night with hints that they might produce some, but not all, of the documents in the Army surveillance case.

Laxalt and other key Judiciary Committee members reportedly met last night in an effort to agree on a compromise. But sources said it was doubtful the administration would give up even the entire ***Laird v. Tatum*** file from Rehnquist's old office, and committee Democrats were said to be insisting on much more.

"Full disclosure is the only acceptable route," a spokesman for Kennedy said. "It's time to stop the stonewalling."

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The Rehnquist Fight

IT IS THE past 15 years in the professional life of William Rehnquist that the Senate should be studying, not the 15 before that. Much is being rehashed that was gone over before, when Justice Rehnquist was being confirmed for his present job. As is the current trend, those who oppose the justice are attempting to get him on personal-misconduct grounds, rather than the aboveboard substantive questions of political and legal philosophy that are really at issue. For there are, in fact, plenty of reasons for scrutinizing the nomination of Mr. Rehnquist to be chief justice without resorting to what has been going on so far in the Judiciary Committee's inquiry.

Questions have been raised there about a confidential memorandum written by a young law clerk, an alleged incident of voter harassment a quarter of a century ago and the presence of old restrictive covenants on two pieces of real estate owned by the nominee. His answers have not been wholly satisfying, but few people in public life would be able to defend all the opinions held or acts taken in youth or in more recent years gone by—least of all some of the senators who are leading the charge against Justice Rehnquist now. Many, in the Senate and elsewhere, resisted school desegregation and other civil rights advances during the years in question concerning Mr. Rehnquist, and many—including some now challenging him—were the product of political machines not exactly famous for their devotion to fair elections or the sanctity of an opponent's ballot once it had been cast.

Accusations of this variety against Mr. Rehnquist can be overcome by a firm declaration that the nominee—like many other public figures—has changed with the times. In a way, they let him off the hook, and the same may be said of the raising of the restrictive covenant question. Restrictive covenants of the kind found in the deeds to Justice Rehnquist's property are obnoxious even if they are unenforceable. A decent response on the part of a property owner who knew they were on his deed would be to insist on some written disclaimer's being appended to the document. But Justice Rehnquist maintains that he was unaware of the covenants, and it is not unreasonable to suppose that this is true. Restrictive covenants were common in this country many years ago; there was one on a house owned by John F. Kennedy; millions of Americans would be surprised to find them in their own property deeds.

The argument that Justice Rehnquist is an extremist because he has so often been a lone dissenter is weak and diverting, too. There is nothing inherently wrong with sticking to your guns when everyone else thinks you're wrong. Justices Douglas and Harlan did that more often than Justice Rehnquist, and both were lauded for it. In recent years, Justice Stevens—the quintessential centrist on the current court—has dissented alone more than the nominee has.

What the Senate should be considering is not statistics but substance. What was each case about? What were the grounds for the dissent? Was the dissenting position reasonable, even if all the other justices disagreed? What does Justice Rehnquist believe now about civil rights and individual liberties, and how are those views reflected in his work on the court?

Fifteen years ago, this paper opposed Justice Rehnquist's nomination to the Supreme Court. Our concerns at that time were not about the 1952 memorandum or the 1962 voting incident—both of which were raised and considered. Our position was based on a fear that the nominee's views on questions of civil liberties in particular would be reflected in opinions that consistently favored the state over the individual. With this concern still at the heart of the controversy over the nomination, we believe the Senate should turn to a thoughtful, careful and rigorous analysis of Justice Rehnquist's opinions and his writing and his speeches.

We would add that on the matter of executive privilege as well, while it would be interesting and no doubt informative to review Justice Rehnquist's files from the early 1970s, we don't believe that material is essential to the Senate's task since a voluminous record of the nominee's views on legal and constitutional issues is already available. If his views disqualify him for the high office to which he has been named—and that is surely a live possibility to which we intend to return—it will be more clearly and conclusively revealed by reviewing his public papers and present positions.

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MARY McGRORY

A Whiff of Watergate

For a show whose ending was supposedly cast in stone, the televised hearings on William H. Rehnquist's qualifications to be chief justice have turned out to be unexpectedly gripping.

It wasn't the melancholy procession of minority representatives who recited Justice Rehnquist's litany of cases in which he decided for the government against the individual. Nor was it a pattern of apathy to civil rights that is documented from the time he opposed a Phoenix desegregation ordinance to the time he stood up for segregated Bob Jones University's income tax exemption. Nor was it even the embarrassing disclosure of restrictive covenants in his two home purchases, or even the fuller disclosure of Rehnquist's past as a super-militant Republican vote challenger in the 1962 election in Arizona.

Rehnquist's champions on the Senate Judiciary Committee accept his categorical denial that he ever bullied minority voters in a polling place, as attested by four witnesses who testified Friday. Besides, they keep suggesting, it was all so long ago as not to matter. And his new accusers, as Sen. Orrin G. Hatch (R-Utah), Rehnquist's most vocal defender, points out in querulous triumph, are all Democrats. Youthful exuberance cannot be claimed. Rehnquist was 37 at the time.

The matter was brought up in 1971, when Rehnquist was nominated as an associate justice, but a sympathetic committee chairman Sen. James O. Eastland (D-Miss.) cut off discussion.

The Republicans are racing to meet a self-imposed deadline for the vote, aiming for the day before the August recess, lest through some awful chance the Senate become Democratic and more people than Sen. Edward M. Kennedy (D-Mass.) boldly proclaim Rehnquist "too extreme to be chief justice."

In the meantime, the psychology is advanced that the Senate must not turn him down after accepting Daniel A. Manion for the Court of Appeals. Having failed to strain at the gnat of Manion, the argument goes, it is obliged to swallow the camel, Rehnquist, whose intellect and temperament are said to be beyond question.

In his time on the stand, Justice Rehnquist gave little hint of legal brilliance and affability, the two qualities most often cited as simply precluding rejection. With a collar so high and tight it looked like a Buster Brown collar, pressed up against his round face, his expression was that of an overgrown, bewildered schoolboy who has been instructed to be as noncommittal as possible. The swagger of his opinions—he once wrote of "integration *uber alles*"—was nowhere evident. In fact, he seemed to have no opinions at all. He had "no comment" about the major decision of his generation, *Brown v. Board of Education*, a case where as in most others, he was then in favor of the status quo.

None of this was exactly surprising. It was the development of a surpassingly awkward subplot that has led to confrontation between the White House and the Senate, and brought back an unwelcome whiff of Watergate.

Judiciary Committee Democrats would like to know more about Rehnquist's role in the infamous Pentagon program of military surveillance of citizens opposed to the Vietnam war. Rehnquist was the head of the Office of Legal Counsel in John N. Mitchell's Justice Department at the time and helped draw up plans for the wiretapping and infiltration. A suit, *Tatum v. Laird* (Melvin R. Laird, Nixon's secretary of Defense.) When it came before the Supreme Court, Rehnquist, despite his intimate involvement in the case, did not disqualify himself. His vote broke a tie, and affirmed his contention that no violation of the First Amendment had occurred.

Democratic senators want to see the papers which would give a clearer idea of Rehnquist's participation. He has no objection, he says, but the White House has taken a stand behind Richard M. Nixon's favorite stonewall, "executive privilege."

Judiciary Committee Chairman Strom Thurmond tried to clamp the lid on the boiling pot.

"The matter is closed," he snapped. The papers were confidential.

"The attorney general is the president's lawyer," he announced.

That's just what Nixon used to say. "We've been down that road," said Sen. Charles McC. Mathias Jr. (R-Md.), a member of the Ervin Committee which challenged the Nixon doctrine and decided that the chief law enforcement officer of the country is indeed the people's lawyer.

Led by Kennedy, the Democrats are pressing for the release of the documents, if not by accommodation, by subpoena.

It is still bad form to question Rehnquist's confirmation. Ronald Reagan has forbidden all consideration of a nominee's ideology. But now at least it has become respectable to ask questions about Rehnquist's judgment and his judicial ethics.

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COPY

Justice Dept. Is Seen Responding Quickly On Rehnquist Data

Special to The New York Times

WASHINGTON, Aug. 3 — The Justice Department is expected to formally respond by late Monday or early Tuesday to the latest request from senators to see legal opinions written by William H. Rehnquist when he was Assistant Attorney General in the Nixon Administration, governmental officials said today.

Reagan Administation officials said there was no reason, however, to believe they would drop their opposition to releasing the papers to members of the Senate Judiciary Committee, which is considering the nomination of Associate Justice Rehnquist to be Chief Justice of the United States.

Staff members of the committee said the senators who are seeking the information would await a formal response before considering whether to issue a subpoena to the Justice Department.

Committee members initially sought access to several legal opinions and memorandums written by William Rehnquist when he served as head of the Justice Department's Office of Legal Counsel from 1969 to 1971. President Reagan denied the request on the ground of the confidentiality of internal deliberations in the executive branch.

Friday night a bipartisan group of committee members fashioned a more narrow request in what some members described as an effort to avoid a confrontation with the White House. But Administration spokesmen were quick to suggest that the revised request would similarly be rejected.

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Rehnquist and His Role in the Arizona Politics of Early '60's

By ROBERT LINDSEY
Special to The New York Times

PHOENIX, Aug. 2 — In the city here William H. Rehnquist began the legal career that took him to the United States Supreme Court, there is little dispute that he played a major role in assisting Democratic efforts to attract black and Hispanic voters to the polls in the early 1960's.

At the time, it is said, he was one of many Republican conservatives who battled with Democrats for control of a state that had many of the racial traditions of the Deep South.

In Washington Friday, four witnesses told the Senate Judiciary Committee, which is considering President Reagan's nomination of Associate Justice Rehnquist to Chief Justice of the United States, that they had seen him personally challenge minority-group voters at polling places in Phoenix in 1962 and 1964.

These accounts were denied by Justice Rehnquist and other witnesses.

Veracity Is Questioned

The nature of the Rehnquist role in Arizona politics in the early 1960's has become a major issue in the nomination hearings. Although he is widely expected to be confirmed as Chief Justice, some Senate Democrats say the conflicting reports raise questions about his veracity and possible prejudice regarding black and Hispanic Americans.

Contemporaries of William Rehnquist from both parties here agree that he worked militantly on behalf of the conservative wing of the state Republican Party in the early 1960's in an unusually bitter struggle with Democrats for polical dominance in Arizona.

Republicans say that in the 1960, 1962 and 1964 campaigns, he helped plan and direct a poll-watching program that was intended to block what Republicans called illegal attempts by Democrats to win elections by bringing large numbers of unqualified black and Hispanic residents to the polls shortly before they closed.

Although the practice of turning away illiterate voters was later barred by the Civil Rights Act of 1964, it was then legal in Arizona. Democrats assert that the Republican poll-watchers intimidated minority voters and restricted voting booths to discourage black and Hispanic residents.

'Voters Would Peel Off'

"They knew our voting strength came after work and if they could hold up the lines, voters would peel off," said former Gov. Sam Goddard, the current state Democratic chairman.

The four witnesses who testified Friday said they had seen William Rehnquist harass minority voters, a charge that others repeated in interviews here this week.

One black resident, Quincy Hopper, said he had seen Mr. Rehnquist and three other men in a "shoving match" at a polling place in 1964.

A Phoenix lawyer and longtime Democratic activist, who said he did not want to be identified because he expected Justice Rehnquist to be confirmed as Chief Justice, said that at the 1962 election he was photographed by William Rehnquist as he and another Democrat approached a voting precinct in a minority community.

Photographing Voters

"We asked him what he was doing, or perhaps he just told us, 'I'm taking pictures of everybody,'" the lawyer recalled. "We asked if that wasn't harassment. He just laughed and said, 'There's no film in the camera.'"

Justice Rehnquist told the Senate committee he had never "harassed and intimidated" or personally challenged voters. Supporters of Mr. Rehnquist suggest that the witnesses Friday may have confused him with another Republican poll-watcher involved in an altercation near a polling place in 1962.

Although the Justice's critics argue that the number of witnesses who say they saw him at the polls is so large that a mistake is not likely, some concede that because of the conflicting stories the dispute will probably never be resolved.

A Committed Conservative

And while some Democrats, including many prominent blacks, contend that William Rehnquist's behavior was racially motivated, others say they believe his actions may not have been those of a bigot but of a party activist committed to conservative principles.

Herbert Ely, a former state Democratic chairman, suggested that William Rehnquist had opposed a 1964 ordinance that outlawed racial segregation of theaters, restaurants and other public places for philosophical reasons. "He just believed property rights shouldn't be compromised for any reason," Mr. Ely said.

After it was disclosed during the Senate hearings on Justice Rehnquist this week that he had owned a home here from 1961 to 1969 that barred the sale or ownership of the property to "any person not of the white or Caucasian race," lawyers pointed out that such convenants probably applied to hundreds of other homes here, including many owned by Democratic leaders.

The restrictions, they say, are a legacy of a time when Arizona was influenced by Southern tradltions.

Arizona's Metamorphosis

When Mr. Rehnquist entered law practice here in 1953, Arizona was a largely rural state that had not begun the metamorphosis that in time that would draw so many people to Phoenix that it now has one of the nation's worst air pollution problems.

Arizona was dominated for generations by a few ranching, mining and mercantile families, some of whom, it has been reported, exploited Hispanic immigrants and blacks from the South.

Its political heritage was frontier-style rugged individualism and distrust of a distant Federal Government, and it often elected conservative Democrats to office, such as the late Senator Carl Hayden.

After World War II, the state, helped by increased availability of air-conditoners that made its summers more tolerable, began attracting more and more immigrants, especially from the South and the Middle West.

Insulated From Changes

But, encouraged by Eugene C. Pulliam, a conservative, now dead, who was the publisher of The Arizona Republic, the state remained insulated from changes occurring in Northern states, and its Democratic Party remained as conservative as any in the South, according to researchers.

"It was just like the South," Dr. Morrison F. Warren, professor of emeritus of education at Arizona State University, recalled. Dr. Warren, a black man, moved to Phoenix with his family in the 1920's, while an infant. "Schools, the theaters, restaurants, housing; everything was segregated," he said.

It remained that way, he said, until the early 1960's, when Arizona began to feel the impact of the national civil rights movement. But, said Dr. Warren, who in 1966 was the first black elected to the City Council, change did not come easy. "For a long time, we were a very segregated city."

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Bell opposes opening of Rehnquist's files

By Ed Rogers
THE WASHINGTON TIMES

With the Senate Judiciary Committee set tomorrow to consider the Supreme Court nomination of U.S. Circuit Judge Antonin Scalia, President Reagan has received unexpected support from President Carter's attorney general on another appointment.

Democrats on the committee, who oppose the nomination of Associate Justice William Rehnquist to succeed retiring Warren E. Burger as chief justice, have demanded access to Mr. Rehnquist's files from when he headed the Justice Department's Office of Legal Counsel and acted as legal adviser to President Nixon.

Mr. Reagan, asserting executive privilege, turned them down Thursday.

Griffin Bell, a former federal appeals court judge who served as attorney general in the Carter administration, endorsed Mr. Reagan's action during an interview yesterday on NBC's "Meet the Press."

"I can't think of anything more mischievous than having the Senate rummage around in the files of the Office of Legal Counsel," Mr. Bell said. "After all, this is a lawyer for the president of the United States."

Sen. Howard Metzenbaum, Ohio Democrat, pointed out during the program that Mr. Rehnquist headed the legal office "during the very period when so many problems existed concerning the whole issue that developed into Watergate."

About the prospect of exposing the nominee's confidential advice to Mr. Nixon about wiretaps, surveillance, break-ins and other issues of that period, Mr. Metzenbaum said, "I think it ought to be put on the table."

When it was pointed out that Mr. Rehnquist himself had no objection to releasing the files, Mr. Bell said, "I do."

"Why should a lawyer be allowed to make files available that belong to a client?" Mr. Bell asked. "Well, if you ask any lawyer, the attorney-client privilege does not belong to the lawyer, it belongs to the client. The president is the client."

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BELL

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Sen. Edward Kennedy, Massachusetts Democrat and a leading opponent of Mr. Rehnquist's nomination, threatened to withdraw his agreement for an Aug. 14 vote on the nomination if the records are not produced.

Sen. Orrin G. Hatch, Utah Republican and Mr. Rehnquist's chief defender on the committee, called the request for the records "a fishing expedition."

Negotiations between the Democrats and the administration continued through the weekend. A committee aide said yesterday that the Democrats may vote tomorrow to issue a subpoena if they do not gain a satisfactory agreement.

During four days of hearings last week, the Democrats failed to derail Mr. Rehnquist's nomination. No further testimony is scheduled, although some committee members have said the nominee may be called back as a witness.

The hearings focused on two charges: that Mr. Rehnquist, as a Republican official in 1961, harassed or intimidated black voters at a polling place in Arizona, and that he bought two homes under convenants not to sell to Jews or blacks.

Mr. Hatch argued on "Meet the Press" that committee witnesses who testified about the alleged voter harassment had confused Mr. Rehnquist with a look-alike at the scene, and pointed out that covenants such as those on the Rehnquist homes have been declared legally void and unenforceable.

After Democrats made an issue of the covenants on the Rehnquist properties — although the nominee said he was not aware of them — U.S. News & World Report reported that a clause in the deed to a Washington house owned by President John F. Kennedy barred its resale to blacks.

Mr. Kennedy bought the residence in 1957 when he was a senator and moved out after he was elected president in 1960. There was no evidence Mr. Kennedy was aware of the clause, the report said.

Republicans on the Judiciary Committee believe Mr. Rehnquist's conservative record during his 15 years as an associate justice is the real reason for the Democrats' opposition.

Mr. Bell was asked if he felt that Mr. Reagan, by his nominations, is "trying to push the court too far to the right."

"No, I don't think so," Mr. Bell said. "He [the president] ran as a conservative and he carried 49 states. The American people apparently are somewhat conservative in their views."

The committee plans to begin hearings tomorrow on the nomination of Judge Antonin Scalia of the U.S. Circuit Court of Appeals in Washington to succeed Mr. Rehnquist as associate justice.

The Scalia nomination drew criticism during the Rehnquist debate.

Eleanor Smeal, president of the National Organization for Women, said Justice Rehnquist and Judge Scalia have views that are "totally out of keeping with where we are in today's society."

Former President William Baroody Jr. of the American Enterprise Institute applauded the nomination.

Justice Rehnquist, 61, Judge Scalia, 50, and an earlier Reagan appointee, Justice Sandra Day O'Connor, 56, would give the court a conservative nucleus into the 21st century. The most liberal members of the court are well into their 70s.

Staff writer David Sellers contributed to this report.

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Hearings on Rehnquist's Nomination End, but the Controversy Lingers On

By STEPHEN WERMIEL
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—The Senate Judiciary Committee wrapped up the hearings, but not the controversy, over the nomination of Supreme Court Justice William Rehnquist to be chief justice.

While the nomination remains virtually assured of approval by the committee and by the full Senate, the process may be slowed by a dispute over whether President Reagan will give Senate Democrats access to legal memorandums concerning domestic surveillance that were written by Mr. Rehnquist while he was an assistant attorney general in the Nixon administration.

On Thursday, the Justice Department invoked executive privilege in President Reagan's behalf and said the documents wouldn't be disclosed. But negotiations over a compromise began immediately. As the committee completed the hearings, Sen. Paul Laxalt (R., Nev.), who is a close friend of the president, and two Justice Department officials discussed the issue with Sen. Edward Kennedy (D., Mass.).

But no agreement was reached Friday or during the weekend, according to Senate and administration sources. If the matter isn't resolved, Democrats plan to bring it up tomorrow at the start of hearings on the nomination of federal appeals court Judge Antonin Scalia to fill the vacancy that would be created by the elevation of Mr. Rehnquist.

Sens. Kennedy and Joseph Biden of Delaware, the senior Democrat on the committee, both have suggested that they may have enough votes in the 18-member committee to issue a subpoena for the documents.

Failure to produce the documents, Sen. Edward Kennedy said at Friday's hearings, also might undo the Democrats' pledge to Senate Republican leaders that they won't block a vote on either Justice Rehnquist or Judge Scalia. The committee is scheduled to vote on both nominations Aug. 14, and the full Senate would vote in early September.

Democrats say the memos, involving the legality of domestic surveillance of groups opposed to the Vietnam War and involved in other issues in the early 1970s, may shed new light on Mr. Rehnquist's views on civil rights and liberties. But Sen. Orrin Hatch (R., Utah), who emerged at the hearings as Mr. Rehnquist's principal defender, said the Democrats are merely on a "fishing expedition."

Meanwhile, senators must wrestle with statements that appear to contradict Mr. Rehnquist's testimony that he never harassed, intimidated or challenged the qualifications of black and Hispanic voters while he was a Republican activist in Phoenix, Ariz., between 1958 and 1964.

James Brosnahan, a prominent San Francisco lawyer, said that as a federal prosecutor in Phoenix in 1962, he investigated complaints at polling places that voters were being intimidated with literacy tests. He said he found Mr. Rehnquist, whom he knew, at one polling place where voters were complaining specifically about his conduct.

Sen. Hatch tried repeatedly to shake Mr. Brosnahan's testimony. The witness finally said angrily, "Do you think I really would be here to testify on the qualifications of the chief justice after 27 years of trying lawsuits if I weren't absolutely sure . . . "

Another witness, Sydney Smith, who was a professor of psychology at Arizona State University at the time, said he saw Mr. Rehnquist at a polling place in 1960 or 1962 tell some black voters that they couldn't read and had better leave the voting line. "I may not be able to define intimidation, but I know it when I see it," he said.

At the conclusion of the hearings, however, several witnesses said they were Republican co-workers with Mr. Rehnquist in 1962 and that he merely offered legal advice to others involved in challenging voters. And a former state Democratic official said he never received any complaints about Mr. Rehnquist in 1962.

Sen. Biden, speaking yesterday on ABC-TV's "This Week With David Brinkley," said Mr. Rehnquist's "credibility has come into some question for me." But some senators have said the dispute is irrelevant and that Mr. Rehnquist should be approved, based on his 15 years as an associate justice.

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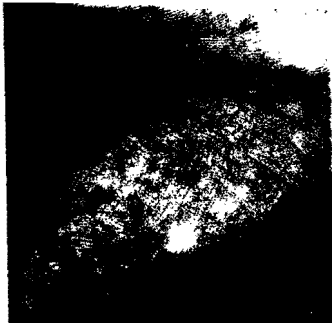

William Raspberry

Rehnquist: No Remorse?

What's this? A prospective chief justice of the United States who twice signed deeds promising not to sell his home to minorities?

Well, as they say just before the tie-breaking hand at the world poker finals: Big deal!

I would be astounded to learn that no member of the Senate Judiciary Committee questioning Associate Justice William H. Rehnquist has ever signed such a once-common, unenforceable restrictive covenant. I find it altogether reasonable that Rehnquist never knew about the bigoted provision, that he, like most of us, left the matter to the real estate people and title lawyers.

What bothers me about Reagan's nominee for the top judicial seat in the land is not his meaningless restrictive covenants but his dismayingly restrictive view of civil rights, women's rights and the social revolution that has taken place under his disdainful nose.

Friday's hearings featured testimony by James J. Brosnahan, assistant U.S. attorney in Phoenix at the time, who said that in 1962 he saw Rehnquist challenging numerous voters at a polling place in a predominantly black and Hispanic precinct in south Phoenix.

"Because the challenges were so numerous, the line of voters in several precincts grew long, and some black and Hispanic voters were discouraged from joining or staying in the voters' lines," said Brosnahan, who had been summoned by complaining voters.

"It was my opinion in 1962 that the challenging effort was designed to reduce the number of black and Hispanic voters by confrontation and intimidation."

It's hard to know which is more unsettling: that Rehnquist may have done such a thing or that, as he testified last week, he doesn't remember. Even if such challenges were legal at the time, it must have been clear that the law permitting them could easily be distorted into a tool of intimidation. That he doesn't even remember whether he did or didn't so distort it in a way that might at least have been viewed as intimidating speaks poorly for a prospective chief judge of the nation's highest court.

So, too, does Rehnquist's undisputed opposition to open-accommodations statutes in Phoenix and Arizona.

Perhaps the poorest defense of Rehnquist's actions came from Sen. Orrin Hatch (R-Nev.), who argued that since they took place some 20 years ago, they were nothing more than red herrings at last week's hearings. The implication is that the nominee's views may have changed so much since then that, as with the late Justice Hugo Black, who though a former Klansman was to become a leading liberal on the court, the actions and attitudes of his youth are unimportant.

The difference is that Black subsequently recanted his former views; he changed. The most remarkable thing about Rehnquist, on the other hand, is the utter consistency of his conservatism. If he regrets having held the property rights of businesses as a higher priority than the right of minority citizens to places of public accommodation, why, in the name of decency, hasn't he said so? As Benjamin Hooks, head of the NAACP and chairman of the Leadership Conference on Civil Rights, noted, the distressing thing is not what he once did but that he displays no remorse for having done it.

Does he still believe, as he said in 1964, when the Phoenix statute was enacted, that its unanimous passage was "a mistake"? (Thirty people had testified in favor of the city council proposal; Rehnquist, appearing as a private citizen, and two others testified against it.) Does he still believe that "it is impossible to justify the sacrifice of even a portion of our historic individual freedom" in order to grant minorities the right to public accommodations?

Does he still believe (or did he never believe, as he now insists) that the 1954 school desegregation case was wrongly decided? In a memo to the late Justice Robert Jackson, for whom he then clerked, Rehnquist wrote: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* [the 1896 separate-but-equal ruling] was right and should be reaffirmed." He now insists that he was reflecting Jackson's views, not his own, although the wording clearly suggests otherwise.

What other unenlightened views lurk in the memos he wrote as law clerk as Nixon's legal counsel? The White House, perhaps fearing the answer, has invoked "executive privilege" to keep us from finding out.

The assumption is that, absent some devastating new disclosure, Rehnquist will be approved by the Judiciary Committee on Aug. 14 and by the full Senate on Sept. 8. But my own feeling is that he shouldn't be—not because of the restrictive covenants or his generally conservative philosophy but because of his extremist views on settled questions of civil rights.

THE NEW YORK TIMES
Sunday, August 3, 1986
Front Page

CLASH IN CAPITAL ON REHNQUIST DATA REPORTED GROWING

Administration and Senators at Odds Over Papers From the Nixon Presidency

By STEVEN V. ROBERTS
Special to The New York Times

WASHINGTON, Aug. 2 — A confrontation seemed to be looming today between a bipartisan group of Senators and the Reagan Administration over Congressional access to sensitive papers written by William H. Rehnquist when he was a high-ranking Justice Department official in the Nixon Administration.

At a meeting on Capitol Hill late Friday, the Senators gave department representatives a revised, more narrowly focused request for opinions and memorandums written by Mr. Rehnquist, the Associate Justice who is President Reagan's nominee to be Chief Justice of the United States.

An earlier, broader request was rejected Thursday by the President under the doctrine that the executive has the privilege of withholding from Congress or the courts certain information to protect confidentiality or for other reasons.

No Need 'to Change Position'

But today a spokesman for the Justice Department said officials would probably not comply with the new request.

"We're aware of the request, and we're reviewing it," said the spokesman, Terry Eastland. "But at the moment, we don't see any need to change our position."

The documents now being sought by members of the Senate Judiciary Committee, which is considering the nomination, relate to such issues as electronic surveillance of radical political movements in the late 1960's, according to several Congressional staff aides.

Possible Subpoena Readied

If the Administration does not change its position and no compromise is reached, it would then be up to the Judiciary Committee to decide whether to issue a subpoena for the documents. The Republicans hold a 10-to-8 majority on the panel, but two Republicans, Charles McC. Mathias of Maryland and Arlen Specter of Pennsylvania, have indicated an interest in reviewing the Rehnquist papers and might provide the key votes in approving a subpoena.

Committee Democrats initiated the first request for Mr. Rehnquist's papers, but according to several Congressional staff aides, Senators Mathias and Specter support the second, narrower request.

Senator Joseph R. Biden Jr. of Delaware, the ranking Democrat on the committee, has already directed his

Continued on Page 21, Column 1

Clash Looming Over Access to Rehnquist Papers

Continued From Page 1

staff to draw up a possible subpeona.

The committee chairman, Senator Strom Thurmond of South Carolina, has designated Senator Paul Laxalt of Nevada, a close friend of Mr. Reagan's who is on the committee, to try to mediate an agreement on the papers issue.

The committee completed four days of hearings on the nomination on Friday and has no further sessions scheduled, according to Mark Goodin, a spokesman for Senator Thurmond.

However, committee Democrats are likely to ask Senator Thurmond to recall Justice Rehnquist for further testimony, said Senator Paul Simon of Illinois, who monitors judicial appointments for the panel's Democrats.

"I favor it," Senator Simon said, "and clearly that is the sentiment on our side."

A primary focus of any new sessions would be on four witnesses' testimony before the panel that Mr. Rehnquist challenged black and Hispanic voters in Pheonix in the late 1950's and early 1960's, Mr. Simon said. An aide to the Senator added, "He believes there are points that have to be resolved."

Justice Rehnquist has denied that he confronted or harassed potential voters, saying his role was solely to offer legal advice to Republican poll workers.

The issue of Mr. Rehnquist's writings at the Justice Department, however, threatens to overshadow other questions raised at the hearings. If some kind of compromise between the Senate and the Administration is not reached, the Rehnquist papers could lead to a prolonged legal battle, and a delay in the Justice's confirmation.

According to Mr. Eastland, the Justice Department has already turned over to the committee a large number of documents from 1969 to 1971, when Mr. Rehnquist headed the Office of Legal Counsel in the Justice Department. But it has refused to disclose internal memorandums and other private papers that some Senators believe could shed light on Mr. Rehnquist's thinking about civil rights and civil liberties issues.

A 'Horrible Precedent'

Justice Rehnquist has said he does not care whether the committee sees the papers.

Patrick Korten, another Justice Department spokesman, said turning over such papers to Congress would be a "horrible precedent to set" that would undermine frank discussion within the Government.

Mr. Goodin, the Thurmond aide, said the committee chairman would abide by whatever decision was made by the Administration, adding, "It's their call."

If the confrontation builds, the legal issue could get "somewhat complicated," Mr. Eastland noted. Should the Reagan Administration refuse to comply with a subpeona, the committee would have to adopt a contempt citation that would need approval from the full Senate, according to a Judiciary Committee aide. If the Administration's resistance continued, the citation would then have to be tested in court.

The issue also has a direct bearing on the nomination of Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia to replace Justice Rehnquist as an Associate Justice. Judge Scalia also held a top post in the Justice Department in the mid-1970's, and Democrats have already prepared similar requests for information about his writings and activities.

Lawmakers from both parties expressed the hope that the clash could be settled by some sort of compromise, without a full-scale confrontation. "It's going to be a terrible mess if something doesn't get worked out," said one Senate staff member.

The Federal Bureau of Investigations said today that it had begun an investigation to find the bureau agent who, according to testimony by James J. Brosnahan, accompanied him to a Phoenix polling station in 1962. Mr. Brosnahan, now a San Francisco lawyer, testified Friday that as an assistant United States attorney, he went to the polling place with an F.B.I. agent, in response to complaints and determined that Mr. Rehnquist was intimidating minority voters.

Edwin M. Yoder Jr.

Does It Matter Whether He's an 'Extremist'?

The anticipated case against the Rehnquist nomination has been a fizzle so far.

Sen. Edward Kennedy has pronounced the Reagan nominee "too extreme" to be the nation's 16th chief justice. But in this big and various land, what seems extreme in Massachusetts in 1986 would not have seemed so in Arizona a quarter century ago.

Before moving to Washington, William Rehnquist belonged to the individualist Goldwater school of southwestern GOP politics. The justice may even share—or have shared—his mentor's famous belief that "extremism in the defense of liberty is no vice." But that is hardly the stuff that sinks judicial nominees.

Similarly, not very fruitful use has been made of the charges about Rehnquist's poll-watching activities in Phoenix in the 1950s and 1960s. Whether his participation was active or passive, whether it involved "harassment and intimidation" or mere polite challenge, the key thing is what it implies about his outlook at the time.

At that stage of the civil rights battle, most of us would have said that the major issue in minority voting was massive and often fraudulent disfranchisement. Phoenix Republicans, it seems, were mainly exercised by the threat that illiterates, presumed to be Democratic, would vote. That indicates a certain inversion of realities. And coupled with the justice's opposition to the opening of public accommodations by law, it is not the brightest spot in his résumé.

But does this parochialism, now decades past, disqualify him to be chief justice? It would be a hard case to make.

As for the other major issue, his views in 1952 on the school segregation cases, the matter is less puzzling, and possibly less discreditable, than Sen. Joseph Biden seems to believe.

> *"The test is the consistency and honesty with which personal bias is put aside when constitutional mandates clearly demand self-restraint."*

In a memo on the school segregation cases, written as Justice Robert H. Jackson's Supreme Court clerk, Rehnquist argued that the "separate but equal" precedent of 1896 was sound "and should be affirmed." That view tallies with other judicial views held by Rehnquist. At the time of his confirmation as associate justice, however, Rehnquist claimed that he was putting himself into Jackson's shoes. He still says so, though The Post has turned up some evidence in the Jackson papers suggesting that Jackson's clerks were encouraged to speak their own minds.

Even if you assume Rehnquist was speaking for himself, the memo hardly shows a partiality to white supremacy as such. Doubts about the reversal of *Plessy v. Ferguson* were widespread in 1952, and not just among segregationists.

One who had such doubts was Justice Jackson himself, a maverick but a hater of political oppression and certainly in no sense a racist. Though he eventually joined the *Brown* decision two years later, Jackson was torn. At one stage he threatened to dissent unless the court candidly faced the ambiguity of constitutional guidelines and admitted that it was declaring "new law for a new day." If his young law clerk shared such doubts two years before the decision crystallized, that would be neither surprising nor discreditable.

Indeed, the association with Jackson throws useful light on Rehnquist's judicial views—certainly more light than the epithet "extremist." As solicitor general and attorney general under the New Deal, Jackson wrote the principal justification for FDR's court-packing plan. It was based on his hostility to the theory that "substantive" economic rights inhere in the due process clause. To that position, his protégé has been faithful, notwithstanding that recent beneficiaries of "substantive due process" have been minority persons, not business corporations. That has made Rehnquist's view less popular than it would have been in New Deal days.

Judging is a mediating art, and the test of integrity cannot be whether the results of a judge's deliberations look extreme or moderate, humane or inhumane, liberal or conservative. The test is the consistency and honesty with which personal bias is put aside when constitutional mandates clearly demand self-restraint.

With an occasional lurch, usually when his strong individualism collides with his strong impulse to give strong government a wide berth, Rehnquist's judicial record is fairly faithful to the views of his mentor, Justice Jackson. Some of the Goldwater conservative undoubtedly lingers in Rehnquist. But the opposition hasn't yet turned that fact into a case against confirmation.

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George F. Will

The Accusation Sweepstakes

Hear the voices of moderation calling William Rehnquist an extremist.

Joseph L. Rauh Jr., a bench-warming utility infielder on one of liberalism's second-division teams, says Rehnquist "doesn't believe in individual rights." Sens. Howard Metzenbaum and Edward Kennedy, whose liberalism is even more pronounced than the liberalism rejected by 93 states in the last two elections, are not exactly a Lewis and Clark team you would send exploring to locate the American mainstream. But they say Rehnquist is out of the mainstream.

"Howard Metzenbaum and Edward Kennedy . . . are not exactly a Lewis and Clark team you would send exploring to locate the American mainstream."

But the fellow to watch in the accusation sweepstakes is Delaware's Democratic senator, Joseph Biden. He is bright and witty and can be thoughtful, three things a president should be. Being president interests Biden, so watch the confirmation hearings on Rehnquist to see if Biden has another attribute presidents need: judgment.

Biden has a bad tendency and two positions—a seat on the Foreign Relations Committee and the role as ranking Democrat on Judiciary—that give him many opportunities to let his tendency slip its leash. His tendency is to turn public-policy choices into telegenic moments of personal torment, explaining, passionately, how the nomination of Ed Meese as attorney general, or the administration's South Africa policy, or this or that judicial nominee makes him "feel" ("troubled," "outraged," "ashamed"). He has been told too often that he is an orator, which he may be by the unexacting standards of the age. But like most people, he has an emotional life more intensely interesting to him than to spectators.

However, Biden has thought hard about the Senate's responsibilities in consenting to presidential nominations to the federal judiciary. He asked two law professors, Philip Kurland of Chicago and Laurence Tribe of Harvard (Kurland inclined toward conservatism, Tribe decidedly liberal), to collaborate on a memo sketching the scope of Senate discretion. It is indeed just a sketch.

In an almost indecipherable sentence, the professors say: "The absence of a nominee's lack of adherence to constitutional values should not be deemed a sufficient ground for confirmation."

By an insufficiency of an absence of a lack they mean: a nominee bears the burden of dispelling doubts about his or her adherence to "constitutional values." But that formation is unhelpful for the same reason it is unexceptionable. It does not clarify what those values are.

In two speeches in the last eight months, Biden has been bolder. He says the Senate must ascertain "that nominees' views and values fall within the bounds of acceptability." More specifically—but not very specifically—he says the Senate must have no doubts as to a nominee's "commitment to the Bill of Rights or to constitutionally commanded equality."

But learned and honorable people differ about the implications of virtually every clause of the Bill of Rights and about what equalities the Constitution commands.

Biden does, however, intimate that the Senate would be justified in rejecting a nominee who rejects the 60-year-old "Incorporation Doctrine." It holds that the "due process" guarantee of the 14th Amendment brings state governments under the control of the Bill of Rights. (The First Amendment, for example, says "Congress shall make no law . . . abridging the freedom of speech." The Incorporation Doctrine says: that binds states too.)

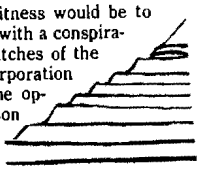
Although an abstract argument can be made that the doctrine is unwise, Biden's intimation is correct: the Senate could legitimately refuse to confirm a nominee who, in the face of 60 years of precedents, wished to inject chaos into constitutional law by rejecting the doctrine. But what application has this criterion for rejecting a nominee to do with Rehnquist? None. There is no reason to suspect that Rehnquist has a radical agenda of opposition to such broad and settled principles of constitutional law.

Implicit in Biden's analysis is, I think, this principle: the Senate cannot legitimately reject a nominee merely because of his disagreement with this or that particular holding by the court, as, for example, regarding abortion or the exclusionary rule. Rather, rejection of a nominee must turn on the nominee's rejection of a meta-principle of constitutional law, the overturning of which would unravel a broad fabric of settled practices.

But Biden has a political doctrine too. It is that Ronald Reagan is serving the "Radical Right," which aims to repeal the Incorporation Doctrine. Biden neglects to name any of these extremists who menace American liberty, but he has seen the whites of their eyes. They have, he says, "the vacant stare of the zealot and the acrid odor of burning books!"

Oh dear. There he goes again, Biden the precocious orator.

One way to attack Rehnquist's fitness would be to smear him with guilt by association with a conspiracy of radicals, who in the silent watches of the night dream the death of the Incorporation Doctrine. Biden knows better. If he opposes Rehnquist, no serious person will take him seriously as a presidential candidate.



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Constitutional Process or Theater?

Rehnquist Questioning Largely Limited to Events of Decades Ago

By Al Kamen
Washington Post Staff Writer

Chief Justice-designate William [. Rehnquist emerged from his enate confirmation hearings lightly wounded from challenges to is truthfulness, but with his approval on track barring new disclo-ures.

It could not have been otherwise, iven that nearly the past 20 years f his life were sealed off from in-uiry.

Rehnquist would not answer uestions from the Senate Judiciary ommittee about his prior judicial opinions, saying it would impinge upon judicial independence o do so. Nor would he talk much bout how he might handle major onstitutional issues in the future.

NEWS ANALYSIS

The Reagan administration, cit-ıg executive privilege, would not :t the committee see what Rehn-uist did during his three years as ead of the Justice Department's)ffice of Legal Counsel during the lixon administration.

And virtually no questions re-arding his health would be asked, espite the fact that Rehnquist has ever said a word in public about his 982 hospitalization and his prob-:ms withdrawing from a powerful rescription drug, which reportedly emporarily affected his mental larity.

The committee agreed such uestioning would impinge on :ehnquist's "privacy."

All that was left for the commit-ee was the hopeless task of trying o grill Rehnquist about events that ccurred 30 or more years ago, uch as alleged voter harassment in 'hoenix or memos he wrote as a oung law clerk or restrictive cov-nants in deeds he may not have een, much less signed.

The situation is not exclusive to Rehnquist. Judicial nominees often leave more questions raised than resolved. But the hearings raise questions about what the Senate really knows about a candidate for one of the most powerful positions in government and whether it is fulfilling the role of "advice and consent" envisioned by the Founding Fathers.

The hearings often seemed more like theater than a solemn constitutional undertaking. Senators darted in and out, some hardly attending, others spending nearly as much time sparring with each other in front of the television cameras as they did questioning witnesses.

The "cross-examination" by most committee members was more often a series of unconnected, rambling questions, followed by laconic answers from Rehnquist, who was following the advice lawyers always give clients to answer precisely the question asked and no more.

The questions followed relentless and pointless speechmaking. It was enough to make veteran prosecutors and defense lawyers weep for their art.

While tradition may support a superficial confirmation process, nothing in the law or the Constitution requires it.

The Constitution lumps justices together with all other officers of government whose appointments require Senate approval. The argument is that questioning a judge about prior opinions, or the suggestion that a judge might be asked about them some day, will compromise judicial independence by making judges fear for their careers while on the bench.

Aside from the obvious insult to sitting federal judges, it is hard to see how judges would slant opinions when they could not know when, if ever, they might be in the right place at the right time for promotion and Senate questioning. Those inclined to curry favor in order to ascend to a higher court will do so whether the Senate questions them or not.

The executive privilege claim—shielding Rehnquist's Justice Department memos from scrutiny—is based on the Supreme Court's ruling in the 1974 Nixon tapes case in which the court for the first time recognized something called executive privilege. The fact that such a claim exists in law, however, does not require its assertion by the administration much less require the Senate to bow to it.

The Senate is fortunate in Rehnquist's case that he has been on the court for the last 15 years, leaving a clear record of his views on major issues. But it may not be so fortunate in the future.

The hearings, if not especially enlightening, were at least entertaining. First there were the shouting matches among the senators to keep everyone awake.

Then there was the abortion rights advocate who testified against Rehnquist. She took the opportunity to announce for the first time publicly, she said, that when she was younger she had once nearly died after undergoing an illegal abortion at the hands of a Mafia-connected abortionist.

There was also the unforgettable exchange between Senate Judiciary Committee Chairman Strom Thurmond (R-S.C.) and Jeffrey Levi, head of the National Gay and Lesbian Task Force.

Levi had just testified about Rehnquist, but Thurmond wanted to know about homosexuals. First Thurmond said he was "shocked" to hear Levi's estimate that 10 percent of adult Americans are gay or bisexual.

"Does your organization advoc or have any kind of treatment p gram for gays and lesbians change them so they'd be like r mal people?" Thurmond asked.

"We consider ourselves to quite normal," Levi replied.

"You don't think gays or lesb are subject to change . . . you d think they could be converted they could be like other peop Thurmond pressed.

"We are like other people," I said, "with one small exception."

"That's a small exception? Th a pretty big exception, isn't Thurmond said.

The last witness, perhaps fitt ly, was a litigant in the fed courts named Bal K. Tharper decided to plead his case to committee. Acting Chairman Orrin G. Hatch (R-Utah) cut him barely two minutes into what pr ised to be a lengthy discussion o legal claims.

JFK's Georgetown House Had Restrictive Covenan

United Press International

John F. Kennedy purchase Georgetown house when he w senator that was covered by a enant barring blacks, U.S. New World Report reported yesterd

The deed obtained by the r azine and published in its Aug issue showed that Kennedy bo the house in 1957, but no proof found that he knew of the cla According to the covenant for house at 3077 N St. NW, "lot 1 square 1229," no part of the "shall ever be used or occupie or sold, conveyed, leased, rente given to Negroes or any perso persons of the Negro race blood."

Restrictive convenants bec newsworthy last week when it revealed in confirmation hea that deeds for two properties chased by Chief Justice-desig William H. Rehnquist in 1961 1974 prohibited sale or leas blacks in one instance and Je another.

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Defender of the Justice

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Aug. 1 — Now the fierce partisan, now the student of the Constitution, with biting sarcasm or gentler gibes, Senator Orrin G. Hatch emerged from the Supreme Court confirmation hearings this week as the principal defender of the Reagan Administration and its nominee for Chief Justice, William H. Rehnquist.

If the four days of hearings gave the public an unusually close look at a sitting Justice, they also provided a public forum for the intense 52-year-old Utah Republican who is believed in some quarters to be a possible Supreme Court nominee himself if President Reagan gets the chance to make another appointment.

Midway through a second term in the Senate, Senator Hatch is only fourth in seniority among the Republicans on the Judiciary Committee. Yet it was he, rather than Senator Strom Thurmond of South Carolina, the committee's 83-year-old chairman, who took the lead in trying to guide Justice Rehnquist through the traps the committee's Democrats had laid.

In the process, he had a number of biting exchanges with the Democrats, particularly with Senator Edward M. Kennedy, the nominee's most outspoken opponent.

Questions Called 'Ridiculous'

"You know it's ridiculous and I know it's ridiculous," Senator Hatch snapped as Senator Kennedy continued pressing Justice Rehnquist on the question of restrictive covenants on property he owned.

"I don't think it's ridiculous," Senator Kennedy replied. "The real question is the sensitivity of this nominee to issues of civil rights."

"Oh, come on," Senator Hatch said. "This is being blown way out of proportion."

At the hearing today, Senator Hatch took on a new role, that of cross-examiner of the witnesses the Democrats produced to testify about Mr. Rehnquist's activities as a young lawyer and Republican activist at Phoenix polling places in the early 1960's.

Senator Hatch is an experienced trial lawyer. But he met his match today in the Democrats' lead witness, James J. Brosnahan, a San Francisco lawyer.

For nearly an hour, Senator Hatch tried to undermine Mr. Brosnahan's testimony that Mr. Rehnquist had challenged voters at a Phoenix polling place on Election Day 1962. Mr. Brosnahan, who knew Mr. Rehnquist personally, went to the polling place as an assistant United States attorney to investigate complaints.

An Unshakable Witness

In his own testimony before the committee earlier in the week, Justice Rehnquist disputed Mr. Brosnahan's account and said he had never personally challenged voters' qualifications.

Mr. Brosnahan was unshakable under Senator Hatch's rapid-fire questions. Finally, Senator Hatch said: "We've got a conflict between you and Justice Rehnquist over events that occurred 24 years ago, and you admit that you never observed anything personally."

Mr. Brosnahan said with some heat: "It is not accurate or fair to suggest that I said I didn't see anything. You have not correctly characterized my testimony."

Mr. Brosnahan proved such a strong witness that some Republicans said privately that Senator Hatch's effort to discredit him had backfired.

Earlier in the week, under questioning by the Democrats, Justice Rehnquist declined to defend his written opinions on the ground that he should not have to account for his actions on the bench.

Senator Hatch undertook to defend him. The Senator discussed in detail Justice Rehnquist's solitary dissent in the Bob Jones Unviersity case, in which the Justice took the view that universities that practice racial discrimination are entitled under current law to tax-exempt status.

Senator Hatch said that, far from endorsing discrimination, Justice Rehnquist was simply taking the view it was up to Congress to amend the Internal Revenue Code. "That is a principled constitutional position," he said, "one you should be given credit for rather than condemned for."

A conservative from one of the most Republican states in the country, Senator Hatch is not particularly well known outside the Senate and Republican circles. But some political experts believe that will change. "Orrin will be coming into his own as a national figure," Charles Black, a Republican political consultant, said today. He said "a lot of people" were watching and discussing Senator Hatch's performance at the hearings. "From what I'm hearing," Mr. Black added, "he's doing a good job."

The New York Times/Jose R. Lopez

Senator Orrin G. Hatch at Judiciary Committee hearing.

NEW YORK TIMES
Saturday, August 2, 1986
Front Page

4 Rebut Testimony by Rehnquist On Challenging of Voters in 60's

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Aug. 1 — Four witnesses, including a former Federal prosecutor, today contradicted Justice William H. Rehnquist's sworn testimony about his role in Republicans' Election Day efforts to challenge voter qualifications in Phoenix in the early 1960's.

The testimony, including a detailed description of a shoving match at a polling place, put Republican supporters of Justice Rehnquist's nomination to be Chief Justice of the United States on the defensive for the first time.

Several Democrats said it raised serious questions about whether Justice Rehnquist testified truthfully when he denied that he had personally challenged the qualifications of any voter at Phoenix polling places from 1958 to 1968.

Major civil rights and women's groups, including the National Association for the Advancement of Colored People and the National Organization for Women, also offered testimony today, passionately denouncing Justice Rehnquist as a determined and "extremist" enemy of the rights of blacks, women and the downtrodden.

The testimony wrapped up a four-day hearing on the nomination, some of whose sessions went late into the night. A committee vote on the nomination is scheduled for Aug. 14 and a floor vote for September. Some committee members said Justice Rehnquist might be called back as a witness to confront specific allegations about Election Day activities. Negotiations continued over the request by some committee members to see internal memorandums written by Mr. Rehnquist when he worked in the Justice Department in the Nixon Administration.

Senator Orrin G. Hatch, Republican

Continued on Page 12, Column 5

4 Rebut Rehnquist Remarks On Voter Challenges in 60's

Continued From Page 1

of Utah, raised his voice to an angry shout several times as he sought to discredit testimony by James J. Brosnahan, the former Federal prosecutor, who is now a senior partner in a major San Francisco law firm.

Witness Says He Saw Acts

Mr. Brosnahan said that on Election Day 1962 he saw Mr. Rehnquist, whom he knew personally, while investigating complaints of voter harassment at a Phoenix polling place. Mr. Brosnahan said he had been told and was confident from the circumstances that Mr. Rehnquist had been challenging voters and upsetting them, apparently in an effort to slow the vote in the precinct, which was predominantly Democratic and had many minority voters.

Mr. Brosnahan drew loud applause from the crowd of more than 200 people at the hearing when he reproached Senator Hatch, who cross-examined him aggressively, for implying that Mr. Brosnahan would come to Washington to testify falsely about a member of the Supreme Court who is likely to become Chief Justice. He never wavered from his account in three hours of testimony.

The four people who gave sworn testimony today contradicting various sworn statements by Justice Rehnquist were Mr. Brosnahan; Dr. Sydney Smith, a psychologist who was a professor at Arizona State University at the time; Charles Pine, former chairman of the Arizona Democratic Party, and State Senator Manuel Pena, a Democrat from Phoenix.

Tonight, several witnesses testified that Mr. Rehnquist's activity about the elections was confined to providing legal advice to Republican poll workers and challengers.

Senator Paul Simon, Democrat of Illinois, said in an interview after hearing much of the testimony that "serious questions have been raised" about Justice Rehnquist's truthfulness, and that "at least a small cloud of uncertainty that could grow" hung over the nominee's prospects for Senate confirmation.

The question of whether further hearings would be held on the nomination was not resolved. Senator Strom Thurmond, Republican of South Carolina, the committee chairman, said he would give Justice Rehnquist an opportunity to return to the stand if he wanted but would not demand that he do so. The chairman's position can be overridden by a majority vote of the committee.

Democrats said it might be necessary to schedule further hearing time to explore the conflicts between Justice Rehnquist's testimony and that of other witnesses. They said the central issue was not whether Justice Rehnquist had violated the law in the 1960's but whether he had been truthful in his sworn testimony Wednesday about what he did then.

Dispute Over Documents

Some Democrats suggested that the committee vote might have to be delayed for further testimony on the Phoenix allegations and to resolve a dispute over President Reagan's refusal to let the committee see memorandums Mr. Rehnquist prepared while in the Justice Department in the Nixon Administration.

Lawmakers and the Justice Department continued to haggle over whether Democrats would be permitted to review internal documents on civil rights and other issues written by Mr. Rehnquist from 1969 to 1971, when he was head of the Office of Legal Counsel. On Thursday Mr. Reagan said he would deny the committee access to the documents on the ground of confidentiality.

There were reports through this afternoon that Democrats and Republicans were close to an agreement that would permit Democratic staff aides to review the documents in the presence of Justice Department officials. But no final agreement was announced, and the negotiations were expected to continue next week.

The New York Times / Marilynn K. Yee

Benjamin L. Hooks, chairman of the Leadership Conference on Civil Rights, testifying.

In testimony today, Dr. Smith said that on Election Day in 1960 or 1962 he had been at a predominantly black precinct when Mr. Rehnquist drove up and approached two blacks standing in line.

He said Mr. Rehnquist held up a white card and said: "You don't know how to read, do you? You don't belong in this line and you should leave." Dr. Smith said he saw this as "clear intimidation."

Justice Rehnquist, asked on Wednesday about a similar account Dr. Smith had given to the Federal Bureau of Investigation, testified that Dr. Smith "is mistaken" and that he had never done such a thing or otherwise challenged voters on the ground of illiteracy.

It was legal in Arizona until 1964 to challenge voters as unqualified if there was reason to believe they were illiterate, Mr. Brosnahan testified, but not to harass or intimidate voters or to stop everyone in line without reason to believe they were unqualified.

Melvin J. Mirkin, a Phoenix lawyer, also gave testimony that appeared to conflict with that of Justice Rehnquist, whom he called "an honorable man."

Republicans on the Judiciary Committee stressed that all five witnesses were or had been active Democratic workers. The witnesses acknowledged this but denied any partisan animus.

Mr. Brosnahan, the former Federal prosecutor, testified that on Election Day in 1962 he had gone to a precinct in "predominantly Hispanic and black" southern Phoenix to investigate some of the numerous complaints that day that Republican workers were challenging voter qualifications so aggressively and indiscriminately as to constitute harassment.

"At that polling place I saw William Rehnquist, who was known to me," he said. "He was serving, on that day, as a challenger of voters. That is to say, the complaints had to do with his conduct."

In response to Senator Hatch's aggressive cross-examination, Mr. Brosnahan said the Senator was mischaracterizing his testimony.

The following exchange took place at one point:

Mr. Brosnahan: "If I wasn't absolutely sure that I interviewed Bill Rehnquist because voters pointed him out, do you think, Senator, I would do that? Because I assure you——"

Mr. Hatch: "Yes, sir, I do."

Mr. Brosnahan: "I assure you, I assure you that if it was even close, if it was even close I would be home having my Friday afternoon lunch at Jack's and I would not be here in front of you. I'm telling you my recollection."

The New York Times/Marilynn K. Yee

Witnesses being sworn in before testifying at the Judiciary Committee hearing. From the left were Charles Pine, James J. Brosnahan, Melvin J. Mirkin, Manuel Pena and Sydney Smith. They spoke on the reported challenging of voters by William H. Rehnquist in Phoenix in the early 1960's.

THE WASHINGTON POST
Saturday, August 2, 1986
Front Page

Rehnquist Disputed on Election Role

Democratic Witnesses Say Nominee Challenged Minority Voters

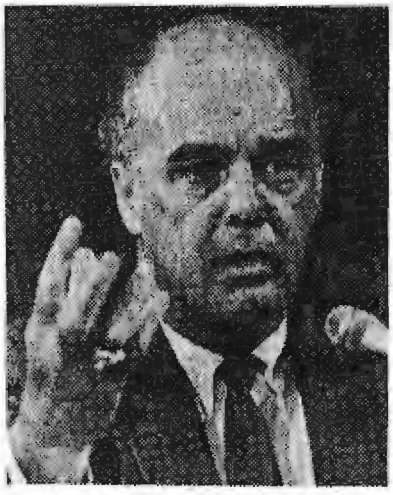
By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

Four persons testified under oath yesterday that they saw Supreme Court Justice William H. Rehnquist challenging and intimidating voters in predominantly black and Hispanic precincts of Phoenix during statewide elections between 1958 and 1964.

A fifth witness, a former federal prosecutor who was sent to investigate complaints at one precinct in 1962, said unhappy voters he found when he got there pointed out Rehnquist as the Republican challenger who had been giving them problems.

"In the words of [the late Supreme Court] Justice Potter Stewart on another occasion," one of the witnesses, Sydney Smith, said, "I may not be able to define intimidation, but I know it when I see it."

The testimony of the five, all Democrats, contradicted Rehnquist's account earlier this week at the Senate Judiciary Committee hearings on his nomination to be chief justice of the United States.



JAMES J. BROSNAHAN
... "I didn't get ... mixed up"

Committee Democrats yesterday suggested that Rehnquist might be called back for further questioning. Committee Chairman Strom Thurmond (R-S.C.) said he would offer him that opportunity.

Rehnquist's most vocal defender, Sen. Orrin G. Hatch (R-Utah), tried repeatedly to shake the accounts of some of the witnesses. But he was unsuccessful, especially in his questioning of the former prosecutor, James J. Brosnahan, now a San Francisco trial lawyer.

At one point, Hatch suggested that Brosnahan had Rehnquist mixed up with a Republican challenger named Wayne Benson, who was removed by police from one precinct in 1962.

"I didn't get Bill Rehnquist mixed up with anybody named Benson," Brosnahan replied. "I knew him then. And I could spot him now. And there's no question about that."

The Democrats were followed to the microphone by six Republican Party officials and workers active in Phoenix in the early 1960s. Those witnesses along with the area's Democratic Party chairman in 1962 and a retired Phoenix police officer all testified that they never saw

See REHNQUIST, A8, Col. 1

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THE NEW YORK TIMES
Friday, August 8, 1986
page A8

Reporter's Notebook

Rehnquist to Scalia, Bitterness to Bonhomie

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, Aug. 7 — After the rancorous partisan disputes that marked the Senate hearing last week on Chief Justice-designate William H. Rehnquist, the session this week on Associate Justice-designate Antonin Scalia began almost like a bipartisan celebration of the American dream.

No fewer than seven members of the Senate, in opening statements to the Judiciary Committee, made sure the television audience knew how proud they were that Judge Scalia was the first son of Italian immigrants ever nominated to sit on the highest court in the land.

"This is a magnificent tribute to the Italian-Americans of this nation," asserted Senator Pete V. Domenici, Republican of New Mexico, an Italian-American himself.

Added Senator Paul Laxalt, Republican of Nevada, "It's really experiencing the American dream itself in many respects, to have the son of Italian immigrants rise to this very high position." Several Democrats joined in the celebration.

Finally, Senator Howell Heflin, Democrat of Alabama, with tongue planted firmly in cheek, told the nominee in a thick, stentorian drawl, "I would be remiss if I did not mention the fact that my great-great-grandfather married a widow who was married first to an Italian-American."

"Senator, I've been to Alabama several times, too," Judge Scalia offered in the same spirit of conviviality.

"So, Judge Scalia," Senator Heflin continued, "it is with pride that I welcome you on behalf of the 4,322 Italian-Americans in Alabama, and the other four million people, to these hearings."

In time, some of the bitterness from the Rehnquist hearing spilled over into the Scalia hearing, however, as Republicans assailed the committee's more liberal Democrats for their sharp interrogations of Justice Rehnquist on matters including his reputed insensitivity to minority groups and for their suggestions that some of his answers may have been false.

"Well, welcome to the pit," Senator Alan K. Simpson, Republican of Wyoming, said by way of greeting Judge Scalia.

Senator Simpson then began a tirade against "the great hunters who have been out to tack the pelt of Bill Rehnquist on the wall of the den."

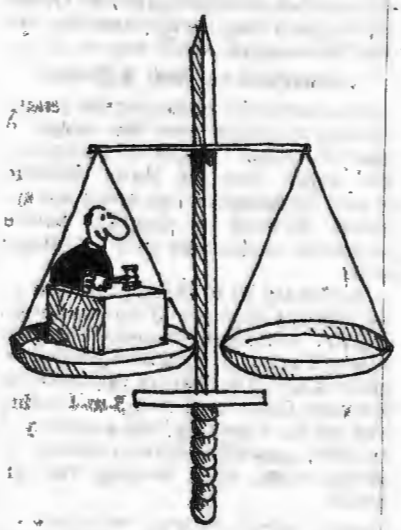
"Not one of us here would want to sit right there at that table," he told the nominee. "We couldn't pass the test. We couldn't stand the heat. It's easier up here. Here we can brag and bluster and blather and almost like a comic book character you could invent, Captain Bombast, pull the cape around the shoulders and shout the magic words, 'Get him.' And rise above it all in a blast of hot air."

When Senator Simpson went on to say, "stonewalling, wiretapping, cover-up, Lord's sake, if there isn't one of us here at this table that hasn't dabbled in all that mystery," some in the crowd wondered aloud where personal confession left off and poetic license began.

"So, dig in and keep your fine humor," Senator Simpson went on. "Tell 'em you did play the piano, and they will likely ask you where, and when, and whether the place was properly licensed, or was there girls there."

In the midst of this monologue, he posed a question — "who appointed us the scorekeepers? who appointed us the judge?" — to which Senator Patrick J. Leahy ventured a response.

"The answer, of course, is simple," the Vermont Democrat said. "The Constitution appoints us."



'Well, welcome to the pit.'

Senator Alan K. Simpson

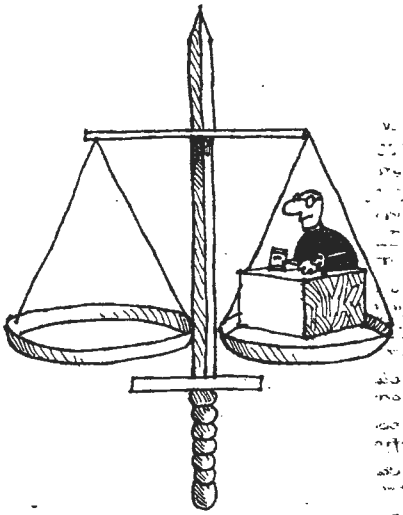
As is usual in Congressional hearings, the witnesses, in particular Justice Rehnquist and Judge Scalia, dodged with ease around questions that they did not want to answer directly.

As interrogators on the committee

fumbled with scripts prepared by aides, trial lawyers in the audience ground their teeth in frustration and waited, often in vain, for someone to ask the right follow-up question to pin an important point down.

Justice Rehnquist managed for what seemed like hours of questioning to avoid expressing a clear view on whether, if he had been on the Supreme Court in 1954, he would have joined in its unanimous decision striking down racial segregation of schools.

Senator Joseph R. Biden Jr., Democrat of Delaware, chided Justice Rehnquist for using "a little bit of sophistry" in sidestepping one question on the point. But try as he might,



As is usual at hearings like these, witnesses dodged some questions with ease.

Senator Biden could not get an unequivocal answer on whether Justice Rehnquist, who said he had followed the landmark desegregation precedent since he joined the Court in 1972, would have joined in laying it down in the first place.

During one break, Senator Heflin, a former Chief Justice of the Alabama Supreme Court who knows well the lawyer's craft of fielding questions without quite answering them, observed that Justice Rehnquist "answers like a well-coached Department of Justice nominee." For the justice responded narrowly and cautiously to each question, volunteered little information that was not specifically requested and seemed unable to recall the details of disputed episodes in his past.

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Senators of all political persuasions seemed frustrated by a kind of Catch-22 logic that stymied their questioning of Justice Rehnquist and Judge Scalia about great constitutional issues.

As Justice Rehnquist explained it, he could not defend in detail his actions in his nearly 15 years on the Supreme Court because he should not be "called to account" before the Senate for his judicial acts, and he could not say much about issues that might come before him later for fear of compromising his impartiality.

Judge Scalia refused even to say whether he still believed what he had written as a law professor in 1979, when he published a scathing attack on "racial affirmative action" plans, or in 1982, when he assailed the Freedom of Information Act as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored."

Those rules of preclusion, which previous judicial nominees have also invoked, often left senators struggling in vain to formulate questions sufficiently vague as to avoid a "no comment" but not so vague as to invite an utterly platitudinous response.

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The tedium attendant to such interrogations was occasionally alleviated by flashes of Judge Scalia's renowned wit and good humor.

At one point he said that when he studied antitrust law at Harvard Law School, "I didn't understand it," but has taken some comfort from being told since then by experts in the field that "I shouldn't have understood it because it didn't make any sense then."

At another point he confessed, with becoming candor for a legal scholar with his credentials, that "I'm a little wishy-washy" on the much-debated question of whether judges enforcing the Constitution should adhere unwaveringly to the original intent of its framers.

Early in the hearing, Senator Howard M. Metzenbaum, an Ohio Democrat who was an aggressive interrogator of both nominees, jokingly reproached Judge Scalia for showing "bad judgment in whipping me" in a tennis game.

The judge, known as a fierce competitior in contests ranging from squash to five-card stud, had a ready response.

"It was a case of my integrity overcoming my judgment," he said.

enate Judiciary Panel Approves Rehnquist, Scalia

JUDICIARY, From A1

tion of Rehnquist, 61, and Scalia, 50, would not change the political balance on the nine-member court, but expressed concern that future nominations might push the court too far to the right.

Leahy, who had been considered a swing vote, said he was "greatly troubled" by Rehnquist's failure to disqualify himself from a 1972 case in which the court rejected a challenge to the Army's surveillance of antiwar protesters. Rehnquist, who had handled the issue as an assistant attorney general in the Nixon administration, "decided to stay on the case so he could cast the deciding vote for the administration he had just left," Leahy said.

"There's a cloud hanging over this nomination," Leahy said. "Justice Rehnquist will be confirmed . . . but he will not be confirmed with my vote."

Kennedy also focused on Rehnquist's role in the 5-to-4 ruling in the surveillance case, saying that the justice voted because he "was so intent on sustaining his totalitarian views of the right of government to spy on its own citizens."

Metzenbaum said he was "concerned that a Rehnquist-led court could very well deprive the disadvantaged, racial minorities and women of the fundamental rights they

Sens. Charles McC. Mathias Jr. (R-Md.), Arlen Specter (R-Pa.), Dennis DeConcini (D-Ariz.) and Howell Heflin (D-Ala.)—all of whom voted for Rehnquist—said they were troubled by testimony that Rehnquist harassed voters at the polls in Phoenix during the late 1950s and early 1960s. Rehnquist has denied challenging any voters while he was a Phoenix attorney, but DeConcini said he was concerned about Rehnquist's role in "Republican dirty tricks in Arizona."

Several senators cited concerns about Rehnquist's purchase of two houses with restrictive covenants barring sale to Jews or blacks, his memos as a Supreme Court law clerk that argued for maintaining "separate but equal" segregation and his refusal to answer some questions. "He was not a good witness on his own behalf," Specter said.

Minority Leader Robert C. Byrd (D-W.Va.) voted for Rehnquist but said he might change his mind after the floor debate. Committee sources said Kennedy and Metzenbaum are considering a filibuster against the nomination, which would require them to stop the Republican leadership from mustering the 60 votes required to cut off debate.

Kennedy served notice of a floor fight, saying that the committee had approved Supreme Court nominee Carswell 13 to 4, before he was defeated on the floor in 1971.

"The battle has just begun," said Ralph G. Neas, executive director of the Leadership Conference on

Sen. Hatch, left, and Judiciary panel Chairman Strom Thurmond (R-S.C.) telephone Chief Justice-designate Rehnquist.

Civil Rights. "I think there's going to be a hell of a fight on the Senate floor."

Sen. Orrin G. Hatch (R-Utah) said Rehnquist's foes had left no stone unturned and that his supporters were "hotly incensed by the way he has been treated by this committee." Hatch had earlier criticized Rehnquist opponents for making an issue of Rehnquist's reported dependence on a hypnotic drug prescribed for him between 1977 and 1981.

The turbulent debate over Rehnquist deflected liberal attacks that might otherwise have been aimed at the equally conservative Scalia. The civil rights groups that oppose Rehnquist took no stand on Scalia, who drew fire mainly from feminist and pro-abortion groups.

This was reflected in the 18-to-0 vote for the former law professor, who has served on the U.S. Court of Appeals here since 1982 and is the first Italian American nominated to the high court.

"I was encouraged by Judge Scalia's statement that he does not have an agenda of cases he is seeking to overturn," Biden said. Although he disagrees with many of Scalia's views, Biden said, "I do not find him significantly more conservative than Chief Justice Burger."

"Judge Scalia's philosophy is not my philosophy," Leahy said. "It is the philosophy of Ronald Reagan .... [But] we should respect the mandate the president has earned."

Metzenbaum was more critical, saying that Scalia's writings and legal opinions show that he has been "hostile to affirmative action," critical of the Freedom of Information Act and "has often ruled against freedom of the press. But I cannot conclude that he will pursue a course of constitutional extremism."

Chaotic Confirmation Process for Bench Nominees Suggests Politics, Not Qualifications, Prevails

By Stephen Wermiel
Staff Reporter of The Wall Street Journal

WASHINGTON—As the Senate Judiciary Committee votes today on the Supreme Court nominations of William Rehnquist and Antonin Scalia, few questions about their qualifications remain unasked.

But the process raised important questions that remain unanswered about the role of the president in selecting and the Senate in confirming Supreme Court justices.

Among these issues are what role political ideology should play in the president's choice and the Senate's review, how much weight should be given to the American Bar Association's rating of candidates, and what kinds of questions senators should ask nominees in the confirmation process.

The confirmation process is a complex, sometimes confusing one, and there isn't any consensus on how it can be improved. Scenes from the recent confirmation hearings and elsewhere illustrate the complexity and suggest that politics, rather than quality, is often the dominant force:

William Rehnquist

—During nearly two full days of testimony, Justice Rehnquist, who is being elevated to chief justice, refused to discuss decisions or dissents he has written in his 15 years on the Supreme Court. He was more than happy, however, to answer questions about his view of different parts of the Constitution.

—Mr. Scalia, nominated to the high court, testified for one day, happily discussing what he has written during four years as a federal appeals court judge, but refusing to give his views on any part of the Constitution.

—Sen. Edward Kennedy (D., Mass.), who has joined criticism of President Reagan and conservative senators for applying an ideological litmus test to judicial nominees, opened his questioning of Mr. Scalia by asking if he expects to overrule the 1973 decision giving women a constitutional right to have abortions. Judge Scalia declined to answer.

—Sen. Orrin Hatch (R., Utah), who has accused the ABA lawyers who rate judicial nominees of having a "liberal mentality" and trying to block conservatives, strongly praised and defended the ABA's finding that Messrs. Rehnquist and Scalia are both "well qualified" for the appointments. Sen. Kennedy, who has cited low ABA ratings as a basis for opposing some of President Reagan's judicial nominees, attacked the thoroughness of the ABA's examination of Justice Rehnquist and Judge Scalia.

—New York Gov. Mario Cuomo, a Democrat, suggested in a speech at the ABA annual convention that the selection of federal judges and Supreme Court justices be made on a nonpartisan, merit-selection basis similar to one used in New York state. This system would probably lead to approval of Justice Rehnquist and Judge Scalia, he said. But although the proposal was well-received at the ABA meeting in New York, Republicans in Washington were quick to criticize it as sour grapes by Democrats who don't control the White House or the Senate.

Some political leaders and legal scholars accept the dominance of politics as the way it has always been. "It is a common practice for presidents to make their judicial appointments based on their perception of the appointees' political views," Justice Lewis Powell said in a speech at the ABA convention.

But others are concerned about this pervasive role. "Whether it's Franklin Roosevelt or Ronald Reagan, liberals or conservatives, the president and the Senate should not be trying to fix the judicial deal," said Gov. Cuomo. "By forcing the judicial branch to do the work of the other two branches," he said, the president and Senate "threaten" the independence of judges. This "can become a grave danger because it can dilute the people's confidence in the court."

Before Chief Justice Warren Burger announced in June his plans to retire, Sens. Joseph Biden of Delaware and Paul Simon of Illinois, Democrats on the Senate Judiciary Committee, began trying to define a role for the Senate in future confirmations.

The result was a letter from Philip Kurland of the University of Chicago Law School and Laurence Tribe of Harvard Law School, respectively a conservative and a liberal legal scholar. The letter said that the burden should be on a nominee to prove his qualifications, rather than on the Senate to disprove them, and that judges shouldn't come from the "lunatic fringes" of legal thought. It also said that while senators shouldn't substitute their preferences for the president's, legislators should determine that judicial nominees believe in the Bill of Rights and the 14th Amendment guarantee of equality.

Antonin Scalia

But efforts by a handful of senators to use this very general guidance in the recent confirmation hearings sometimes clashed with the views of the nominees about what they would discuss.

As a result, the hearings were sometimes contentious, as when Democrats became frustrated with Judge Scalia's unwillingness to discuss different laws or constitutional provisions. But conservative Republican senators who criticized the questioning by Democrats have apparently forgotten their own attempts in

1981 to pin down Sandra O'Connor, then a Supreme Court nominee, on such issues as abortion, busing and school prayer.

Some legal experts think there isn't any need to change the system of confirming judges and justices. "The process is working quite well," said William Falsgraf, a Cleveland lawyer whose term as ABA president ended yesterday. "There may have been some excesses" in the committee's questioning of Justice Rehnquist and Judge Scalia, he said, "but I'd rather have that to permit a full and thorough review."

But not all legal experts agree about the proper focus for the Senate. Philip Lacovara, a respected Washington lawyer, says Justice Rehnquist drew the proper line. "The Senate ought to know how one views the Constitution," he says, as long as the questions are general ones about philosophy, rather than about specific cases likely to arise. "It's improper for judges to comment on decisions they have rendered," he said.

New York's Gov. Cuomo is among the strongest voices for change. The debate in editorial columns and in the Senate Judiciary Committee over the nominations, he says, "reads as though the matter of selecting and confirming justices to the Supreme Court is no different from electing a president or a senator and judging them by their positions on the current political issues."

Queries About Rehnquist's Health Are Called 'Overreaction' of Foes

Senate Committee Expected to Endorse Nominee Today

By Howard Kurtz
Washington Post Staff Writer

Sen. Orrin G. Hatch (R-Utah) said yesterday that questions about the past health problems of Chief Justice-designate William H. Rehnquist are "an overreaction by many who would like to hurt his chances."

Hatch's defense of Rehnquist came as the Senate Judiciary Committee prepared to vote today on the nomination, which senators of both parties predicted will be approved by a comfortable margin.

Sen. Paul Simon (D-Ill.) announced yesterday that he will oppose Rehnquist, but there are still expected to be no more than six or seven votes against him on the 18-member committee.

Simon said Rehnquist's opposition to civil rights over three decades makes him unsuited for heading the federal judiciary.

The questions about Rehnquist's past health followed three controversies that added drama and tension to his confirmation hearings but failed to jeopardize his majority support on the committee.

In testimony that he disputed, Rehnquist was accused of harassing voters at the polls as a Phoenix lawyer in the late 1950s and early 1960s. He said he did not recall that two houses he purchased had restrictive covenants barring their sale to Jews or blacks. And papers that Rehnquist prepared as a Justice Department official in the Nixon administration, turned over after a brief battle over executive privilege, appeared to have done him no damage.

The panel is also expected, by a wider margin, to approve the nomination of appeals court Judge Antonin Scalia to fill Rehnquist's Supreme Court seat. Simon said he will vote for Scalia.

The Washington Post reported yesterday that a confidential report to the committee on Rehnquist's medical history shows that he was seriously "dependent" on a powerful hypnotic drug, Placidyl, from 1977 to 1981. Freeman H. Cary, the Capitol physician who prescribed the drug, told the Federal Bureau of Investigation that he occasionally warned Rehnquist against exceeding the recommended dosage, according to sources.

Hatch said yesterday that Rehnquist's medical records show that the justice took no more of the drug than his doctors had prescribed.

Rehnquist was "a very compliant patient," said Hatch, who criticized news accounts of the issue. "He did not take any medication beyond that which his doctors prescribed . . . . He discontinued the medications when he was asked to discontinue it."

Placidyl is a federally controlled substance recommended for short-term use to counter insomnia. Sources said the report by Dr. William Pollin, former director of the National Institute on Drug Abuse, did not address whether Rehnquist was a passive recipient of the medicine or pressed for bigger dosages.

Hatch did not dispute reports that Rehnquist was dependent on the drug, but said the question is no longer relevant. He said the important point is that the report "found no difficulties or any reason to doubt that Mr. Justice Rehnquist is capable of performing his duties as chief justice."

Hatch said he found the report "a thorough review" even though Pollin did not interview Cary or Rehnquist.

Simon urged committee Chairman Strom Thurmond (R-S.C.) to make the medical report on Rehnquist public. But Thurmond declined yesterday because, he said, "the information in it is of a personal and highly confidential nature. Our agreement was for this report to remain confidential, and I intend that it stay that way."

Simon, in joining Sens. Edward M. Kennedy (D-Mass.) and Howard M. Metzenbaum (D-Ohio) as the only definite votes against Rehnquist, said he does not question the justice's ability.

But Simon said that "the chief justice ought to be a symbol of justice for the country, just like the Statue of Liberty. Justice Rehnquist's record is not such that a lot of people are likely to view him as a symbol of justice."

Simon pointed to Rehnquist's "consistent record of being on the wrong side, from my perspective, of civil rights issues, going back to his days in Phoenix."

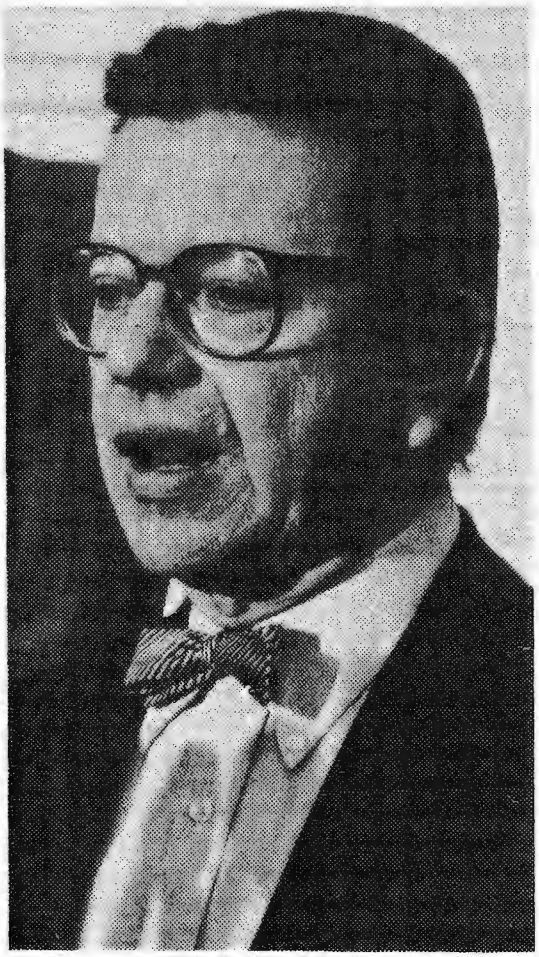
Simon cited testimony at Rehnquist's confirmation hearings, which the nominee strongly disputed, that as a Phoenix lawyer Rehnquist had harassed voters as part of a Republican "ballot security" program in the late 1950s and early 1960s.

"There is no question in my mind that Justice Rehnquist did some things in Phoenix that he should not have done," Simon said. "If that were an isolated example, I would not be voting against him."

The Illinois Democrat also pointed to Rehnquist's purchase of two properties with covenants barring their sale to Jews or blacks and to memos on segregation that Rehnquist wrote while serving as a clerk to then-Supreme Court Justice Robert Jackson. "All that spelled a pattern that was very clear in not showing a sensitivity on matters of race," Simon said.

On Scalia's nomination, Simon said the judge "is more rigid on some issues, such as affirmative action, than I would like, but he shows flashes of open-mindedness." He said he also considered the fact that "Ronald Reagan won the presidency" and would nominate an equally conservative candidate if Scalia were not confirmed.

SEN. ORRIN G. HATCH
. . . Rehnquist was "a very compliant patient"



SEN. PAUL SIMON
. . . "chief justice ought to be a symbol of justice"

Rehnquist Memo Reveals A Pre-Bench Opinion

Paper on Army Spy Work Went Unmentioned

By George Lardner Jr.
Washington Post Staff Writer

Supreme Court Justice William H. Rehnquist, as an assistant attorney general in the Nixon administration, participated in the internal administration debate over whether the Army could be authorized to conduct surveillance of civilian political activity.

Three years later, as an associate justice of the court, he refused to disqualify himself from a controversial Supreme Court decision dismissing a lawsuit that had challenged the constitutionality of the Army surveillance program.

Rehnquist's participation took the form of a draft memorandum he wrote in March 1969, in which he said the U.S. Army Intelligence Command "may assist" in the collecting of raw intelligence but recommended that "in order to preserve the salutary tradition of avoiding military intelligence activities in predominantly civilian matters," the Army "should not ordinarily be used to collect" such data.

In defending his remaining in the Supreme Court case in 1972, Rehnquist acknowledged that, at a congressional hearing and "on other occasions," he had expressed his opinions on the legal issues involved in the intelligence gathering. But he made no mention of the memo.

The draft memo was one of the documents that the Reagan administration initially refused to provide last month to the Senate Judiciary Committee in connection with its hearings on Reagan's nomination to be chief justice of the United States.

The administration relented last week to avert a committee subpoena and supplied a number of documents, including the Rehnquist memo, under a strict secrecy agreement.

This particular Rehnquist memo, however, dated March 25, 1969, was made public 12 years ago in a little noticed appendix to Senate hearings on the subject of military surveillance.

Sources said it is likely to be raised today by Rehnquist opponents when the Judiciary Committee meets to vote on his nomination, which is expected to be approved by a wide margin.

The constitutionality of the Army's domestic spy work, and Rehnquist's public pronouncements on that issue, have been debated ever since he cast the deciding vote in *Laird v. Tatum.* The plaintiffs had charged that the Army's program, its compilation of "subversives' files," and other aspects of the surveillance violated their First Amendment rights.

As a Justice Department official, Rehnquist had told a Senate subcommitee headed by Sen. Sam Ervin Jr. in 1971 that the case had no place in the courts because the

Plaintiffs said Rehnquist's impartiality was "questionable."

defendants had not been hurt by follow-up government action. Then, in June of 1972, he voted with the majority in a 5-to-4 ruling that took the same position.

The lawyers in the case asked Rehnquist to disqualify himself so that the ruling could be reconsidered. They said his impartiality was "clearly questionable" because of his testimony and other public statements.

Rehnquist rejected the motion, defending his position in an opinion he issued Oct. 10, 1972.

The record of Ervin's military surveillance hearings in 1974, however, show that the Army was trying to get out of the domestic intelligence business, initiated in the Johnson administration, and had gone to the Justice Department for help. Rehnquist's draft memo was part of the debate that followed.

Rehnquist's original language was not preserved in the final memo sent to the White House on April 1, 1969. Instead, the language was changed to state that "raw intelligence data pertaining to civil disturbances will be acquired from such sources of the government as may be available." The Army wound up doing much of the work.

There is no indication Rehnquist was involved in that turnabout.

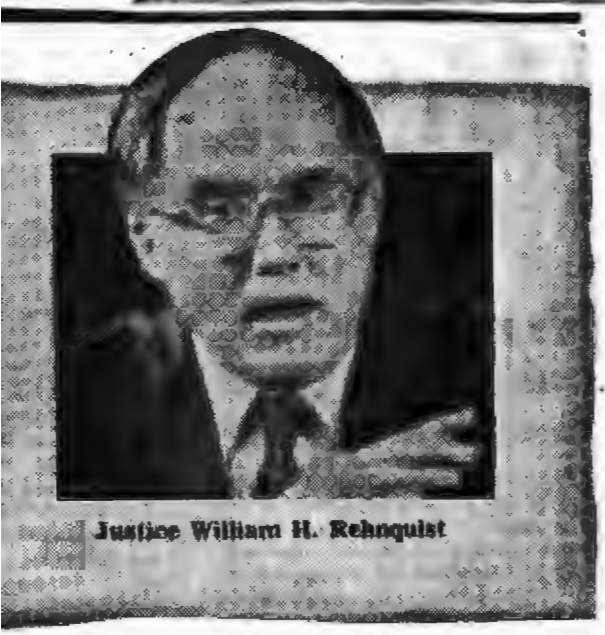
The New York Times

THE WEEK IN REVIEW

Section 4

Sunday, August 10, 1986

Advice, or Consent?



Justice William H. Rehnquist

The Court, The Congress And the White House

By LINDA GREENHOUSE

WASHINGTON

DURING the days or weeks a Supreme Court nominee spends under the Congressional microscope, the three branches of Government intersect as they rarely do at any other time.

Sometimes the fit is smooth, as it was five years ago, when the Senate confirmed President Reagan's first nominee, Sandra Day O'Connor. The hearing served essentially as the Senate Judiciary Committee's "welcome to Washington" for the little-known Arizona judge.

But events of the last two weeks demonstrate that there can also be ragged edges when the three branches come together.

A narrowly averted constitutional crisis between the White House and the Senate Judiciary Committee over access to Justice Department documents was only one of several incidents last week to cast a pall over the process of confirming William H. Rehnquist to be Chief Justice of the United States.

There is virtually no doubt that Justice Rehnquist, who was confirmed as an Associate Justice in 1971, will become Chief Justice. The Judiciary Committee is to vote Thursday on his nomination and that of Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia Circuit, whom President Reagan named to succeed Justice Rehnquist. Judge Scalia, who

Drawing by David Shannon; United Press International

pent a day before the committee last week, may well be pproved unanimously by the 18-member panel. There ould be four or five votes against Justice Rehnquist. The ull Senate will vote on both nominations next month.

The two confirmation processes proved, for different easons, to be so unenlightening as to raise questions bout how the Senate discharges its constitutional obliga- on to advise and consent to judicial nominations.

The Judiciary Committee's four-day hearing on Mr. ehnquist dwelled more on decades-old events, including dvice that the young William Rehnquist gave as a Su- reme Court law clerk in 1952 and his activities at Phoe- x polling places in the 1960's, than it did on his record of ore than 14 years as a Supreme Court Justice.

The session ended with little clear sense of which mbiguities were trivial and which ought to be central to ach senator's ultimate judgment. Could Justice Rehn- uist fairly be considered unduly insensitive to the impli- ations of restrictive covenants because deeds to prop- erty he owned contained such clauses, which he and every member of the committee knew to be legally meaningless? Was his support of the "separate but equal" doctrine in 1952 an expression of his own opinion or that of the judge for whom he was working? Since Justice Rehnquist has long since disavowed that opinion in any event, does the question matter in 1986?

Back to the Nixon Years

Potentially more germane was the effort to learn whether Mr. Rehnquist, as an Assistant Attorney General in the Nixon Administration, was involved in any activities that came to light as a result of the Watergate investigations. After first refusing to make the relevant files available, the White House backed down when it became clear that a bipartisan majority of the Judiciary Committee was about to vote to issue a subpoena.

Two dozen documents dating from Mr. Rehnquist's service as head of the Office of Legal Counsel were delivered to the committee under conditions of strict secrecy. Although the documents touched on such potentially explosive matters as the Nixon Administration's handling of domestic dissent, several key Democrats said by the end of the week that they had found no "smoking gun" that could jeopardize the Rehnquist nomination by linking him to wrongdoing.

By the time Judge Scalia came before the committee, the senators seemed worn out and distracted. The 50-year-old former law professor is one of the country's leading conservative legal theorists. His intellectual force, strongly held views and pungent manner of expression will make him a powerful figure on the Court. Yet the questioning was perfunctory and the answers were uninformative.

Both nominees said they could not take stands on questions that might come before the Court, thus ruling off-limits almost anything of interest. In maintaining that position, the two judges were honoring a tradition that dates to 1939, when Felix Frankfurter became the first Supreme Court nominee to appear for questioning by the Senate Judiciary Committee. Before that nominees' appearances were limited to courtesy visits, and in carefully negotiating the ground rules for Mr. Frankfurter's appearance his lawyer, Dean Acheson, convinced the committee that the nominee should not be asked his views on matters that might come before the Court.

The strength of the tradition did not make the exercise any less frustrating last week, particularly in the case of Judge Scalia, who has been on the bench only four years and so has a shorter public record to weigh.

But just what the senators should make of any nominee's record and views remained the central unanswered question of the last two weeks. Assuming that the Senate could draw a precise ideological roadmap for a Supreme Court nominee, is that an appropriate basis for deciding whether to confirm, or should competence and character be the only attributes that matter?

Several Judiciary Committee members wrestled openly with that question without reaching an explicit conclusion. But the senators' political judgment appeared to be that they needed to find some basis other than ideology to make a credible case against a President's Supreme Court choice. Some of Justice Rehnquist's strongest opponents, including Senator Edward M. Kennedy, seemed to bend over to assure Judge Scalia that legal philosophy would not be the deciding factor when the time comes to vote.

Rehnquist Confirmation Hearings Leave Question of Truthfulness

Belsaglini contends the key issue is: "Have I fairly construed the Constitution?"

REHNQUIST, From A1

"I'm concerned about his candor," Sen. Howard M. Metzenbaum (D-Ohio) said last week. "I'm concerned about his integrity .... I don't know that he's willfully misstating the facts, but I have difficulty with it. And for the man to be the chief justice of the United States, I think it's a great problem ... one of the most difficult issues that faces us in this confirmation process."

Defenders of Rehnquist dismiss the attacks as tired excursions into the distant past, warmed-over rehashes of disputes that were raised in 1971 and effectively settled by the Senate's confirmation of him as an associate justice.

Said Sen. Orrin G. Hatch (R-Utah): "We're talking about a man here who has the highest qualification from the American Bar Association ... a man who is called the leading intellect on the court and who Mr. Justice [William J.] Brennan [Jr.], certainly one of the most liberal justices on the court, said would make a splendid [chief] justice, and these people are dredging up this type of stuff? Come on."

Rehnquist was questioned briefly at the witness table in 1971 about his conduct at the polls in Phoenix. He was never asked about the covenants, nor his memos as a law clerk, nor his decision to cast the deciding vote in the Army surveillance case.

The grilling Rehnquist got at the hearings this time did little to assuage skeptics such as Sens. Metzenbaum and Edward M. Kennedy (D-Mass.). But the chemistry of the situation is such that it is unlikely there will be more than a handful of votes, if that many, against Rehnquist Thursday.

"If they turned him down, they'd basically be calling a sitting justice a liar," said a former Supreme Court law clerk who has followed the hearings. "That's too tough. It'd be another thing if they were going to send him back to private practice or to the Justice Department. But here, if they rejected him [as chief justice], they'd still be sending him back to the court for life."

Perhaps the most significant issue is the one that has received the least attention: Rehnquist's decision to cast the deciding vote in his first year on the court in the Army surveillance case, *Laird v. Tatum*, and his subsequent refusal to disqualify himself so that the decision could be reconsidered.

As an assistant attorney general, Rehnquist had clearly taken a stand on the matter. It had come up at hearings in May 1971, before the late Sen. Sam J. Ervin Jr. (D-N.C.) and his subcommittee on constitutional rights.

Rehnquist testified before the panel as the Nixon administration's chief defender of surveillance of antiwar activists and organizations by the U.S. Army. He took the position that even "unauthorized" and "reprehensible" government surveillance did not itself amount to a "violation of any particular individual's constitutional rights."

More to the point, he also took a stand on the lawsuit brought by Arlo Tatum, director of the Central Committee for Conscientious Objectors, and other targeted dissidents who had been fighting the Army's program in the courts since 1970. They contended that the Pentagon surveillance, the compilation of voluminous "subversives" files, and interagency reporting of data on lawful civilian activities violated their constitutional rights.

The ACLU lawyers decided to seek a rehearing and asked that Rehnquist disqualify himself, saying his impartiality was "clearly questionable."

The new justice gave his answer in October 1972, after the American Bar Association had adopted a policy stating in part that "a judge formerly employed by a governmental agency . . . should disqualify himself in a proceeding if his impartiality might reasonably be questioned." In a 16-page memorandum, Rehnquist dismissed the rule as not "materially different" from a less restrictive federal disqualification statute, and went on to analyze that statute as not requiring his recusal.

In fact, Rehnquist reasoned that he had "a duty to sit" to avoid "the prospect of affirmance" by a 4-to-4 vote. He mentioned his 1971 exchange with Ervin only indirectly, describing it simply as "a discussion of the applicable law."

In his book, "The Appearance of Justice," New York Times editorial writer John P. MacKenzie disagreed strongly. "The sad conclusion—sad because it must be made of a jurist with brains, ability and dedication to the court," MacKenzie asserted, "is that Rehnquist's performance was one of the most serious ethical lapses in the court's history."

Frank Askin, one of the plaintiffs' lawyers in *Tatum v. Laird*, testifying July 31 at a late-night session of Rehnquist's confirmation hearings, was more harsh:

"The fact is that he sat on and cast the deciding vote in a case in which he had been involved in a partisan capacity before being ap-

Rehnquist took the p... case was not "justiciable," that it had no place in the courts because no one had been hurt.

At one point Rehnquist volunteered his disagreement with Ervin about "the case of *Tatum v. Laird*," then pending in the U.S. Circuit Court of Appeals here. Rehnquist said he did not think that private citizens could bring suit "to enjoin the gathering of information by the executive branch where there has been no threat of compulsory process and no pending action against any of these individuals on the part of the government."

A few months later, in September 1971, Rehnquist sent the Ervin subcommittee a memo asserting that "if anything, the now-terminated data-gathering functions of the Army seem to have stimulated rather than curtailed debate . . . indeed it may be that repeated assertions of such government information-gathering activity do more to inculcate paranoia in the general populace than the actual gathering of the information itself."

Months later, after Rehnquist had become a justice, *Tatum v. Laird* came before the Supreme Court. The Tatum lawyers, from the American Civil Liberties Union, have said they were stunned to see Rehnquist take his seat to hear the case. But they remained silent, hoping he would disqualify himself later.

On June 26, 1972, however, the court, in a 5-to-4 decision, held that civilians who were targets of surveillance by military agents could not take the government to court. Rehnquist's vote was critical. Had it been a tie, it would have upheld the U.S. Court of Appeals' decision that the case should be tried on its merits. The plaintiffs had contended that their reputations had been damaged, that the program had not been dismantled and that only an evidentiary lower-court hearing would establish the facts.

pointed to the bench . . . [Rehnquist] was willing to evade and avoid the most basic principles of judicial ethics to make sure the case turned out in one particular way—and more importantly, in favor of his own 'former clients.'"

Under questioning at the recent hearings by Sen. Patrick J. Leahy (D-Vt.), Rehnquist said that "there would probably be a very strong ground for disqualification" under similar circumstances now, in light of a new federal statute on the subject. He also conceded that the late Justice Potter Stewart had informed him that he had misstated the applicable ABA rule and that it was "intended to be more stringent."

At one point, Leahy asked Rehnquist if he had "any second thoughts" about his decision not to disqualify himself.

Replied Rehnquist: "I never thought about it again until these hearings, to tell the truth."

As for the other disputes dogging Rehnquist, none was thoroughly confronted before his 1971 confirmation to the court. For example, at his confirmation hearings that November, Rehnquist was questioned only briefly about an accusation made by the Arizona NAACP that he had engaged in "harassment and intimidation of voters in 1968 during the presidential election in precincts heavily populated by the poor."

The nominee deflected the charge with ease, saying that he had "absolutely nothing to do with poll watching in 1968."

In earlier years, Rehnquist explained, as chairman of GOP lawyers' committees that tried to supply legal advice to Republican challengers in the precincts, he had sometimes gone to polling places with a Democratic counterpart to try to arbitrate disputes. He also recalled "an occasion in which I felt that a couple of our challengers were being vehement and overbearing in a manner that was neither proper nor permitted by law and of telling them so."

Subsequent witnesses introduced additional accusations about Rehnquist's conduct at the polls as early as 1958. The allegations, however, were sketchy and second-hand. Only after the hearings concluded did Rehnquist's critics come up with affidavits alleging improprieties by Rehnquist at Bethune, a predominantly black south Phoenix precinct, in 1964. Rehnquist formally denied the charges. Three committee Democrats then posed a list of written questions. Rehnquist responded for the record.

"I have not, either in the general election of 1964 or in any other election, at Bethune precinct or any other precinct, either myself harassed or intimidated voters, or encouraged or approved the harassment or intimidation of voters by other persons," he wrote. "In none of those years [1958 to 1964, when he was most active] did I personally engage in challenging the qualifications of voters."

That settled the matter. The committee voted to clear Rehnquist's nomination 12 to 4.

One more obstacle turned up on Dec. 6, 1971, the day Senate floor debate on the nomination began.

Newsweek magazine disclosed that Rehnquist, as a clerk for the late Justice Robert Jackson, had written a memo defending the "separate but equal" doctrine underpinning racial segregation. The doctrine had been laid down by the Supreme Court in an 1896 case, *Plessy v. Ferguson*, but the issue was coming before the court again in a series of cases involving school segregation.

"I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues," Rehnquist wrote in the memo, "but I think *Plessy v. Ferguson* was right and should be reaffirmed."

The disclosure threatened to derail the nomination, but Rehnquist once again deflated the opposition with a letter. Once again, as with his statement about his role in the Phoenix elections, there was no opportunity to question Rehnquist about it under oath.

In the letter, Rehnquist said that as best he could recall, he prepared the memo at Jackson's request and "it was intended as a rough draft of a statement of his [Jackson's] views" at a forthcoming conference of the justices "rather than as a statement of my views."

The nominee also contended that the memo "differs sharply from the normal sort of clerk's memorandum that was submitted to Justice Jackson during my tenure . . . He very definitely did not either expect or welcome the incorporation by a clerk of his own philosophical view of how a case should be decided."

The memos Rehnquist wrote as a clerk for Jackson have recently become available. They show in fact that he often offered his personal views of how cases should be decided.

The Senate confirmed Rehnquist as associate justice 68 to 26.

When Rehnquist went before the committee July 30 and 31 as President Reagan's nominee to become chief justice, he was questioned under oath for the first time about the lingering controversies, as well as some new ones.

He said he had been chairman of GOP "ballot security" and similar programs in Phoenix elections from 1958 to 1966, but denied challenging voter credentials. He swore that he had never harassed or intimidated any voters.

A Committee Democratic produced three Phoenix Democrats who said they saw Rehnquist challenging and intimidating voters in predominantly black and Hispanic precincts in those years. A fifth witness, James [illegible] Rehnquist as the cause of their problems.

Brosnahan pointedly disputed Rehnquist's statements that his occasional visits to precincts were "to arbitrate disputes."

"That is not what Mr. Rehnquist was doing when I saw him on Election Day 1962," Brosnahan told the committee, adding that he spoke to Rehnquist that day.

Hatch, Rehnquist's chief Senate defender, contends this is a case of mistaken identity. About a dozen witnesses have reported sighting Rehnquist at different times of day in different elections and in different precincts, but Hatch maintains that Rehnquist is being mistaken for an obstreperous Republican challenger named Wayne Bonson, who was about the same height and weight and who was removed from Bethune precinct by authorities in 1962.

"There's enough question about mistaken identity here and enough knowledge about what a mild-mannered, decent, honorable man Rehnquist is and has always been," Hatch said, "that there is no reason for anybody not to give him the benefit of the doubt."

At the hearings, Hatch pressed Brosnahan about how sure he was that it was Rehnquist who had been pointed out to him, and with whom Brosnahan had spoken in 1962. An exasperated Brosnahan, now senior partner of a 230-member San Francisco law firm, replied:

"Do you think I really would be here to testify about the qualifications of the chief justice after 27 years of trying lawsuits if I wasn't absolutely sure? If it was even close, I would be at Jack's [restaurant in San Francisco] for my Friday afternoon lunch."

The dispute over the 1952 memo raised another question of believability. Rehnquist testified that he had always thought the *Plessy v. Ferguson* ruling was wrong. But he acknowledged that he had defended it in lunchtime bull sessions with fellow clerks because "I thought there were good arguments to be made in support of it," ingrained in the South as it was after nearly 60 years.

Sens. Kennedy and Metzenbaum suggested that Rehnquist must therefore have been referring to himself when he wrote, "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues . . ."

Rehnquist denied it, saying that he had written the line for Jackson

Reagan Accuses Rehnquist Opponents Of 'Hysterical Charges, Political Posturing'

By David Hoffman
Washington Post Staff Writer

President Reagan accused Senate critics yesterday of using "hysterical charges of stonewalling and coverup" and "political posturing" to oppose his nomination of Supreme Court Justice William H. Rehnquist as chief justice.

In his weekly radio address, Reagan belittled senators who had requested memorandums and legal opinions written by Rehnquist when he was a Justice Department official in the Nixon administration. He also defended his nomination of Judge Antonin Scalia to the high court.

The president did not mention that he at first invoked executive privilege to shield the Rehnquist documents from Senate scrutiny. He agreed to allow them to be reviewed after a bipartisan majority of the Senate Judiciary Committee made clear it was prepared to subpoena the material.

"To be sure, there were many serious allegations by political opponents of Justice Rehnquist and Judge Scalia," Reagan said. "One Democratic senator announced he would vote against Justice Rehnquist even before the hearings started.

"There were dark hints about what might be found in documents Justice Rehnquist wrote while a Justice Department official many years ago," Reagan said. "To add to these unfounded charges, I took the unusual step of permitting the Senate committee to see the documents themselves."

Reagan had invoked executive privilege on grounds that the documents contained confidential legal advice, but he waived the claim after the panel narrowed its request to documents Rehnquist sent or received on seven specific issues from 1969 to 1971.

"Of course, there was nothing there but legal analysis and other routine communications," Reagan said. "The hysterical charges of coverup and stonewalling were revealed for what they were—political posturing.

"I was sorry to have to release these documents," he added, "but Supreme Court nominations are so important that I did not want my nominees to enter upon their responsibilities under any cloud. And so I was delighted that when all was said and done, our nominees emerged unscathed . . . ."

Judiciary Committee members said after reviewing the documents last week that there appeared to be nothing in them that would endanger Rehnquist's confirmation. A vote is scheduled for Thursday.

Reagan said critics of Rehnquist and Scalia were really striking out at the appointment of judges who share his philosophy of restraint.

"Beyond their undoubted legal qualifications, Justice Rehnquist and Judge Scalia embody a certain approach to the law—an approach that as your president I consider it my duty to endorse, indeed to insist upon," Reagan said.

"You see, during the last few election campaigns, one of the principal points I made to the American people was the need for a real change in the makeup of the federal judiciary," Reagan said. "I pointed out that too many judges were taking upon themselves the prerogatives of elected officials. Instead of interpreting the law according to the intent of the Constitution and the Congress, they were simply using the courts to strike down laws that displeased them politically or philosophically. I argued the need for judges who would interpret the law, not make it.

"Of course, this upsets those who disagree with me politically," he said. "And I have a lurking suspicion that politics had more than a little to do with some of the tactics used against Justice Rehnquist."

The Washington Times

Twisting minority 'rights'

A principle awry

JOSEPH SOBRAN

It's a strange experience, seeing a member of the Supreme Court baited by politicians. But there was Justice William Rehnquist, sitting before the Senate Judiciary Committee, his character under scrutiny by the likes of Edward Kennedy and Howard Metzenbaum. The interrogators acted as if they were conducting the Nuremburg trials and dealing with a particularly unsavory defendant.

Mr. Kennedy is particularly concerned about Mr. Rehnquist's record with respect to women. While he is at it, he may want to investigate the justice's driving record.

These are the Democrats who were lately complaining that Ronald Reagan was demeaning the federal judiciary. Concerned that the administration was subjecting prospective judges to "ideological litmus tests," they subjected a conservative nominee to a lower court, Daniel Manion, to a spelling test. (One commentator, M. Stanton Evans, found that the Democrats' own report on Mr. Manion's literacy contained 12 errors of spelling and grammar.)

As soon as Mr. Manion was confirmed — by one vote — the Democrats dropped the pretense that they are concerned only with competence and mounted a fierce attack against Mr. Rehnquist on openly ideological grounds.

Mr. Kennedy denounced him as "too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be chief justice." By "too extreme" the senator means that he disagrees with Mr. Rehnquist. He would predictably vote for the confirmation of Mr. Rehnquist's polar opposite.

The standard hypocrisy of the American liberal is that he is concerned only with the purity of procedure, regardless of substantive outcome.

Liberals affected to be opposed to Mr. Manion only because he was "incompetent" or "underqualified," not because they disagreed with his political views.

In William Rehnquist they have a nominee for chief justice whose brilliance is beyond dispute. And they are opposing him because they don't like the way he votes.

Some of them have come up with a new pseudo-procedural test which, as it happens, Mr. Rehnquist doesn't seem to them to meet. In an interview on "The CBS Morning News," Sen. Joseph Biden of Delaware (yes, him again) said that a chief justice should be able to unify the court and achieve consensus, which Mr. Rehnquist is, as we know, too extreme to hope to do.

The Democrats have never acknowledged that there are members of their own party who may be too extreme. And because they don't even recognize this as a danger, the party has gotten more and more extreme — while retaining its complacent assurance that it represents the golden mean of American politics. For them, the left is the middle.

Consider the flat statements that Mr. Rehnquist opposes "minority rights." Well, he doesn't. He believes that membership in a group, minority or majority, has no bearing on the merits of a litigant's case. And he is correct.

Minority rights, in the proper sense of the term, mean that both parties in any dispute deserve to have their claims adjudicated without reference to their wealth, status, or political power. All such considerations are left outside when a court deliberates.

This is a hard-won principle, and it is enshrined in the phrase "equality before the law." This used to be a matter of consensus. Until recently, in fact, it was the goal sought by the minority lobbies.

But the meaning of "minority rights" has been subtly twisted to imply that the law should actually favor anyone who can claim minority status.

In his notable speech at Georgetown University last fall, Justice William Brennan endorsed the notion that the judiciary's special function is to uphold minority rights in this sense. That's nonsense. Rights don't belong to majorities and minorities as such: they belong to citizens.

The semantic corruption of "minority rights" has derailed a great legal tradition. In a way, it has occurred because the old minority lobbies succeeded. Having won their war, they didn't disband their armies: they redefined, or rather de-defined, terms like "minority" and "discrimination" to give themselves an excuse to stay in business and to move on to new conquests that subverted the rationale of the old ones. They became special interests with halos.

But Mr. Rehnquist refuses to give them special treatment. He adheres to a central principle of the American tradition, and that's why he is being called "too extreme."

Joseph Sobran, a senior editor of National Review, *is a nationally syndicated columnist.*

THE WASHINGTON POST

Rehnquist on Trial

David S. Broder

Those Memos Will Tell

Three main issues have arisen in the confirmation hearings for William Rehnquist's nomination as chief justice. One is frivolous, one is probably capable of fair resolution and one cries out to be settled by definitive evidence before the Senate acts on his confirmation.

The frivolous issue is the claim by Sens. Edward Kennedy and Howard Metzenbaum that Rehnquist is "too extreme" to preside over the high court. He is a staunch conservative and in his 15 years on the bench has written at least 54 dissenting opinions on which he stood alone against his colleagues.

But nothing in the Constitution requires that the chief justice be "moderate," whatever that may mean. "Extremism" is in the eye of the beholder, and Rehnquist's views do not seem extreme to President Reagan, who carried 49 states. That is not a flippant comment. Reagan's views of the Constitution were well known by the time of the 1984 campaign, and the pattern of his judicial appointments was clear. The Democratic nominee made an issue of Reagan's views in the campaign and lost overwhelmingly; it ill behooves the Democrats to raise it as a disqualification for Rehnquist now.

But the issue is weakened further by the wide acknowledgment that Rehnquist is highly and affectionately regarded by his colleagues on the court, including those who oppose his views on many legal issues. An American Bar Association official who interviewed those other justices reported "an almost unanimous feeling of joy" at Rehnquist's elevation. As a barrier to confirmation, the charge of extremism just doesn't fly.

The second claim is that Rehnquist is biased against minorities. His record on the court clearly shows he has resisted the civil-rights remedies the courts and Congress have applied in the last three decades. But his opponents cannot defeat him on those grounds, so they are stretching to show that he has been guilty of gross personal bias as well. They have turned up restrictive covenants on the deeds of two houses he owned. But those were all too commonplace at the time and hardly prove the charge of prejudice, especially since Rehnquist said he was unaware of them and finds them not only unenforceable but "obnoxious."

The major evidence of prejudice is the allegation that Rehnquist challenged and perhaps intimidated black voters as part of a Republican "ballot security" program in Phoenix in the early 1960s. Competent witnesses say he was aggressive in that effort; others, equally competent, deny it. Rehnquist says he neither intimidated nor challenged, but the latter is frankly hard to believe.

Still, the events occurred 24 years ago, and there is nothing in Rehnquist's copious record since then to sustain a charge of prejudice, and much testimony from colleagues who share few of his opinions that he is, instead, a tolerant, unbiased individual. I doubt many senators will reject him on this ground.

PHOTOS BY JAMES K.W. ATHERTON — THE WASHINGTON POST

The last question—and to my mind, the most serious—involves a fundamental question of judicial ethics: whether Rehnquist was right in sitting in judgment and casting the deciding vote to approve the actions of the Justice Department and military authorities in handling Vietnam protest demonstrators. In 1972 the newly appointed justice cast what was in effect the swing vote in a 5-4 decision on *Laird v. Tatum*, disallowing a challenge to the constitutionality of an Army surveillance program aimed at antiwar protesters.

A year earlier Rehnquist had taken the same position as a Justice Department witness during a Senate hearing, but, to the surprise of the lawyers for the losing side, he did not disqualify himself when the case reached the Supreme Court. Rehnquist said at the time that he was not so intimately involved with the issue as the head of the Justice Department's office of legal counsel that he could not deal with it fairly as a judge.

How much did Rehnquist have to do with the Nixon administration's strategy for monitoring and combating antiwar protesters? The answer lies in the Justice Department files, which he said last week he would be willing to have made public. But President Reagan initially invoked executive privilege to keep those files from the senators. That was a mistake, which he has now corrected.

Executive privilege is validly claimed to protect the confidentiality of communications to the president and the candor of advice within the Cabinet departments connected to him. But the Rehnquist memos to Nixon and Attorney General John Mitchell are historical documents now. They cannot inhibit the performance of people now in the executive branch. They can clear a serious cloud of judicial ethics overhanging the president's choice for chief justice.

Reagan owed Rehnquist the documentation he needs to clear his name. He owed the Senate the information it needs to perform its constitutional function of "advice and consent." Belatedly, but wisely, the president has decided to stop being coy and legalistically cute.

Michael Kinsley

The Cover-Up

What really hurts in matters of this sort is not the fact that they occur, because overzealous people . . . do things that are wrong. What really hurts is if you try to cover it up.

—Richard Nixon

The important issue in the confirmation of William Rehnquist as chief justice isn't what he may have done many years ago, but what he says about it now.

Ten people have told the FBI they saw Rehnquist challenging or harassing minority voters during elections in the early 1960s. Four of them testified to the Senate Judiciary Committee, and their stories couldn't be shaken. (Several other people testified that they hadn't seen Rehnquist harassing voters, as if that proves anything. I didn't see him do it either.)

Rehnquist doesn't deny supervising voter challenges as a young Republican activist. But he told the Senate during his first Supreme Court confirmation in 1971 that he never "harassed or intimidated" voters, and did not "personally engage in challenging the qualifications of any voters" between 1958 and 1968. He now concedes that this was an evasion—he might have challenged voters in 1954. But he stands by his assertion that he did not personally "challenge" voters during the later years and never "harassed or intimidated" them. One further twist: he does "not recall" approaching voters and demanding proof of literacy during the later years, leaving the possibility that he may have done this but doesn't feel it counts as a "challenge."

Challenging the literacy and other qualifications of people standing in line to vote was not illegal before the Civil Rights Act of 1964, though harassing them was. And having participated in such challenges is no proof of racial bigotry. It was all part of the rough-and-tumble of local politics in those days. Rehnquist could have explained this and conceded that it looks worse in the clarity of hindsight than it did at the time. But instead it seems to me he took refuge in technical evasions at best or deceptions—under oath—at worst.

Another problem for Rehnquist is the memo he wrote in 1952 as a young clerk for Justice Robert Jackson, urging that racial segregation not be ruled unconstitutional—as it was two years later in the great case of *Brown v. Board of Education*. Rehnquist claims that the memo—written in the first person—was actually a reflection of Jackson's views, not his own. This would be implausible enough even without the recollection of fellow clerks that Rehnquist took the same position in cafeteria bull sessions.

Once again, having held this opinion in 1952 hardly puts Rehnquist beyond the pale today, or makes him a racist even in hindsight. Ending segregation by federal judicial fiat was a big step. The very fact that *Brown* was a landmark decision demonstrates that opposition to it was a respectable view at the time, even if history has proved this opposition profoundly wrong. But rather than admit that he was wrong, Rehnquist has chosen to dissemble.

All this is troubling for the obvious reason, and for a less obvious one. Obviously, honesty is an important qualification for any high office, especially the Supreme Court. The intellectual honesty of justices is tested every time they make a decision. Are they attempting to apply neutral principles of the law, or are they simply choosing the result they prefer?

The administration, and conservatives generally, have made a special point of demanding this particular form of honesty from judges. Yet justices, once confirmed, can't be fired for mere failures of intellectual integrity. Indeed they can't even be questioned about their records except under unusual circumstances like the present ones.

Rehnquist's testimony also casts a shadow over the larger issue of whether he is acceptably within the current national consensus on such matters as race. The Post editorialized yesterday that the accusations against Rehnquist "can be overcome by a firm declaration that the nominee—like many other public figures—has changed with the times." Rehnquist's attempt to cover up rather than make such a declaration inevitably raises the suspicion that he has *not* changed with the times.

Thanks to a Supreme Court case of 1948, the racial covenants attached to Rehnquist's two houses are not enforceable. But the William Rehnquist of 1948 might well have felt (as did many at the time) that this decision was too great an interference with private property. Thanks to the 1964 Civil Rights Act, Election Day voter challenges of the kind Rehnquist at least supervised are no longer permitted. But the Rehnquist of 1964 undoubtedly opposed the Civil Rights Act (as did the man who nominated him, President Reagan).

"Imagine," said Sen. Edward Kennedy at Rehnquist's confirmation hearing, "what America would be like if Mr. Rehnquist had been chief justice and his cramped and narrow view of the Constitution had prevailed in the critical years since World War II." It's a fair point. To rebut it will require more frankness than Rehnquist has supplied so far. His petty dissembling doesn't really hide what his behavior and opinions were like back then. What he's covering up is whether he's changed his mind.

Nat Hentoff

Cold, Cold Heart

Althea Simmons of the National Association for the Advancement of Colored People, testifying against the confirmation of William Rehnquist as chief justice, noted that "even though a person is a genius, if he lacks compassion, it distorts reality and cripples objectivity."

By all reports, Rehnquist is congenial at work and warmly regarded by his colleagues and court personnel. But beyond the collegiality of the court and beyond his family and friends, Rehnquist—in his official opinions—has often appeared to be remarkably mean-spirited, more so perhaps than any member of the modern court.

It is as if those he cannot see—in places remote from the majesty of the court—are not fully human. In a 1979 case, *Bell v. Wolfish*, concerning overcrowding in a federal prison facility in New York, he wrote for the majority against the prisoners, in this tone: "I disagree . . . that there is some sort of a 'one-man, one-cell' principle lurking in the due process clause." A clever crack, if you have never spent any time in a cell.

In the same case, which dealt with *pre-trial* detainees, Rehnquist ruled that in order to receive contact visits from their families, any one of them could automatically be required to undergo a strip search without any individuated reason to believe that he was a risk to prison security.

Two years later, in *Atiyeh v. Capps*, a federal district court found such overcrowding in an Oregon prison that there was a substantial risk to health, along with rising tension and fear among inmates and staff. Prison authorities asked for a stay of the lower court order, and Rehnquist granted it, saying: "Nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires them to be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like."

So too in 1979, dissenting in a school desegregation case in Columbus, Ohio, Rehnquist noted that the Constitution does not mandate school boards to "follow a policy of integration *über alles*." I suppose some may regard that as a charming, even brilliant way of putting the case for keeping *Brown v. Board of Education* in its place.

There has been concern that the lonely dissenter will not be much of a consensus-maker as chief justice. Given some of the majority opinions he has written, the Constitution might be safer if he remains on the sidelines. Consider *Rummel v. Estelle* (1980). Under a Texas recidivist law, a man had been given a life sentence as a three-time loser. He had bilked someone out of $120.75 on a service contract, had fraudulently used a credit card for $80 and had passed a forged check for $28.35. For a 5-4 court, Rehnquist affirmed the dangerous grifter's life term. But at least under Texas law there was a possibility of parole.

Three years later, a man was sentenced to life imprisonment in South Dakota with no possibility of parole (*Solem v. Helm*). He had committed no violent crimes, but he did have a record of third-degree burglaries, of passing a bogus check for $100 and other minor offenses. This time the court's majority could not bring itself to send this recidivist away for what literally would be the rest of his life. Rehnquist, however, did not let sentimentality dilute his vision of justice. He dissented.

Rehnquist not only has been a devoted defender of the death sentence, but he has often chastised the rest of the court for allowing those on death row to keep the executioner waiting while they kept filing appeals. Five years ago, he lamented during a dissent that "the existence of the death penalty in this country is virtually an illusion." Since then, things have been looking up, with corpses expected to pile up at an ever more spirited rate.

Rehnquist told Sen. Howard Metzenbaum during the hearings: "There is no reason to think that the way I see things will change from the way I've seen them on the court for the last 15 years."

That is precisely the point made by Althea Simmons of the NAACP. For the past 15 years, Rehnquist has been more devoid of compassion than any other member of the court. This has less to do with ideology than with the very nature of the nominee.

BY JAMES K.W. ATHERTON—THE WASHINGTON PO

Benjamin Hooks, left, and Joseph Rauh Jr. testify during daylong hearing.

itnesses Contradict
ehnquist on Role

REHNQUIST, From A1

uist intimidate voters or chal- heir credentials in any way.

enix attorney Jim Bush, who as cochairman of the GOP s' committee with Rehnquist 0 and 1962, testified that in those years, "neither Mr. uist nor myself spent much way from the headquarters, jority of our time was spent . . . answering [legal] ques- nat came to us."

said that "no lawyer, includ- . Rehnquist, acted as a chal- ."

nquist denied this week—and 1 during the initial confirma- roceedings over his appoint- to the court—that he had personally engage[d] in chal- g the qualifications of voters" he was a Republican activist.

nquist also swore that he had in any election, in any pre- either "harassed or intimi- voters" or encouraged or ap- d such activity.

most explicit eyewitness ac- contradicting Rehnquist's nents came from Smith, a clin- sychologist now living in La Calif., who said his son, a reg- d Republican, and his daugh- d urged him to speak up.

ith said he had been serving as mocratic poll-watcher at one nix precinct one morning when d a colleague, John Grimes, a r Arizona State University saw Rehnquist emerge from a ith one or two other men.

here was a long line winding d outside [the polling place], up of largely black voters," testified. He said Rehnquist ached the line, stopped in of two black men near the end held a white card in front of faces. Smith said Rehnquist them no chance to read it.

e said, 'You're not able to are you? You have no business in the line. I would ask you to '

. His activity was very delib- ," Smith testified. "It was not uch a challenge, it seemed to as clear intimidation. Other e in the line were upset and led by this experience . . . . pproached the line very rapidly ough he knew exactly what he doing."

ith said that when the two men started to leave, Grimes vened and tried to nudge them into line, instructing Smith to t the trouble to Democratic quarters.

said Grimes, who is believed ve died some years ago, stayed k with Rehnquist, but the Re- cans drove off almost as quick- they arrived. Smith said the ent took place in either the or 1962 election when he had active as a Democratic work-

n. Edward M. Kennedy (D- .) asked Smith how he hap- d to have come forward. Smith he told his son about the inci- shortly afterward and again in when Rehnquist was nomi- for the Supreme Court. But en, Smith said, he was living in er state and "really didn't how to go about" reporting he knew. In the past week, said, his son, Christopher, his daughter, Anne, "indicated it was my patriotic duty to come forth." They put him in touch with National Public Radio, whose broadcast alerted Democrats.

Yesterday's dramatic daylong hearing began with testimony from civil rights, feminist and other organizations opposed to Rehnquist's nomination.

Benjamin Hooks, chairman of the Leadership Conference on Civil Rights, told the committee that what distresses him most about Rehnquist is the lack of any sign that he has changed from the anti-civil rights stances he took years ago.

"I've seen [southern] senators, congressmen and mayors, with tears in their eyes, admit they were wrong," Hooks said. "And if they haven't changed, at least they give lip service. Mr. Rehnquist, in my judgment, doesn't give lip service."

The hearing then shifted to the Phoenix controversy.

While the Democrats portrayed Rehnquist as an active leader of squads of GOP challengers, Bush said, "His role was that of a lawyer, and we weren't about to waste the talent of lawyers to do challenging."

Bush's testimony was backed by former Maricopa County (Phoenix) Republican Chairman Ralph Staggs, who said, "Justice Rehnquist was not a member of the challenger's committee and to the best of my knowledge was never involved in any actual challenging in any of the precincts in Maricopa County."

Two other GOP activists in the late 1950s and early '60s issued a joint statement saying that "at no time in our presence . . . did Bill Rehnquist, or any other attorney . . . play the role of a challenger or engage in harassment or intimidation of voters. The two men, William C. Turner and Gordon Marshall, said they organized the challenging effort during the 1962 election.

Another Phoenix lawyer, Fred Robert-Shaw, who worked for Rehnquist and Bush on the lawyers' committee, said Rehnquist instructed him simply to read the election code and be prepared to answer questions from precinct workers about the law.

"We were never supposed to challenge anyone," he said, adding that such actions would be "directly contrary" to Rehnquist's instructions.

Former county Democratic chairman, Vincent Maggiore, said he went to several precincts where there had been some tension during the 1962 election and never saw Rehnquist. "At no time did anyone come to me and say" that Rehnquist had been challenging voters, he said.

Several of the Democratic witnesses said they were not sure about which election year they said they saw Rehnquist. Phoenix lawyer Melvin Mirkin, for instance, did not give a date, but described having seen Rehnquist arrive with a "flying squad of challengers" at a minority precinct in south Phoenix early one election morning.

Mirkin said Rehnquist announced in a clear voice that could be heard by the 10 to 20 predominantly Hispanic voters waiting in line that they were there "to see that no persons were improperly permitted to vote.

"He was letting the crowd know what the drill was going to be," Mirkin said. "Some [voters] peeled off and left the line." Mirkin, who was serving as a roving Democratic troubleshooter, said he tried to allay the fears of those in line.

Sen. Joseph R. Biden Jr. (D-Del.) asked Mirkin how he could tell Rehnquist was not simply giving his workers instructions.

"Well, I don't think he would have brought people to the polls and then have to instruct them there," Mirkin said. "I thought this was purely for public consumption."

"Would you say this was an attempt to chill the atmosphere?" Sen. Charles McC. Mathias Jr. (R-Md.) asked him.

"That would be my conclusion," Mirkin responded.

He also said he felt certain the man at the precinct was Rehnquist, whom Mirkin knew as a fellow Stanford law school alumnus.

Charles Pine, Arizona Democratic chairman from 1972 to 1976, told the panel, "I saw Rehnquist challenging individuals and I saw him do it illegally" at the predominantly black Bethune School polling place in 1964.

"All I can say is that the justice obviously is suffering a convenient lapse of memory," Pine said of Rehnquist's denials.

Pine said he distinctly recalled Rehnquist walking up to one middle-aged man waiting in line and saying "in a firm, authoritative voice, 'Are you a qualified voter?' "

Pine said the Republican strategy was aimed at cutting the Democratic turnout in closely contested statewide races.

Asked why he did not speak up in 1971 when President Richard M. Nixon named Rehnquist to the court, Pine replied, "I didn't testify in 1971 because nobody asked me."

Kennedy observed at another point that the controversy over Rehnquist's role in Phoenix elections did not fully develop until the 1971 hearings had been concluded and Kennedy and other Democrats submitted a long list of questions for the record. Rehnquist answered them in a written statement, but was never questioned about his responses until this week.

Another Democrat at yesterday's hearing, state Sen. Manuel Pena said he saw Rehnquist at the Butler precinct in south Phoenix in 1964 when he said he was serving as a roving troubleshooter for the Democrats. He said he found "a fella sitting at the end of the table" where precinct election officials were also stationed.

"He was asking everyone that came in what their name was, where they lived and how long they lived there," Pena recalled. Pena said he objected, but the challenger was adamant and "we had a close confrontation." He said he did not know Rehnquist at the time, but identified him from a photograph years later.

Most of the committee's questioning, however, was spent on Brosnahan. He said he and an FBI agent went to a south Phoenix precinct in the 1962 election that generated numerous complaints about "Republican challengers . . . aggressively challenging many voters without having a basis for the challenges."

Brosnahan said he spotted Rehnquist, whom he knew, behind a table and "we were told he had been acting as a challenger . . . . We talked to him about it . . . . At no time did he say, 'It's not me; it's someone else.' . . . . I'm sure he told us that whatever he had done, he thought was appropriate. I didn't think it was appropriate."

In general, Brosnahan said, what the Republicans were doing that day was to "look at a line of black and Hispanic voters and then, in a loud voice, go down that line and say, 'I don't think this one and this one and this one and this one can read' when you have no basis factually to think that is true."

Brosnahan said he did not want to characterize just what he was told Rehnquist had been doing so long ago, but he told the committee that a number of voters in the line pointed out Rehnquist to him and the FBI agent "as someone who had been doing the challenging.

"That's why we went to him," Brosnahan said. "People in the line said, 'That's the gentleman who's doing the challenging.' He was doing something they didn't like."

Hatch tried chip away at the account and at times got into shouting matches with Brosnahan, who accused the senator of unfairly summarizing his testimony.

When Hatch wondered how sure Brosnahan was, Brosnahan said, "Do you think I really would be here to testify about the qualifications of the chief justice, after 27 years of trying lawsuits, if I wasn't absolutely sure? If it was even close, I would be at Jack's [in San Francisco] for my Friday afternoon lunch."

THE WASHINGTON POST
Saturday, August 2, 1986
Front Page

Democrats Seek to Subpoena Papers

By Howard Kurtz and Ruth Marcus
Washington Post Staff Writers

Democrats on the Senate Judiciary Committee are trying to round up enough votes to subpoena Chief Justice-designate William H. Rehnquist's papers dating from the Nixon administration, most likely by narrowing the scope of the request, committee officials said yesterday.

At the same time, Democratic sources said Sen. Paul Laxalt (R-Nev.) had been informally designated to negotiate with the Reagan administration through the weekend to see whether a compromise can be reached on obtaining internal documents written by Rehnquist while he served as the Justice Department's chief legal adviser from 1969 to 1971.

A Washington attorney drafted a proposed subpoena for the material yesterday at the request of Sen. Joseph R. Biden Jr. (D-Del.), the panel's ranking Democrat. Biden said he did not know whether he had enough votes on the committee, which has a 10-to-8 Republican majority, to approve such a subpoena.

The subpoena issue surfaced after President Reagan invoked executive privilege late Thursday in refusing to provide the documents to Judiciary Committee Democrats.

Rehnquist has said he has no objection to release of the material.

Some opinions from the department's Office of Legal Counsel, which Rehnquist headed before joining the Supreme Court, have been released for years, most re-

See MEMOS, A8, Col. 5

Compromise Sought For Memos' Subpoena

MEMOS, From A1

cently a controversial opinion concerning whether federal antidiscrimination laws protect AIDS victims. Former assistant attorney general John M. Harmon, who headed the office under President Jimmy Carter, said that a "blanket assertion" that its opinions are shielded by executive privilege "probably doesn't make much sense."

Discussions about a subpoena intensified throughout the day among members of the staffs of Biden, Sen. Edward M. Kennedy (D-Mass.), other Democrats and the panel's two moderate Republicans, Charles McC. Mathias Jr. (Md.) and Arlen Specter (Pa.). The talks were aimed at narrowing the Democrats' earlier request for Rehnquist's Justice Department papers in a way that a bipartisan majority could support and that some senators hope might prompt the Reagan administration to agree to release some of the material.

Justice Department spokesman Terry H. Eastland said no department officials are involved in the discussions and that the administration is not interested in a compromise. "The issue here is not what these papers say," Eastland said. "The issue here is the integrity of the decision-making process in the executive branch."

Eastland said that although some opinions from the department's Office of Legal Counsel have been made public, the president can withhold opinions without giving a reason.

"If the Justice Department can live with a narrower request, that's fine," said Mark Goodin, spokesman for committee Chairman Strom Thurmond (R-S.C.).

In a July 23 letter, Sens. Kennedy, Howard M. Metzenbaum (D-Ohio) and Paul Simon (D-Ill.) asked for "all memoranda, correspondence and other materials" on certain issues that Rehnquist received, prepared, initialed or had his staff prepare while at the Justice Department. They asked for documents on such topics as civil rights, civil liberties, executive privilege, national security, domestic surveillance, anti-war demonstrations, wiretapping, leak investigations and the May 1970 killings at Kent State.

John R. Bolton, assistant attorney general for congressional affairs, responded in writing that much of the office's work for its government clients must remain confidential. In Senate testimony Thursday night, Bolton went further, invoking executive privilege to cover the documents after meeting with Attorney General Edwin Meese III, Office of Legal Counsel head Charles J. Cooper and White House counsel Peter J. Wallison, who took the issue to Reagan.

A source close to negotiations said that, as part of a compromise, the panel might seek only Rehnquist's final opinions at the Justice Department, while excluding internal memos and correspondence.

Another key avenue, said another source familiar with the negotiations, is to limit the requests to a smaller number of specific subject areas so that the Democrats could argue that no decision could properly be made on confirmation without knowing Rehnquist's actions on that matter while at the Justice Department.

Kennedy and Biden said they think they have enough votes for a procedural move to force a committee meeting on a proposed subpoena, if Thurmond refuses to allow a vote. Such a meeting can be called on three days' notice.

The Democrats hope to fashion a compromise that will draw support from their most conservative colleagues on the committee, Sens. Howell Heflin (Ala.) and Dennis DeConcini (Ariz.), as well as some Republicans. At the same time, they must retain the support of Kennedy, the panel's most vociferous member in demanding the papers.

The confidentiality of Office of Legal Counsel documents is certain to arise again next week when the committee begins confirmation hearings on Antonin Scalia, Reagan's nominee to fill Rehnquist's Supreme Court seat. Scalia, a federal appeals court judge here, headed the Office of Legal Counsel under President Gerald R. Ford.

As part of his response to the committee, Bolton attached a 1975 letter from Scalia to a House subcommittee chairman in which Scalia outlined the policy against releasing documents.

The Office of Legal Counsel provides legal advice to the attorney general, the president and Cabinet officers. Selected opinions of the Office of Legal Counsel have been published since 1977, with the approval of those who received the legal advice.

"We were faced with exactly this question with Freedom of Information requests for opinions that were rendered by someone in a prior administration," said Harmon, Carter's head of the Office of Legal Counsel. "In each of those cases we had to look on a case-by-case basis, to determine whether release of that opinion would dampen a future president or a future attorney general in seeking the advice of his lawyer."

The age of the documents being sought, Harmon said, "is certainly a consideration."

"The claim of privilege is not absolute," said James Hamilton, former assistant chief counsel to the Senate Watergate Committee and author of a book on congressional investigations. "It basically depends on a weighing of the executive's interest against the Congress."

In this case, Hamilton said, the Senate has a "specific need that relates to whether you're going to confirm a man who may well be chief justice for 20 years," he said. "This is one of the Senate's most important roles."

But Theodore B. Olson, who headed the Office of Legal Counsel earlier in the Reagan administration, called the assertion of executive privilege "a very strong and sound legal and constitutional argument."

"If Justice Rehnquist had been in private practice and they asked for his letters and memoranda he had written to private clients, you wouldn't say you have a right to those," he said. "If the president or the attorney general, on their most sensitive deliberations about whether a certain policy should be pursued or not, if they feel today that their communications with that office will be made public, they will ask someone else for that advice."

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The moderate Mr. Kennedy

If anyone ever doubted that the campaign to keep William Rehnquist from being chief justice was largely ideological, Sen. Edward Kennedy settled the matter on the first day of confirmation hearings. Sen. Kennedy, it seems likely, will not vote to confirm Mr. Rehnquist as chief justice.

"Justice Rehnquist is outside the mainstream of American constitutional law and American values, and he does not deserve to be chief justice of the United States," Sen. Kennedy declaimed, just warming up. "He is too extreme on race, too extreme on women's rights, too extreme on freedom of speech, too extreme on separation of church and state, too extreme to be chief justice."

As good as it is to have these calm observations from the department of moderation, they do not tell us much about the candidate's qualifications — or much of anything else except that Sen. Kennedy disapproves of Mr. Rehnquist, which is a kind of qualification itself. But they do perform one service. They underscore the poverty of the opposition arguments.

The case against Mr. Rehnquist rests on three legs: (1) that, as a law clerk for Justice Robert H. Jackson in 1952, he wrote a memorandum reiterating what was then the law on school segregation, (2) that, as a political worker in Arizona in the 1960s, he ran a controversial ballot security program in which some votes allegedly were challenged, and (3) that, as Sen. Kennedy boils it down, his views are "too extreme," *i.e.*, are not those of Sen. Kennedy.

That's it. That is the case against William Rehnquist — that and a boilerplate deed to a piece of property in Vermont containing a hateful — and unenforceable — restrictive covenant that Mr. Rehnquist was quick to repudiate. It would not be going overboard to say that the objections to Mr. Rehnquist are scarcely more than a dirge sung by those who, too long accustomed to ruling, have not quite made the adjustment to losing.

Conservatives especially should sympathize, remembering as they must the many dreary winters when their own faces were stuck to the window watching the plump liberals warming their bottoms by the fire and lifting their glasses to this or that quaint bit of nuttiness.

Those days are mercifully past. Sen. Kennedy now can be safely ignored and, more to the point, Justice Rehnquist confirmed. With some degree of seemliness, let us hope, but confirmed in any event.

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COPY

Justice asked to prosecute former Commerce official

By George Archibald
THE WASHINGTON TIMES

The General Accounting Office reported yesterday it will ask the Justice Department to consider prosecuting a former high-ranking U.S. government official whose actions stood to benefit clients of a lobbying firm with which he was negotiating employment.

Walter C. Lenahan, who resigned Feb. 7 as the Commerce Department's deputy assistant secretary for textiles and apparel, negotiated his current job as vice president of International Business and Economic Research Corp. while helping determine the future level of textile imports, the GAO told a House Government Operations subcommittee.

Three of the countries affected by those determinations — Hong Kong, Israel and the People's Republic of China — were clients of IBERC, a consulting firm associated with the lobbying division of the powerful law firm Mudge Rose Guthrie Alexander & Ferndon, said William Anderson, director of GAO's general government division, in testimony before the panel.

Mudge Rose, whose managing partner Michael P. Daniels founded IBERC and hired Mr. Lenahan, lobbys for several textile-importing countries.

In addition to negotiating future employment with IBERC during his last year in office, Mr. Lenahan also discussed job prospects with Liz Claiborne Inc. and Burlington Industries, two manufacturers of textile products, Mr. Anderson testified.

Mr. Lenahan "had reason to know [that his official actions] would affect the financial interests of those firms," Mr. Anderson said.

"While discussing potential employment with Liz Claiborne Inc., Mr. Lenahan served on the inter-agency working group that developed the U.S. position for negotiating bilateral agreements with Hong Kong, Korea, and Taiwan — the primary sources of Liz Claiborne products," he testified. "Mr. Lenahan said he knew at the time that Hong Kong and Taiwan were large Liz Claiborne suppliers.

"While discussing potential employment with IBERC, Mr. Lenahan chaired CITA [Committee for the Implementation of Textile Agreements] meetings resulting in calls for consultations that led to quotas for products from Hong Kong and China," said the GAO official.

"IBERC and Mudge Rose represent the Hong Kong Department of Trade and the government-owned China National Textile Import and Export Corp. on quota issues. Mr. Lenahan said he knew at the time that both were IBERC clients."

Mr. Anderson said the GAO has "no evidence that any of his [Mr. Lenahan's] activities was for personal gain either directly or through benefit to the companies involved."

However, he said the law prohibits federal employees from participating "personally and substantially" in any "particular matter" which to their knowledge will affect the financial interests of organizations with which they are negotiating for employment.

The conflict-of-interest law "is not only directed at intentional wrongdoing but at the impairment of impartial judgment that can result when an employee's personal economic interests are associated with the business he transacts on behalf of the government," Mr. Anderson testified. Accordingly, the case would be referred to the Justice Department for possible criminal prosecution, he said.

Mr. Lenahan is the second former official referred by the GAO to Justice for possible criminal prosecution. The other, Michael K. Deaver, President Reagan's former deputy chief of staff, currently is being investigated for alleged conflict-of-interest violations by a court-appointed independent counsel.

Mr. Deaver's alleged wrongdoing in part involves his official actions on the U.S.-Canada acid rain issue before leaving the White House and a subsequent lobbying contract he had with the Canadian government on acid rain matters.

Mr. Lenahan refused to testify at yesterday's hearing called by Rep. Doug Barnard, Georgia Democrat and chairman of the House Government Operations subcommittee on commerce, consumer and monetary affairs. He also declined to talk to reporters.

In a written statement submitted to the subcommittee, Mr. Lenahan said, "I engaged in no conflict of interest in the months preceding my departure from government or since."

Mr. Barnard said he was concerned Congress might need to toughen laws governing ethical standards for pre- and post-employment activities of former federal officials.

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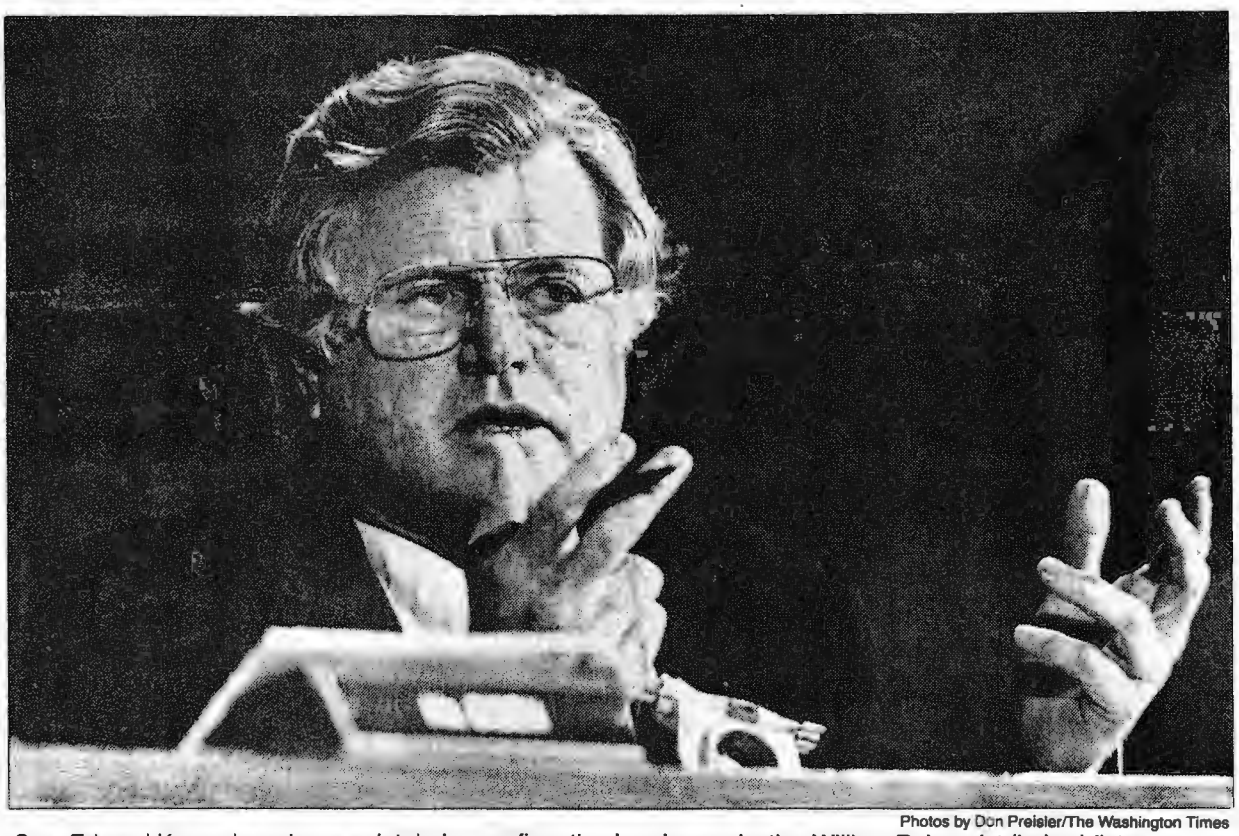

Photos by Don Preisler/The Washington Times

Sen. Edward Kennedy makes a point during confirmation hearing as Justice William Rehnquist (below) listens.

Millions of land owners hold restrictive covenants

By Lucy Keyser
THE WASHINGTON TIMES

Restrictive property convenants that bar sales to buyers of certain races, religions and nationalities — such as those in the deeds for two pieces of property owned by Justice William H. Rehnquist — have existed since the beginning of American land law.

Authorities in real estate law say anyone who bought property in a suburban housing development before 1948 probably bought a restrictive covenant as well, and as many as 4 million homeowners still have such restrictive deeds.

But these restrictions have had no legal effect since 1948, when the Supreme Court ruled in two separate decisions that neither state nor federal courts could enforce them.

In 1972, the Supreme Court ruled that even recording such restrictions violated the Fifth Amendment and the Fair Housing Act of 1968, said William North, executive vice president of the National Association of Realtors.

Mr. North, formerly the senior legal counsel for the association, has studied the history of restrictive

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Skeletons in Senate closets. Pruden on Politics, Page 2A.

DEEDS

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covenants and written a book about them.

"I get a big bang out of looking at old deeds — they say the most incredible things," Mr. North said. "But you have to remember that what seems so common and usual and right to us today — and outlawing discriminatory deeds is right — we forget that not too many years ago it was absolutely revolutionary.

"You can't look at conduct prior to that period and judge it by today's standards. It's really a revolution."

The deed for Mr. Rehnquist's vacation home in Greensboro, Vt., includes a clause barring its sale to Jews. A deed for a house he once owned in Phoenix, Ariz., included a restrictive convenant dating from 1928 — when the justice was 3 years old — that prohibited selling or leasing the property to non-whites.

Mr. Rehnquist owned the house, in the Palmcroft subdivision in Phoenix, from 1961 to 1969.

Mr. Rehnquist said he was unaware of the restrictions in either deed until several days ago. He promised to delete the "offensive" convenant from the deed to his Vermont home, which he has owned since 1974.

Barry Goldstein, a lawyer for the NAACP Legal Defense Fund, said that because of the timing of Mr. Rehnquist's purchase of his Vermont home — after the Supreme Court barred the recording of discriminatory covenants — it seemed to him that such a restriction would have been "very obvious."

"Lots of these types of deeds are standard forms, and it would be hard to believe there would still be a company producing them [deeds with restrictive convenants]," Mr. Goldstein said. "Often when you negotiate, a party will write in a phrase that's not standard."

But usually not. The Supreme Court's 1972 decision, Mr. North said, never required property owners to go back into their records and rewrite deeds or erase restrictive covenants. He says 3 million or 4 million homeowners in the United States may still have restrictive covenants in their deeds.

The restrictions were very popular and were encouraged by earlier decisions of the Supreme Court and policies of the federal government, Mr. North said.

"A great deal of the red-lininig issue was rooted in efforts by the real estate industry and lawyers and homeowners to comply with federal policy, which has changed dramatically since 1968," Mr. North said.

An underwriting manual for federal housing authorities, used during the Roosevelt and Truman administrations to determine whether property was eligible for a mortgage, included the following guideline:

"... If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."

When the Supreme Court in 1883 said discriminatory acts by states violated the Constitution, but not acts by private individuals, the use of restrictive covenants increased, Mr. North said.

In 1917, the Supreme Court outlawed cities' "checkerboard" zoning practices that banned certain groups from living in particular neighborhoods and subdivisions. But the court's language suggested that if there are to be restraints, they are to be private, which again increased the use of private restrictive convenants, Mr. North said.

"I'd suspect that anyone who bought into a subdivision prior to 1948 would have had a restrictive covenant in their deed," Mr. North said.

Sen. Dennis DeConcini, Arizona Democrat, suggested at Mr. Rehnquist's hearings that Senate members probably hold property with restrictive clauses in their deeds.

Spokesmen for two of Mr. Rehnquist's Democratic critics on the Senate committee — Edward M. Kennedy of Massachusetts and Howard M. Metzenbaum of Ohio — said deeds held in the senators' names include no convenants relating to race or religion.

The press secretary for Sen. Patrick Leahy of Vermont, who disclosed the anti-Jewish clause in Mr. Rehnquist's deed for his home, could not be reached for comment.

THE WASHINGTON TIMES
Friday, August 1, 1986
Front Page

Kennedy angers Rehnquist backers

By David Sellers
THE WASHINGTON TIMES

Sen. Edward M. Kennedy continued yesterday to lead the Democratic attack on the qualifications of William Rehnquist to be the chief justice of the United States, finally provoking the wrath of his Republican defenders.

The issue, as on Wednesday, was the existence of restrictive covenants in the deeds to property Mr. Rehnquist has owned in Arizona and Vermont, which prohibit their sale to Jews.

"This nominee was an official of the Justice Department when he transferred a home that had such a restriction," Mr. Kennedy, said. "I think that's significant."

Sen. Orrin Hatch of Utah exploded.

"That's the biggest red herring in this whole hearing," he said. "You know it's ridiculous. I know it's ridiculous."

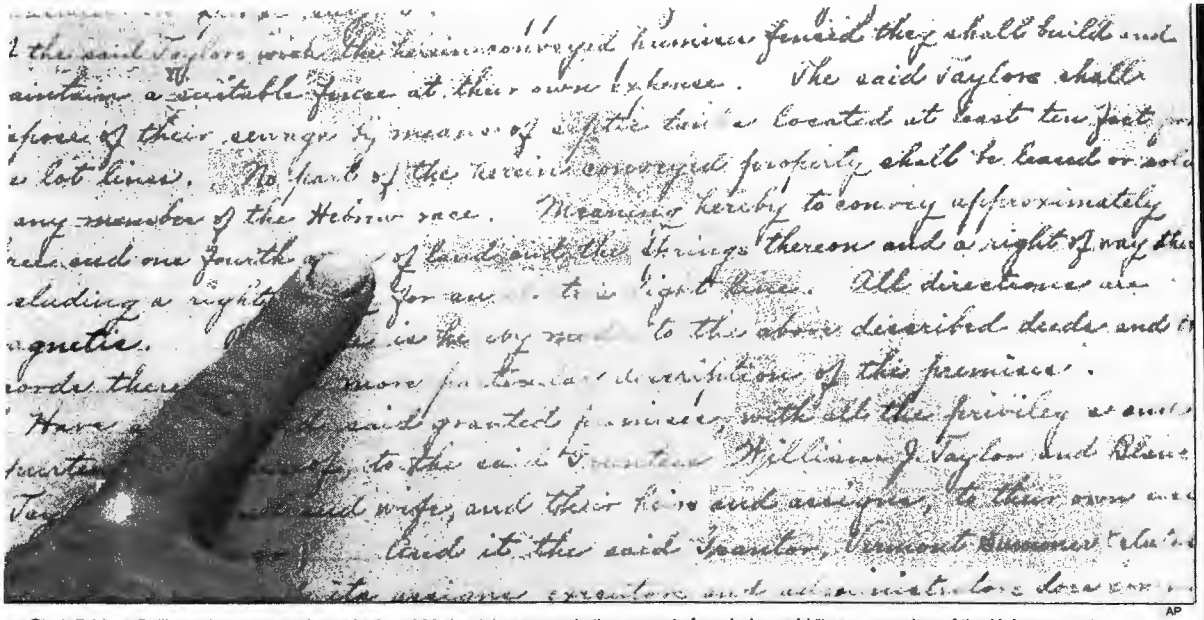
"I don't know that it's ridiculous at all," said Sen. Howard M. Metzenbaum of Ohio.

"The point that has to be made is this nominee's sensitivity to civil rights," Mr. Kennedy said. "These are not matters that are inconsequential."

Asked by Mr. Kennedy whether he had read the Phoenix deed, Mr. Rehnquist said: "I simply can't answer whether I read through the deed or not. One relies on a title company. While very offensive, [the covenant] has no legal effect."

He repeated a promise he made Wednesday to remove the anti-Semitic language from the Vermont

see **ATTACK**, *page 10A*



AP

wn Clerk Bridget Collier points out the clause in the 1933 deed that prevents the property from being sold "to any member of the Hebrew race."

ATTACK

rom page 1A

ed. Sen. Patrick Leahy of Ver-
ont, who disclosed the existence of
e deed, replied, "I accept your as-
rances completely."

Mr. Rehnquist spent the second
y of the hearing deflecting accu-
tions ranging from charges that
has advocated segregation to
laims that he is too "extremist" to
the 16th chief justice of the
nited States. He completed his tes-
mony last night.

The committee will vote Aug. 14
the nominations of Mr. Rehnquist
d Antonin Scalia, who is nom-
ated to be an associate justice on
e Supreme Court. The Scalia hear-
gs begin Tuesday.

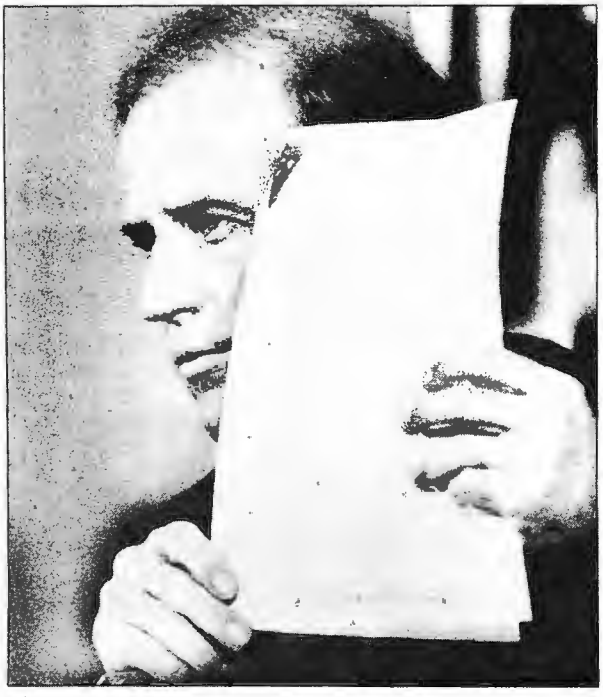
Before the vote, an independent
hysician will review Justice Rehn-
uist's medical records and issue a
onfidential report to the commit-
e.

The issue of the restrictions on
ustice Rehnquist's Phoenix home
d not come up when he was con-
rmed to the Supreme Court by the
ommittee 15 years ago. He told the
ommittee yesterday that he was not
ware his Phoenix house, which was
ld in 1969, or his vacation house in
ermont, which was purchased in
974, had ownership restrictions.

"While very offensive, the housing
nitation has no legal effect," he told
e committee.

"I'm satisfied with your explana-
on," said Sen. Dennis DeConcini of
rizona, a Democrat. "I would ask of
y friends to look at their deeds."

"You said you will have [the re-
ricted covenant] removed," said
r. Leahy. I accept your assurances



AP

Sen. Joseph Biden questions Justice Rehnquist at yesterday's hearing.

completely. I find nothing in your statements or background to suggest any anti-Semitism. The fact that the covenant is in there I find regrettable."

Justice Rehnquist answered once more the accusations that he is an extremist.

"There's often compromise because it's unlikely five people are going to see anything exactly alike," he said. "I think the chief justice probably has a greater obligation than anyone else on the court, in cases where unanimity is possible, to not only get his colleagues together by consensus, but himself to adapt his own views," Justice Rehnquist said.

Justice Rehnquist, who earlier in the week said women and minorities should not fear having him as chief justice, told the committee that during his tenure with the Justice Department he testified before the House in support of the Equal Rights Amendment.

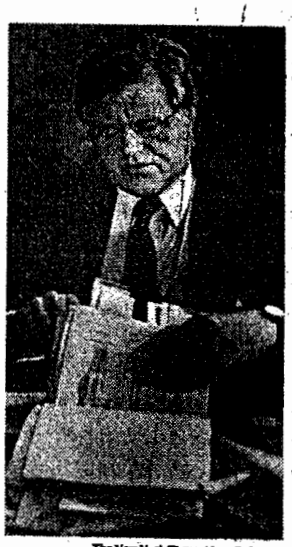
"I had reservations at the time. I thought there were more problems with the ERA than the administration's position indicated."

Several Republican members of the committee declined to question the nominee, saying they did not wish the proceedings to drag on. Sens. Charles Mathias of Maryland and Arlen Specter of Pennsylvania asked questions on technical and procedural issues, ignoring the topics explored by the Democrats.

Sen. Paul Simon of Illinois, a Democrat, said he would withhold his vote on Justice Rehnquist until the nominee said whether he would resign his membership in the 72-year-old Alfalfa Club, an all-male dinner club that meets once a year. Prominent members of both parties are members.

The most unusual question was asked by Mr. Simon: "If you were Paul Simon, how would you vote?"

Replied Mr. Rehnquist: "The question is how is the Senate's power to be exercised. You probably have to say a senator should not simply say this is not a person I would have appointed . . . and because this nominee does not share my views, I will vote against him. Putting myself in your place is very difficult."



The New York Times / Jose R. Lopez

Senator Edward M. Kennedy yesterday at hearing.

PRESIDENT ASSERTS HE WILL WITHHOLD REHNQUIST MEMOS

DEMOCRATS SEEKING DATA

Senators on Judiciary Panel Told Reagan Is Exercising Executive Privilege

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, July 31 — President Reagan asserted executive privilege this evening as a basis for refusing to allow the members of the Senate to see internal memorandums that William H. Rehnquist wrote when he was a high-ranking Justice Department official in the Nixon Administration.

The announcement came at 8 P.M. and was a surprise to Democrats on the Senate Judiciary Committee. They had requested access to the memorandums written by Mr. Rehnquist, now an Associate Justice of the Supreme Court and President Reagan's nominee for Chief Justice. The documents dealt with issues including civil rights, civil liberties, wiretapping and surveillance of radical groups.

Mr. Reagan's decision to claim executive privilege was disclosed in testimony by Assistant Attorney General John B. Bolton, after committee Democrats objected to the Justice Depart-

Excerpts from questioning, page A8.

ment's refusal to provide access to the documents, and argued that under an executive order only a formal claim of exective privilege could justify such a refusal.

Protests From Democrats

The claim drew immediate protests from the Democrats, who said it would prevent them from considering important information about the qualifications of the nominee.

Senator Paul Simon, Democrat of Illinois, read from a November 1984 executive order by Mr. Reagan that Congressional requests for information from the executive branch should generally be complied with and that "executive privilege will be asserted only in the most compelling circumstances." Mr. Simon said no compelling reason had been given for withholding the Rehnquist memorandums.

Mr. Bolton stressed that the claim covered only highly confidential internal memorandums by Justice Rehnquist at a time when he was acting virtually as President Nixon's lawyer. From 1969 to 1971, Mr. Rehnquist was head of the Justice Department's Office of Legal Counsel, which provides legal advice on critical issues to the Attorney General and to the President. At the time, John N. Mitchell was Attorney General.

Questions on Properties

Earlier in the day's hearing, Justice Rehnquist confronted questions about his ownership of a second house with a restrictive convenant in its deed as Senators continued to question his views on civil rights issues.

Senator Edward M. Kennedy, Democrat of Massachusetts, said the Federal Bureau of Investigation had discovered a 56-year-old restrictive provision against nonwhites in the deed of a house in Phoenix, Ariz., owned by Jus-

Continued on Page A8, Column 1

Reagan Says He Will Withhold Rehnquist Memos

Continued From Page 1

tice Rehnquist from 1961 to 1969.

Justice Rehnquist replied that he had not known at the time about the convenant, which barred sale or lease to "any person not of the white or Caucasian race." On Wednesday the issue of a Rehnquist house in Vermont with deed restrictions against Jews came up, and this was touched on again today.

Justice Rehnquist said he had learned of the provision in Phoenix in the last few days, and he termed it "very offensive" and legally unenforceable. Most of the Judicary Committee's 18 members appeared to accept his explanation.

Justice Rehnquist said the same of the provision in the deed of his home in Vermont that purports to bar sale to Jews. Both deed provisions were discovered by the F.B.I. in its routine check on Justice Rehnquist.

Republican senators angrily protested that Senator Kennedy, who alone among the committee's 18 members has announced his opposition to the nomination, had raised what Senator Orrin G. Hatch called a "red herring."

The discussion of the deeds occupied 20 or 30 minutes of the marathon second day of committee hearings on the nomination, which continued into the evening and are due to resume Friday. It provoked angry exchanges between Republicans and Senators Kennedy and Howard M. Metzenbaum, Democrat of Ohio, who have questioned Justice Rehnquist's sensitivity to racial minorities.

The hearing also went in detail into Justice Rehnquist's 1952 memorandum as a law clerk about school segregation, and touched on his conservative votes on civil rights issues in his nearly 15 years on the Court and his opposition to civil rights laws as a young lawyer in Phoenix. He testified carefully and confidently from 10:30 A.M. into the evening, with a few breaks.

In response to questions, Justice Rehnquist said that he would be frank with the American people if he had serious health problems and that he had no concern that his health would prevent him from doing the job of Chief Justice.

While Senators Kennedy and Metzenbaum suggested this morning that the two restrictive deed provisions might be relevant to Justice Rehnquist's qualifications to be Chief Justice, none of the 16 other committee members suggested they agreed, or questioned Justice Rehnquist's explanation that he had not known about the provisions.

Senator Patrick J. Leahy, a Democrat from Vermont who disclosed the Vermont deed provision Wednesday, stressed today that he accepted Justice Rehnquist's explanation, appreciated his statement that he would have the restriction removed from that deed and did not suspect him of anti-Semitism.

He Gives His View on Powers

The Phoenix deed's provision dated from 1928, and the Vermont deed's provision from 1933, according to statements at today's hearing. Justice Rehnquist testified that he had probably not read either deed when he bought the houses. Senators Kennedy and Metzenbaum suggested some skepticism.

Justice Rehnquist stressed, as he did Wednesday, that such racially restrictive deed covenants were "totally unenforceable" and had been for nearly 40 years under a Supreme Court decision called Shelley v. Kraemer.

Also today, Justice Rehnquist told the committee that he thought Congress probably lacked power to strip the Federal courts of jurisdiction to enforce the First Amendment protections of the freedoms of speech, press, assembly and religion.

His answer to a question from Senator Arlen Specter, Republican of Pennsylvania, appeared to be a significant rejection, by the most conservative member of the Court, of a tactic some new-right groups have favored to undo Supreme Court decisions on issues such as school prayer.

"The Court has often referred to the First Amendment as the preferred freedom, the indispensable matrix of a free society," the 61-year-old Justice said in one of many circumspect answers to questions by various senators about constitutional issues.

But he declined to discuss whether Congress would have power to strip the Supreme Court of jurisdiction to enforce other constitutional rights. He said it would be improper to discuss issues that might come before the Court.

Justice Rehnquist refused to defend in detail his judicial actions on issues, including a 1983 dissent in which he was the only Justice to support the Reagan Administration's view that racially discriminatory private schools were legally entitled to tax exemptions and his 1972 refusal to disqualify himself in an Army spying case despite allegations of conflict of interest.

He said it would compromise his independence to be "called to account" by the Senate for his judicial actions.

Justice Rehnquist did note, in discussing the decision on racially discriminatory schools, Bob Jones University v. United States, that he had dissented only on the ground that he disagreed with the majority's view that Congress had intended to bar Federal tax exemptions for such schools.

If his dissent had prevailed, he said, "Congress could have changed the law" explicitly to deny tax exemptions for discriminatory schools, and he would have upheld such a law.

He Cites Club for Men

To another question, whether he belonged to any social clubs that practiced discrimination, Justice Rehnquist said he belonged to a Washington organization called the Alfalfa Club, which met once a year to listen to patriotic music and "hear some funny political speeches."

He said "the Alfalfa Club, as I understand it, is open to men only," but he said he did not think his membership in such a once-a-year group violated the canons of judicial ethics.

Senator Simon asked the nominee to "reflect upon" whether he wanted to continue his membership in the club. "Certainly, I'd be happy to," Justice Rehnquist responded.

The health issue appears to have been raised by an episode in late 1981 when Justice Rehnquist was apparently taking a prescription hypnotic drug called Placidyl for back pain. This caused slurred speech and difficulty in enunciating, which was noticed in the Court. In December 1981, the Justice entered George Washington Hospital, where he was taken off the drug. According to Dr. Dennis O'Leary, the hospital's dean for clinical affairs, the reactions produced "disturbances in mental clarity," and "distorted" perceptions of reality.

Justice Rehnquist now leaves the court daily in the early afternoon to swim, it was disclosed today. The committee said that an independent physician would examine the nominee's medical records and his doctors and make a confidential report to the committee.

Several Democratic senators questioned Justice Rehnquist at length about a 1952 memorandum to the late Justice Robert H. Jackson of the Supreme Court, for whom he was a law clerk, supporting official segregation of schools by race.

Senator Metzenbaum and others suggested they found incredible Justice Rehnquist's explanation, both in this week's hearing and in the 1971 proceeding leading to his confirmation as an Associate Justice, that he had written the memorandum as a rough draft Justice Jackson's views, and that was "not an accurate statement of n own views at the time."

The New York Times/Jose R. Lo

Senator Orrin G. Hatch speaking in defense of Associate Justice William H Rehnquist yesterday morning at hearing.

Senators Avoid Questioning Rehnquist On Health, Arrange Independent Review

By Stephen Wermiel
Staff Reporter of The Wall Street Journal

WASHINGTON—The Senate Judiciary Committee, which has avoided questioning Supreme Court Justice William Rehnquist about his health, reached an agreement to have his medical records reviewed by an independent physician.

Mr. Rehnquist, who has been nominated to be chief justice, was hospitalized in 1982 after suffering adverse effects from a drug intended to ease chronic lower-back pain. Before he was hospitalized, Justice Rehnquist was observed in the courtroom slurring his speech and having difficulty using complex words.

Questions about Mr. Rehnquist's present or past health have been conspicuously absent during the confirmation hearings. For most of the day yesterday, most senators and their aides refused to discuss the existence of any arrangement with Mr. Rehnquist.

Sen. Edward Kennedy (D., Mass.), when questioned by reporters, broke the silence in midafternoon and said that Justice Rehnquist has agreed to have his medical records examined by a physician to be selected by the Judiciary Committee. Others said Mr. Rehnquist had also agreed to make his doctor available for questioning.

Until the records are examined, Sen. Kennedy said, there is an "understanding" that senators won't question Mr. Rehnquist about the 1982 episode or about his current health.

Last night, nearly nine hours into the third day of testimony, Committee Chairman Sen. Strom Thurmond, (R., S.C.) interrupted the hearings to announce that an understanding has been reached. The reason for the agreement, he said, is that the senators consider Justice Rehnquist's medical records "confidential."

Any report on those records will also be confidential, Sen. Thurmond said. Sen. Kennedy earlier said he "assumed" Mr. Rehnquist would be available to answer additional questions, if necessary, after the hearings conclude, probably today.

Mr. Rehnquist attempted to keep his hospitalization secret in 1982 and has refused to discuss it since then, taking the position that his health isn't a matter of public interest.

During the confirmation session on Wednesday, Sen. Paul Simon (D., Ill.) asked Mr. Rehnquist if he would deal "openly" with any future health problems. Mr. Rehnquist said his position was that "so long as I can perform my duties, I don't think I have any obligation" to give a public briefing.

Sen. Simon, who later acknowledged that he was abiding by the committee's "understanding," never asked whether Mr. Rehnquist had been able to perform his duties during the 1982 episode.

Meanwhile, Democrats on the committee said they have been trying to obtain copies of memos Justice Rehnquist wrote when he was an assistant attorney general during the Nixon administration. They deal with the issues of domestic wiretapping and surveillance of anti-Vietnam War demonstrators.

After conferring with the White House, John Bolton, an assistant attorney general for legislative affairs, declined to turn the documents over to the lawmakers, citing executive privilege. Justice Rehnquist said he wouldn't object to releasing the memos, but he said he didn't think he had any copies of them.

In other developments yesterday, it was disclosed that a home owned by Mr. Rehnquist in Phoenix, Ariz., from 1961 to 1969 included an agreement prohibiting its sale or leasing to blacks. Justice Rehnquist said he hadn't been aware of the provision.

Mr. Rehnquist was previously questioned about a provision in the deed to a summer home he has owned since 1974 in Greensboro, Vt., that prohibits sale or leasing to people of the "Hebrew race." He denied any knowledge of the Vermont restriction, as well. Neither the Arizona nor Vermont restriction is legally enforceable under a Supreme Court ruling nearly 40 years old.

On other topics, Mr. Rehnquist said he doubted that the Constitution would permit Congress to pass a law removing from the Supreme Court's jurisdiction all cases involving freedom of speech and religion. But he declined to say whether the Constitution prohibits Congress from removing all legal areas from Supreme Court jurisdiction, or whether his views apply only to First Amendment cases.

He also testified that he doesn't believe that the "wall" of separation between church and state should prohibit a program of tuition tax credits for parents who want to send their children to private or parochial schools.

Yesterday evening, civil-rights and women's rights groups testified, criticizing what they said is Mr. Rehnquist's "insensitivity" to the rights of women and minorities.

WASHINGTON POST
Friday, August 1, 1986
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Covenant Brings Town Distress

'A Little Late, Isn't It?' Official Asks After Justice Dept. Call

By Laura Kiernan
Special to The Washington Post

GREENSBORO, Vt., July 31—"That's the Justice Department," announced Cleora I. Collier, hanging up the phone today in the town clerk's office in this remote village. "They're going to take that covenant out."

"A little late, isn't it?" said her niece—the town clerk—Bridget Collier, who patiently sifted through stacks of deeds while reporters and television camera operators hovered around her.

The covenant, revealed Wednesday in confirmation hearings for U.S. Chief Justice-designate William H. Rehnquist, is a sentence in the deed to a hillside chalet here owned by the associate justice that prohibits the sale or lease of the property "to any member of the Hebrew race." Rehnquist learned of it only a few days ago, he told the Senate Judiciary Committee Wednesday.

Wednesday the Justice Department made a hasty call to Greensboro to see how the covenant could be removed, according to department spokesman Terry Eastland. Eastland said the department was told that in order to get rid of the covenant, Rehnquist must sign over the deed to a "nonexistent third party, or straw man," and then take it back.

"Maybe somebody has an idea of how to get rid of it, but I don't," said David L. Willis, a lawyer in the nearby town of St. Johnsbury, who represented Rehnquist at the 1974 sale.

The locals in this town 40 miles south of the Canadian border call this rich green pastureland the "Northeast Kingdom" because they say it is a part of God's country. For years it has been a summer retreat for academics from the halls of Princeton, Harvard and Yale. It is a secluded haven for the elite and it is not interested in disturbance.

"Do you think it shook the country?" asked Ernie Hurst, the proprietor of Willey's General Store as he dodged questions about the Rehnquist matter. There are "good common folks here," said Hurst as he maneuvered toward a storeroom. "You don't pry into their business."

"I didn't realize we'd been taken over by the public. How horrible," said a woman who was filing cards and checking out books in the town's tiny library.

"Mercy," said the woman who refused to identify herself other than to say she was 84. "What an extraordinary thing to find out about that deed." But, she said, those who are surprised about such things, happening at that time in history, "must be very young because it's not unusual at all."

The history of the property, preserved in faded record books here, shows that the covenant was first included in a handwritten deed in 1933 for 185 acres of farm land owned by some local businessmen. It was called "Vermont Summer Estates" and the property stretched from the hills down to the shore of Caspian Lake.

Plans for development were not carried out and the land was eventually sold. According to the town records the covenant followed the property through the years, either explicitly stated in the deed or included by reference.

Attorney Willis said that his records of the Rehnquist transaction were destroyed in a fire in 1984 that leveled his law firm's building in St. Johnsbury.

"I certainly remember him but I just don't recall that particular clause, and it really has no binding effect today," Willis said during an interview in an old Victorian home where the law firm has relocated. Federal and state law prohibit the type of restrictions that are part of the Rehnquist deed, and the justice himself has said they are unenforceable and described them as "obnoxious."

If Rehnquist sold his summer house, Willis said the covenant could be left out of a new deed but otherwise, he said, "you can't remove what's in the land records in the past."

John Downs, a St. Johnsbury attorney who represented the couple who sold the property to Rehnquist, said both he and Willis were aware of the restrictive clause. "We recognized its presence and dismissed it," Downs said. He said that the Rehnquist deed was prepared by copying, verbatim, the property description in the 1933 handwritten deed that included the restrictive covenant.

Today the deserted Rehnquist family house, a white building with brown trim, was the focus of attention of television crews.

Staff writer Howard Kurtz contributed to this report.

WASHINGTON POST
Friday, August 1, 1986
Front Page

Racial Restriction Found in 2nd Deed

By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

Senate Democrats, continuing their attack on Supreme Court Justice William H. Rehnquist's candor and commitment to civil rights, disclosed yesterday that the deed to his former house in Phoenix included a covenant barring its sale or rental to "any person not of the white or Caucasian race."

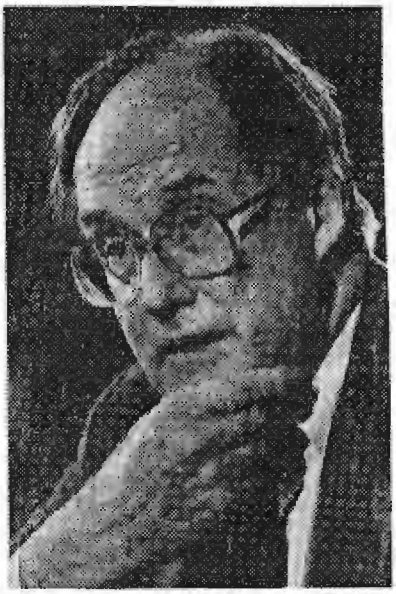
Testifying before the Senate Judiciary Committee for a second grueling day on his nomination to be chief justice of the United States, Rehnquist said he had not been aware of the proviso until a few days ago when it was discovered by the Federal Bureau of Investigation. The restriction dated to 1928 and covered the Palmcroft subdivision where Rehnquist bought a house in 1961.

The disclosure, the second of its kind in two days, touched off an angry counterattack by Sen. Orrin G. Hatch (R-Utah) who denounced the issue as "the biggest red herring of the whole hearing."

"I think it's ridiculous to make a brouhaha about it," Hatch said, his voice rising. "I think this has been blown way out of proportion." He emphasized that the restrictions were "unenforceable . . . the vestiges of a very bad past."

On another issue, Rehnquist's health, Chairman Strom Thurmond (R-S.C.) announced that the committee had appointed an independent physician to review Rehnquist's records and interview the justice's doctors, if necessary.

The health records, however, will be kept "confidential," Thurmond said. He did not say whether any overall findings would be made public. Rehnquist, who had chronic severe back problems, suffered temporary "disturbances in mental clarity" in 1982 while he was hospitalized and withdrawing from a sleep-inducing prescription drug he was using to relieve back pain. He has never spoken publicly about the incident.



JUSTICE WILLIAM H. REHNQUIST ... made aware of covenant by FBI

Thurmond said Rehnquist "has been willing to answer questions regarding his health," but he was asked only once, in general terms, about his condition.

"You had a back operation, a disc removed" by 1969 or 1970, Sen. Howell Heflin (D-Ala.) reminded him at one point. "Basically do you feel you will be able to do the task of chief justice?"

"Yes, I do, senator," Rehnquist, who is 61, replied. "I certainly would not have accepted the nomination had I thought otherwise."

Democrats revealed Wednesday night that the warranty deed on a vacation house in Vermont that Rehnquist bought in 1974 also contained a restrictive covenant, one

See REHNQUIST, A10, Col. 1

Restriction Is Found In 2nd Deed

REHNQUIST, From A1

prominently typed in and prohibiting sale or rental "to any member of the Hebrew race."

Rehnquist said he had not been aware of that restriction either, until the FBI turned it up in its background check for Rehnquist's nomination. The nominee said he regarded it as "obnoxious" but "meaningless in today's world." He agreed under prodding from Sen. Patrick J. Leahy (D-Vt.) to take steps to have it expunged.

Sen. Dennis DeConcini (D-Ariz.) spoke up for the nominee, saying he was completely satisfied with Rehnquist's explanations. "I would ask my friends," DeConcini told his colleagues, "maybe they should look at all the deeds they have." Leahy added that he knew of nothing in Rehnquist's background that would suggest any anti-Semitism."

Sens. Edward M. Kennedy (D-Mass.) and Howard M. Metzenbaum (D-Ohio), Rehnquist's most vocal critics, made clear that they were still not satisfied.

"It was something typed in. It would have been normal to expect you would have noticed that," Metzenbaum told Rehnquist of the Vermont covenant. "It almost stands out . . . . There's no Hebrew 'race.' It's the Hebrew religion."

Kennedy said the restriction on the Phoenix deed was still there when Rehnquist sold the house in 1969, after he had moved to Washington to become assistant attorney general in charge of the office of legal counsel at the Justice Department.

"I think both of those [restrictions] are significant," Kennedy said during a recess. "The basic issue is his sensitivity to civil rights."

The Palmcroft neighborhood, where the Rehnquists resided from 1961 to 1969, is an oasis of green lawns, stately palms and elegant houses in the midst of a bustling business district near the center of Phoenix.

"It's an isolated pocket of better-than-average homes purchased by people who earn better-than-average incomes," said Bob Caldwell, who has lived since 1965 in the house next door to where the Rehnquists resided. Caldwell said he was surprised to learn of the racial covenant in Rehnquist's deed.

"There was no such thing mentioned when we bought," he said in a telephone interview, adding that he had not read "all the small print" in his own deed.

Testifying through the day with about 50 other witnesses backed up and waiting to be heard, Rehnquist said at one point that he considered the Supreme Court more suited than the other two branches of government to be "the guardian of minorities."

But he also acknowledged that he had vocally defended the old separate-but-equal doctrine in luncheon debates with fellow Supreme Court clerks back in 1952.

"It seemed to me that some of the others [clerks] were not facing the arguments on the other side and I thought they ought to be faced," Rehnquist said. "Around the lunch table I'm sure I defended it. I thought there were good arguments to be made in support of it."

BY JAMES K.W. ATHERTON—THE WASHINGTON POST

Justice Rehnquist: restriction "obnoxious" and "meaningless in today's world."

Rehnquist also told the committee that he had always thought the doctrine, enunciated by the Supreme Court in 1896 in the case of *Plessy v. Ferguson*, was "wrong." But he pointed out that nearly 60 years of southern customs and folkways had grown up around the decision by the early 1950s, making it difficult to overturn.

The questioning stemmed from Rehnquist's authorship of a controversial 1952 memo for his boss, Associate Justice Robert H. Jackson, which concluded: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed."

Despite his lunchtime debates of the 1950s, Rehnquist said repeatedly yesterday that the "I" in the memo was a reference not to himself but to Justice Jackson. He said the memo was requested by Jackson for a conference with other justices, was intended as a statement of Jackson's views, and that he tried to imagine how Jackson would phrase it.

Kennedy and Metzenbaum made clear that they did not believe the explanation.

"That sentence I find impossible to give to Justice Jackson," Kennedy said.

"Why would you describe Jackson's views in that way?" Metzenbaum asked.

"I don't know, sir," Rehnquist replied.

"Was he [Jackson] excoriated by his liberal colleagues and if so, who excoriated him?" Metzenbaum pressed.

"I was not a party to the conference discussion," Rehnquist answered.

A dispute over executive privilege broke out after questioning about Rehnquist's role in a 1972 Army surveillance case, *Laird v. Tatum*. Rehnquist had told a Senate subcommittee the year before, while he was still at the Justice Department, that he did not think the case, a challenge to the constitutionality of the Army program, belonged in the courts because the targets, antiwar dissidents, had not been hurt.

The Supreme Court threw the case out, on those same grounds, in 1972 by a 5-to-4 decision, with Rehnquist, in effect, serving as the swing vote. A 4-to-4 tie would have sent the litigation back to U.S. District Court here for evidentiary hearings. The lawyers for the defendants asked the court to reconsider the decision and they filed a separate motion asking Rehnquist to disqualify himself. But he refused in a lengthy decision.

Rehnquist testified Wednesday that a new law passed since then would provide strong grounds for disqualification under similar circumstances today. He also acknowledged misstating a relevant American Bar Association rule in deciding not to disqualify himself in 1972. But yesterday, under questioning by Kennedy, he refused to discuss the matter further.

"Judges are not supposed to sit on cases where their minds are made up," Kennedy told him. "You had basically made your mind up on that issue, hadn't you, Mr. Rehnquist?"

Rehnquist replied that he regarded disqualification as a "judicial act" and that he did not think he should be questioned about it. "I was performing a judicial act," he said, "and I ought not to be called on somewhere else to justify it."

Kennedy later said that one of the main results of the Supreme Court's decision in *Laird v. Tatum* was "the denial to the American people of the discovery [about the extent of government spying] that might have taken place." He pointed out that these were the days, as it later turned out, not only of Army surveillance of antiwar dissidents but also of secret Central Intelligence Agency operations against domestic targets and the so-called Huston plan to step up government spying in the United States.

In that vein, Kennedy said that he had been trying to get the office of legal counsel at the Justice Department to produce any memos Rehnquist might have written at OLC "about civil rights, civil liberties, government surveillance."

Rehnquist said he "would certainly waive any claim I might have" to keeping the records confidential.

At that, Thurmond spoke up. "The Justice Department feels that interoffice memoranda are confidential and they do not intend to make them public," he declared. "I concur." The Democratic side of the committee erupted with complaints.

But last night, Assistant Attorney General John Bolton told the committee the administration was withholding the memos under the doctrine of executive privilege.

Staff writer Saundra Saperstein contributed to this report.

WASHINGTON POST
Friday August 1, 1986
Front Page

Reagan Uses Executive Privilege To Keep Rehnquist Memos Secret

Senate Denied Access To Nixon-Era Papers

By Al Kamen and Ruth Marcus
Washington Post Staff Writers

President Reagan invoked executive privilege last night to deny access by Senate Judiciary Committee Democrats to internal memos Chief Justice-designate William H. Rehnquist wrote when he was in the Nixon administration Justice Department.

Assistant Attorney General John Bolton made the announcement in the committee room about 8 p.m., just after Rehnquist concluded his second day of testimony at his confirmation hearings. Bolton said the administration was invoking the controversial executive privilege doctrine to protect the confidentiality and candor of the legal advice received by presidents and their assistants.

Democrats, some of whom had left, returned hurriedly upon hearing of the unusual action and reacted angrily. Sen. Edward M. Kennedy (D-Mass.) called it "stonewalling" and Sen. Howard M. Metzenbaum (D-Ohio) charged a "cover-up."

But it was uncertain last night what, if anything, the Democrats could do about the withholding of the memos. Committee sources said they did not have the votes necessary to subpoena the memos and provoke a court battle.

Kennedy told Bolton that the Justice Department was "doing a disservice" to Rehnquist, who had agreed to release of the documents. Kennedy said he could not "reach any other conclusion but that the administration is stonewalling."

Kennedy noted that the period during which Rehnquist served as assistant attorney general in charge

See MEMOS, A10, Col. 4

Access to Rehnquist Memos Denied

MEMOS, From A1

of the Justice Department's Office of Legal Counsel—1969 to 1971—was a time of such controversial activities as Army surveillance of antiwar dissidents, illegal CIA domestic operations and the Huston plan to step up government spying in the United States.

The department's legal counsel is often called upon for opinions—formal and informal—on the legality of administration policy. Rehnquist's public defenses of Nixon administration policies on wiretapping, surveillance and mass arrests of antiwar protesters were a source of considerable controversy then. Selected opinions by the legal counsel have been regularly published since 1977.

"Human experience," Bolton told the committee, "teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." He said the privilege was not "being lightly invoked" and that the administration was acting "for the benefit of the Republic," rather than for any particular president.

Sen. Joseph R. Biden Jr. (D-Del.) criticized the department last night for issuing a "blanket exception" and said, "I think you all are making a big mistake."

Metzenbaum told Bolton he thought the action was a "deliberate cover-up . . . . You may try to give it a higher profile," he said, by invoking constitutional arguments of "separation of powers, but that just doesn't fly . . . .

"We are entitled to know what the facts are . . . what's so secret . . . . The president has a right to do it," Metzenbaum said but added that he should not do so on this occasion.

Kennedy indicated last night that he would ask for a committee vote to subpoena the documents. Committee Chairman Strom Thurmond (R-S.C.) said in response, "I consider the matter closed."

Thurmond aide Mark Goodin said the Democrats "are obviously on a fishing expedition, and they need the documents now. They are not interested in a protracted legal fight," which could result in a lengthy delay in the confirmation process.

Executive privilege "is a very murky field," said A.E. Dick Howard, a constitutional law scholar at the University of Virginia. When one branch is battling with another, he said, "courts tend to step aside. The resolution is typically political, not judicial."

The Supreme Court explicitly accepted the validity of "executive privilege" in 1974 in *U.S. v. Nixon*, when which the justices nonetheless ordered President Richard M. Nixon to turn over White House tapes to the special prosecutor investigating the Watergate scandal. However, the court said in a footnote that its decision did not address the issue of the scope of executive privilege in the face of congressional demands.

Stanley M. Brand, House general counsel during a House committee's 1982-83 battle with the Reagan administration and Environmental Protection Agency Administrator Anne M. Burford over access to Superfund documents, called the assertion of executive privilege "highly offensive."

"In this matter I think the claim [of executive privilege] is even weaker [than in the EPA case] because the documents are relevant to the constitutional power of confirmation," he said. While congressional power to investigate is not expressly provided in the Constitution, he added, "here you're talking about a power that the Senate has conferred on it" by the Constitution to give its advice and consent to those nominated by the president.

ROBERT A. McCONNELL

Peter –

FYI

Bob

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Where The Spirit Of The Lord is, There Is Liberty — II Corinthians 3:17

EDITORIALS

REHNQUIST

Liberal McCarthyism

THE opposition to the nomination of William Rehnquist as chief justice of the United States is plainly ideological. Rehnquist is a conservative, which is all the reason some of his liberal detractors require to oppose his confirmation.

Objections raised thus far to Rehnquist's nomination are allegations that as a Republican party poll watcher 25 years ago he tried to prevent Phoenix minorities from voting, and ideological objections from the far left.

If Rehnquist was judged qualified to sit on the Supreme Court in 1971, he is qualified to be chief justice in 1986. It's that simple.

The chief justice is a *primus inter pares*, the first among equals, and casts only one vote. His sole power is to assign written decisions. *Any* justice already seated on the bench is qualified to hold the position.

Rehnquist categorically denied the charges of election tampering during his 1971 nomination hearings and he was confirmed on a 68-26 vote of the then-Democrat-controlled Senate.

As California's attorney general, Earl Warren gave the Constitution short shrift, enthusiastically enforcing the World War II program in which thousands of American citizens of Japanese ancestry were deprived of their property and imprisoned without due process. If that dark episode in American history did not disqualify Warren from becoming chief justice, 25-year-old partisan political recollections against Rehnquist certainly do not.

It is comical that the likes of Eleanor Smeal of the National Organization for Women call Rehnquist an ideological extremist. Smeal's real objection is not ideological extremism, but that Rehnquist is a conservative, for a far left ideological extremist would not be met with similar objections by NOW.

This liberal McCarthyism goes like this: The liberal agenda is identical to "the American way," and to disagree with liberalism is to advocate un-American ideas. It is liberal bigotry, pure and simple.

It is also an absurd idea that Rehnquist is disqualified because he regularly votes with the conservative minority against the liberal majority. Were that criterion forced on the presidency it would preclude any ideological change in the court by mandating majoritarian appointments, regardless of the political ideology of the president in office. Liberals would not stand for this were the ideological shoe on the other foot.

Just because the court has followed the path of liberal judicial activism for three decades does not mean the president cannot make appointments under the powers reserved to him in the Constitution which would shift the court toward a more conservative position.

Liberalism is not protected by the Constitution, nor is it entitled by right to control the Supreme Court indefinitely. Rehnquist should be confirmed without delay, and without petty partisan politics.

Benson

THE WASHINGTON TIMES
Tuesday, July 29, 1986
page 8A

Rehnquist lets stand ruling letting women into Rotary

THE ASSOCIATED PRESS

Supreme Court Justice William H. Rehnquist has refused to block a California appeals court order directing Rotary International to readmit a chapter kicked out for admitting women.

Justice Rehnquist left intact a ruling that the parent organization must readmit a Rotary chapter in Duarte, Calif., that was ousted in 1978.

Justice Rehnquist's action was taken late Friday but was not announced until yesterday.

A California appeals court last March ordered Rotary International to reinstate the Duarte chapter by July 24.

The organization then asked Justice Rehnquist to suspend the state court ruling until the full Supreme Court has an opportunity to consider a formal appeal by Rotary International.

Justice Rehnquist has jurisdiction over such emergency requests in California cases.

Rotary International has some 20,000 clubs with more than 900,000 members in 54 countries. It was founded 81 years ago by four Chicago men and took its name from their practice of rotating meeting sites to each member's place of business.

The Duarte chapter was kicked out by the parent group in 1978 after it admitted three women, Mary Lou Elliott, Donna Bogart and Rosemary Freitag.

Only Ms. Elliott still is a member. The other two women moved to other communities.

The California 2nd District Court of Appeal ruled that Rotary clubs are business establishments subject to regulation by the state's Unruh Act banning discrimination based on race, sex, religion or ethnic origin.

THE WASHINGTON POST
Tuesday, July 29, 1986
page

Cosmos Club Permit Challenged

Group Seeks to Block Liquor License Renewal at All-Male Facility

By Ruth Marcus
Washington Post Staff Writer

A coalition of feminist and liberal groups is seeking to block the renewal of a liquor license for the all-male Cosmos Club, charging that the club's refusal to admit women violates a D.C. antidiscrimination law.

The effort is the first public move against all-male clubs in the District by the Private Clubs Discrimination Project, a coalition of Americans for Democratic Action, the National Women's Political Caucus, the D.C. chapter of the National Organization for Women and other groups.

"It increasingly struck us as . . . absurd and outrageous that in the capital of the United States in 1986 we would have major institutions that openly discriminate against women," said Ann F. Lewis, national director of the ADA.

"Not being able to participate in these clubs can be a bar to women in their careers," she said. "There's a networking that can go on in private clubs and when women are excluded from them it can be a real problem."

The Cosmos' Club's liquor license came up for renewal yesterday before the D.C. Alcohol Beverage Control Board. The complaint was set for a hearing Sept. 10.

Ben Johnson, administrator of the Business Regulation Administration, which oversees the liquor licensing process, said yesterday that the Alcohol Beverage Control Board "has no jurisdiction over this particular matter" because the club has not been cited by the D.C. Office of Human Rights for violating the human rights law.

"There's no ABC violation around this particular protest issue," Johnson said. "It may very well be a violation of the human rights law."

The director of the Office of Human Rights, Maudine Cooper, said, "We would like to have the ADA come in and indeed file the case with us."

Cosmos Club President Bruce E. Clubb declined to comment about the complaint or about the possible impact the loss of liquor license would have on the club.

Members of the Cosmos Club, located in a mansion at 2121 Massachusetts Ave. NW, include at least one Supreme Court justice, top government officials, scientists, educators and lawyers. The issue of admitting women has divided the club for more than a decade, arising most recently when the club voted in January to suspend the reprimand of a club member who led an unsuccessful movement to allow women members.

The coalition contends that the Cosmos Club's exclusion of women violates the D.C. Human Rights Act, which prohibits discrimination based upon sex in any "place of public accommodation."

Although the human rights law specifically exempts "distinctively private" clubs, the group argued in a July 22 memorandum to the Alcohol Beverage Control Board that the club's "substantial membership roster and calendar of revenue-deriving events" may make it a place of public accommodation.

Even if it is considered a private club, the memorandum stated, the law also requires that issuance of all licenses be conditioned upon compliance with its nondiscrimination provisions and makes violation of the law a proper basis to revoke a license.

The club's "sex-based exclusionary practices are so egregious, and work such an invidious discrimination against many citizens of this community, that we believe it to be a fundamental violation of public policy for the Cosmos Club to continue to receive a city-conferred liquor license," the memorandum said.

The coalition also plans to employ a 1977 federal directive cautioning federal officials against participating in meetings held at discriminatory facilities.

In May, Lewis wrote to Assistant Secretary of Defense James H. Webb Jr., who was scheduled to speak at the Cosmos Club on June 2 on "Being a Writer as Government Official."

"Your participation in a meeting at one of the few openly discriminatory facilities still operating in the nation's capital would clearly violate this policy—and, we believe, would violate important American principles as well," Lewis wrote.

Webb sent back a memorandum by Assistant General Counsel Robert L. Gilliat concluding that federal policy did not bar the speech, primarily because Webb was not speaking in his official capacity.

Lewis said the group would watch the club's bulletin for other federal officials scheduled to speak there. "We will regularly be writing and notifying federal officials that as we read the [personnel] manual, this is not allowed," she said.

THE WASHINGTON POST
Friday, July 25, 1986
page A4

1971 Rehnquist Account Is Challenged by 3 Men

'Ballot Security' Role in '60s Called Active

By George Lardner Jr. and Al Kamen
Washington Post Staff Writers

Three men yesterday contradicted Supreme Court Justice William H. Rehnquist's account during his 1971 confirmation hearings of the role he played in a controversial Republican "ballot security" program in Phoenix in the early 1960s.

Rehnquist, President Reagan's nominee for chief justice of the United States, had said he was in overall charge of the programs, but declared that he never personally engaged in challenging the credentials or literacy of Democratic minority voters.

But two of the witnesses interviewed yesterday said that they saw Rehnquist challenging black and Hispanic voters in the Arizona city. The third, a former assistant U.S. attorney who was sent to one precinct to investigate complaints of harassment, said Rehnquist was definitely a member of a group that was "aggressively challenging minority voters by looking at them coming up in line and saying, 'You don't know how to read.' "

The former prosecutor, James J. Brosnahan, now a senior partner in a San Francisco law firm, said he had no doubt that it was Rehnquist he saw and that it was not a case of "mistaken identity" as the majority report of the Senate Judiciary Committee suggested in 1971 when the charges were first aired.

Brosnahan was emphatic in attacking the "mistaken identity" suggestion.

Rehnquist could not be reached for comment. Rehnquist's Senate confirmation hearings are scheduled to begin Tuesday.

The three witnesses, Brosnahan, a self-described liberal Democrat, and two Phoenix residents, Charles W. Pine and the Rev. Snelson W. McGriff, were cited in a special report by the Nation Institute, a liberal group affiliated with The Nation magazine. All three confirmed their remarks and provided additional details yesterday in separate interviews.

Charges of voter harassment against Rehnquist first surfaced at the 1971 hearings on his appointment to the Supreme Court.

Rehnquist denied any improprieties at the 1971 hearings, both in direct testimony and later in a lengthy letter to the Senate Judiciary Committee.

In his letter, Rehnquist said that he had been in charge of GOP "ballot security" programs and similar efforts conducted by lawyers' committees in the biennial elections in Phoenix from 1958 through 1964. However, he said, that "in none of these years did I personally engage in challenging the qualifications of any voters."

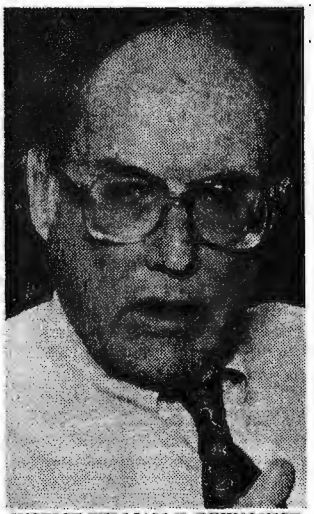
Pine, a Phoenix public relations man and state Democratic Party chairman from 1972 to 1976, said he saw Rehnquist on one occasion approach two prospective voters waiting in line outside the polling place of a predominantly black and Hispanic precinct and ask them if they were qualified voters.

"He challenged one and then another," Pine recalled yesterday. "Both were black men and both left the line." He said Rehnquist was with one or two other men and they left together after the incident, with Rehnquist driving. Pine said Rehnquist was part of what he called Republican "flying squads" going from precinct to precinct in heavily Democratic areas, either in 1962 or 1964.

Told of Rehnquist's 1971 disclaimer of any such activity, Pine said: "If he wants to say that, he can. But I disagree." Neither Brosnahan nor Pine spoke up in 1971, saying they thought about it, but decided not to bother. McGriff submitted an affidavit in 1971 saying he saw Rehnquist challenging voters at McGriff's polling place, located in the Bethune school. McGriff said he thought it was in 1964, but was not positive.

"If it wasn't him [Rehnquist], it was his twin brother," McGriff said. "He had a card in his hand .... He'd say, 'Read this' .... I looked him right in the eye. I wasn't going to read that card. I was going to put my fist in his mouth."

Rehnquist told the Senate committee that he strongly disapproved of "any scattergun use of literacy challenges" and on one occasion in 1962 went to the Bethune precinct to tell one overzealous Republican challenger there to stop demanding that voters prove their literacy by reading printed passages from the Constitution as they waited to vote.



JUSTICE WILLIAM H. REHNQUIST
... denied harassing minority voters

Literacy challenges were later prohibited by the Civil Rights Act of 1964, but they were permissible in Arizona before then so long as they did not amount to harassment.

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.

"Brosnahan said he found a small "group" of Republicans, including Rehnquist, there challenging voters on a random basis, asking Hispanic voters if they could read English and black voters if they could read at all. "They would do this right in line, rather than getting a person off to the side," Brosnahan said. "Telling one person after another, 'You can't read,' is an aggressive thing to do .... "

"My best recollection is that he [Rehnquist] was challenging voters," Brosnahan said, "but that was 1962 and this is 1986. I know he has denied that, but I have asked myself in fairness what I can remember."

"This was a group that deliberately set out to discourage and harass minority voters on the subject of whether they could read. The concept that Mr. Rehnquist was somehow supervising and making it better is one that conflicts with my recollection. I am very firm about that," Brosnahan said.

The 1971 Senate Judiciary Committee report dismissed the voter harassment charges as "wholly unsubstantiated," but a Democratic minority complained that the allegations had not been adequately investigated or effectively refuted.

Staff writer Saundra Saperstein contributed to this report.

THE WASHINGTON POST
Tuesday, July 22, 1986
page A8

Rehnquist Said Backer of '50s Racial Tenet

Ex-Colleague Recounts Stance on Segregation

By George Lardner Jr.
Washington Post Staff Writer

A lawyer who clerked with William H. Rehnquist at the Supreme Court in the 1950s said yesterday that Rehnquist strongly defended the old separate-but-equal doctrine underpinning racial segregation in conversations among the clerks.

The former clerk, Donald Cronson, indicated that Rehnquist often argued that the doctrine, enunciated by the court in an 1896 case called *Plessy v. Ferguson*, was correct at luncheon meetings of the clerks in the days before the 1954 decision declaring it unconstitutional.

Cronson added, however, that "I think the whole issue is a silly issue." He said he regarded it as completely irrelevant to Rehnquist's qualifications, more than 30 years later, to become chief justice of the United States.

"All this was gone into ad nauseam when Justice Rehnquist was first confirmed [in 1971]," Cronson, now an international lawyer based in Switzerland, said in a telephone interview. "It's very much res judicata [a matter already decided]."

Rehnquist is expected to win Senate confirmation as chief justice by a wide margin, but Democrats on the Senate Judiciary Committee reportedly plan to question him closely about his views on a wide range of issues, including his 1950s stand on desegregation, at hearings next week.

The debate over Rehnquist's views on racial matters dates to 1952-53, when he and Cronson were clerks for the late Supreme Court Justice Robert H. Jackson. The court at the time was discussing what to do about a series of cases involving segregation in the public schools.

Jackson's papers, now housed at the Library of Congress, show that he was perplexed about how to deal with the practice, torn between a belief that it was indefensible and a realization that it was "deeply imbedded in social custom in a large part of this country."

At one point, Cronson turned in a memo stating that "there is no doubt that Plessy was wrong," and suggesting that the court say so. The memo, entitled "A Few Expressed Prejudices on the Segregation Cases," suggested that the court try to "straighten out the mess" by repudiating the separate-but-equal doctrine and inviting Congress to fashion the remedies.

Rehnquist countered with a memo over his initials, entitled "A Random Thought on the Segregation Cases," and contending that any attempt to strike down the practice would be wrong-headed and futile.

"I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed," the memo stated.

The document came to light in 1971 during Senate floor debate, after Rehnquist's confirmation hearings had been concluded, and he was never questioned about it. But he blunted the criticism with a letter in which he stated that he had prepared the memo at Jackson's request and that it was intended as "a statement of his [Jackson's] views" at an upcoming conference of the justices "rather than as a statement of my views."

Cronson, then with Mobil Oil in London, followed up with a cable affirming that Jackson had requested the second memo "supporting the proposition that Plessy was correctly decided." Cronson added that he and Rehnquist both worked on it.

In the telephone interview yesterday, however, when asked who the "I" was in "I think *Plessy v. Ferguson* was right," Cronson emphasized that he didn't write the entire memo and reiterated that "I thought it was wrong."

As for Rehnquist, Cronson said, "unquestionably, in our luncheon meetings with the clerks, he did defend the view that Plessy was right. Bill Rehnquist has never been afraid to defend an unpopular position. The very fact that it was unpopular would be an incentive for him to argue it . . . . But he defended all kinds of outrageous things, which I know he didn't believe."

Asked what Rehnquist believed on this particular issue, Cronson declined to say. "I have a view as to that he thought," he said, "but I don't think it's material."

THE WHITE HOUSE

WASHINGTON

Hold for meeting w/ Scalia

July 16, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ALAN CHARLES RAUL ACR

SUBJECT: Rehnquist/Scalia Clippings

As you requested, I have attached clippings on the President's recent Supreme Court nominations.

Attachments