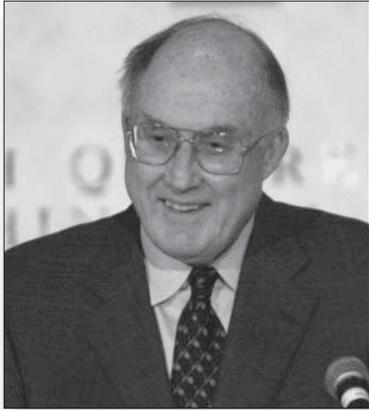


William H Rehnquist

The sixteenth chief justice of the US Supreme Court

By Jeffrey Phillips SC



When William Hubbs Rehnquist died last September (3 September 2005) he had served on the US Supreme Court either as an associate justice or as chief justice for a period of over thirty three and a half years.

He was first nominated to the court by President Richard Nixon and sworn in during January 1972. He became chief justice in September 1986, nominated by President Ronald Reagan. He continued as chief justice until his death from thyroid cancer, having reached the age of 80 years.

He had served in World War II in the Army Air Corps in North Africa. After the war, having obtained two masters degrees, he was head of his class in law school at Stanford in 1952. Thereafter, he served as a clerk to Justice Robert Jackson in the US Supreme Court. A few memos he had prepared, which he later said were at the insistence of the judge, in civil rights cases, came back to haunt him during his confirmation hearings in 1971 and 1986.

After his clerkship ended he commenced as a lawyer in Arizona where he became involved in Republican Party politics. He assisted Barry Goldwater in his candidacy for president in 1964 in particular, writing speeches for the senator attacking the legacy of the liberal Warren court. He later served in the Nixon administration in the Justice Department as assistant attorney-general. Notwithstanding his dress sense, which had come to the attention of the president, who had referred to him as that 'clown Rensburg', his abilities led to his appointment to the court replacing Justice John M Harlan.

He was an instinctive conservative who favoured pluralism over centralising power in the federal government. His conservatism was of an older, milder strain to those of later 'culture war' radicals such as justices Scalia and Thomas.

His preference for state rights over federal intervention can be easily detected in his majority opinion for the court in *National League of Cities v Usery* 426 US 833 (1976).

That case has remarkable similarities to the High Court challenge mounted by some Labor state governments against the Howard government's WorkChoices legislation. At issue was a 1974 federal statute that extended the maximum hours of minimum wage provisions of the Fair Labor Standards Act to most state and municipal employees. The Act as it applied to 'states as states' was struck down as an unconstitutional interference with an essential 'attribute of sovereignty attaching to every state government' (p845). Even though it was subsequently overruled in *Garcia v San Antonio Metropolitan Transit Authority* 496 US 528 (1985) as chief justice, Rehnquist continued to stress the theme of local as opposed to federal control in a host of important areas.

He, like our own Justice Dyson Heydon was suspicious of judicial activism. In an obituary¹ written by Linda Greenhouse, the *New York Times* Supreme Court correspondent and author of the recently published biography of Justice Harry Blackmun (reviewed in 79 ALJR 723), it was said of Rehnquist:

the courts were simply one institution among others, with no claim to greater wisdom or moral authority. This view was in sharp contrast to the judicial liberalism that was dominant when Chief Justice Rehnquist came of age as a young lawyer, when the federal courts were thought to have - or behaved as if they had - an almost oracular ability to discern the hidden meaning of the Constitution in light of the public good (shades of Justice Heydon's criticism of the Mason High Court).

In his early years, he was often in respectful dissent from the majority opinion of the court. His most famous dissent was in the

right to abortion case of *Roe v Wade* 410 US 113 (1973), a case which has become a touchstone of all Senate questioning in confirmation hearings of subsequent members of the court. Despite his controlling influence as chief justice and the growing conservative majority in the court since his appointment, he was never able to put together a majority to overrule it.

William Rehnquist also formally presided over the impeachment trial of President Clinton. His role was mainly procedural rather than substantive. For his part, in what could have been a dangerous polarising position, he was applauded by both majority and minority leaders in the Senate for his carefully neutral contribution.

More controversial was his concurrence with the majority opinion (5-4) in the Florida vote count case, *Bush v Gore* 531 US 98 (2000) which decided the US presidential election of that year. The decision was, as could be envisaged, one steeped in controversy, which, over the remaining period of his occupancy as chief justice, was largely dissipated.

His amiable, efficient and pragmatic nature made his court more successful and respected than the court ran by his predecessors, the 'pompous' Warren Burger and the court ran by the liberal Earl Warren, whose appointment President Eisenhower said was his 'worst mistake'.

Justice Rehnquist also wrote a number of books about the court, most notably a history of the Supreme Court in 1987. He also, like our own Justice Callinan, tried his hand at a murder mystery novel, albeit unpublished.

His significant contribution to the court, particularly in his last ten years, makes a nonsense of the early and compulsory retirement of federal judges in Australia at seventy years of age as required by section 72 of the Constitution.

Justice Rehnquist's replacement, Judge John Roberts was a Rehnquist law clerk. If he lives as long as his former boss his obituary will be not be written until sometime in 2036.

¹ *New York Times*, 4 September 2005.