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WEDNESDAY, SEPTEMBER 11, 2013

Chicago Daily Law Bulletin®

Volume 159, No. 178

Rehnquist's influence lives on through key Fourth Amendment decisions

John A. Jenkins' recent book "The Partisan" (2012) includes a story that bears retelling.

In 1969, John Dean was a lawyer in the Nixon administration's Department of Justice. On April Fools' Day, he received a 19-page memo from another new DOJ lawyer. Dean described it as "a brutal critique of how the Supreme Court had gone astray in the field of criminal law." Dean said the memo contained "reactionary thinking" on a wide range of issues. The memo excoriated some of the recent criminal decisions of the Warren court.

The solution? The memo proposed the creation of a committee charged with the task of amending the U.S. Constitution to free states from the restrictions imposed on their criminal systems by the Bill of Rights. And it was no April Fools gag; the author was dead serious. Dean, as well as his boss John Mitchell, thought the idea was terrible and the memo was simply filed and forgotten.

So why care about some ignored memo from the distant past? Maybe because the young author of the memo would later serve on the U.S. Supreme Court for 33 years, 19 of them as chief justice.

As you've guessed by now, the memo was written by William H. Rehnquist.

As we approach the start of a new Supreme Court term, it is important to take a broad look at the changes that have taken place in constitutional criminal procedure during the last half-century.

The Warren court in the 1960s effected a revolution in criminal law. It did this by ruling that the 14th Amendment's due process clause "selectively incorporated" many of the criminal-related provisions of the Bill of Rights against the states. There are 15 criminal procedure provisions in the Fourth, Fifth, Sixth and Eighth amendments. Fourteen of them have been either explicitly or implicitly incorporated to apply in state courts. The one famous exception is the indictment clause of the Fifth Amendment, which is why felony preliminary hearings only occur in states.

But something very significant occurred on Jan. 7, 1972. On the day Rehnquist and Lewis Powell were sworn in as Supreme Court justices, the court suddenly had a majority of Republican appointees for the first time since the mid-1930s. And this has remained true up to today.

The last 41 years of criminal decisions from the Burger, Rehnquist and Roberts courts have obviously been largely pro-prosecution. But to provide some evidence of this, let me just focus on the impact Rehnquist had in the area of Fourth Amendment law.

The Mississippi Law Journal recently published a symposium titled "William Rehnquist's Fourth Amendment" (Vol. 82, No. 2, 2013). A series of articles by legal scholars reviews all aspects of Rehnquist's work in this area and it contains some sobering statistics. For example, in Rehnquist's tenure on the court he faced 196 cases in which his position in a Fourth Amendment case could be clearly identified as either pro-law enforcement or pro-defendant.

In these cases, he favored law enforcement in 166, which is roughly 85 percent of the time. But many of the 15 percent of the cases that went pro-defendant were unanimous decisions. So the truly stunning statistic is this: In only one of these 196 cases did Rehnquist take a position that could be considered more civil libertarian than the position of even one other justice. James J. Tomkovicz, "Rehnquist's Fourth: A Portrait of the Justice as a Law and Order Man," 82 Miss. L.J. 359, 370 (2013).

Or consider this: Rehnquist participated in 38 cases that decided Fourth Amendment issues by 5-4 votes — a little over one case for every year he served on the court. Thirty of these cases rejected a defendant's claim. And Rehnquist cast the deciding fifth vote against the defendant in all 30 cases.

So what did Rehnquist accomplish in Fourth Amendment law? Craig Bradley describes Rehnquist's legacy in the area as leaving behind a "manual of techniques for limiting Fourth Amendment rights." Craig M. Bradley, "Rehnquist's Fourth Amendment: Be Reasonable," 82 Miss. L.J. 259, 265 (2013).

CRIMINAL PROCEDURE

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For example, if police activity is not a "search," then the Fourth Amendment is simply irrelevant. Therefore, one technique is to refuse to characterize police activities as searches. Thus, Rehnquist helped develop the concepts that police conducting airplane and helicopter surveillance, rummaging through curbside trash and going into privately owned "open fields" were not technically "searches" and therefore not covered under the Fourth Amendment.

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If some activity is a search, the next best technique is to find that a warrant is not required. Rehnquist helped to vastly extend the "automobile exception" to the warrant requirement. He also wrote the landmark opinion holding that searches incident to arrest never require a warrant. *U.S. v. Robinson*, 414 U.S. 218 (1973). As Bradley sees it, Rehnquist oversaw a movement that has eliminated the need for warrants for "virtually all outdoor searches and seizures."

As to probable cause, Rehnquist authored the *Gates* opinion that overruled Warren court precedent and established a much more police-friendly, totality-of-circumstances approach to defining "probable cause." *Illinois v. Gates*, 462 U.S. 213 (1983). And although the Warren court established the concept of "*Terry* stops," Rehnquist's work greatly expanded the ease with which police could use the stop-and-frisk tactic.

Then there were techniques for limiting the use of suppression of evidence as a remedy for Fourth Amendment violations. Rehnquist wrote a key opinion which held that to invoke suppression it was not enough for a defendant to show that he was affected by an unlawful search and seizure. He also had to specifically show that his own personal expectation of privacy was violated. Thus, a mere passenger in a car that was illegally searched could not ask for suppression of evidence. *Rakas v. Illinois*, 439 U.S. 128 (1978).

Finally, Rehnquist was a supporter of the "good faith exception" to the exclusionary rule. It is a technique that only continues to grow stronger. See *Davis v. U.S.*, 131 S.Ct. 2419 (2011).

In the 44 years since the end of the Warren court, constitutional criminal procedure has become much more prosecution-friendly. It is already clear that this is one of William Rehnquist's most significant legacies.