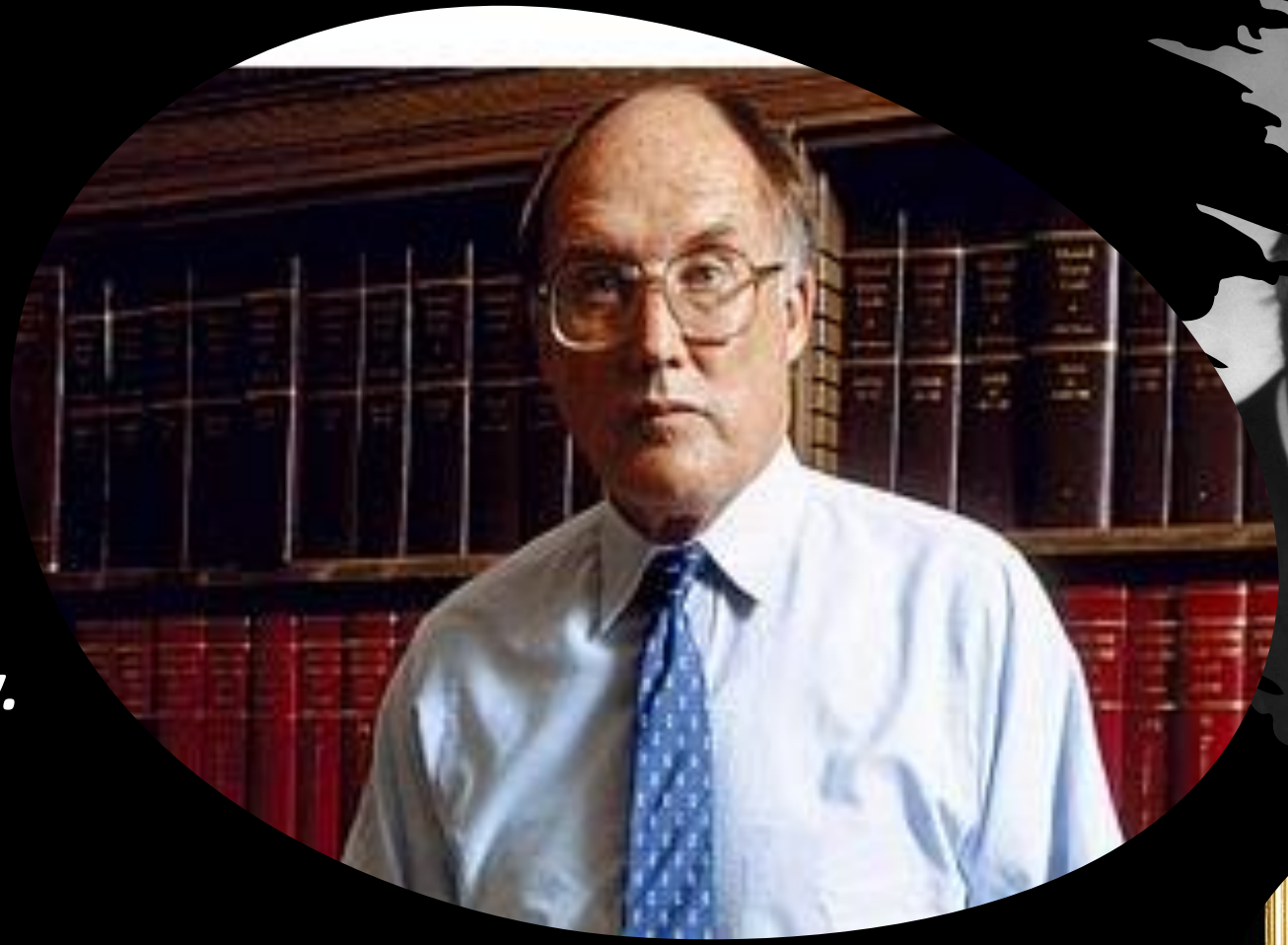
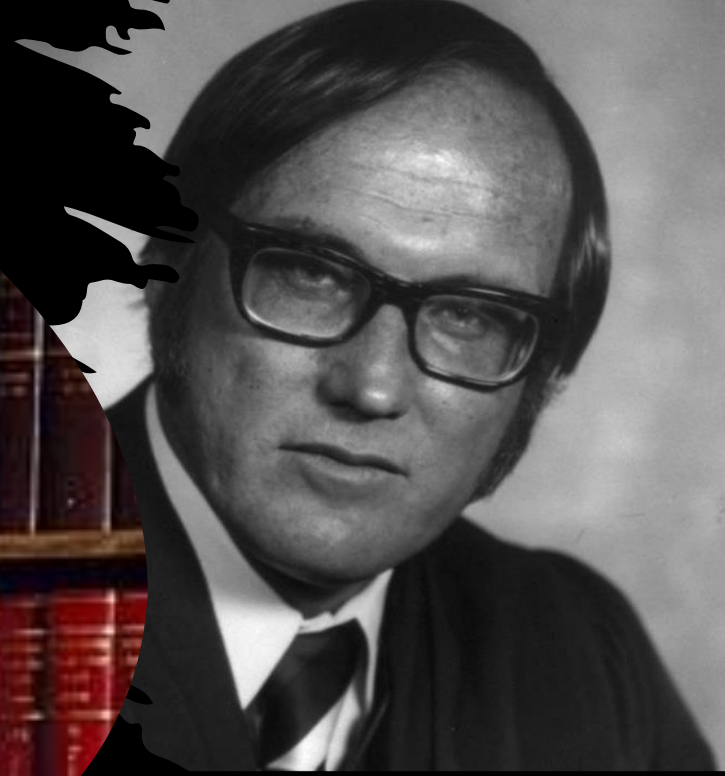
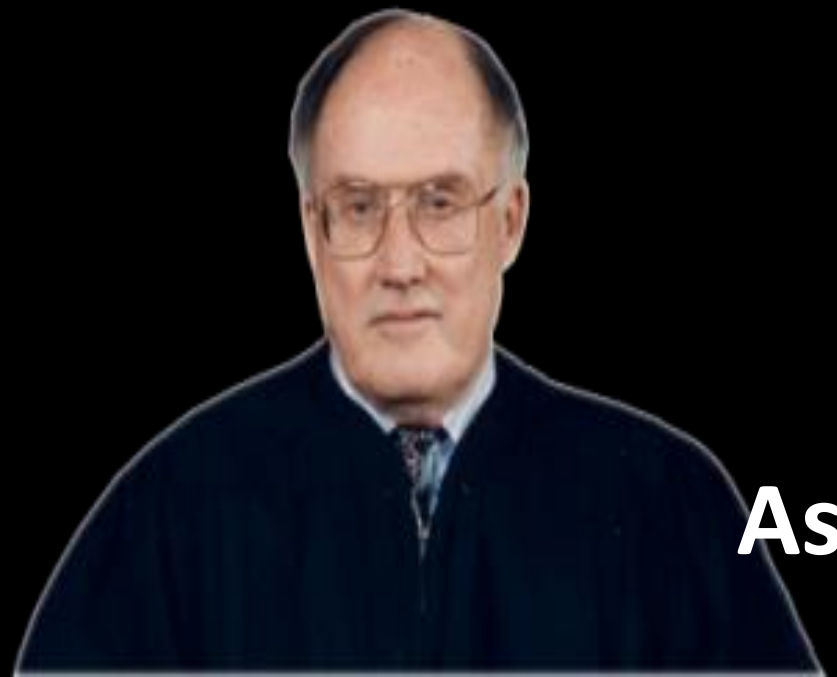
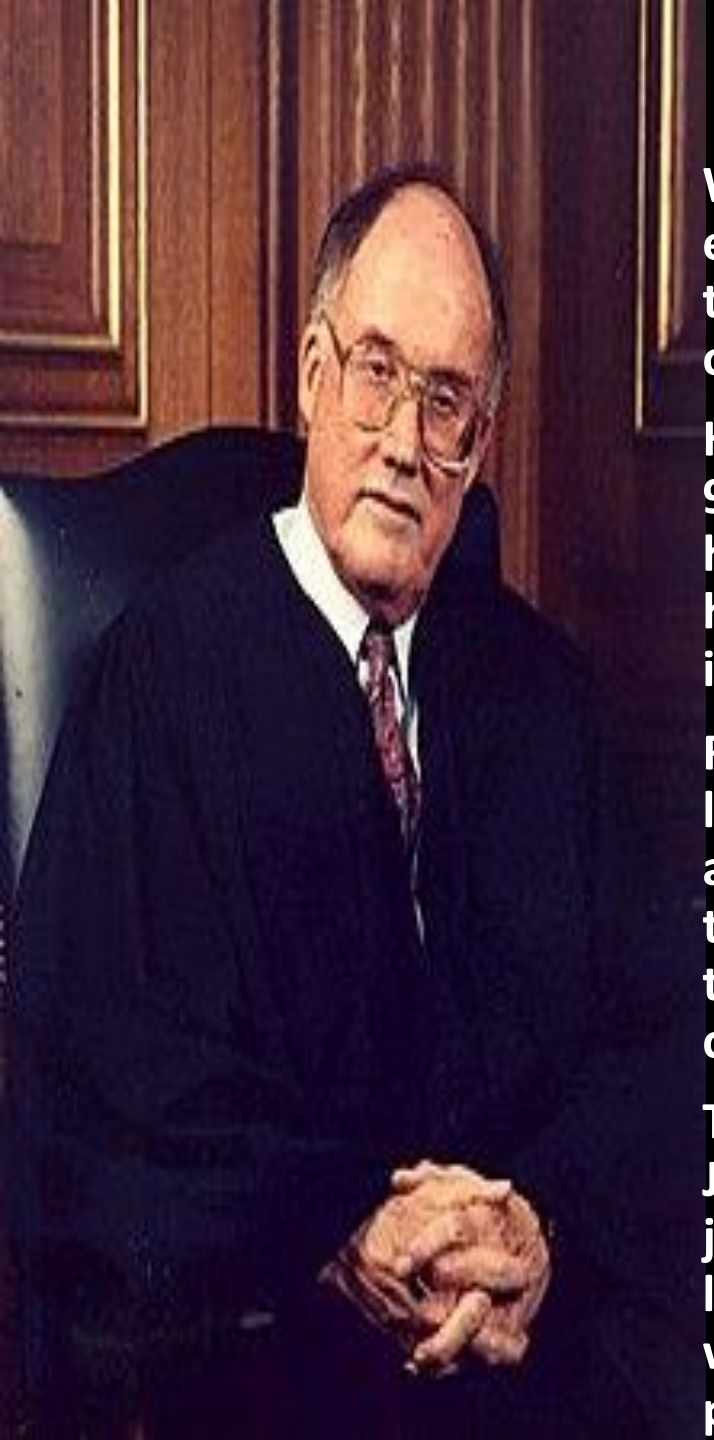
The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.







William Rehnquist: The Chief Justice As Counter-Revolutionary



William Hubbs Rehnquist

(October 1, 1924 – September 3, 2005)

William Rehnquist was the 16th Chief Justice of the United States, prior to his elevation to the center chair he had served as the 89th Associate Justice, becoming the Supreme Court's 100th member. Rehnquist would serve for more than 33 years on the Court from 1972 until his death in 2005, the latter 19 were as Chief.

His tangible legacy is found in the 458 majority opinions, 376 dissenting opinions; 96 concurrences; 33 opinions in which he either concurred or dissented in part, that he authored during his long tenure. But his most lasting legacy could well be how he altered the direction of the Court and fostered a more conservative approach to issues of federalism, individual liberty, and constitutional interpretation.

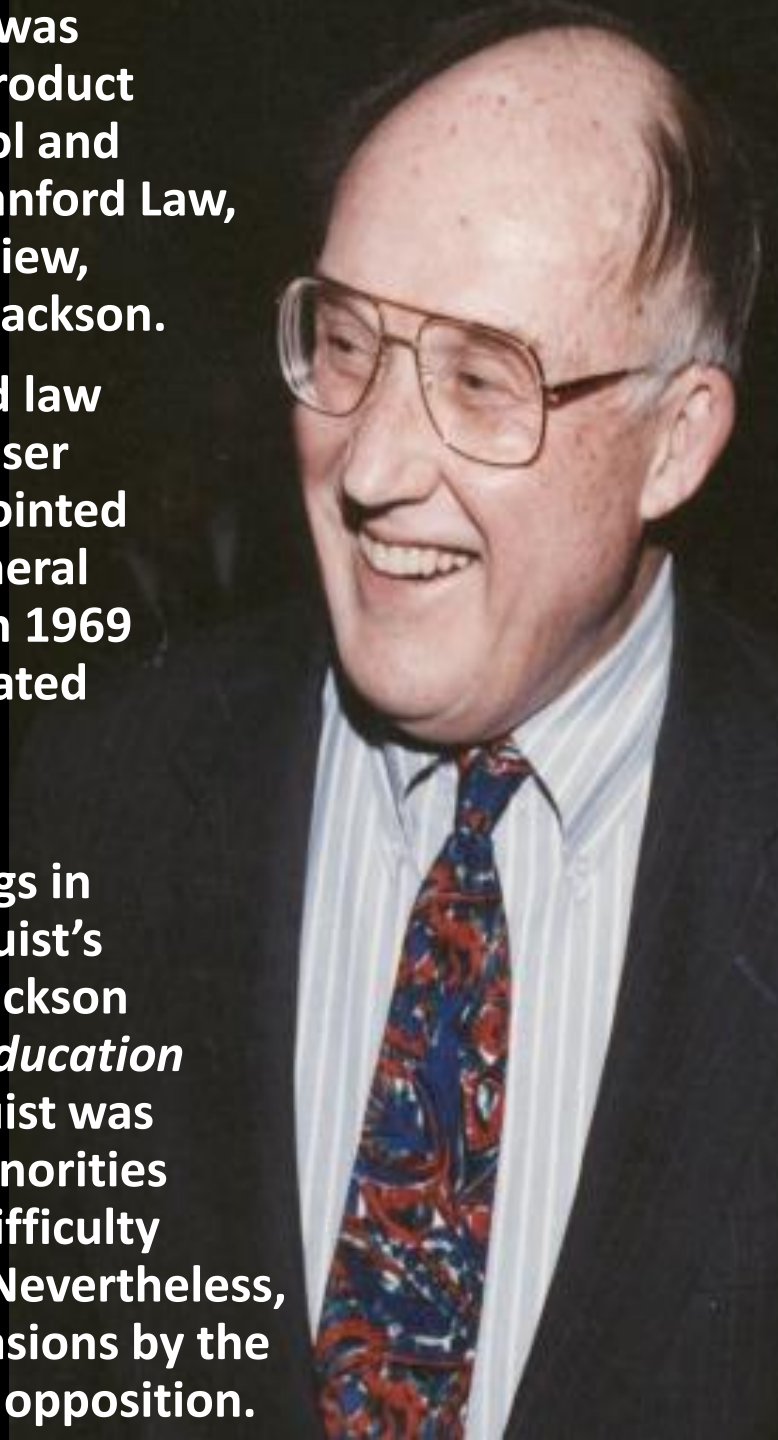
Rehnquist was appointed to the Supreme Court by President Richard Nixon and later promoted by President Ronald Reagan because of his brilliance, legal acumen, and his conservative bona fides. Rehnquist first came to the Court in the wake of the Warren years. In the two preceding decades, a constitutional revolution had taken place under Chief Justice Earl Warren. The Warren Court had become controversial, and many felt it had gone too far left in many of its decisions.

The election of Nixon, and his appointment of Warren Burger as the 15th Chief Justice in 1969 was taken as a sign that the Court would be less expansive in its judgements and conclusions. However Burger was unable to provide sufficient leadership to counterbalance Warren's legacy. Rehnquist, as an associate justice, would prove himself to be a conservative wunderkind. Rehnquist, as Chief, did provide that leadership and he saw many of his legal positions adopted over time.

Born in Milwaukee, Rehnquist was a World War II veteran and a product of Stanford (college, grad school and law school) and Harvard. At Stanford Law, he was first in his class, law review, and clerked for Justice Robert Jackson.

After his clerkship, he practiced law in Phoenix and was a legal adviser to Barry Goldwater. Nixon appointed him the Assistant Attorney General in the Office of Legal Counsel in 1969 and in late 1971 he was nominated to the seat being vacated by John Marshall Harlan II.

During his confirmation hearings in 1971, and later in 1986, Rehnquist's 1952 clerk's memo to Justice Jackson concerning *Brown v Board of Education* (1954) and accusations Rehnquist was involved in efforts to impair minorities voting in Arizona caused him difficulty and engendered controversy. Nevertheless, he was confirmed on both occasions by the Senate in spite of considerable opposition.



President Nixon was determined to curb the liberal jurisprudence of the Warren Court. Nixon had campaigned on a theme of "law & order" and wanted to reshape the federal judiciary. Nixon also appointed at the same time Lewis Powell, Jr. to another court vacancy.

Burger and Powell were both essentially moderate-to-conservative jurists. Burger had the infuriating habit of switching his vote in order to be able to assign the Court's majority opinion. Powell became the proverbial swing vote on many high-profile cases.

Harry Blackmun, whom Nixon had appointed in 1970, moved steadily to the left during his tenure and by the time of his retirement was one of the Court's most liberal members. As such, Nixon did not have a firm grasp on the legal philosophies of his four nominees to the Supreme Court and many came to disappoint conservative court watchers. Rehnquist was the exception, he was a solid conservative.

Holding views antithetical to those of the Warren Court, Rehnquist quickly made his initial reputation as the most conservative member of the Burger Court. His articulate and muscular opinions, often solo dissents, clearly demonstrated that he was committed to a consistently conservative stance on all legal issues as reflected in his voting record during the 1970s into the 1980s.

Rehnquist articulated a rather restrictive view of the 14th Amendment, voted to overturn an acts of Congress as exceeding the Commerce Clause, and advanced a conception of federalism that emphasized the 10th Amendment's reservation of powers to the states. He firmly held that the Supreme Court *"had no business reflecting society's changing and expanding values"* preferring that such matters be decided by the political branches through the legislative process.

Rehnquist was so adamant in his positions that he was popularly known as the "Lone Ranger" during this early phase of his tenure. The anchor of the court's emerging conservative bloc, his brilliant solo dissents would serve as harbingers in the decades to come. He steadily moved the Court right-ward, in the process becoming a beacon and a persuasive authority to the conservative justices who would later join the Court, even after he himself had passed away.

By the same token, Rehnquist always enjoyed cordial personal relations with liberal members of the court, jurists such as William O. Douglas, William Brennan Thurgood Marshall, and Ruth Bader Ginsburg. Regardless of where his colleagues on the Court stood philosophically, Rehnquist was widely respected by all for his intellect, his integrity, and, upon his elevation for his fair, even-handed and thoughtful leadership. He was an exemplar in the role of Chief Justice.

On first becoming the Chief, his colleagues of many years standing were supportive. Bill Rehnquist was a welcome change from his predecessor. Warren Burger was ham-fisted in his managing of conferences and in the assigning of opinions. Rehnquist was considerate in his relations with his fellow justices. He never assigned a second opinion until every justice already had one assigned. In fact, Rehnquist was the leader Burger should have been and which Warren most certainly was. Thurgood Marshall, who seldom if ever agreed with Rehnquist on the law, would call him *"a great chief justice".*

Rehnquist headed the Court for 19 years as Chief, making him 4th in terms of length of service and his 33 years make him 8th in terms of total years on the Supreme Court. Beyond his leadership on cases and controversies, it was the Rehnquist Court that decided the presidency in 2000 and as Chief Justice, he presided at the impeachment trial of Bill Clinton in the Senate. He also wrote four books on the Court's history.

Committed to a more conservative reading of constitutional law, the Supreme Court's prevailing philosophy for nearly 20 years mostly reflected this man's commitment to altering the direction of the Court established in the Warren era. The years 1994 to 2005 would not see the Court's make-up change during 11 years, the lengthiest period of consistency among the Court's personnel since the Marshall Court of 1811 to 1823. Rehnquist (excepting cases involving hot-button social issues) exercised a steady hand over a 5/4 razor thin conservative majority consisting of Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.

Rehnquist was an influential Chief on the order of Earl Warren, an associate justice who saw his dissents vindicated by the very Court he himself would lead, and a commanding figure in Constitutional jurisprudence during the final years of the 20th century.

It is about time the Court faced the fact that the white people in the South don't like the colored people; the Constitution restrains them from effecting this dislike through state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontier of state action and 'social gain,' it pushes back the frontier of freedom of association and majority rule. - **Memo written to Justice Robert Jackson (1952)**

Rehnquist was born in Wisconsin in 1924 and was raised in Shorewood, an upper-middle class suburb of Milwaukee. His father, William Benjamin, was a wholesale paper salesman and his mother, Margery, was a homemaker and translator who spoke five languages. As one of his contemporary remembered: *"That was his upbringing. You worked hard and didn't depend on others. That's how we were taught."*

In keeping with his mid-western upbringing and solidly Republican household, he was a life-long conservative. As a youngster, he admired *"Republican standard bearers such as Alf Landon, Wendell Willkie and Herbert Hoover."* When asked in elementary school about what he wanted to do when he grew up, he said*, "I'm going to change the government"* in reaction to the New Deal.

After Rehnquist graduating from Shorewood High School in 1942, he briefly attended Kenyon College before enlisting in the U.S. Army Air Corps. Stationed mostly stateside from 1943 to 1945, he went to North Africa in 1945 as a weather spotter until his discharge from the military in 1946.

With the G.I. Bill, Rehnquist was able to complete his education at Stanford and graduated with Bachelor and Masters in 1948. He did graduate work at Harvard (another Masters). He went back to Stanford for his law degree. It was at Stanford Law that Rehnquist made his mark: law review, graduating first in the class of 1952, and he was described as *"the outstanding student of his law school generation."* Peers recall Rehnquist as witty, pleasant and unpretentious. Others note his unwavering conservatism. As a young man, he soon acquired a formidable reputation as an advocate for his political/philosophical positions.



Rehnquist graduated first in the Class of 1952. The student who ranked third in that year's class at Stanford Law was a fellow Stanford undergraduate from Arizona by name of Sandra Day O'Connor (1930-2023). O'Connor affirms that even in law school Rehnquist was a young man who was poised for a brilliant future in the law: *"He was head and shoulders above all the rest of us in sheer legal talent and ability. He was definitely the star of our class."* Moot-court competition partners, this pair of future supreme court justices actually finished second.

As law students, they also dated. Rehnquist was sufficiently taken with her that he even proposed marriage to O'Connor during their 2L year. Rehnquist asked: *"To be specific, Sandy, will you marry me this summer?"* Sandra Day declined his proposal. She was then interested in her future husband John O'Connor. This aspect of their relationship was not made public until 2018, after Rehnquist died and O'Connor retired from the Court. Had they married, it is doubtful O'Connor would have become the Court's first female member. History would be different.

They maintained a life-long friendship. When they married their respective spouses, Rehnquist and O'Connor knew each other socially and were both involved in Arizona Republican politics. Rehnquist recommend O'Connor to President Reagan as a potential Supreme Court nominee in 1981. They has an excellent 25-year working relationship on the Court and when Rehnquist died, one could not help but be moved by O'Connor's reactions.

Justice Robert Jackson came to Stanford to dedicate a new law school building in 1951, and took the opportunity to interview Rehnquist for a clerkship. He thought Jackson *"had written me off as a total loss. "* Rehnquist got the job anyway and clerked for Jackson during the 1952-1953 term. He came to the marble temple of the Court after a cross-country trip in his Studebaker. This experience proved formative. Rehnquist first gained a feel for the workings of the Court by reviewing cert petitions and drafting memos for Jackson.

Among the other clerks, mostly from eastern law schools, Rehnquist stood out for his intellect, his confidence and his right-leaning views. Fellow clerk and Harvard Law professor Donald Trautman remembered Rehnquist as: *"He was funny and charming, very bright and quick. He could give you all the good conservative arguments on any issue."* Rehnquist recalled such interactions by noting that *"I can remember arguments we would get in as law clerks"* adding, *"I don't know that my views have changed much from that time."*

In his memos to Jackson, Rehnquist expressed his unfavorable opinions of liberals and in criminal cases asked why convictions should be overturned on *"technicalities".* Views unsympathetic to efforts to desegregate have been attributed to him from these writings. Rehnquist wrote at the time:
"It is about time the court faced the fact that the white people of the South don't like the colored people." Such writings would prove controversial decades later, and be raised during his confirmation hearings in the Senate.

Rehnquist's 1952 memorandum to Jackson, *"A Random Thought on the Segregation Cases"*, pertaining to *Brown v Board of Education* arose in both of his confirmation hearings. In 1971, after his nomination was approved by the Judiciary Committee and pending on the Senate floor, it was revealed that as a law clerk Rehnquist wrote that racial segregation should be maintained:

> *To the argument that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are [...] 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.*

Rehnquist attributed such views to Jackson.

The memos of Supreme Court law clerk William Rehnquist: conservative tracts, or mirrors of his justice's mind?

Rehnquist said, *"I believe that the memorandum was prepared by me as a statement of Justice Jackson's tentative views for his own use."* Confirmed in 1971, in 1986 Elsie Douglas, who was Jackson's private secretary, contested this account as *"a smear of a great man, for whom I served as secretary for many years. Justice Jackson did not ask law clerks to express his views. He expressed his own and they expressed theirs. That is what happened in this instance."*

Rehnquist countered, *"The bald statement that Plessy was right and should be reaffirmed was not an accurate reflection of my own views at the time."* As a justice, Rehnquist held against affirmative action but never took any action to overturn *Brown* as precedent.

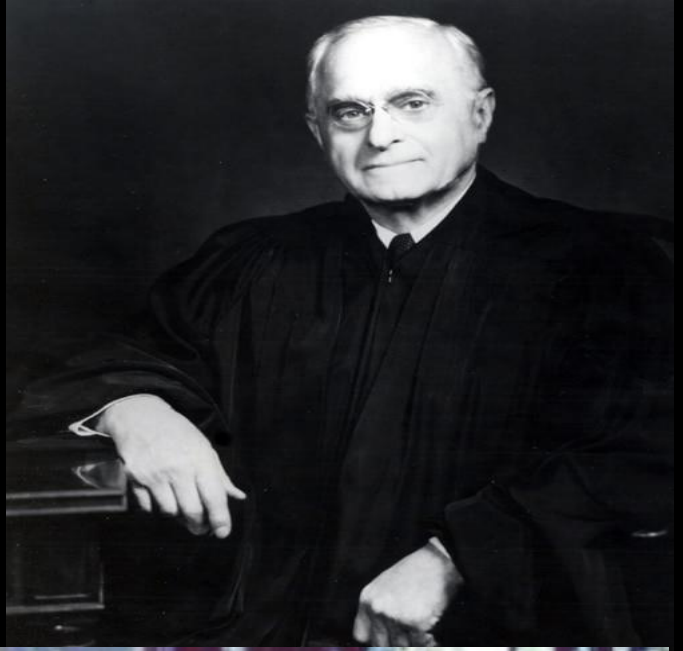
In 1985, Rehnquist did say there is a *"perfectly reasonable"* argument against *Brown* and in favor of P*lessy*, but that he now saw that *Brown* was correctly decided.

Robert Houghwout Jackson (1892 –1954) was the Solicitor General, Attorney General, an associate justice (sitting on the Court from 1941 until his death in 1954), and the Chief American Prosecutor at the International Military Tribunal held at Nuremberg after World War II. Appointed by Franklin Roosevelt, Jackson believed in procedural fairness and due process. In spite of being a New Dealer, Jackson as a jurist believed that the rule of law protects members of the public from overreaching by government agencies. He advocated for judicial restraint.

On the Court, Jackson displayed a lucidity and brilliance in his written decisions. He was a gifted stylist, perhaps the best writer ever to sit on the Supreme Court. He once famously described the Supreme Court thusly: *"We are not final because we are infallible, but we are infallible only because we are final."*

Jackson and Hugo Black were on opposite sides of the fissure on the Court between judicial activists and proponents of judicial restraint. Jackson sided with Felix Frankfurter against Black and William O. Douglas. Jackson particularly opposed Black for imposing his policy preferences in his decisions. At Stanford Law, Rehnquist as law student actually wrote in his diary that he *"hated"* Black.

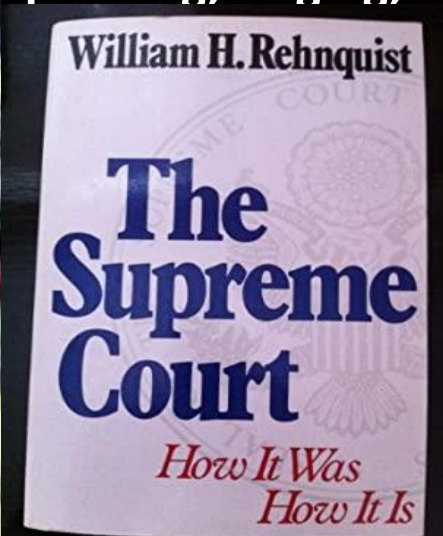
Jackson also felt that Black's actions had unfairly denied him the post of Chief justice after Harlan Fiske Stone died in 1946. Jackson was promised the Chief Justiceship by FDR in 1945. After FDR died, President Harry Truman would choose Fred Vinson (1890-1953) over Jackson and Black in order not to make the selection between two sitting associate justices. Jackson blamed Black for being passed over and retaliated by making public Black's behavior on the Court. The upshot was that the controversy it hurt Jackson more than it hurt Black.

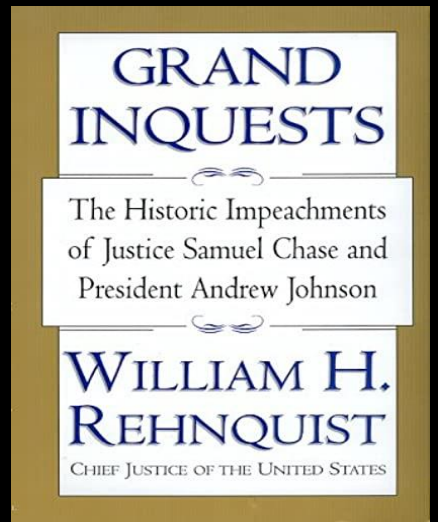


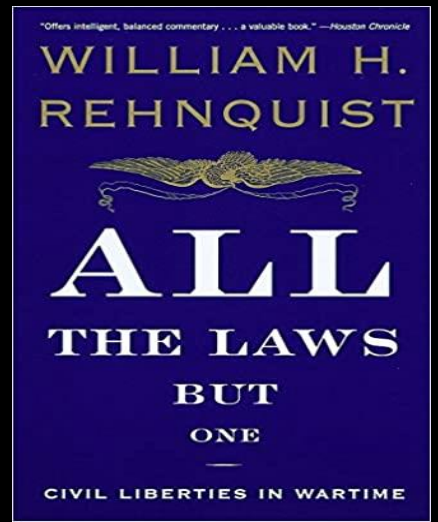
Jackson was a political and judicial moderate. It appears he had had no influence on the political or judicial philosophies of his law clerk. In his book on the history of the Court, Rehnquist speaks highly of Jackson but it was Felix Frankfurter (1882-1965) who made more of an impression. Rehnquist describes Frankfurter as a *"magnetic"* personality to whom he was "*tremendously drawn … by his willingness to discuss and argue while asking no quarter by reason of his position or eminence.*"

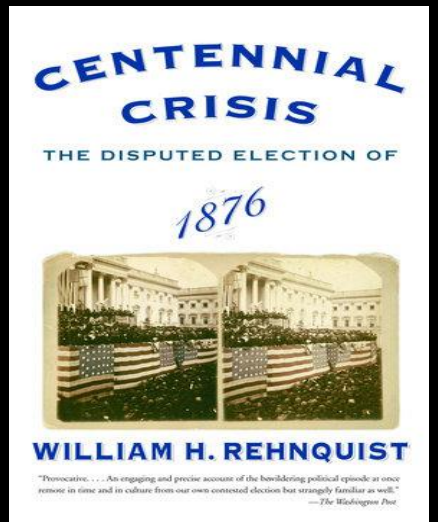
Upon completing his clerkship, Rehnquist married Natalie 'Nan' Cornell, whom he met at Stanford, in 1953 and the couple remained together until 1991 when Nan died of ovarian cancer. The Rehnquists had three children: James, a lawyer; Janet, a lawyer; and Nancy, a book editor who worked on her father's books.

As Chief Justice, Rehnquist authored four books dealing with legal controversies, including impeachment, law during war-time, and a disputed presidential election. All were topics the Rehnquist Court faced. Rehnquist was a social leader on the Court, relishing good relations with his fellow justices and his clerks. He enjoyed painting, singing, stamp collecting, theater-going, and poker playing.









An oft-heard description of the Supreme Court is that it is the ultimate protector in our society of the liberties of the individual. This phrase describes an important role of the Supreme Court, but by ignoring other equally important functions of the Court, it has a potential for mischief.

Rehnquist's career prior to joining the Court entailed of 16 years in private practice in Phoenix from 1953 to 1969, followed by three years at the Department of Justice in the Office of Legal Counsel during the Nixon administration. He started at the firm of Denison Kitchel and eventually hanged out his own shingle engaged in commercial litigation in what was then a small but growing legal market.

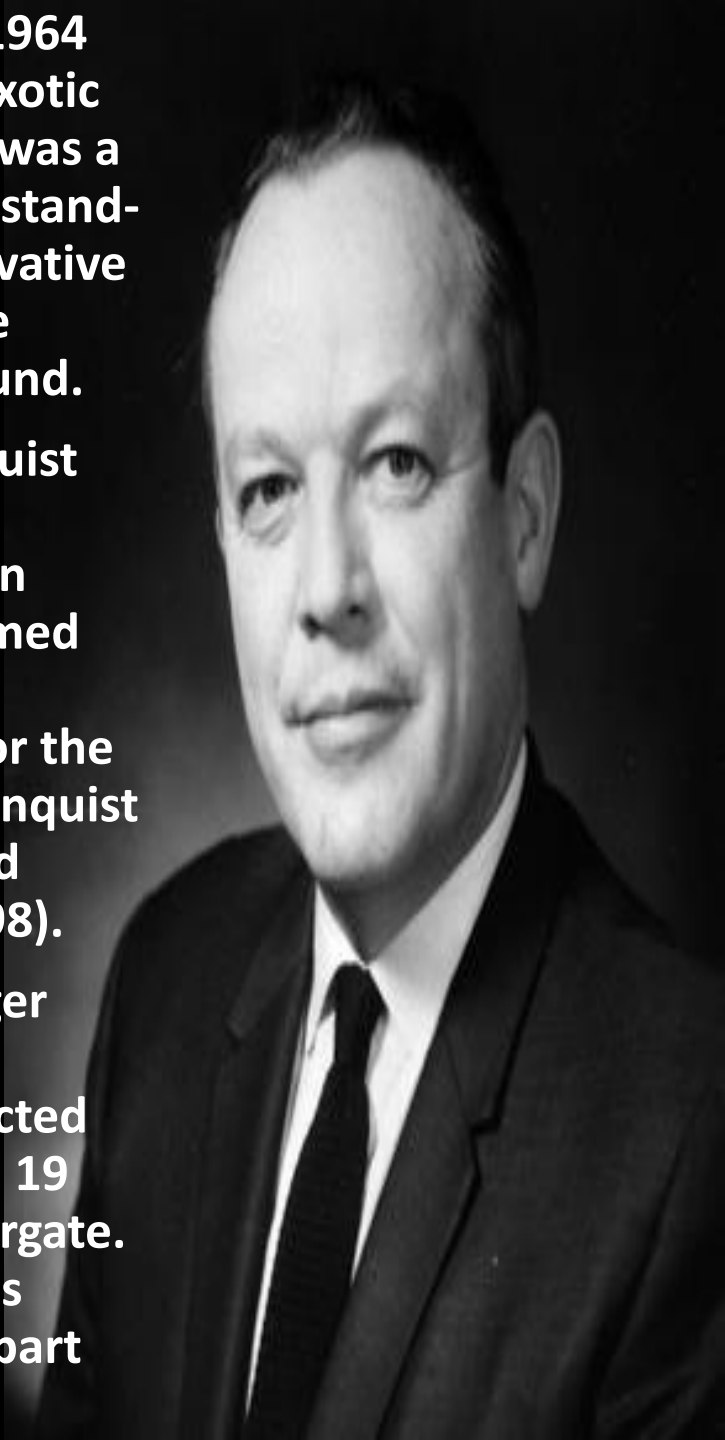
Phoenix was a deliberate choice, as opposed to his native state of Wisconsin or California where he attended university and law school. The conservative political climate in Phoenix suited Rehnquist as much as did the city's desert climate. Frankfurter advised him *"that conservatives as well as liberals ought to get active on the political scene."* He became active in Republican party politics and an outspoken critic of liberal social policies. During both his confirmation hearings, Rehnquist was accused of taking part in Operation Eagle Eye, a voter suppression operation in Arizona to challenge minority voters by aggressively enforcing literacy requirements. Rehnquist denied the charges, and Vincent Maggiore, chairman of the Phoenix Democratic Party, testified he was unaware of these activities.

Rehnquist was among the first in legal circles to be critical of the Warren Court, his term at the Court was under Chief Justice Vinson. In 1957, he wrote an article for *U.S. News & World Report* pointing out the *"extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, great sympathy toward any government regulation of business–in short, the political philosophy now espoused by the Court under Chief Justice [Earl] Warren."* Rehnquist questioned the political biases of the law clerks that might have some undue influence over which cases the Court choses, but did not question the decisions rendered by the individual justices per se.

Rehnquist entered the fray of national politics in 1964 serving as a legal advisor in Barry Goldwater's quixotic quest for the presidency. Goldwater (1909-1998), was a Senator from Arizona and the GOP's conservative stand-bearer. His campaign galvanized the entire conservative movement. Rehnquist also wrote speeches for the candidate. The 1964 campaign was a proving ground.

It was through his work for Goldwater that Rehnquist connected with fellow Phoenix attorney Richard Kleindienst (1923-2000). In 1968, with the election of Richard Nixon (1913-1994), Kleindienst was named deputy attorney general. Kleindienst arranged for Rehnquist to become assistant attorney general for the Justice Department's Office of Legal Counsel. Rehnquist served as the chief lawyer to Attorney General and former Nixon law partner John Mitchell (1913-1998).

Mitchell resigned to become the campaign manager for Nixon's reelection in 1972 and Kleindienst was promoted to attorney general. Mitchell was convicted in 1977 for Watergate related offenses and served 19 months. Kleindienst resigned in 1973 due to Watergate. In 1974, he pleaded guilty to contempt of Congress for his failure to testify fully before the Senate as part of his confirmation hearings for attorney general.



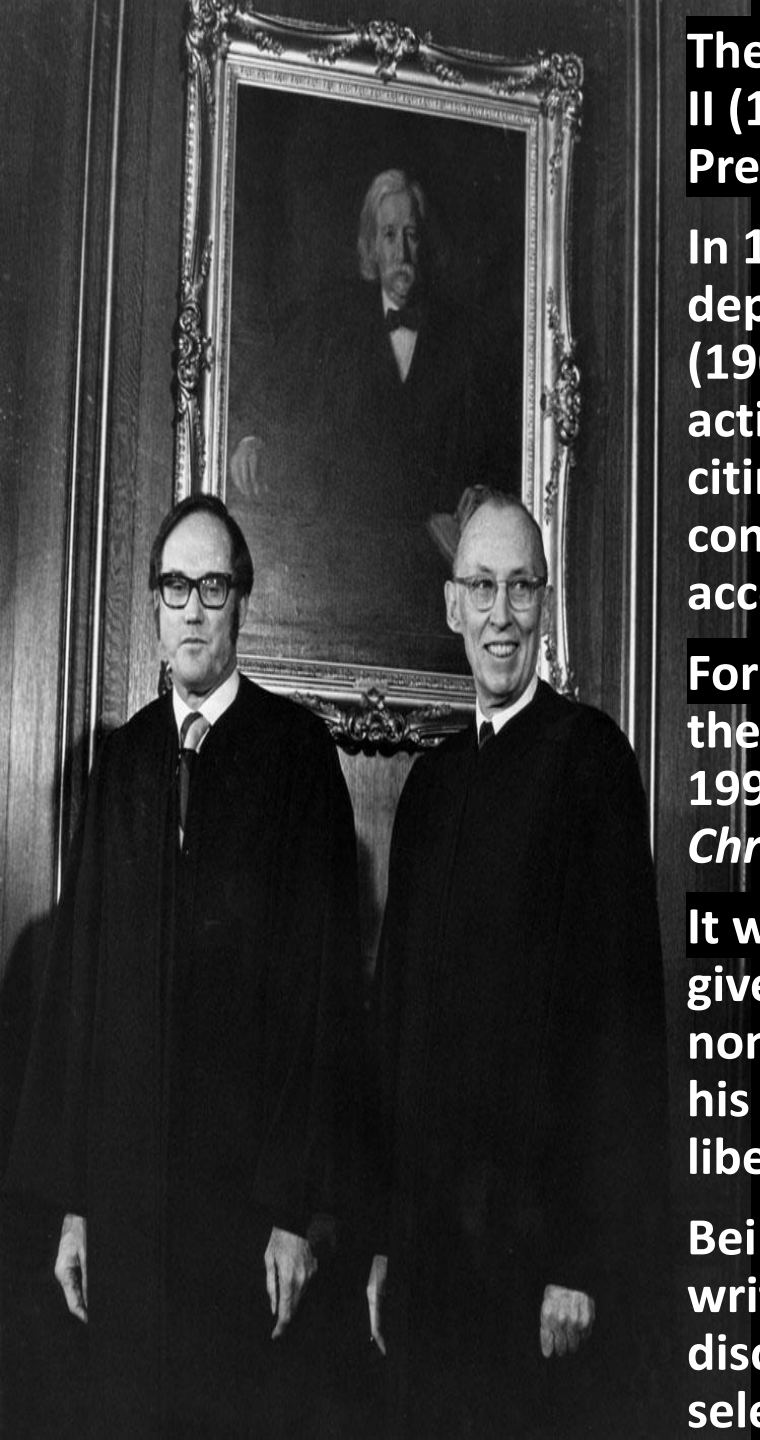
As an assistant attorney general, Rehnquist made a name for himself in conservative legal circles as an advocate of enhanced police powers. This was totally in keeping with the administration's position on law & order and a desire to quell dissent. However, he seemed to have not made much of an impression on Nixon at first. The President mistakenly called him 'Renchburg' as documented on several Watergate tapes. Nixon, knowing very little about him, dismissed him as a bit of a clown for his ties and lack of clothing sense. He rendered several opinions justifying the use of wiretaps and other surveillance techniques that eventually impressed Nixon.

One of Rehnquist's principal functions was screening prospective judicial candidates for Mitchell and Kleindienst on behalf of the White House. The Nixon Administration made a concerted effort to find those candidates it deemed "acceptable" for the federal judiciary.

This post at the DOJ would be Rehnquist's stepping stone to the Court. Within less than 3 years, he would become a justice at age 47.

During the Watergate scandal, there was some speculation Rehnquist, of all people, might have been "Deep Throat", the high-placed official who was the source for Bob Woodward and Carl Bernstein's reportage in the Washington Post. In 2005, FBI official Mark Felt was revealed as the actual source.

In 1971, the Washington Post published the secret Pentagon Papers. Still at DOJ, Rehnquist asked the Post to cease publication. After the paper refused, the Administration then sought an injunction in the D.C. District Court.



The back-to-back retirements of Hugo Black (1886-1971) and John Marshall Harlan II (1899-1971) created 2 vacancies in October, 1971. Nixon named former ABA President and Virginia lawyer Lewis Powell, Jr. (1907-1998) to Black's seat.

In 1969, Nixon wanted to nominate Powell for the seat opened up by the forced departure of Abe Fortas (1910-1982) and which eventually went to Harry Blackmun (1908-1999). Rehnquist wrote memos to the effect the DOJ could investigate Fortas' activities that resulted in his resignation. At the time, Powell turned Nixon down citing his age, lucrative law practice, and as a corporate lawyer he would not be conversant with the constitutional questions decided by the Court. In 1971, Powell accepted Nixon's nomination and was confirmed without much opposition.

For the other opening, National Security Advisor Henry Kissinger (1923-2023) was the one who first recommended Rehnquist to Chief of Staff H.R. Haldeman (1926-1993). Asked if *"Rehnquist is pretty far right, isn't he?"* Haldeman responded, *"Oh, Christ! He's way to the right of [White House speech writer Pat] Buchanan."*

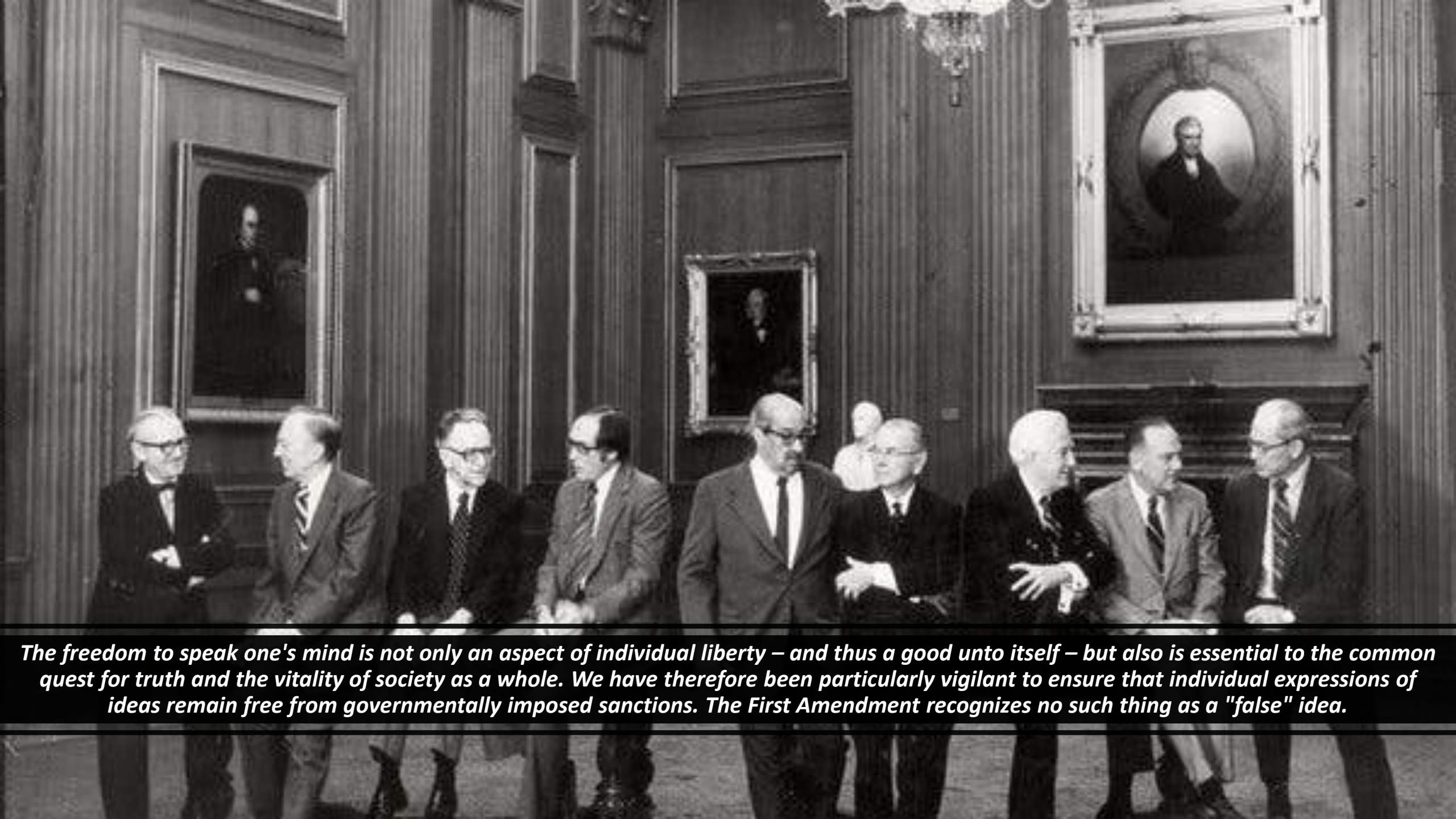
It was Mitchell who informed Rehnquist that the President had settled on him, and given his legal and political conservatism, Rehnquist was the logical choice. It was nonetheless a bold move given his youth, absence of any judicial experience, and his well pronounced political and social views that would certainly displease those liberal members of the Senate that would have to eventually confirm him.

Being a few years removed from the civil rights struggles of the 1960's, Rehnquist's writings as expressed in his 1952 memo to Jackson and allegations of attempts to discriminate against Black voters Phoenix in the sixties made him a provocative selection under any rubric. Various groups were aligned against his nomination.

Confirmation hearings before the Judiciary Committee were held in November 1971. Rehnquist faced a predominantly democratic Congress. Senators queried Rehnquist over his views on executive power, the Vietnam War, the anti-war movement, and law enforcement surveillance methods. On all issues Rehnquist had advised the White House while at DOJ. On November 23, 1971, the committee voted 12–4 to send his nomination to the full Senate with a favorable recommendation. Although asked in committee about his views on school desegregation and racial discrimination in voting, the issue really came to the fore when the memos to Jackson became public.

Rehnquist faced stiff opposition, and procedural hurdles. Senators and Civil Rights groups used the memos to discredit Rehnquist. Nixon had nominated two Southern appeals court judges, Clement Haynsworth (1912-1989) of the 4th Circuit and G. Harrold Carswell (1919-1992) of the 5th Circuit, to replace Fortas in 1969 and both were denied confirmation. Haynsworth was opposed because he was alleged to have favored segregation. Carswell was opposed for his prior views on race (which he recanted) and for being "mediocre." Nebraska Senator Roman Hruska (1904-1999) defended Carswell by responding: *Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises, Frankfurters, and Cardozos.* Rehnquist was many things, but he was not mediocre.

On December 10, the Senate first voted 52–42 against a cloture motion. The Senate then voted 22–70 to reject a motion to postpone consideration until July 18,1972. Later that day, the Senate voted up or down, and confirmed Rehnquist as the nation's 100th justice by a margin of 68–26 . Rehnquist was sworn in on January 7, 1972.



The freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a "false" idea.


Rehnquist was an Associate Justice from 1972 to 1986, and was the Chief Justice from 1986 to 2005. With more than 33 years of service, Rehnquist worked alongside 17 other members of the Court during his tenure.


The Court that Rehnquist was joining in 1972 was fractured along ideological lines, finding itself without a rudder. The Burger Court (1969-1986) under the leadership of Warren Burger (1907-1995) can in many ways be considered a liberal court in transition to becoming a more conservative body. The Burger Court was called his *"in name only." Time* called Burger *"plodding", "standoffish", "pompous"* and *"aloof".*

A critic of the Warren Court, Burger was widely perceived as a strict-constructionist. The Burger Court was less expansive in its rulings, and narrowed Warren era rulings at the margins, but it did not overturn any major cases. Reluctant to have the courts fashion judicial remedies to cure societal ills, Burger was also unable or unwilling to reverse the legacy of Warren. And in some areas, women's rights and in the right to abortion in Roe v Wade, the Burger Court went further than the Warren Court did.

As Chief Justice, Burger failed to provide leadership. Burger was outmaneuvered by William Brennan, who was something of ward healer and lived by the motto *"it only takes five".* Justice Brennan was a suburb tactician able to carve 5/4 votes on many matters due to his skill and ability to shade his views to secure that crucial 5th vote.

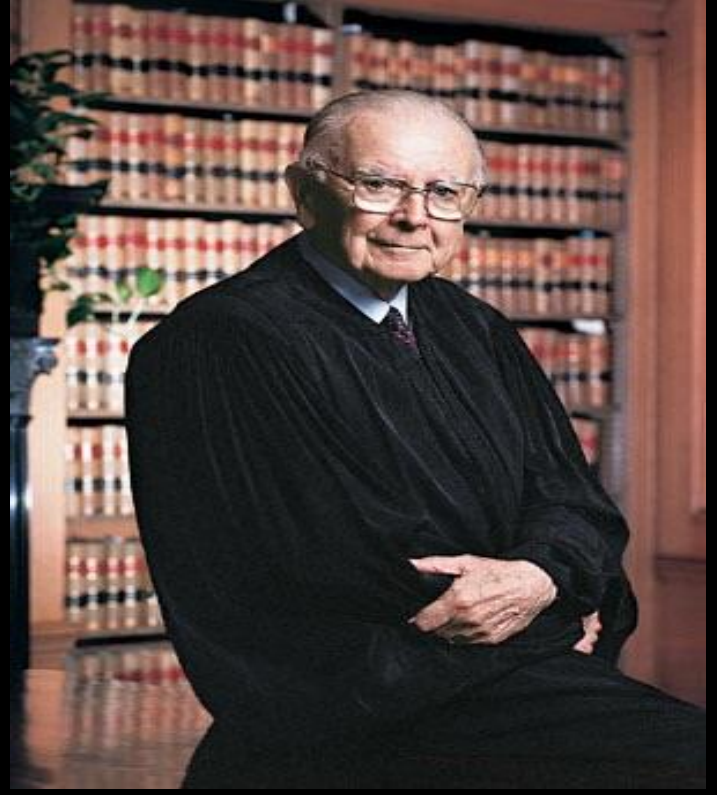
Brennan, Douglas and Marshall were the liberals. They were joined by Blackmun as he moved left. Stevens, who replaced Douglas, along with Stewart, White, and Powell were the centrists. Rehnquist and Burger were the conservatives. O'Connor, who replaced Stewart, was more conservative. But Burger had the annoying habit of switching his vote in conference so that he could then control opinion assignments. This tactic was used much to the consternation of his fellow justices.

Burger's substantive contribution were his efforts to improve the administration of the federal courts. His 1986 retirement was looked on with a sense of relief by many.

Coming from the American West, Rehnquist was something of an iconoclast when he first arrived at the Court. He seemed to many at the outset as something of an anachronism. During his initial years, Rehnquist staked out positions for himself to the right of even his fellow Nixon appointees. Emerging as the most consistently conservative voice on the Burger Court, Rehnquist in his polished opinions provided a cogent, well-reasoned, and most of all uncompromising distillation of his views.

Rehnquist, on many cases, was often in the minority and in 52 cases he was the sole dissenter. He earned the moniker "The Lone Ranger" for his efforts. His clerks in the late seventies gave him a Lone Ranger doll, which he kept in his chambers, which was an affectionate token of his unique role on the Court.

The ideas articulated in Rehnquist's early dissents formed the basis of later majority opinions. Per Laurence Tribe, *"Even in lone dissent, he has helped define a new range of what is possible."* In his 14 years as an associate justice, from 1972 to 1986, Rehnquist anchored the court's conservative bloc. This is not to say that he was isolated or that he went out of his way to alienate his fellow justices.


Rehnquist was always collegial with his fellow justices. These bonds were formed not only with like-minded colleagues but also with those he disagreed with. A "team player", Rehnquist was good-humored, cordial, and thoughtful. This side of Rehnquist served him well when he was elevated to Chief Justice, as the justices often chafed under the leadership of Burger. Rehnquist got along well with William O. Douglas (1898-1980) and William J. Brennan (1906-1997), the Court's foremost liberals. Douglas once said that Rehnquist was the smartest man he ever served with, and they bonded over their mutual affection for the American West. Brennan said that "*Bill Rehnquist is my best friend up here.*" Most of their disagreements were over the law or the outcome of their decisions. The liberal justices did not care for his *"willingness to cut corners to reach a conservative result".* Yet, much the same has been said about their rulings. Rehnquist relationship with Thurgood Marshall (1908-1993) was more complicated, and Marshall often thought Rehnquist insensitive to racial minorities. However, by the time of Marshall's retirement, Marshall acknowledged that Rehnquist has been *"a great chief justice".*

The role of the Supreme Court is to uphold those claims of individual liberty that it finds are well-founded in the Constitution, and to reject other claims against the government that it concludes are not well-founded. Its role is no more to exclusively uphold the claims of the individual than it is to exclusively uphold the claims of the government: It must hold the constitutional balance true between these claims.

In his article *"The Notion of a Living Constitution"* (1976), Rehnquist refuted the widely held liberal conception of a "living constitution". He felt that in a democratic society, judicial restraint and deference to lawmaking majorities are essential to an accountable judiciary. The living constitution constituted *"an end run around popular government"* that is *"corrosive of the fundamental values of our democratic society."*

To this end, Rehnquist from the very start championed a view of federalism not advocated since the days of the 4 Horsemen during the Hughes Court. He called for a far more limited view of federal authority. It seemed to many observers at the time that he was fighting battles that already been settled during the New Deal. An expansive view of the Commerce Clause was the prevailing wisdom since the 1930's.

Rehnquist, thoughtfully and methodically through his dissents, was unwavering. He sought to limit the scope of federal power and preserve the prerogatives of the states taking a broad view of state power when it comes to domestic or economic policy.

His efforts first paid off in *National League of Cities v Usery* 26 U.S. 833 (1976), here the Court ruled the Fair Labor Standards Act can't applied to state governments. His majority opinion overturned a Congressional statute that imposed minimum wage and maximum hours provisions to state and local government employees. He noted that while Congress may have the affirmative authority under the Commerce Clause to reach the subject matter, the Constitution prohibits such federal regulation. The Court concluded that determinations of state employee wages and hours worked, are functions of state plenary powers protected from Congressional infringement. The holding in this case was overturned in *Garcia v San Antonio Metropolitan Transit Authority* 69 U.S. 528 (1985). Rehnquist dissented in *Garcia.*

Rehnquist was if not out-of-step with the social dynamics of the early 1970's, certainly felt the Court *"had no business reflecting society's changing and expanding values".* In his jurisprudence, Rehnquist adopted a narrow view of the 14th Amendment and was adamant that cases involving individual rights do not necessarily require a judicial remedy from a federal court. These hot-button social issues should best be addressed by the legislature and not the courts.

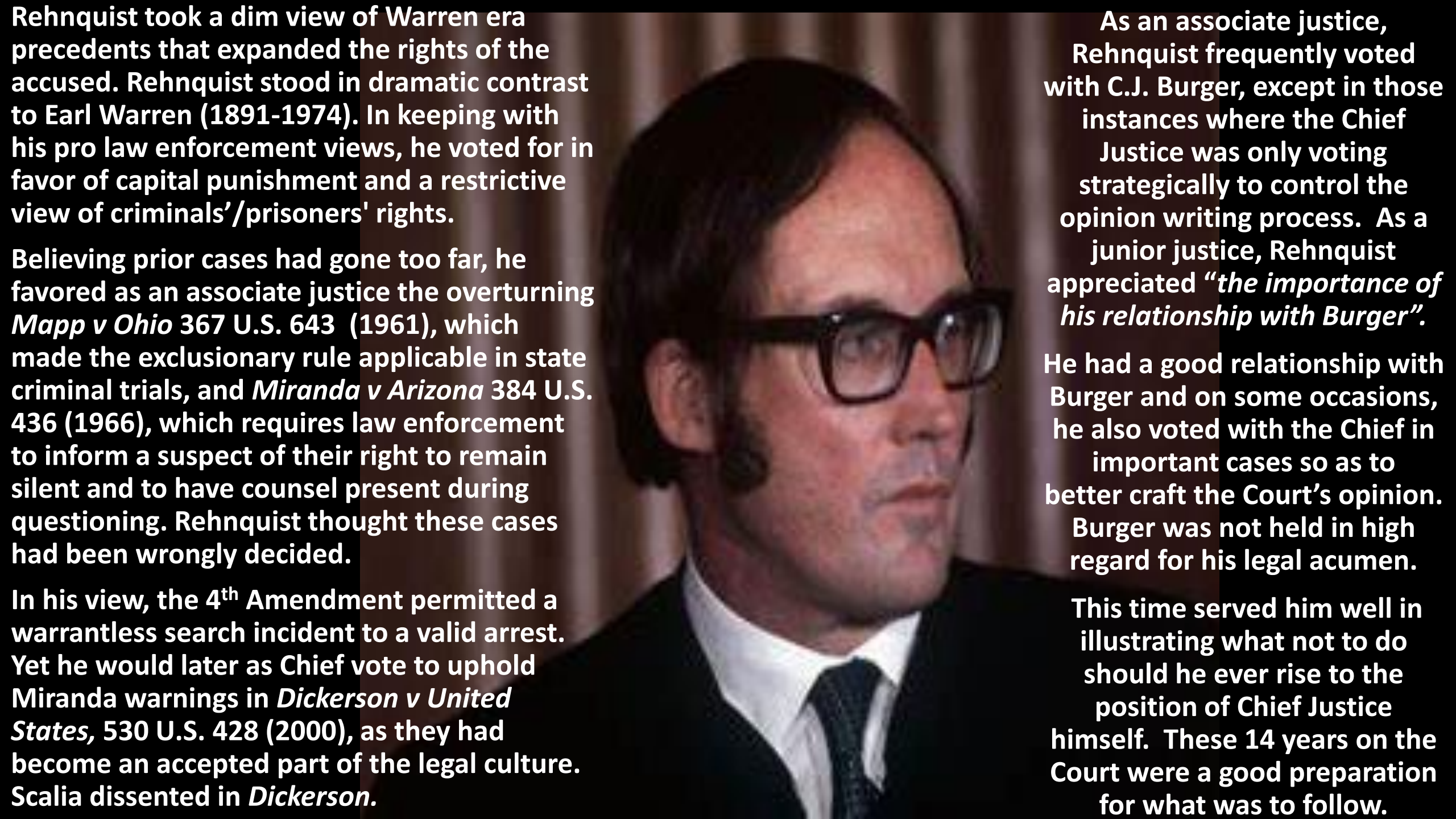
To that end, he along with Byron White (1917-2002), dissented in *Roe v Wade,* 410 U.S. 113 (1973) voting against a constitutional right to an abortion. He wrote: *"To reach its result, the Court necessarily has had to find within the scope of the 14th Amendment a right that was apparently completely unknown to the drafters of the Amendment."* He held the 14th Amendment's Equal Protection Clause should be limited to cases dealing with race (as a Civil War Amendment) and not be extended beyond its original scope.

In his dissent in *Trimble v Gordon* 430 U.S. 762 (1977), Rehnquist encapsulates his view of the 14th Amendment thusly:
Unfortunately, more than a century of decisions under this Clause of the 14th Amendment have produced ... a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to be kept in the judicial closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary", "illogical", or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply—classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle.

Rehnquist took a dim view of Warren era precedents that expanded the rights of the accused. Rehnquist stood in dramatic contrast to Earl Warren (1891-1974). In keeping with his pro law enforcement views, he voted for in favor of capital punishment and a restrictive view of criminals'/prisoners' rights.

Believing prior cases had gone too far, he favored as an associate justice the overturning *Mapp v Ohio* 367 U.S. 643 (1961), which made the exclusionary rule applicable in state criminal trials, and *Miranda v Arizona* 384 U.S. 436 (1966), which requires law enforcement to inform a suspect of their right to remain silent and to have counsel present during questioning. Rehnquist thought these cases had been wrongly decided.

In his view, the 4th Amendment permitted a warrantless search incident to a valid arrest. Yet he would later as Chief vote to uphold Miranda warnings in *Dickerson v United States,* 530 U.S. 428 (2000), as they had become an accepted part of the legal culture. Scalia dissented in *Dickerson.*



As an associate justice, Rehnquist frequently voted with C.J. Burger, except in those instances where the Chief Justice was only voting strategically to control the opinion writing process. As a junior justice, Rehnquist appreciated "*the importance of his relationship with Burger".*

He had a good relationship with Burger and on some occasions, he also voted with the Chief in important cases so as to better craft the Court's opinion. Burger was not held in high regard for his legal acumen.

This time served him well in illustrating what not to do should he ever rise to the position of Chief Justice himself. These 14 years on the Court were a good preparation for what was to follow.

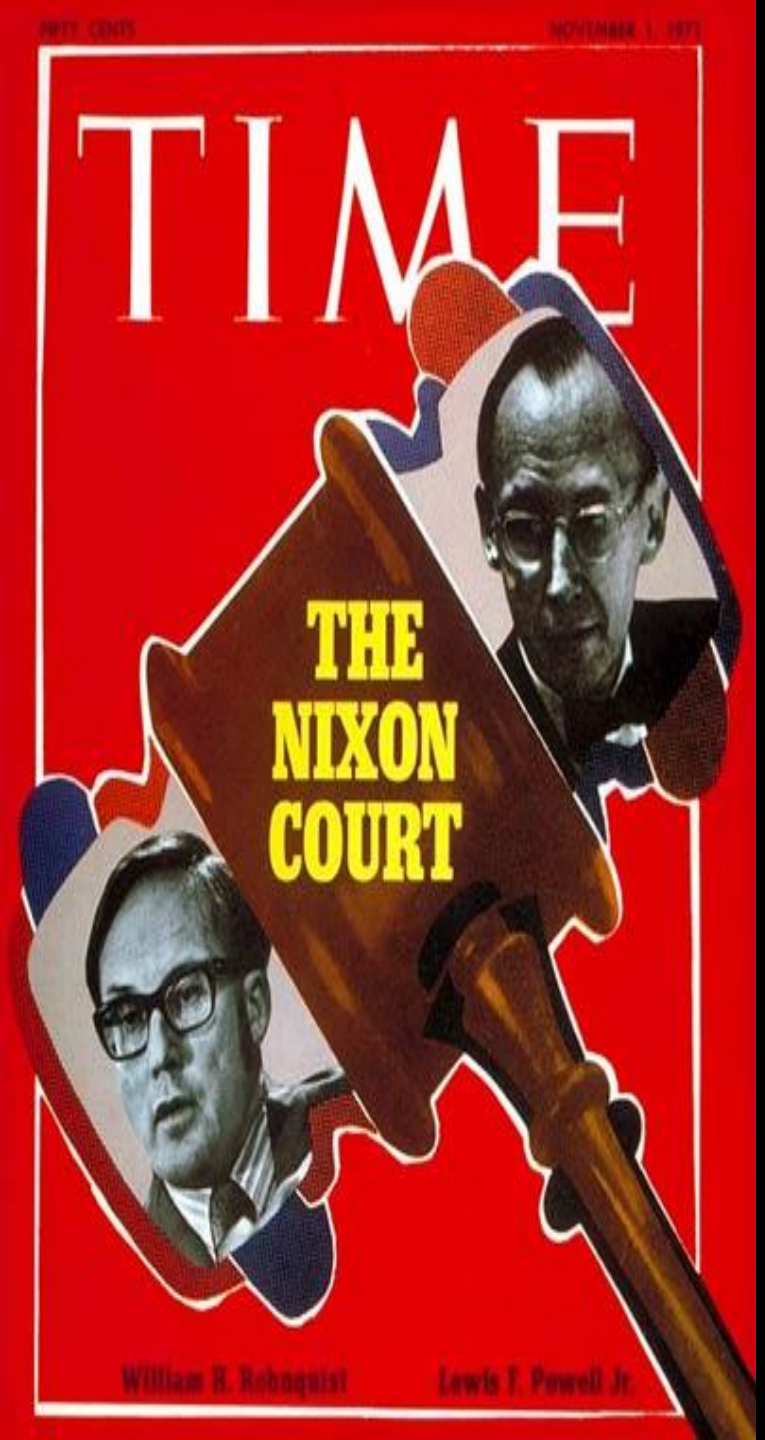
In her last oral argument as a litigator before the Supreme Court in *Duren v Missouri*, 439 U.S. 357 (1979), future colleague Ruth Bader Ginsburg (1933-2020) was challenging a Missouri statute that provided for gender-based exemptions from jury duty. At the end of Ginsburg's oral presentation, Rehnquist sardonically asked RBG: "*You will not settle for putting Susan B. Anthony on the new dollar, then?*" RBG took his comment in stride, and Rehnquist was the lone dissenter in a case where RBG prevailed 8-1. In fact, Rehnquist dissented in every case that RBG argued with the exception of *Weinberger v Wiesenfeld*, 420 U.S. 636 (1975).

Once she joined the Court in 1993, they found themselves often on opposite sides of most decisions. Nevertheless, Rehnquist concurred in *United States v Virginia*, 518 U.S. 515 (1996), wherein RBG issued a landmark women's rights decision which open up the Virginia Military Institute to female cadets. There was mutual respect and they liked each other personally.

After Rehnquist died, RBG called him *"her Chief"* and said *"He was a man who grew in that office."* She warmly acknowledged that the conservative Rehnquist was willing to keep an open mind. Also contributing to this sentiment from RBG, was his graciousness and fairness as Chief Justice.

Rehnquist would as the leader on the Court be attuned to the needs of the Supreme Court as an institution. A lesson not lost on his former clerk and successor John Roberts. Rehnquist the conservative rebel, the Lone Ranger if you will, evolved into the role of an institutionalist and custodian of the Court's prestige. It is unique ability first demonstrated by John Marshall.

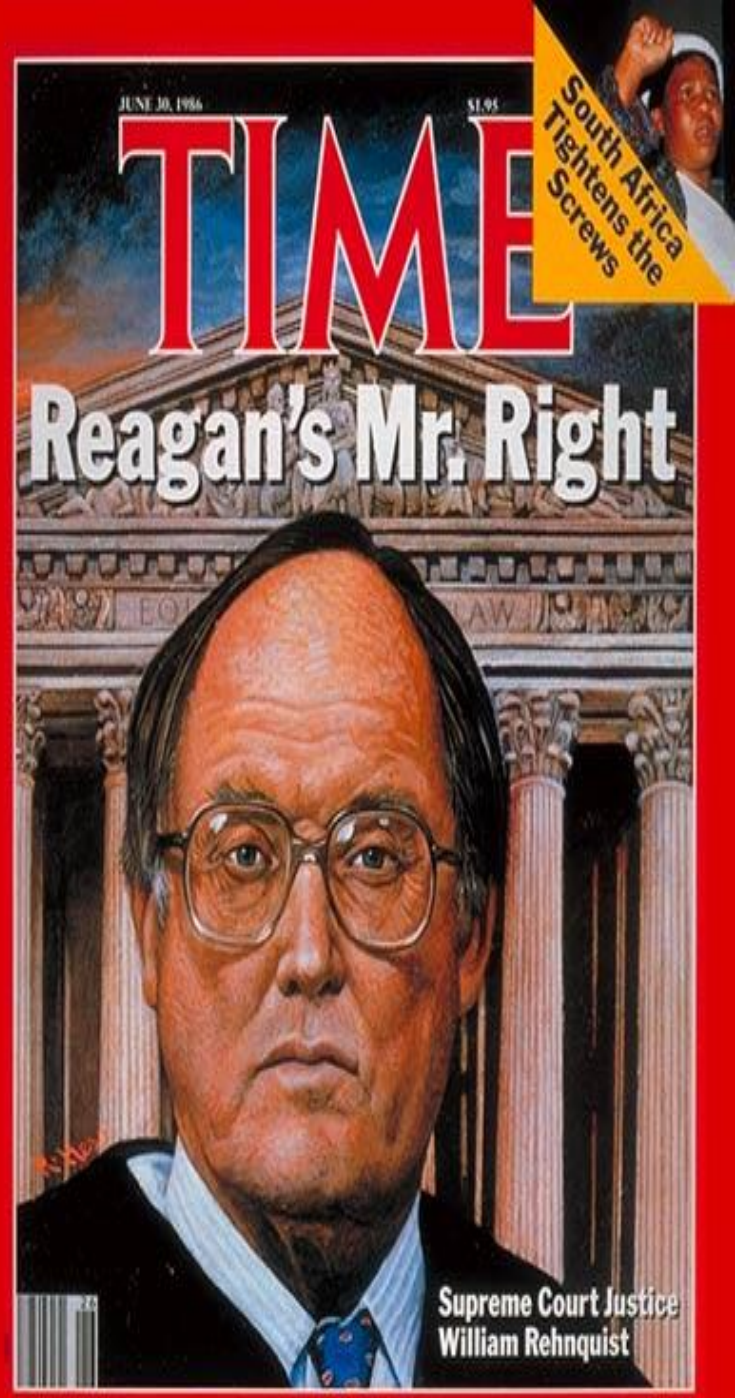
The framers of our Constitution came up with two major contributions to the art of government.
The first was the idea of an executive not dependent on the political support of the legislature.
The second was the idea of the judiciary independent of the executive and legislative branches.



Before Rehnquist joined the Supreme Court as seen with the filibuster of Abe Fortas' Chief Justice nod in1968, but particularly after *Roe v Wade* in 1973, the confirmation process turn highly politicized. As the Court ruled on many contentious social issues, it seemed that each seat that opened up created a combative political climate on both sides of the aisle.

While there was no doubt as to his abilities or his qualifications, he was in many quarters considered a incendiary nominee. During each of his two confirmations, in 1971 and 1986, he was paired with a prospective justice who seemed to garner universal approval, i.e. Powell and Scalia. All eyes were ever focused on Rehnquist, and the knives were out.

The Jackson memos came up again in 1986 and this time there was a 14 year record and paper trial to examine. The dispute whether the memos from 1952 were a reflection of his views or those of Jackson's continued, and some commentators went so far as to allege that in his defense Rehnquist may have perjured himself during his confirmation.



Burger retired from the Court in 1986, Ronald Reagan (1911-2004) was president and he was committed to appointing conservatives to the Court. The Reagan White House and the Justice Department were committed to screening candidates to avoid the appointment of someone on the order of another Harry Blackmun.

Reagan, in a bold move, chose to elevate Rehnquist to the center chair and Antonin Scalia (1936-2016) of the DC Circuit of Appeals was chosen to take Rehnquist's spot as an associate justice. Rehnquist was deemed to be more conservative than Burger, and Scalia deemed more conservative than even Rehnquist.

His fellow justices were supportive of the move, as was Court personnel. Over the prior 14 prior years, he had established relationships across the ideological boundaries and among all people who worked in the Supreme Court building. Burger was universally unpopular and Rehnquist was a welcome choice.

Rehnquist's nomination was sent to the Judiciary Committee in July, 1986. His was the first confirmation hearing for a chief justice to be televised gavel-to-gavel. He was attacked by Senate Democrats, among them Joe Biden, for his perceived insensitivity to women and racial minorities.

Senator Ted Kennedy challenged Rehnquist on his unwitting ownership of a property that had a restrictive covenant against sale to Jews and his membership in an all-male private club. The Committee voted 13–5 to report the nomination to the Senate with a favorable recommendation.

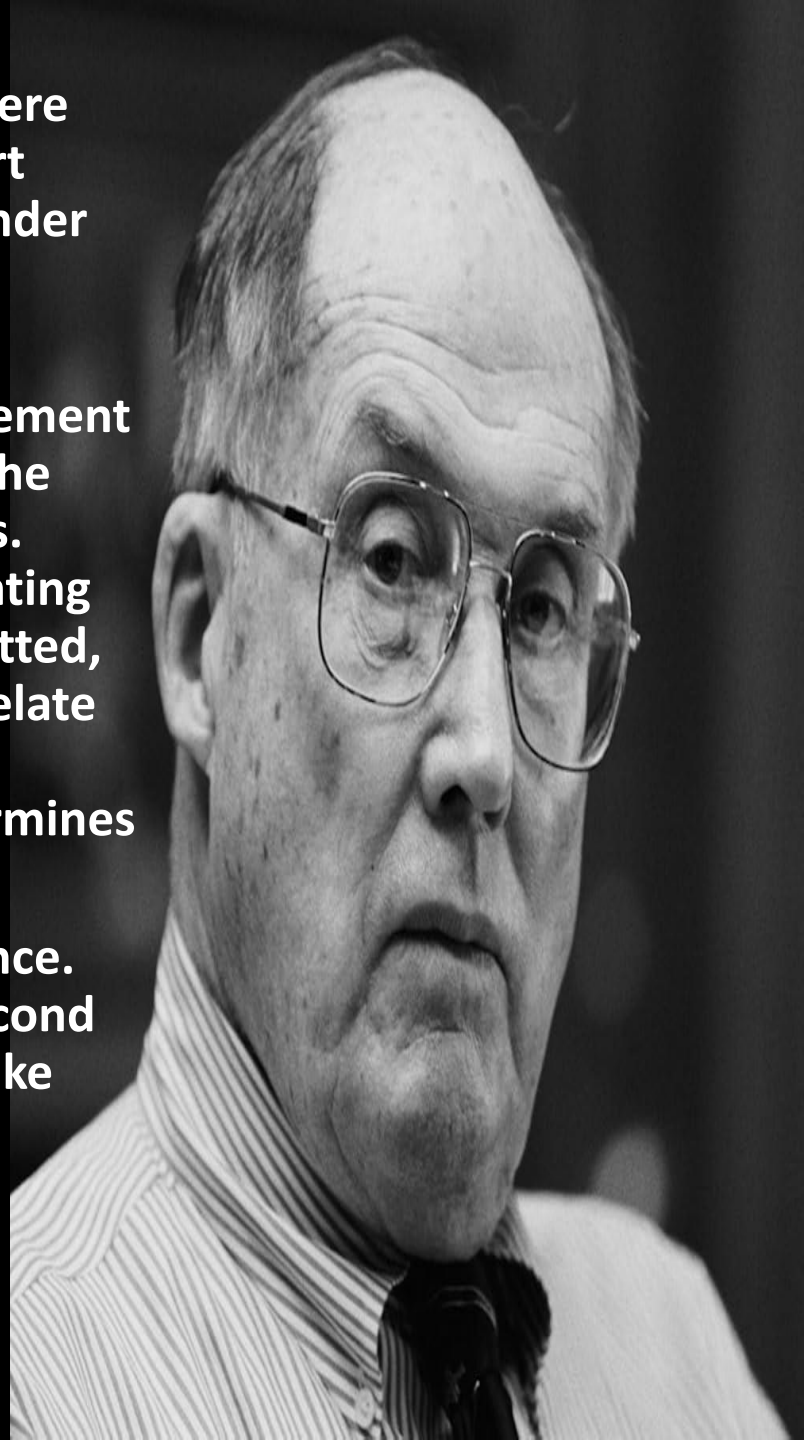
Despite various Democratic efforts to derail Rehnquist's confirmation, the Senate confirmed him on September 17. After cloture was invoked in a 68–31 vote, Rehnquist was approved by 65–33 (49 Republicans/16 Democrats voted in favor; 31 Democrats/2 Republicans voted opposed).

Following Rehnquist's confirmation, Scalia, who had faced no opposition from the Judiciary Committee, was confirmed by the full Senate 98-0. Both men where sworn in and took office on the same day, September 26, 1986. Rehnquist Court at first consisted of the new Chief, Scalia, and seven justices who had served under Burger – Brennan, White, Marshall, Blackmun, Powell, Stevens and O'Connor. Rehnquist remained as Chief Justice until his death in 2005.

In terms of the Court's administration, Rehnquist brought considerable management skill. As well, his amiable personality smoothed over much of the ill-will from the Burger years. Rehnquist streamlined the mechanics of the justices' conferences. These are closed-door meetings when the justices discuss and vote on the granting of cert and on cases just heard in oral argument. Clerks and staff are not permitted, only the nine justices. Each justice in order of seniority is given the chance to relate their view of the matter and a preliminary vote taken. Following this vote, the writing of the opinion is assigned. The most senior justice in the majority determines the assignment. If the Chief is in the majority, the Chief makes the assignment.

Under his direction, a justice to could not speak twice until each had spoken once. Unlike Burger, he was fair in assigning opinions: Rehnquist never assigned a second opinion to a justice until each had already been given an assignment. Also unlike Burger, he did not switch his vote to impact the writing of opinions. He would never involve himself in the writing of an opinion in a case when he was in the minority. These practices went a long way in cementing his position as Chief.

Rehnquist also convinced Congress in 1988 to give the Court control of its own docket, reducing mandatory appeals and cert grants.



In terms of its membership, the Rehnquist Court was known for the stability of its composition. Powell retired (in 1987), to be succeed by Kennedy. Liberals Brennan (in 1990) and Marshall (in 1991) stepped down, to be replaced by Souter and Thomas. The departures of White (in 1993) and Blackmun (in 1994), would see the first democratic appointees since Marshall with the arrival of Ginsburg and Breyer. These same nine justices would sit on the same court for 11 years from 1994 to 2005. This period marked a consistency unmatched during the modern era since the adoption of the Judiciary Act of 1869 setting up a nine member Supreme Court.

Rehnquist, who began as the “Lone Ranger” dissenting all by himself in 52 cases, would forge a mostly conservative consensus which moved the court to the right much as the country had done during the Reagan years. Although O'Connor and Kennedy would prove to be moderates or swing votes on certain social issues much in the tradition of Powell, they voted solidly with the Chief Justice, Scalia and Thomas on other matters forging a new conservative bloc. Stevens, Souter, Ginsburg, and Breyer formed the liberal bloc. The Rehnquist Court tilted 5/4 to the right curtailing but not overturning some of the excesses of the Warren and Burger eras.

Advocates in their briefs and in oral argument often pitched their points to appeal to the sensibilities of O'Connor, and the Rehnquist Court at times seemed to be more like the ‘O'Connor Court’. This situation frustrated conservatives, as Republican appointees like Stevens (appointed by Ford) and Souter (appointed by G.H.W. Bush) voted consistently liberal, while O’Connor and Kennedy (both of whom were appointed by Reagan) also voted with their liberal colleagues on certain cases. The Rehnquist Court was definitely to the right of the Burger Court, and it set the stage for the conservative rulings of the Roberts Court that followed.

The Supreme Court is an institution far more dominated by centrifugal forces, pushing toward individuality and independence, than it is by centripetal forces pulling for hierarchical ordering and institutional unity.

As an advocate of judicial restraint, Rehnquist thought that when construing the Constitution the intent of the framers was paramount.

From its inception, the Rehnquist Court was expected to overrule prior case law wholesale. This was not how things turned out once Rehnquist became the new Chief Justice.

All the same, and with the Chief in dissent, many liberal landmarks remained in place to the consternation of many conservative court watchers.

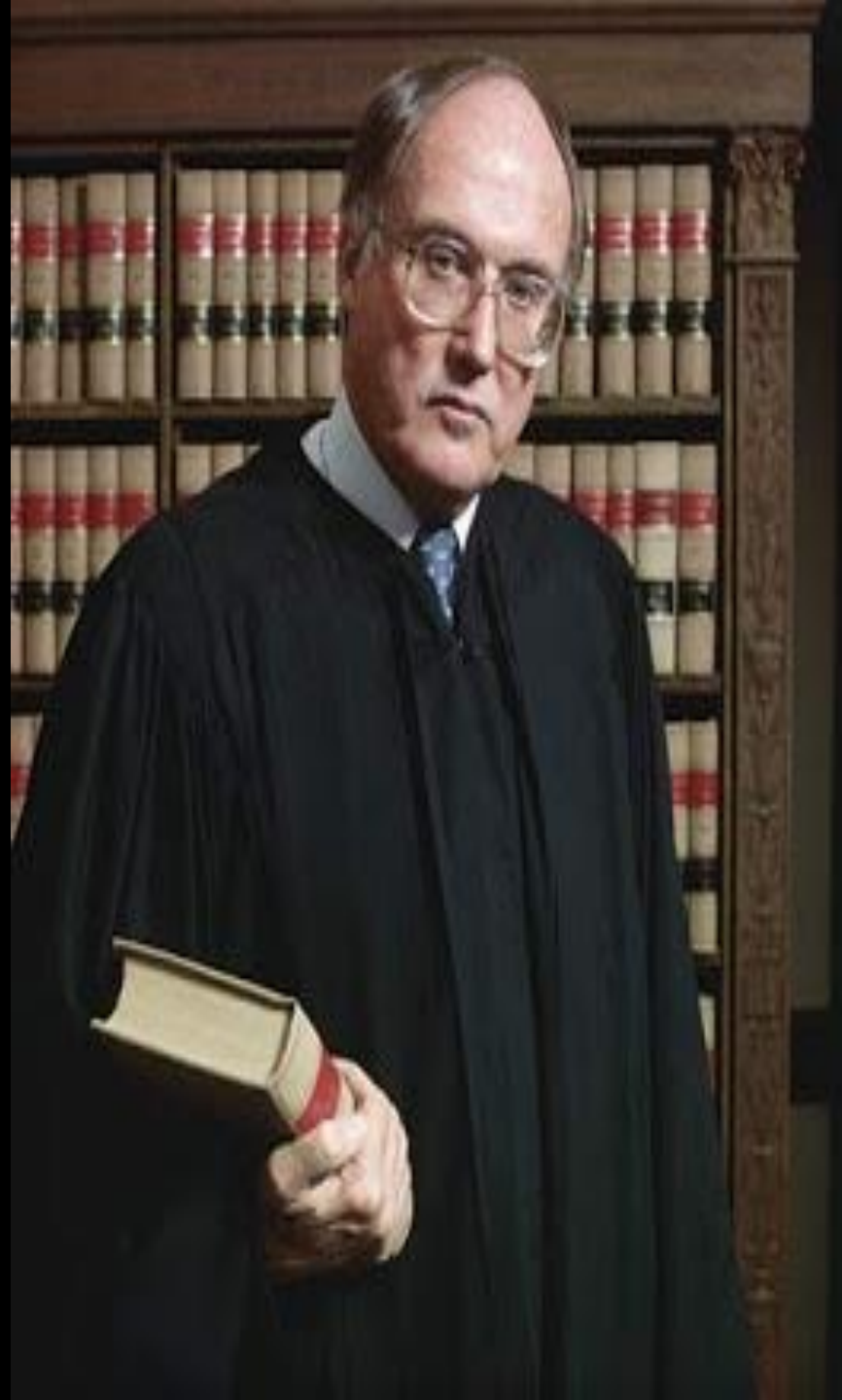
One such case, a 1st Amendment matter, the Court held 5–4, that burning the flag was protected speech in *Texas v Johnson*, 491 U.S. 397 (1989). A decision which was orchestrated by Brennan and in which Rehnquist dissented. It was Brennan's final triumph on the court. Scalia voted with Brennan on the case.

As an associate justice, Rehnquist joined the majority in *Bowers v Hardwick,* 478 U.S. 186 (1986) upholding a Georgia sodomy law as constitutional. As Chief, he joined the dissent by Scalia in *Romer v Evans,* 517 U.S. 620 (1996), a 6/3 ruling which held that a Colorado constitutional amendment denying protected status premised on sexual preference did not satisfy equal protection, arguing since the Constitution says nothing about this subject, *"it is left to be resolved by normal democratic means." Similarly, i*n *Lawrence v Texas*, 539 U.S. 558 (2003), a 6/3 majority reversed *Bowers* with the Chief joining a dissent also written by Scalia which balked to the majority's *"invention of a brand-new 'constitutional right.'"* This would be a frequent pattern.

Conservatives hoped that Rehnquist would lead his fellow conservative justices on the Supreme Court in reversing the Roe v Wade decision. In its jurisprudence, the Rehnquist Court would conversely place additional legal restrictions on abortion but at the same his Court reaffirmed the right to an abortion under the rubric of privacy as was first established in 1973. Rehnquist would find himself in the minority in a series of abortion cases, as O'Connor and Kennedy became the swing votes which sided with the Court's liberal bloc to maintain the legal regime created by *Roe v Wade*.

In 1992, *Roe* survived by a 5/4 vote in *Planned Parenthood v Casey*, 505 U.S. 833 which relied heavily on stare decisis. In his dissent in *Casey*, the Chief Justice argued *"that Roe was wrongly decided, and that it can and should be overruled consistently with our traditional approach to stare decisis in constitutional cases."* It was much the same outcome in a 5/4 ruling, with Rehnquist again dissenting, in *Stenberg v Carhart* 530 U.S. 914 (2000), where the Court overturned a Nebraska law which made outlawed the practice of partial-birth abortion as the statute was deemed to be violative of due process under the precedents set by both Roe and Casey.

The overturning of Roe would not come until 2022 in *Dobbs v Jackson Women's Health Organization*, 597 U.S. 215, where the court held that the Constitution does not confer a right to an abortion, leaving the matter for the states to decide. The court's decision formally overruled both *Roe* and *Casey*, returning to the states the power to regulate abortion policy. This decision came down during the tenure of John Roberts as Chief Justice, although Roberts himself did not want to explicitly overturn *Roe*.



A similar result can be seen regarding the issue of affirmative action and race based admissions. As evidenced by the ruling in *Grutter v Bollinger*, 539 U.S. 306 (2003), the 'O'Connor Court' upheld an admissions process favoring underrepresented minorities did not violate the Equal Protection Clause. This case stemmed from objections to the admissions process at the University of Michigan Law School. The school admitted that its admission process favored certain minority groups, but argued that there was a compelling state interest to ensure a *"critical mass"* of minority students. Grutter in effect upheld and added texture to the ruling in *Regents of the University of California v Bakke* 438 U.S. 265 (1978), which allowed race to be taken into account to promote a diverse student body but forbade the use of racial quotas.

In *Gratz v Bollinger* 539 U.S. 244 (2003), a separate case decided the same day dealing with undergraduate admissions at Michigan, the Court struck down a points-based admissions scheme that awarded an automatic 20 point bonus to the admissions scores of minority applicants. Rehnquist, for a 6–3 decision majority, held that Michigan's point system was unconstitutional.

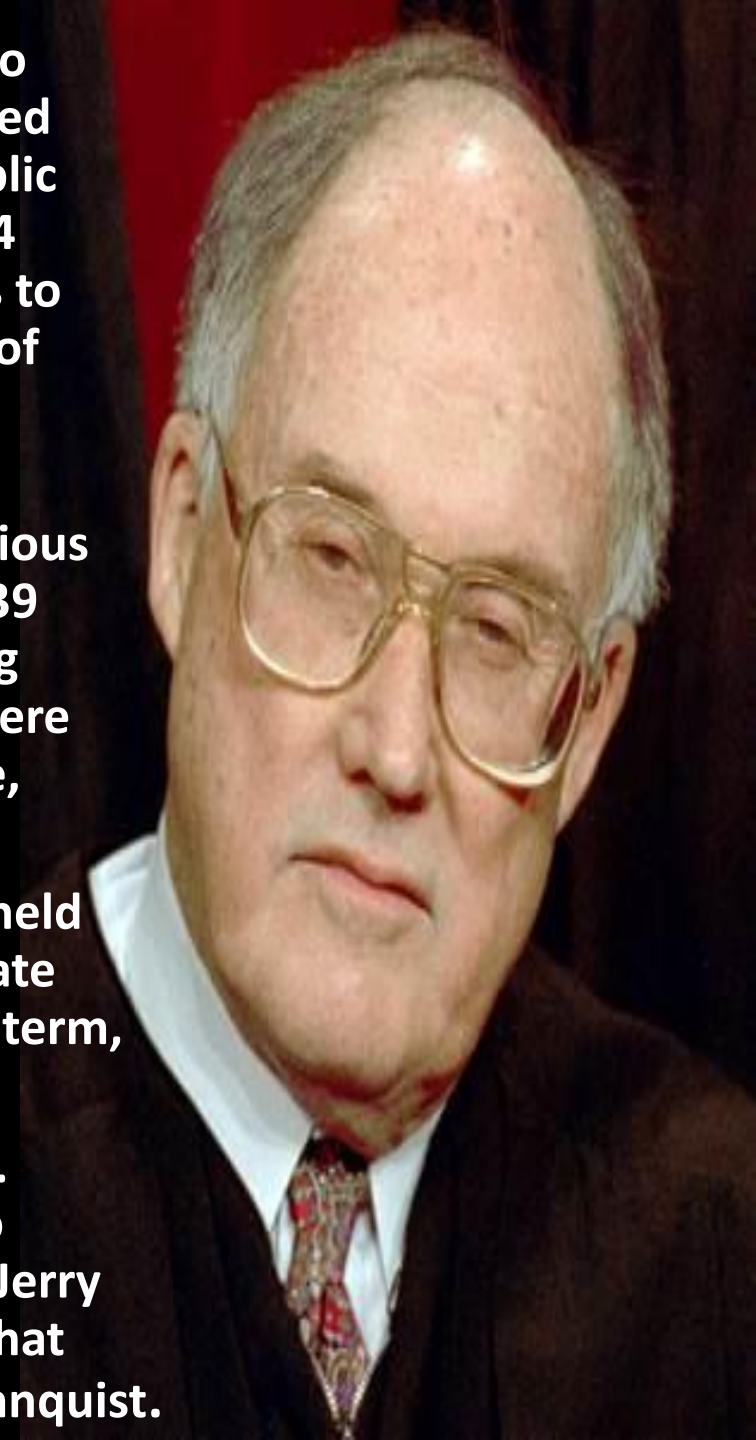
O'Connor in her 5/4 decision in *Grutter* ruled the Constitution "*does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."* O'Connor also wrote that *"race-conscious admissions policies must be limited in time,"* setting a 25-year expiration. In 2023, the Roberts Court effectively overruled *Grutter* in *Students for Fair Admissions v Harvard*, 600 U.S. 181 finding that affirmative action in student admissions violated the Equal Protection Clause.

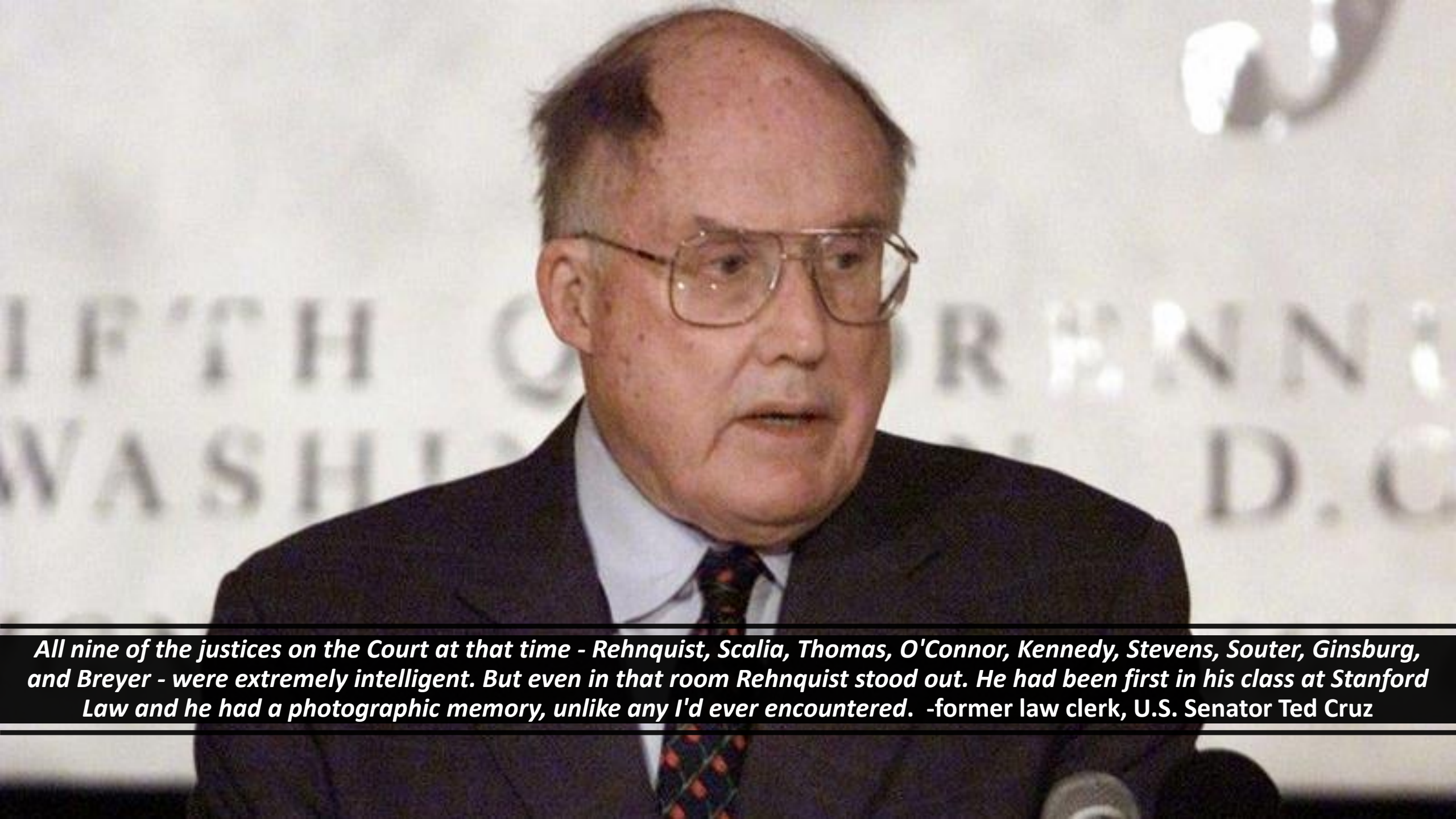
Again with the issue of prayer in the public schools, conservatives were notable to achieve their desired rulings with the Rehnquist Court. The Warren Court had ruled in *Engel v Vitale*, 370 U.S. 421 (1962) an official state sponsored prayer in the public schools violated the 1st Amendment. In *Lee v Weisman*, 505 U.S. 577 (1992), a 5/4 decision, in which Rehnquist dissented, held that schools may not sponsor clerics to conduct even non-denominational prayer. The Court sustained an interpretation of the Establishment Clause designed to enforce a strict ban on most forms of state sponsored religious exercises in the public schools.

Conversely, Rehnquist led the way in allowing for greater state assistance to religious schools, writing in a 5/4 majority opinion in *Zelman v Simmons-Harris* 536 U.S. 639 (2002) which approved a school voucher program that aided church schools along with other private, non-sectarian schools so long as parents using the program were allowed to choose among a range of secular and religious school. In this instance, O'Connor and Kennedy joined with Rehnquist, Scalia and Thomas.

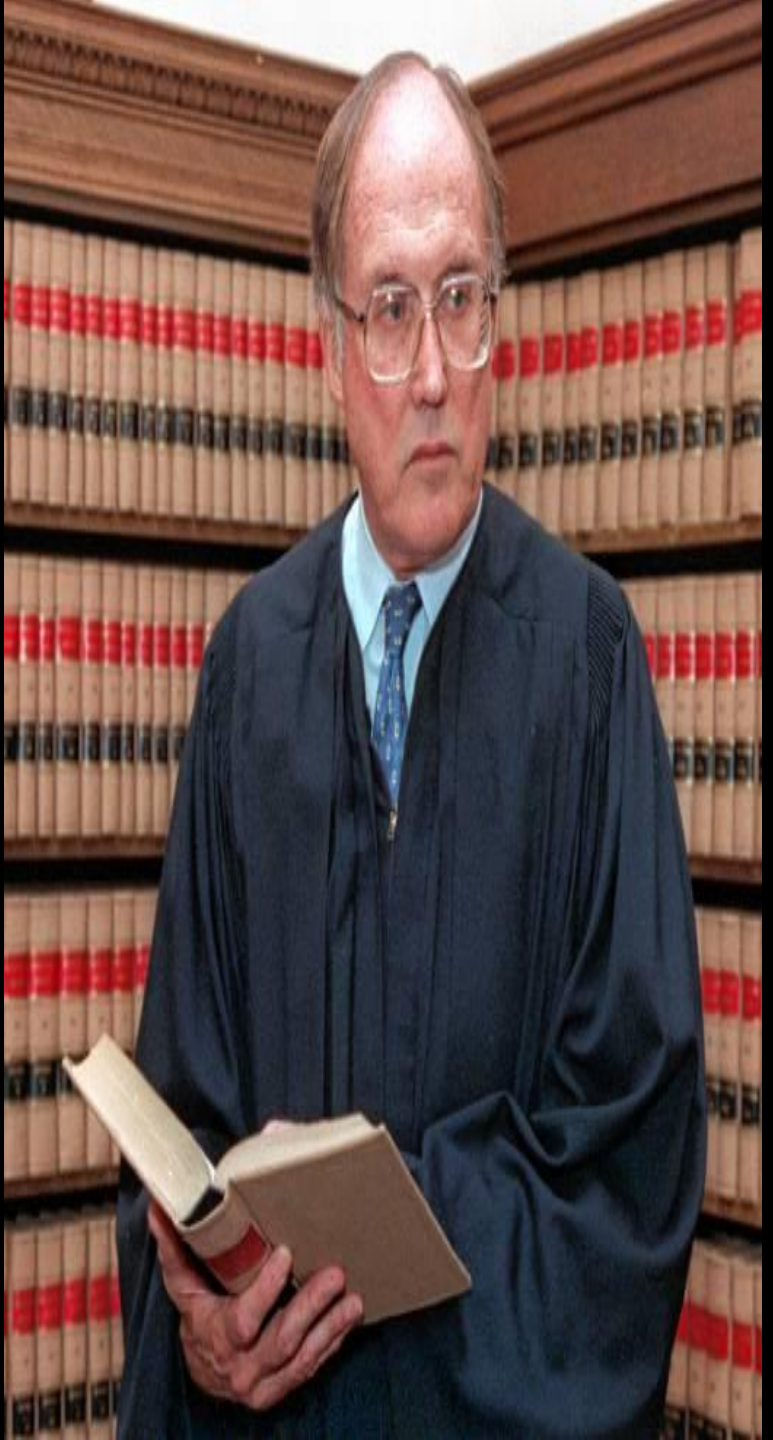
In *Van Orden v Perry* 545 U.S. 677 (2005), Rehnquist in a 5/4 plurality opinion upheld the constitutionality of a public display of the 10 Commandments at the Texas state capitol in Austin. This opinion, delivered on the last day of the court's 2004-2005 term, was a fitting testament as it was Rehnquist's final opinion as Chief Justice.

Yet his approach was not doctrinaire. In *Hustler Magazine, Inc. v Falwell*, 485 U.S. 46 (1988), Rehnquist held that parodies of public figures, even those intending to cause emotional distress, are protected under the 1st Amendment. Televangelist Jerry Falwell sued *Hustler* magazine for an offensive ad explicitly marked as a parody that was *"not to be taken seriously,."* The Court ruled 8/0 in an opinion written by Rehnquist.





All nine of the justices on the Court at that time - Rehnquist, Scalia, Thomas, O'Connor, Kennedy, Stevens, Souter, Ginsburg, and Breyer - were extremely intelligent. But even in that room Rehnquist stood out. He had been first in his class at Stanford Law and he had a photographic memory, unlike any I'd ever encountered. -former law clerk, U.S. Senator Ted Cruz



Rehnquist was more successful in promoting his view of the Equal Protection Clause in procedural matters. In *City of Boerne v Flores* 521 U.S. 507 (1997), the Rehnquist Court limited Congress's enforcement powers under Section 5 of the 14th Amendment striking down the Religious Freedom Restoration Act as applied to the states. A precedent was set requiring Congress to defer to the Court when interpreting the 14th Amendment (Equal Protection Clause). *Boerne* held a statute must demonstrate *"a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."* The Rehnquist Court undercut the ratchet theory found in *Katzenbach v Morgan* 384 US 361 (1966). Congress could now no longer ratchet civil rights beyond what the Court had recognized as doing so would mean Congress could define its powers by varying the 14th Amendment's meaning, the Constitution would not be a *"superior paramount law, unchangeable by ordinary means.".*

In *Alexander v Sandoval* (2001), which involved the issue of whether a citizen could sue a state for not providing driver's license exams in languages other than in English, Rehnquist voted with the majority in denying a private right to sue for discrimination based on race or national origin involving disparate impact under Title VI of the Civil Rights Act of 1964.

In *Kimel v Florida Board of Regents,* 528 U.S. 62 (2000), the Court held Congress had exceeded its power to enforce the Equal Protection Clause and Congress' enforcement powers to do not countenance the abrogation of a state's sovereign immunity under the 11th Amendment. The Rehnquist Court held discrimination by states based upon age (as opposed to race or gender) need satisfy only a rational basis review as opposed to a strict scrutiny standard.

The Rehnquist Court, in contrast to the direction of the Court since the New Deal, afforded much greater deference to the states, i.e. a conception of federalism where the balance between federal and state power tilted back ever so slightly in favor of the states. Rehnquist had a 5/4 majority that was willing to strike down federal laws which encroached on the authority of the states.

In *United States v Lopez* 514 U.S. 549 (1995), the Chief in 5/4 ruling struck down the Gun-Free School Zones Act of 1990. *Lopez* was the first time since 1937 a law enacted by Congress was overturned for exceeding the Commerce Clause. The Act made it a federal crime to have a handgun near or in a school, and the Court held that possession of a handgun is not economic activity with no substantial effect on interstate commerce. This decision in many ways harken back to the 1800's and the Marshall Court in *Gibbons v Ogden* 22 U.S. (9 Wheat.) 1 (1824) in which Chief Justice John Marshall (1755-1835) held that federal law may control state law only when necessary to effectively exercise an enumerated power, and it may not otherwise deny the states' authority to govern in the same area.

In another 5/4 ruling in *U.S. v Morrison*, 529 U.S. 598 (2000) Rehnquist held parts of the Violence Against Women Act of 1994 unconstitutional because it was in violation of the Commerce Clause and the Equal Protection Clause of the 14th Amendment. Rehnquist held that the Commerce Clause gave Congress only the power to regulate activities that directly economic in nature and the Equal Protection Clause applies only to acts by states, not to acts by private individuals.

It was an issue that animated the Chief Justice's jurisprudence. Rehnquist also promoted the doctrine of sovereign immunity which limits the ability of Congress to subject non-consenting states to lawsuits by individual citizens seeking damages.

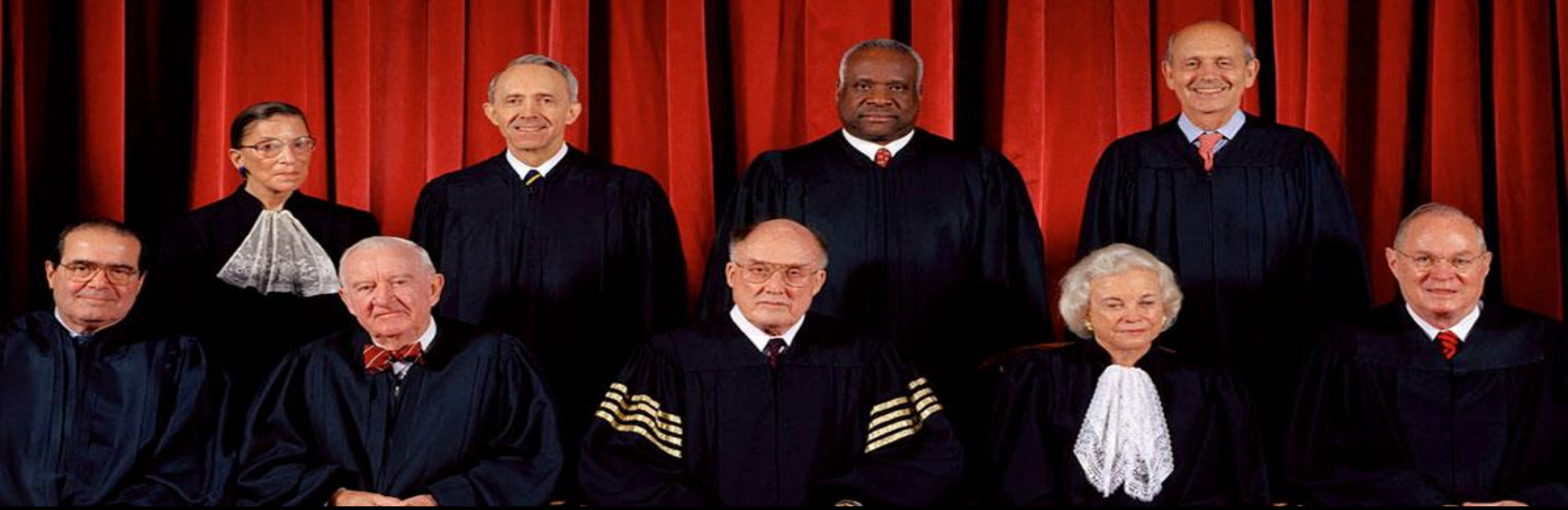
Rehnquist, in a handful of cases, voted for seemingly progressive measures in spite of his conscripted view of the 14th Amendment. Often he ruled this way, consistent with his conservative jurisprudence, on statutory grounds rather than based upon a constitutional interpretation. Ginsburg, when reflecting on Rehnquist, praised these rulings.

In *Meritor Savings Bank v Vinson* 477 U.S. 57 (1986), the Rehnquist Court ruled in a 9/0 decision recognizing sexual harassment in the workplace as a violation of Title VII of the 1964 Civil Rights Act. The case set the standards for analyzing whether conduct was unlawful and when an employer would be liable making sexual harassment an illegal form of discrimination, including protection against psychological aspects of harassment.

Nevada Department of Human Resources v Hibbs, 538 U.S. 721 (2003), Rehnquist, in the majority, wrote the Family & Medical Leave Act of 1993 was constitutional as a narrowly targeted sex-based overgeneralization guaranteeing working women, who Congress found bear the primary responsibility for caretaking, and was thus a *"valid exercise of [congressional] power under Section 5 of the 14th Amendment.* The FMLA allows for up to 12 work weeks of unpaid and authorizes employees to sue their employer for equitable relief and money damages.

In 1995, Rehnquist's robes had 4 yellow stripes sewn on. A departure from the customary attire of justices since the days of John Marshall.

Rehnquist enjoyed the music and appreciated the whimsy of the Victorian-era comic operettas of W.S. Gilbert (1836 –1911) and Arthur Sullivan (1842–1900). Rehnquist saw and appreciated the regalia worn by the character of the Lord Chancellor in a local community theater production of Gilbert & Sullivan's *Iolanthe.* Taking his fashion cues from the Lord Chancellor, the Chief Justice decided to distinguish himself from his colleagues and thereafter appeared in court with the same striped sleeves. His former clerk and successor as Chief Justice John Roberts decided to return to a plain black robe, saying in 2005 that he had to earned his stripes.



After a decade on the job, and with a court split along a 5/4 conservative/liberal axis, Rehnquist came into his own as the leader of the conservative wing and one of the dominant figures in the federal judiciary. He moved the Court perceptively to the right on many matters, particularly federalism, but the Rehnquist Court had limited success on the social issues like abortion and affirmative action. Yet even in dissent, Rehnquist made his most telling points in his opposition questioning the majority as to whether its decision was based on the Constitution or its desire to enact what it deemed to be a desirable social policy outcome. Rehnquist proved flexible enough to be an effective figure who led and directed the Court's energies. After all, being Chief is different than being an associate justice. By contrast to the conservative purity he exhibited during his Lone Ranger period, Rehnquist adopted a tactical approach which won victories where he could with the Court's lineup. It could be said, the Rehnquist Court planted seeds that came to fruition and set the stage for what transpired in the coming decades.

St. Petersburg Times

WEDNESDAY, December 13, 2000

DECISION: BUSH

Supreme Court rules against recount;

The court has built a great deal of prestige, and I think is generally quite well thought…. It is always possible for the court to overreach …perhaps declare a lot of laws unconstitutional and frustrate the will of the majority in a way that it ought not be frustrated. In that sense, it poses a danger, but not the same sort of perhaps very active danger that a run-away Congress or runaway executive would.

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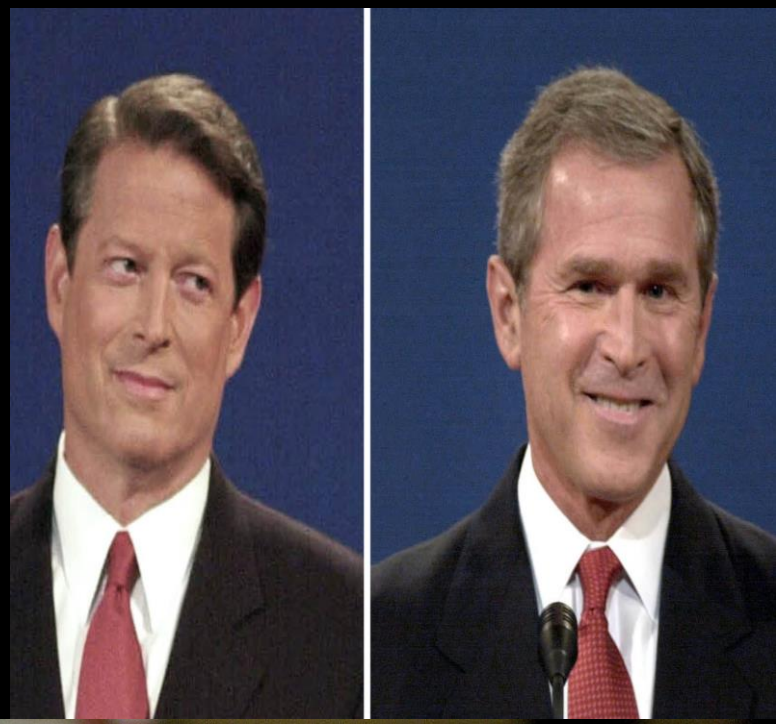
As Chief Justice, Rehnquist presided over the impeachment trial that decided the fate of one President and he led the Court in deciding who would emerge victorious in the 2000 election. The course of the American presidency for about a decade was influenced by his demeanor and his leadership.

Article I, Section III, Clause VI of the Constitution states the Chief Justice is the presiding officer in any impeachment trial involving the President. Rehnquist became only the 2nd chief justice to preside over just such an impeachment trial. Salmon Chase presided over the impeachment of Andrew Johnson in 1868 and John Roberts later presided over the trial of Donald Trump in 2020, but did not participate in the trial of Trump in 2021. In 1992, Rehnquist had written his historical tome *Grand Inquests*, which dealt with Johnson's trial.

Clinton's trial began on January 7, 1999, and concluded with the President's acquittal on the charges of perjury and obstruction of justice with neither receiving the required 2/3rds majority required for conviction. The charges arose from a sexual harassment lawsuit filed against Clinton. During pre-trial discovery, Clinton gave misleading testimony regarding his conduct.

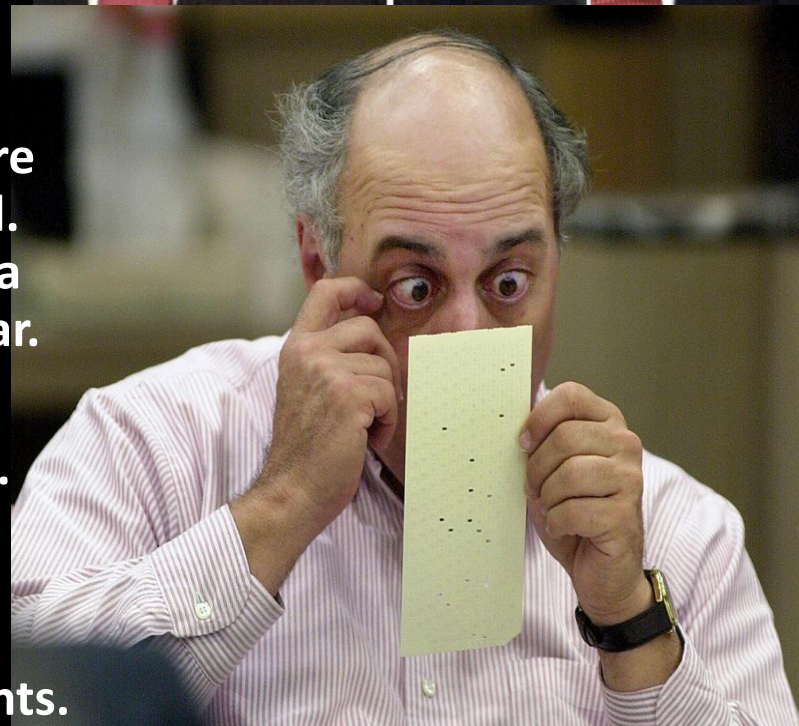
Rehnquist carried out his duties at the impeachment trial in the Senate while still fulfilling his duties at the Court. Rehnquist earned the approval of many for his dignified, neutral manner as the presiding officer of the proceedings, which were quite contentious and volatile. After all, Clinton's presidency was at stake. In a rather self-deprecating assessment of his performance, Rehnquist noted: *"I did nothing in particular, and I did it very well."* The Chief Justic discharged his duties admirably, with aplomb, and to the satisfaction of all involved.

The most controversial decision delivered during the Rehnquist Court's 19 years was its ruling in *Bush v Gore*, 531 U.S. 98 (2000). This case determined the outcome of the 2000 presidential election. That year the contest was between Texas Governor George W. Bush, the son of President G.H.W. Bush, and the sitting Vice-president Al Gore. It was one of the closest elections in history.



The outcome was riding on the electoral vote coming from Florida and the resulting recounts in the tabulation of the vote. On election day November 8th, the Florida Division of Elections reported Bush won by a margin of 1,784. State law required an automatic machine recount since Bush won by less than .5%, with 48% of the total vote. Support for Ralph Nader, a 3rd party candidate may cost Gore the state. On November 10th, with all machine recounts apparently complete in all but one county, Bush's margin of victory had fallen to 327 votes.

Florida permits a candidate to request a manual recount, and Gore selectively requested manual recounts in 4 Democratic leaning Florida counties. The 4 counties granted the request. Hence the saga of the 'hanging Chad' as the future occupant of the oval office hinged on how these disputed ballots were counted. But Florida law also mandated all counties certify election returns to the Florida secretary of state within 7 days of the election. ence the urgency of the calendar.



On November 14th, the statutory deadline, the Florida Circuit Court ruled that the deadline was mandatory but that the 4 counties could amend their returns. The Circuit Court also ruled the secretary of state had discretion to accept the amended returns in the statewide certification. On the 14th, Florida Secretary of State Katherine Harris announced she received the certified returns from all 67 counties, while 3 of the 4 counties disputed by Gore were conducting recounts.

In an epic legal battle that saw the case play out in Tallahassee and Washington, the stakes were the White House itself. On November 17th, the Florida Supreme Court enjoined Secretary of State Harris from certifying the election results and on November 21st, it allowed the continuation of manual recounts, delaying the certification until November 26, nearly two weeks past the 7 day statutory limit. The Constitution calls on the state legislatures, not the state courts from actually determining the electoral count of the given state for the electoral college.

December 8th saw the Florida Supreme Court, by a 4–3 vote, order a statewide manual recount of the undervotes, over 61,000 ballots that the vote tabulation machines had somehow missed. The Bush campaign immediately asked the U.S. Supreme Court to intervene, stay the Florida Supreme Court decision, and stop the recount. On December 9, ruling in response to an emergency request from Bush, the U.S. Supreme Court stayed the recount. The Court treated Bush's application as a petition for *certiorari*, it requested briefs and scheduled oral arguments for December 11. Because of the urgency involved, the Court would issue its on December 12th.

Before the Rehnquist Court was whether the recounts ordered by the Florida Supreme Court were constitutional, and whether there is an appropriate remedy if the recounts are indeed ruled invalid. Having already decided to stay the recount on December 9th, the Court now had to decide whether to permit it to resume. It was Bush's argument that recounts violated the Equal Protection Clause because Florida did not have a statewide vote recount standard. Gore countered that a statewide standard, the intent of the voter standard, existed and was sufficient for purposes under the Equal Protection Clause.

The Court's 5/4 per curium decision by Rehnquist, O'Connor, Scalia, Kennedy, and Thomas held that there existed an Equal Protection Clause violation, as such the recount ordered by the Florida Supreme Court had to be halted. Kennedy has since been identified as the opinion's primary author. The majority held that the use of different standards of counting in different counties results in an *"unequal evaluation of ballots in various respects"* which ran afoul of the 14th Amendment.

That the recount was to be halted was the remedy agreed to by the majority, as there was no alternative that could be found within the discretionary December 12 safe harbor deadline set by Title 3 of the United States Code (3 U.S.C.), § 5. The Court, holding that not meeting the safe harbor deadline would violate the Florida Election Code, rejected an extension to allow the counting of ballots under uniform guidelines. The opinion did not end the case but rather *"remanded for further proceedings not inconsistent with this opinion"* to the Florida Supreme Court.

Stevens, Souter, Ginsburg and Breyer dissented from both the December 9 and 12 decisions. Still 7 justices agreed (the majority and Breyer and Souter0) there was an equal protection issue. But Breyer and Souter preferred remanding the case to the Florida Supreme Court so that Court could devise uniform guidelines for counting disputed ballots before the scheduled December 18 meeting of Florida electors. Recounts could not have been completed in a timely fashion due to stoppages ordered by the various branches and levels of the state and federal judiciary.

Bush also argued that Article II gives the federal judiciary the power to interpret state election law in presidential elections to ensure the intent of the legislature is followed and not the Florida Supreme Court. Rehnquist, Scalia, and Thomas agreed.

Even if the Rehnquist Court had ruled otherwise, the Florida Legislature in Special Session met with the purpose of selecting a slate of electors should the recount issue continue. The slate would have gone to Bush, based on the state-certified vote, and Gore's likely last recourse would have been to force a contingent election in the House as provided for by the 12th Amendment. Gore, to his credit, withdrew although technically he could have continued on in the Florida Supreme Court, only to perhaps experience a subsequent defeat when the case went back to the U.S. Supreme Court.

The December 12 decision effectively ended the matter. The contested 25 electoral votes from Florida would go to Bush, for a 271-266 margin of victory in the electoral college and with it the presidency to Bush despite his losing the popular vote that year. Ever since, the decision has been controversial and it cast considerable doubt on the impartiality of the Court. But by any measure, the ruling in *Bush v Gore* makes the Rehnquist Court one of the most consequential in all of American history.

Applauded and decried, the ruling is certainly out of step with the political question doctrine. The political question doctrine holds that a dispute not suitable for a court's determination or explicitly concerning the political branches should be decided in the political rather than the legal realm. Judges customarily refused to address such issues, judicial restraint. For many, the outcome in *Bush v Gore* seemed nakedly partisan and damaged the reputation of the Court as an institution.

There has been commentary that the justice's retirement schedules, hoping to able to have a member of the justice's own party appoint their successor, played an undue role in the opinion. All nine members of the Court remained on the bench until after the next election in 2004. In response to being asked about the case, Scalia said *"Get Over It".* Rehnquist's final public appearance was at G.W. Bush's 2nd inaugural.

I want to put to rest the speculation and unfounded rumors of my imminent retirement... I am not about to announce my retirement. I will continue to perform my duties as chief justice as long as my health permits

On October 26, 2004, the Supreme Court press office announced that the Chief Justice was diagnosed with anaplastic thyroid cancer. An aggressive type of thyroid cancer, it is nearly always fatal due to its aggressive nature and its resistance to cancer therapies. Rehnquist swore in President G.W. Bush in January 2005. He had previously sworn in his father, G.H.W. Bush, Bill Clinton twice, and Bush the first time. Walking with a cane, Rehnquist administered the oath and left soon thereafter. It was widely seen as an act of great physical courage on his part to have participated.

Rehnquist's ailment forced him to miss 44 oral arguments in 2004 and early 2005. Often physically debilitated and absent from the Court, he resumed his work in March. He was nonetheless engaged in the business of the court, contributing to its work and expressed he had no intention to retire anytime soon. In response to press inquiries about his departure from the bench, Rehnquist replied, *"That's for me to know and you to find out."*

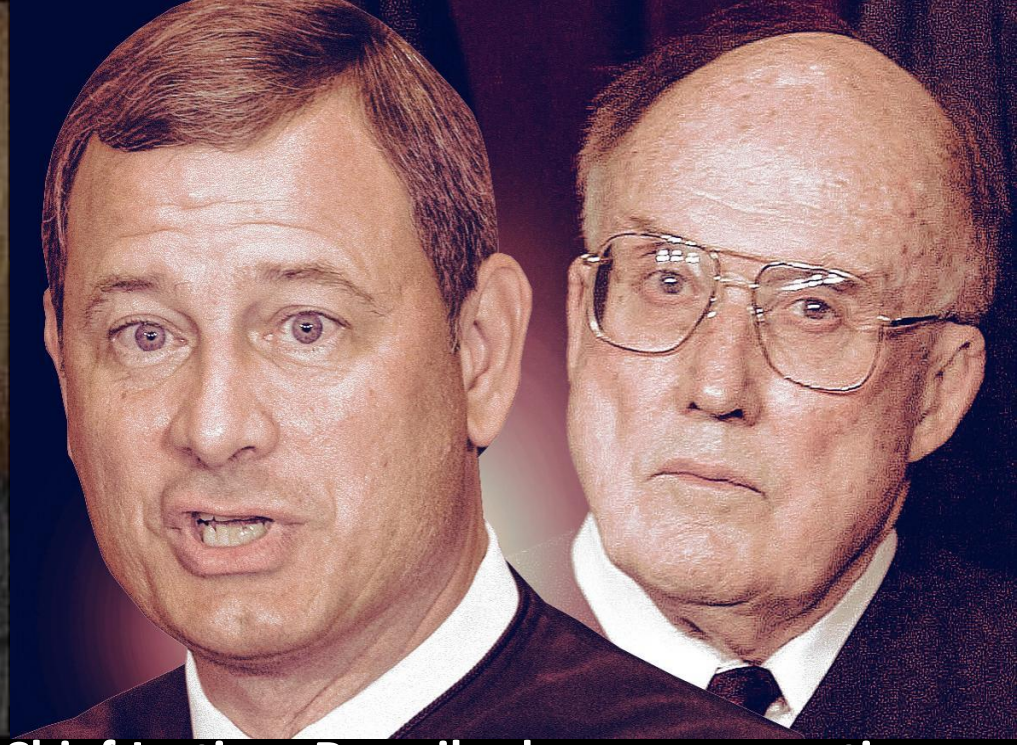
Rehnquist died at his home on September 3, 2005, at age 80. He was the first justice to die in office since Robert Jackson, for whom he clerked, and the first chief justice to die in office since Fred Vinson in 1953.

Prior to Rehnquist's death, O'Connor had announced her retirement. John Roberts of the D.C. Circuit Court of Appeals was already nominated by President Bush to replace O'Connor as an associate justice. The nomination was subsequently withdrawn and Samuel Alito of the 3rd Circuit was named in her stead. Roberts was then nominated for the post of Chief Justice. It marked the end of an era on the Court that first began in 1972.

Rehnquist's death left a void on the Court. His passing was profoundly felt by all who served with him and beyond by those who shared his vison of the law.. On September 6, 2005, Rehnquist's former law clerks, among them John Roberts, carried his casket where he lay in repose at the Great Hall of the Supreme Court, his home for a third of a century. His funeral, a Lutheran service, was held at the Cathedral of St. Matthew the Apostle, wherein all three branches were represented.

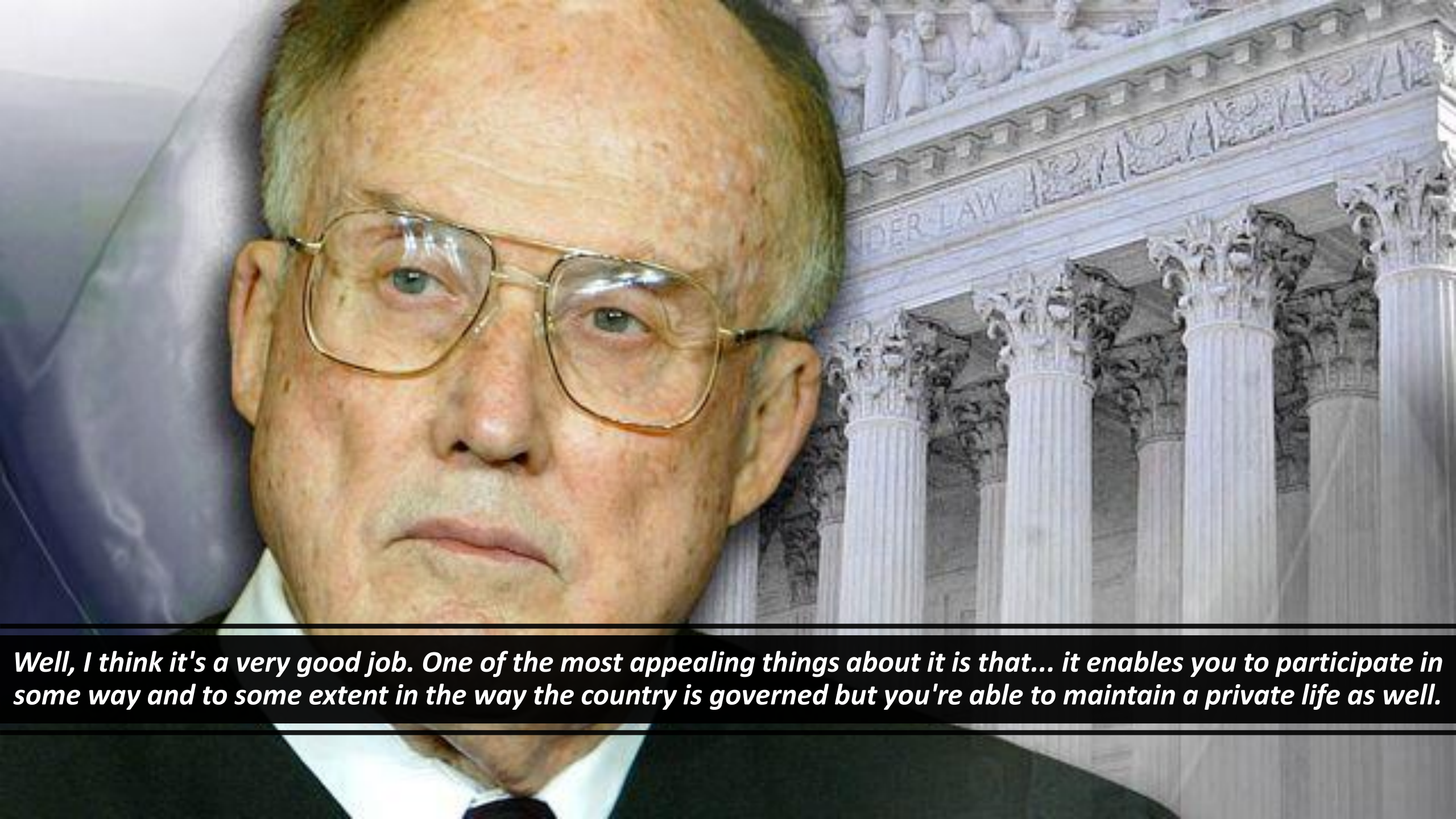
Rehnquist was remembered by his family. President G.W. Bush and Justice O'Connor delivered eulogies. He was buried beside his late wife, Nan, at Arlington Cemetery.

Justice O'Connor ended her eulogy by declaring: *Now, as the chief would say: 'Counsel, the red light is on. Your time is up.* As she passed a pew of Supreme Court reporters, she clutched her handbag and silently mouthed a single word: "Sad." They had known each other for 55 years.



John Roberts Jr. (born 1955) succeeded Rehnquist in 2005 as the 17th Chief Justice. Described as a conservative institutionalist, Robert was appointed by G.W. Bush. His judicial philosophy is generally described as conservative, but his temperament leans toward a moderate orientation that values the image of the Court as an institution. Roberts enjoys a close connection to his predecessor, having clerked for Rehnquist during the 1980-1981 term. By comparison, he is more attuned to the Rehnquist who served as the Chief Justice during his latter 19 years than the conservative iconoclast that was Rehnquist as a "Lone Ranger" figure. He also is more conciliatory than colleagues such as Scalia, Thomas or Alito, who generally share his views.

Roberts moved the Court to the right on several issues during his initial years, but fearing a controversial decision may unduly impair the Court's reputation he has on occasion sided with the liberal bloc, acting for a time as a swing vote. That was until the appointment of Neil Gorsuch, Bret Kavanaugh, and Amy Comey Barret provided for a 6/3 conservative super majority. As such, Roberts seems to have taken a back seat as 5 conservatives, led by Thomas and Alito, provide a solid conservative majority regardless of how the Chief Justice votes.



Well, I think it's a very good job. One of the most appealing things about it is that... it enables you to participate in some way and to some extent in the way the country is governed but you're able to maintain a private life as well.

Thomas Loepp,
Collection of the Supreme Court

During Rehnquist's tenure as both an Associate Justice and as Chief Justice, he demonstrated not only considerable legal acumen, but more importantly a quality for leadership that marks him as one of the great Chief Justices. To date, their have been only 17. And if a Mount Rushmore of Chef Justice were to be assembled, Rehnquist would be there along side John Marshall.

In that mold, Rehnquist commanded respect. And he did so in spite of the divisions over significant Constitutional issues that marked his 33 years at the Court. His even temperament, his consideration of his fellow justices, his pragmatic efforts to craft a conservative majority over time, all place him in the pantheon of great American jurists. Ever mindful of his role as Chief, even liberal justices recognized his innate fairness and his ability to work with others despite ideological barriers or differing Constitutional interpretations.

Rehnquist's conservatism made him a staunch defender of the Constitution. He believed that the judiciary should interpret rather than make the law. Rehnquist was committed to the idea that the only means of conserving individual liberty is by limiting the power and scope of the federal government, including that of the judiciary which should not be able legislate from the bench or dictate policy outcomes which judges find preferable.

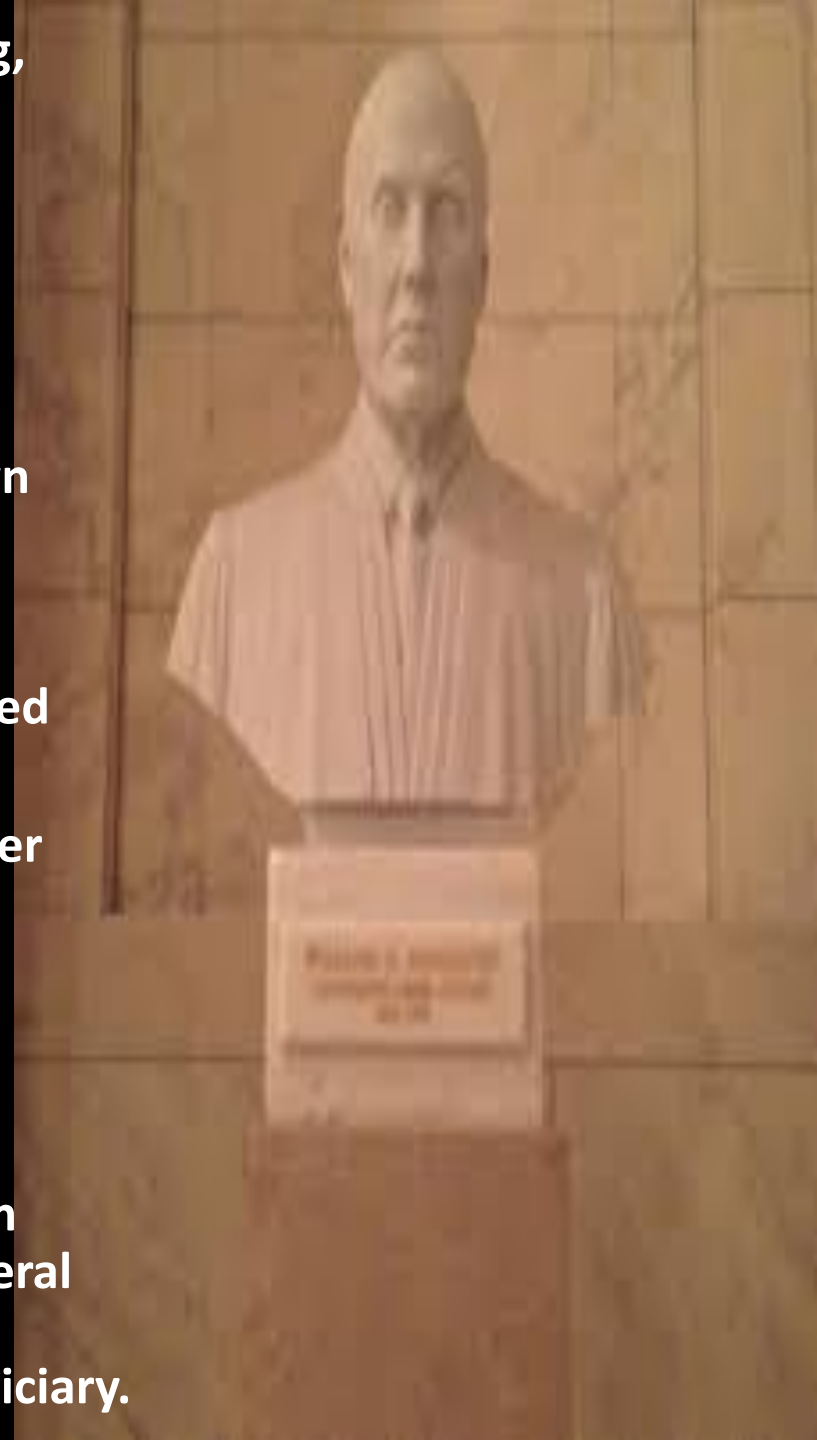
His method of interpretation was constrained by the Constitution's text. What mattered was the Constitution as it was understood by the framers. In terms of statutory construction, he eschewed legislative history favoring a reading of the laws of the United States as they were actually written and codified by the Congress. If change was needed, it was up to Congress to pass a law.

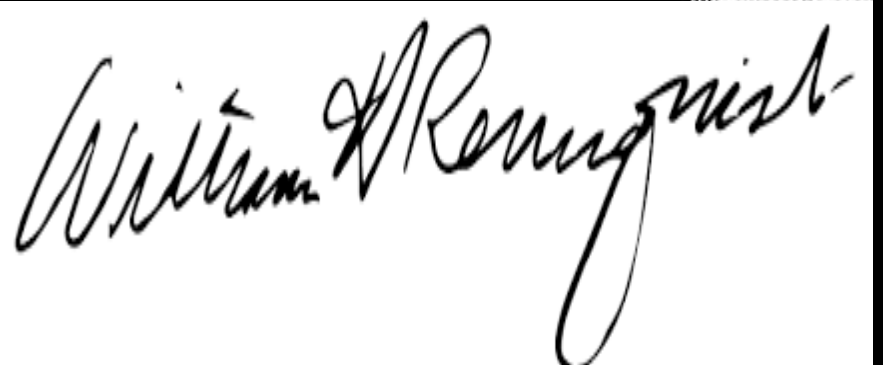
In contrast to the activist Warren Court or the Burger Court that plodded along, the Rehnquist Court was directed to an approach to judicial decision making that sought to incorporate his understanding that courts must enforce the limitations on federal power imposed by the Constitution. He successfully promoted a federalism in which the Supreme Court gave greater deference to the states by reigning in the prevalent interpretation of the Commerce Clause.

Rehnquist put together a fragile 5/4 conservative coalition that challenged much of previous orthodoxy. In doing so, his conservative majority struck down federal laws that a 5/4 majority was able to have declared unconstitutional. Even when unsuccessful, inroads were made. The Rehnquist Court, although unable to end legalized abortion under *Roe*, was able to place restrictions on abortion practices at the margins. In the area of criminal procedure, he curtailed the excess of the Warren era but he did ultimately vote to uphold *Miranda.*

Unable to restore prayer in the public schools, Rehnquist championed a broader understanding of Church/State relations, arguing the Constitution guarantees government neutrality toward religion rather than removing religion from the public square entirely. Thus his Court was able to bolster religious schools and religious liberty claims against challenges under the Establishment Clause of the 1st Amendment when able.

This not surprisingly opened the Rehnquist court to much of the same criticism that conservatives directed at the Warren court. In the estimation of many liberal commentators, charges of judicial activism not judicial restraint were in order. Yet he preserved judicial independence and the prerogatives of the federal judiciary.





The role of Chief Justice suited William Rehnquist perfectly. His tenure leaves an indelible mark on the legal landscape. As both an Associate Justice and as Chief Justice, he served with distinction as he embraced the legal issues of his day and sought to bring to his duties an understanding that was consistent with the framers' intent. He always maintained a strong sense of personal as well as judicial independence.

He had to endure charges that his opinions were too closely wedded to his philosophy. However, when examined closely, it should be noted that he on occasion did vote with the majority when he became the Chief Justice on institutional grounds. Rehnquist brought order to the court and a sense of competence that imbued confidence, save for the ruling in *Bush v Gore*.

Through his life's work, he earned the admiration, the respect and often the votes of his colleagues. He could be quite funny and charming, he was intelligent and quick witted. He could make the conservative case on any legal issue, and do so with elegance and brilliance. Yet his conservatism was not an end in itself. He changed the prevailing dynamic on the Court and he altered the direction of American Constitutional law.

Chief Justice Rehnquist approached each case with integrity and humility. He never forgot that any form judging that bespeaks of arrogance through a disregard for the will of the people as embodied in either the text of the Constitution or the statutes duly enacted by the people's representatives is not only inherently unconstitutional but profoundly mistaken. His legacy is secure and it continues to thrive.