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Rehnquist helped lead court, country to right

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WASHINGTON - In October 1971, President Nixon was looking to fill two U.S. Supreme Court openings with nominees who would steer a more conservative legal course.

During a telephone call, Sen. Barry Goldwater, R-Ariz., had a suggestion: "Bill Rensler."

"Oh, I know Rensler well," Nixon replied. "He's an excellent man."

Though both got his name wrong, Nixon and Goldwater were talking about the same former Phoenix lawyer.

That man was William Hubbs Rehnquist, according to an insider account by John Dean, Nixon's White House counsel, in his 2001 book, *The Rehnquist Choice*. By Jan. 7, 1972, Rehnquist would be sworn in as an associate justice. On Sept. 26, 1986, he would take the oath as President Reagan's choice for chief justice.

On Saturday, more than 33 years after he arrived as a barely known Nixon appointee to the U.S. Supreme Court, Rehnquist died in his home in Arlington, Va. His death came more than 10 months after the Court first reported he had thyroid cancer. Over the years, the nation's 16th chief justice did more than simply steer a more conservative course.

Legal scholars, practitioners and pundits agree that Rehnquist, 80, virtually propelled the court to a profound and historic shift away from ideals of the era of former Chief Justice Earl Warren that espoused strong national government and historic civil rights cases.

Marked by its emphasis on states' rights and its rulings on such controversial issues as affirmative action and a presidential election, the Rehnquist court:

- Scaled back congressional power and established a stronger respect for state sovereignty, such as when it struckdown a law that imposed a nationwide ban on firearms possession near a school.
- Limited the reach of federal courts to review alleged constitutional violations, including dramatically cutting death-row prisoners' abilities to challenge their cases in federal court.
- Nibbled away at rules barring use of evidence during trial that is questionably obtained, even as it upheld *Miranda vs. Arizona*, the 1966 Supreme Court decision

requiring police to inform crime suspects of their right against self-incrimination and to have a lawyer present during questioning.

- Set tougher standards for establishment of affirmative-action policies, helping to curtail government efforts to use racial classifications to assist members of racial minorities.
- Eased restrictions on how public money could be spent on private religious schools.
- Allowed White voters to challenge Black-majority congressional districts, which had been intended to improve minority voting power.

But the Rehnquist court did not always deliver in key areas where conservatives wanted more. Though it incrementally nipped at some privacy doctrines and chipped away at *Roe vs. Wade*, his court continued to preserve that 1973 ruling making abortion legal nationwide.

And there were other less-expected actions. Even Rehnquist's critics give his court positive marks for keeping alive efforts to fight discrimination against homosexuals, maintaining a ban on officially sanctioned school prayer and protecting traditional speech and ending the executions of juveniles and the mentally disabled.

Mixed reviews

Whether or not they agree with his legal views, many analysts say Rehnquist brought the court more in line with a changing nation as it was tilting to the right, leaving a legacy that could rank him as among the most influential chief justices in history.

They point particularly to the area of federalism, meaning the court's role in shifting the power of central government to states and private associations and away from a strong deference to Congress.

"He has done for the Supreme Court what Ronald Reagan did for the presidency: articulated a new conservative vision," said Richard Seamon, a University of Idaho law professor who argued before Rehnquist's court as an assistant U.S. solicitor general from 1990-96.

"The conservative revolution that Reagan is credited with bringing about, Rehnquist actually had a lot to do with," added Seamon, who was a law clerk for Kenneth Starr, the former Whitewater prosecutor, when Starr was a judge.

Others aren't so admiring of the man who wrote the majority opinion in *Bush vs. Gore*, stopping a Florida vote recount in the 2000 presidential election, and who

presided over the impeachment trial of President Clinton. "He's presided over a real retrenchment in both American constitutional law and law generally in a way that is more conservative than people realize, more conservative than people are, and that has profound consequences over a wide range of law," said Peter Rubin, a member of Vice President Al Gore's legal team in the Florida ballot case.

Rehnquist has not done his work alone, of course. He was helped by a string of other Republican presidential appointments, including Arizonan Sandra Day O'Connor, who gradually turned a more liberal Supreme Court led by Chief Justices Warren (1953-69) and Warren Burger (1969-86) into being more conservative, like himself.

There were some personal quirks and miscues.

There was Rehnquist's sudden adorning of the sleeves of his long black judicial robes with gold stripes, inspired by a Gilbert and Sullivan operetta, during the Clinton impeachment hearings. A bit of whimsy, he acknowledged.

He once borrowed the words of a popular song in writing a memo to exhort fellow justices to meet a deadline crunch for finishing written opinions: "Accentuate the positive/Eliminate the negative/Latch on to the affirmative/Don't mess with Mr. In Between."

And Rehnquist struck a particularly sour note when he publicly led a rendition of *Dixie* while attending a judicial event in Virginia in 1999, angering many lawyers and others who view the tune as a wistful ode to a defeated racist society.

Inside the courtroom, Rehnquist was a stickler for formality, even correcting nervous lawyers who mistakenly called him "judge" by noting his title was actually "chief justice of the United States."

But Rubin and others say this rigid courtroom persona was nothing like the private man.

They say Rehnquist was among the few justices who would learn the names of all the court's clerks, and the one most likely to lend somebody \$100.

For years, before his recent battles with thyroid cancer, strangers could get a nod or a smile on almost any day from Rehnquist, as the lanky, 6-foot-3 jurist took his daily morning stroll around the Supreme Court building.

It likely will be decades, or longer, before Rehnquist's rightful place in U.S. history is sorted out by scholars and historians. "Rehnquist's legacy is very much a matter for debate," said Jonathan Turley, who teaches constitutional law at George Washington University in Washington, D.C. "The legacy itself changes in the eyes of the beholder."

The Arizona years

At the core of that debate are key questions.

How much of modern American law that Rehnquist helped to establish was truly rooted in a strict interpretation of the U.S. Constitution, as he claims?

And how much came from Rehnquist's own conservative political and social beliefs, honed during his years as a rock-solid Goldwater Republican in Arizona in the

1950s and 1960s?

Rehnquist's journey to the Supreme Court included, before Arizona, a conservative upbringing in Milwaukee, education at Stanford and Harvard universities, and Stanford Law School. He graduated at the top of his law class in 1952 and even briefly dated classmate O'Connor.

After law school, Rehnquist returned east to serve as law clerk for Supreme Court Justice Robert Jackson. A year later, in 1953, he moved to Phoenix to work at the firm of Evan, Hull, Kitchel and Jenckes.

Rehnquist said in a 2001 interview with *The Arizona Republic* that he was drawn to Phoenix because of the weather and a desire to live in a small city. He and his wife, Natalie, who died in 1991, bought a house near 16th Street and Bethany Home Road and began raising a family.

Rehnquist soon would pair with another young Phoenix lawyer, James Powers, to form a law firm.

"He was obviously bright, a good lawyer, and served his clients well. When it got to be 5 p.m., he closed his law books and went home," Powers said of his former partner. "He didn't fuss over things."

In those years, Powers said, there was little doubt as to Rehnquist's political leanings.

"He was very conservative . . .," Powers said, noting that Rehnquist devoted much of his free time to political activities.

"I was fairly active on the Democratic side of things," Powers said.

The two young lawyers made a pact that, in order to stay friends, they would not talk politics at the office.

In 1957, Rehnquist gave a speech to the Maricopa Young Republican League, criticizing what he saw as the liberal activism of the Warren court.

He warned that Chief Justice Warren and other justices were "left-wing philosophers" who were making the U.S. Constitution say what they wanted.

In 1964, Rehnquist opposed, as a private citizen, a proposed Phoenix ordinance to require local restaurants and other businesses to serve people of all races and religions.

Rehnquist told the City Council at the time, "It is, I believe, impossible to justify the sacrifice of even a portion of our historic individual freedom for a purpose such as this."

That same year, Rehnquist worked as a speechwriter for Arizona's favorite-son presidential candidate, Republican nominee Barry Goldwater.

Goldwater biographer Rick Perlstein wrote that Rehnquist drafted the bulk of a key Goldwater speech, delivered at a Chicago fund-raiser, in which Goldwater made his most forceful attack on federal civil rights laws and their encroachment on individual liberties. "Our aim as I understand it is neither to establish a segregated society nor to establish an integrated society," Goldwater said in that speech. "It is to preserve a free society."

Rehnquist, in the 2001 interview with *The Republic*, explained that he and others at the time didn't like the idea of a lot of regulation of private business. But eventually, he said, they saw that civil rights laws were good for the country and had not

caused any "catastrophic" consequences.

There also were political activities in Phoenix, such as Rehnquist serving as a legal adviser to Republican election "challengers" assigned to various polling places in the city from 1958-68.

At Rehnquist's Supreme Court and chief justice confirmation hearings in 1971 and 1986, liberal Democratic senators alleged that Rehnquist participated in GOP "squads" that would dart among Phoenix voting precincts on election days, confronting Blacks and Hispanics to intimidate and discourage them from voting.

Those senators, led by Edward Kennedy, D-Mass., produced witness statements from Phoenix. The extent of Rehnquist's involvement remains cloudy. Rehnquist flatly denied having any role in challenging voters between 1958 and 1968.

What Nixon wanted

The autumn of 1971 marked a remarkable turn of events for Rehnquist, then in his mid-40s.

He had just been confirmed by the Senate, was waiting to be sworn into the U.S. Supreme Court, and was getting some advice from Nixon to be tough.

By Dean's account, Rehnquist did not emerge in 1971 as a candidate for one of two open seats on the court until after about a half-dozen other candidates' names were raised inside the White House and dropped for one reason or another.

In fact, Dean wrote, it was almost on a lark that Dean had come to first suggest Rehnquist to Nixon for one of the two seats vacated by Justices Hugo Black and John Harlan.

Previously, the president's only encounter with Rehnquist had been seeing him at a White House meeting dressed in Hush Puppies, a pink shirt, a psychedelic tie and sporting bushy muttonchops, which prompted Nixon at one point to ask Dean who that "clown" was.

Eventually though, Dean wrote, Rehnquist emerged as a top candidate, in part because he seemed someone who would help achieve the president's agenda.

Nixon wanted a "law and order" appointee who would help reverse what he saw as the Warren court's "coddling of criminal defendants."

Rehnquist came to Washington from Phoenix in 1969 to work as an assistant attorney general for the Justice Department's Office of Legal Counsel. He was brought to the nation's capital by Richard Kleindienst, whom he had come to know from working together in Arizona Republican politics. Kleindienst became attorney general in 1972.

Based on his work with the Justice Department and earlier work with Goldwater, Rehnquist passed all the political tests, Dean wrote.

And he was smart. Nixon particularly liked that Rehnquist was first in his class at Stanford.

Some Democrats weren't so enamored of him.

During Rehnquist's Senate confirmation hearings, they raised some of his controversial political activities, including his voter "challenger" activities in Phoenix. Rehnquist responded that he only provided legal advice to challengers and was not a challenger himself.

More troubling for the White House was the surfacing during that hearing of a Rehnquist memo titled "A Random Thought on the Segregation Cases."

Rehnquist wrote the memo in 1952 while he was a law clerk to Justice Jackson as the Supreme Court was considering *Brown vs. Board of Education of Topeka*, the landmark case that made racial segregation of schools by states illegal.

In the memo, Rehnquist urged that the "separate but equal" doctrine not be overruled.

During his confirmation hearings, Rehnquist explained to senators that the memo did not actually embody his own views. Rather, he said, he had prepared it at Jackson's request to represent the justice's perspectives.

Ultimately, these questions did not derail Rehnquist's nomination and he was confirmed on Dec. 10, 1971, by a Senate vote of 68-26.

The following Jan. 7, Rehnquist, along with Lewis Powell, was sworn in as an associate justice.

'Lone Ranger'

As Nixon had urged, Rehnquist stayed true to conservative beliefs throughout his early years on the court. He typically stood alone in voting against the majority of more-liberal justices.

"When Rehnquist was nominated, Nixon said that people will see that this guy is so far right that he'd curl their hair," said Herman Schwartz, a professor at the Washington College of Law at American University and the editor of several books, including *The Rehnquist Court: Judicial Activism on the Right*.

Schwartz said Rehnquist in those early years consistently was the lone opposing vote on measures involving women's rights, civil rights, prisoners' rights and claims that government was sponsoring religion.

In fact, Schwartz said, Rehnquist's frequent solitary dissents from the court's decisions in the 1970s prompted several of his own law clerks to kiddingly buy him a "Lone Ranger" action figure.

In 1986, after being tapped by President Reagan to replace the retiring Burger as chief justice, it came as no surprise that Kennedy and other Senate Democrats would set out to paint Rehnquist as too extreme to sit in the center chair.

On the Senate floor, Kennedy asked his colleagues to look at Rehnquist's record on the court and to imagine what would have happened if "his cramped and narrow view of the Constitution had prevailed in the years since World War II."

Kennedy suggested that schools still would be segregated, women still would be second-class citizens and charges of police brutality would be ignored.

In addition, the old Phoenix allegations about voter harassment were resurrected, along with charges that the deed to Rehnquist's house in Phoenix had contained a racially restrictive covenant. Rehnquist said he was unaware of the covenant.

None of the arguments scuttled Rehnquist's nomination. But no other chief justice nominee ever has received more votes in opposition. Still, by 65-33, Rehnquist was confirmed.

Managing the court

Republican occupation of the White House in 24 of the past 36 years has led to eventual Republican dominance of the Supreme Court.

But during Rehnquist's first eight years as chief justice, the court remained in a state of flux, with six justices departing.

With the appointment of Clarence Thomas in 1991, Rehnquist, for his first time as chief justice, had a conservative majority. But the court's conservatives have turned out to be far from monolithic in their ideological consistencies.

In 2000, for instance, roughly one-third of the cases were decided by one vote, 5-4, said Turley, the George Washington University law professor. And more than half of those were by a coalition of justices - Antonin Scalia, Thomas, O'Connor and Anthony Kennedy - who joined the chief justice.

But a loss of just one of those judicial votes, more often O'Connor or Kennedy, has sent rulings the other way.

Rubin noted that there are areas in which Rehnquist did not succeed in his efforts to change laws, such as overturning *Roe vs. Wade*.

"The role of the Supreme Court is to uphold the laws that it finds are well founded in the Constitution - and to reject other claims of individual liberty against the government that it concludes are not well founded," Rehnquist wrote in the 2001 edition of his book, *The Supreme Court*.

Schwartz argues that Rehnquist too often used such arguments as "states' rights" and "strict interpretation" as a "fig leaf" to write his own personal preferences in the Constitution, just as he had always accused liberals of doing when they were in the majority.

"But instead of extreme, many of his ideas over the years have become mainstream," Schwartz conceded.

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