The Rehnquist Years

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WHEN THE SUPREME COURT RECONVENES tomorrow morning, William H. Rehnquist will mark his 10th anniversary as the 16th Chief Justice of the United States. The Rehnquist Court's first decade may best be remembered for such surprisingly "liberal" decisions as the 1992 reaffirmation of Roe v. Wade and this year's vindication of gay rights in a case from Colorado. In both exceptional cases, Rehnquist was in dissent on the losing sides, but those outcomes are unrepresentative of his winning record in crucial, if less publicized, areas of the law.

Rehnquist's most far-reaching triumphs have come in cases raising fundamental questions of federalism, involving the distribution of power between the Federal Government and the states. One year ago, in United States v. Lopez, for the first time in 58 years a court majority restricted Congress's ability to expand Federal authority after it enacted an anti-gun-possession law. This June, in the otherwise unsung death penalty case of Felker v. Turpin, Rehnquist ratified a significant victory in a long-standing war over the power of Federal courts to review and potentially reverse state inmates' criminal convictions. This seemingly abstruse battle over greatly truncating Federal courts' habeas corpus jurisdiction demonstrates how successfully Rehnquist has extended his own staunchly conservative, lifelong beliefs into a judicial agenda that has significantly remade major portions of American law.

But as decisions like Romer v. Evans, the Colorado gay rights case, and 1992's reaffirmation of Roe in Planned Parenthood of Southeastern Pennsylvania v. Casey exemplify, the "Rehnquist Court" is only sometimes the Rehnquist Court. That's true only when the Chief Justice is able to win the determinative fifth vote of the one crucial Justice who most oftentimes is the deciding voice whenever the Court is split 5 to 4 -- Anthony Kennedy. When he chooses to side with the High Court's four moderates, the "Rehnquist Court" is turned into the "Kennedy Court." In the meantime, Rehnquist will no doubt continue his drive to shrink the influence of Federal courts in American life.

MONDAY MORNING, JUNE 3, 1996, MARKED A POTENTIALLY culminating moment for the 72-year-old Chief Justice.

Just as it will be tomorrow, the court's magisterial courtroom is packed to capacity. United States Senators and members of the House sit toward the front. Former clerks to several Justices have come from as far away as California just to watch; senior members of the Court's press corps squeeze onto two tightly packed wooden benches on the left. Members of the marshal's staff shush tourists in the rear of the intimate chamber.

At precisely 10 A.M., a marshal brings the courtroom to its feet as the nine Justices emerge from behind the velvet curtain to take their seats on the elevated bench. Chief Justice Rehnquist declares that several decisions are ready for announcement, and in quick succession the authors of the majority opinions offer brief summaries of the new holdings.

Only at 10:28 A.M. does Rehnquist reach the event the capacity crowd has come to see. "We'll hear argument now in No. 95-8836, Ellis Wayne Felker v. Tony Turpin." The Chief Justice, too, has been waiting for this opportunity for a long time.

The Court's regular argument calendar ended more than five weeks earlier, on April 24; for all of May and June, the Justices normally would have devoted themselves simply to finishing up their opinions in cases that had been argued during the standard October-through-April schedule. However, on that very same April 24, President Clinton signed into law a new statute awkwardly titled the Antiterrorism and Effective Death Penalty Act of 1996.

Long under consideration by Congress, the new law includes a host of provisions intended to reduce and hasten Federal court review of criminal offenders' challenges to the finality of their state court convictions -- including challenges by convicted murderers sentenced to death. Prisoners have an initial right to appellate court review; those who fail can pursue subsequent challenges by filing petitions for writs of habeas corpus -- literally "you have the body" but in essence a Federal court order overturning a state court conviction. The new law imposes stringent limits on any Federal court consideration of a second or additional habeas petition from a convict. Death-row prisoners often file petition after petition, thereby delaying their executions even if their sentences are never overturned; some noncapital felons file such papers year after year.

Opponents of the new law argued that, if allowed to stand, it would eventually open the floodgates to speedier executions of the 3,153 prisoners now on death row nationwide. For Rehnquist, however, the limiting of Federal habeas corpus reflects not some sort of personal blood lust for the death penalty. It instead bespeaks his commitment to a federalism-centered view of American politics and government, which encompasses many other issues in addition to Federal court respect for the finality of state court criminal convictions. "The core" of Rehnquist's theory, one scholar has written, "is the idea of state sovereignty," above and beyond Federal Government control.

Testifying at his 1986 confirmation hearings for promotion to Chief Justice, Rehnquist acknowledged that "my personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the state level, and if it cannot be done at the state level, then you go to the national level."

Rehnquist strongly opposed an expansive habeas role for the Federal courts even long before President Richard M. Nixon nominated him to the Supreme Court in the fall of 1971. Then a 47-year-old Assistant Attorney General, Rehnquist had joined the Justice Department in 1969 at the behest of his fellow Arizonan, Deputy Attorney General Richard G. Kleindienst, whom he had come to know during 15 years of law practice in Phoenix. But 1969 hadn't marked Rehnquist's first job in Washington, for way back in 1952 and 1953 -- just after he had graduated first in his class from Stanford Law School -- young Rehnquist had served for 18 months as one of two law clerks to the highly regarded Supreme Court Justice Robert H. Jackson. Rehnquist had enjoyed his clerkship immensely, but when he himself was nominated to the High Court in 1971, his work for Jackson generated a major controversy when a Rehnquist memorandum arguing against any Supreme Court voiding of segregated schools and for a continued endorsement of the old

doctrine of "separate but equal" was discovered in Jackson's file on Brown v. Board of Education. Rehnquist unpersua sively insisted -- as he would again during his 1986 confirmation hearings for Chief Justice -- that the memo represented an articulation of Jackson's views rather than his own. The Senate nonetheless confirmed him on a vote of 68 to 26.

Jackson's papers also contain a Rehnquist memo with a minority view on another Brown case, Brown v. Allen, a 1953 ruling little known to the general public but justly famous among criminal law practitioners as the modern fount of an expansive approach to Federal courts' habeas jurisdiction. In that memo, Rehnquist argued that Federal courts should not grant habeas petitions involving any issue that had been considered by a state court unless the defendant had been denied the right to counsel. In 1953, that recommendation had no more impact than did Rehnquist's advice in the other Brown case, but three decades later, once he sat on the High Court in his own right, habeas excesses reappeared as a subject of his special concern. In a 1981 opinion involving a death-row petitioner, Coleman v. Balkcom, Rehnquist complained that in light of habeas's "increasing tendency to postpone or delay" death-penalty enforcement, "stronger measures are called for" beyond the Court's simple denial of repeated death-row appeals.

Reminded of his Jackson clerkship memos in a 1985 interview with this Magazine -- the last such interview Rehnquist has granted -- he frankly acknowledged that "I don't know that my views have changed much from that time." Four years later, Chief Justice Rehnquist vented his continuing anger at repetitive filings in a 5-4 majority opinion rebuffing an application from an ostensibly penniless petitioner named Jessie McDonald. "Since 1971," Rehnquist observed, McDonald "has made 73 separate filings with the Court, not including this petition, which is his eighth so far this term." Rejecting the solicitude of four dissenters who objected to the majority's order instructing the clerk's office to reject any further unpaid filings from McDonald, Rehnquist emphasized that "every paper filed with the clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources."

A few months later, Rehnquist took up his capital habeas cudgel in his role as head of the Judicial Conference, the administrative arm of the Federal judiciary. Failing in an effort to obtain majority support for a recommendation calling upon Congress to limit Federal habeas jurisdiction, Rehnquist nonetheless forwarded a report to the Senate Judiciary Committee. In an unprecedented public letter, 14 of the conference's 26 other members objected to the Chief Justice's action. Rehnquist refused to back down.

Congress did not act, but in April 1991 Rehnquist achieved much of his legislative goal judicially in a 6-3 court ruling that starkly limited successive habeas petitions and vindicated his 1981 call for action in Coleman. Decrying "the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process," the majority stressed that "perpetual disrespect for the finality of convictions disparages the entire criminal justice system."

But even that ruling in McCleskey v. Zant did not set as high a hurdle to successive petitions as Rehnquist sought. Warning that America cannot afford "the luxury of state and Federal courts that work at cross purposes or irrationally duplicate" each others' efforts, the Chief Justice continued to emphasize that "capital habeas corpus still cries out for reform." Come April 1996,

after 24 years on the court and 10 years as Chief Justice, it seemed with the Felker case that Rehnquist's wish had finally come true.

WHEN REHNQUIST WAS NOMINATED TO SUCCEED THE retiring Warren E. Burger as Chief Justice by President Ronald Reagan in 1986, his colleagues were unanimously pleased and supportive. Fourteen years of working together had built good personal relations even between Rehnquist and his ideological opposites, William J. Brennan and Thurgood Marshall. Brennan startled one acquaintance by informing him that "Bill Rehnquist is my best friend up here," and a Washington attorney, John D. Lane, who privately interviewed all seven other Justices on behalf of the American Bar Association's Committee on the Federal Judiciary, informed the Senate Judiciary Committee that Rehnquist's nomination was met with "genuine enthusiasm on the part of not only his colleagues on the Court but others who served the Court in a staff capacity and some of the relatively lowly paid individuals at the Court. There was almost a unanimous feeling of joy."

Rehnquist's colleagues looked forward to his installation as "Chief" in part because they welcomed the departure of his overbearing, manipulative and less-than-brilliant predecessor, Burger, who had succeeded the legendary Earl Warren 17 years earlier. Reporters always stressed that Burger looked the part of Chief Justice of the United States, but among his fellow Justices there was virtually unanimous agreement that his skills at leading the Conference -- the Justices' own name for their group of nine -- had been woefully lacking. John Lane told the Judiciary Committee that one Justice said that "he looks for a tremendous improvement in the functioning of this Court" under Rehnquist. Based upon all the Justices' comments, Lane reported, "I came away with a very strong opinion that Justice Rehnquist will make an excellent Chief Justice."

Much of the 1986 debate over Rehnquist's promotion focused upon newly augmented allegations that 20-odd years earlier he had taken part in Republican Party efforts to intimidate black voters at Phoenix polling places. The charges were not provable, but the final Senate confirmation vote of 65 to 33 was closer than Rehnquist's backers had expected and in its wake the new Chief Justice privately told friends that he felt the Judiciary Committee hearings had treated him very badly. "He took it somewhat personally," one acquaintance remembered, but within the Court there was immediate agreement that Rehnquist was far superior to Burger in leading the Conference's discussion of cases.

Ten years before, in a 1976 law review essay on "Chief Justices I Never Knew," Rehnquist had stressed the importance of firmly run sessions in which each Justice, speaking in order of seniority, stated his views succinctly and without interruption: "A give and take discussion between nine normal human beings, in which each participates equally, is not feasible." He also acknowledged how a "Chief Justice has a notable advantage over his brethren: he states the case first and analyzes the law governing it first. If he cannot, with this advantage, maximize the impact of his views, subsequent interruptions of colleagues or digressions on his part or by others will not succeed either." Citing Harlan Fiske Stone and Felix Frankfurter as brilliant Justices of the past whose efforts to influence their colleagues had generally failed, Rehnquist added that "the power of persuasion is a subtle skill, dependent on quality rather than quantity."

In his 1987 book, "The Supreme Court," Rehnquist gently noted that "I have tried to make my opening presentation of a case somewhat shorter than Chief Justice Burger made his." Justice Harry A. Blackmun often disagreed substantively with Rehnquist, but he was quick to praise Rehnquist's management skills. "The Chief in conference is a splendid administrator," he told one semiprivate gathering. Unlike the Burger years, "we get through in a hurry. If there's anything to be criticized about it, he gets through it in too much of a hurry at times."

Warren Burger was seen by his colleagues as a Chief who often abused his power to assign the writing of majority opinions whenever he was not in dissent. One Rehnquist clerk from the mid-1970's still recalls how Burger, unhappy with the political humor of a Rehnquist-produced skit at the Court's 1975 Christmas party, the next month assigned Rehnquist only one opinion, in an Indian tax case. Most Justices expected Rehnquist to eschew such gamesmanship, and the record of the past decade generally bears that out. Some former clerks contend in private that in recent years Anthony Kennedy has fared far better in receiving important assignments from Rehnquist than other Justices, but Rehnquist as Chief is far more concerned with maximizing the speed and efficiency of the Court's opinion-writing than with playing favorites.

In a 1989 memo to his colleagues, Rehnquist divulged that "the principal rule I have followed in assigning opinions is to give everyone approximately the same number of assignments of opinions for the Court during any one term." But, he warned, any Justice who failed to circulate a first draft of a majority opinion within four weeks or who failed to circulate the first draft of an anticipated dissent within four weeks of the majority opinion or who had not voted in any case in which both majority and dissenting opinions had circulated would now be looked upon less favorably. "It only makes sense," he asserted, "to give some preference to those who are 'current' with respect to past work."

Rehnquist's announcement provoked an immediate objection from John Paul Stevens, now the second-most-senior Justice to the Chief himself. An iconoclastic and generally liberal thinker, Stevens in recent years has outpaced all of his colleagues in his number of individual dissents and concurrences. Reminding Rehnquist that "too much emphasis on speed can have an adverse effect on quality," Stevens warned that it "may be unwise to rely too heavily" on rigid deadlines, especially when a Justice's investment in a major dissent, or a handful of dissents, might create a lag. "I do not think a Justice's share of majority opinions should be reduced because he is temporarily preoccupied with such an opinion, or because he is out of step with the majority in a large number of cases." Rehnquist remained largely unmoved, chiding his colleagues just a few weeks later about several decisions that were running behind schedule. "I suggest that we make a genuine effort to get these cases down 'with all deliberate speed.' "

EIGHT DAYS AFTER PRESIDENT CLINTON SIGNED THE NEW HABEAS legislation into law, a three-judge panel of the Court of Appeals for the 11th Circuit applied the statute in denying a request from a Georgia death-row inmate, Ellis Wayne Felker, to file a successive petition. Convicted 13 years earlier of murdering a 19-year-old woman soon after being released from prison on a prior felony conviction, Felker now was finally facing actual execution; three times before, the Supreme Court had turned aside appeals. Later that very same day, May 2, Felker's attorneys asked the High Court to review how the new law prohibited Felker from appealing the circuit court's refusal.

Less than 24 hours later, the Supreme Court granted Felker's request for a hearing and set oral argument on his challenge to the new law for exactly one month later. The Court's swift action -- the first such accelerated hearing in six years and the fastest grant of review since the famous Pentagon Papers case, New York Times Co. v. United States, a quarter-century earlier -- brought a cry of protest from the four least conservative Justices, John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. Formally dissenting, they called the majority's action "both unnecessary and profoundly unwise" and declared that review of the new law "surely should be undertaken with the utmost deliberation, rather than unseemly haste."

One question posed by Felker was whether the new limits on appeals involving second or successive habeas petitions represented a Congressional diminution of the Supreme Court's own appellate jurisdiction. That would be a constitutional issue of the highest order; not since the Civil War era had the Court directly confronted it. Felker's lawyers, focusing on an avenue Congress had failed to address, noted in their brief that the new law did not expressly affect the Court's authority to consider "original" habeas petitions filed directly with it. Conceding that the High Court's use of "original habeas" would be "exceptional and discretionary," Felker's attorneys nonetheless acknowledged that "no unconstitutional interference with this Court's appellate jurisdiction exists if Congress merely eliminates one procedure for review but leaves in place an equally efficacious alternative."

Henry P. Monaghan, a Columbia University law professor and an experienced Supreme Court advocate, spoke for Felker when oral argument got under way on June 3. The present-day Rehnquist Court is as vocal and energetic a nine-member bench as any attorney could imagine confronting (only Justice Clarence Thomas is usually silent, but the liberal icons William Brennan and Thurgood Marshall were likewise generally quiet), and Rehnquist himself -- along with Justices Souter, Breyer, Ginsburg and Antonin Scalia -- is an outspoken questioner, as both Monaghan and his opponent, Senior Assistant Attorney General Susan V. Boleyn of Georgia, soon found. "Why shouldn't we just try to apply the statute as written?" asked Rehnquist with some exasperation. "I mean, rather than trying to torture some meaning out of it that's not there?" Monaghan tried to demur, but drolly conceded that "this statute passed by Congress with respect to second petitions is not the work of Attila the Hun."

Susan Boleyn, however, faced a far tougher grilling. "That's not a very specific position, Ms. Boleyn," the Chief Justice interjected before she had uttered her fourth sentence. Peppering her with questions, Rehnquist asked how she would distinguish a 19th-century decision, Ex Parte Yerger. Boleyn struggled. "Well, I think that this Court has recognized exceptions to its jurisdiction both in the constitutional venue under Article III --." An unhappy Rehnquist cut her off. "Are you familiar with the Yerger case?" "Yes, Your Honor, but I'm not familiar with what exactly you're asking me to respond to."

It only got worse. Breyer, telling her, "I'm sorry, I don't understand," asked Boleyn a fast-paced hypothetical and demanded an answer. "Do we have jurisdiction to hear it? Yes or no." Boleyn said no, but Breyer objected: "I thought from your brief the answer was yes."

Asked in 1992 by C-Span's Brian Lamb whether he could tell if attorneys are nervous during oral argument, Rehnquist jocularly replied that "I assume they're all nervous -- they should be."

Occasionally -- most often in the months before his wife's slow death from cancer in October 1991 -- Rehnquist has rebuked or snapped at lawyers who have been unprepared or who have committed the tiny but grievous sin of calling him Judge rather than Chief Justice.

The day after the Felker argument, the Justices met in private conference to discuss the case. The substance of that meeting isn't likely to be known for a long time; accounts of conference discussions generally become available only years after the event, with release of the handwritten notes of one or more Justices. Even then, some Justices' papers -- Thurgood Marshall's are the most recent example -- shed next to no light on conference discussions, for not all Justices take notes. Those of William O. Douglas and Brennan offer reliable guides to the 1960's, 70's and 80's, but every modern Court scholar knows full well that the ultimate treasure trove for the years 1970 through 1994 will, in time, be the conference notes of now-retired Justice Blackmun.

In his own chambers, Rehnquist instructs each of his three clerks to have their first drafts of his opinions ready for his review within 10 to 14 days. Some wags insist that Rehnquist has three clerks -- seven other Justices now have four, Stevens has three -- primarily to ease the arrangements for his weekly tennis-match doubles, but Rehnquist treats his young aides in a warm, low-key manner. He revises their drafts by orally dictating amended wording into a recorder, and he volunteered in his 1987 book that "I go through the draft with a view to shortening it, simplifying it and clarifying it."

In Rehnquist's first 15 years on the Court, commentators praised his writing as "clear, lucid, brief and mercifully free of bureaucratese." One commended "the somewhat peculiar references to history, the classics and gamesmanship with which Rehnquist likes to sprinkle his opinions" -- this June a Rehnquist concurrence included a passing reference to "Grover Cleveland's second inaugural address" -- but since 1986 such acclaim has gradually diminished, with critics noting "the characteristic terseness of a Rehnquist opinion" and journalists labeling his prose "dry and to the point."

Rehnquist's June 28 opinion announcing the Court's unanimous -- including the four Justices who had protested the accelerated hearing -- resolution of Felker v. Turpin manifested all these traits. Back in 1987, Rehnquist acknowledged how "the Chief Justice is expected to retain for himself some opinions that he regards as of great significance," but Rehnquist traditionally has written a disproportionate number of criminal law rulings. The 12 1/2-page Felker decision had been written, edited and circulated for other Justices' comments and agreement in little more than three weeks' time, and the substance of Rehnquist's -- and the Court's -- holding followed closely from the implications of the questions Rehnquist had put to Monaghan and Boleyn back on June 3.

The new statute "makes no mention of our authority to hear habeas petitions filed as original matters in this Court" and thus, fully in keeping with Ex Parte Yerger, it "has not repealed our authority to entertain" such petitions. Therefore, Rehnquist held, "there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III." No constitutional collision thereby occurred, and the new statutory restrictions on Federal court consideration of successive habeas petitions could remain fully in place. Convicts and death-row prisoners could send "original" petitions directly to the High Court, but -- just as Felker's lawyers

had conceded in their brief -- only in a rare instance of "exceptional circumstances" would such an appeal be granted.

Felker's own habeas request was denied; Georgia has not yet set a new date for Felker's execution.

Some habeas specialists, pointing back to Rehnquist's earlier 1991 judicial breakthrough in McCleskey, dismiss Felker's actual holding as "relatively insignificant." They emphasize that several pending challenges to other particular provisions of the new law, including Lindh v. Murphy, a case that was decided by the Court of Appeals for the Seventh Circuit in Chicago in late September, are likely to force Rehnquist and his colleagues to revisit the habeas battlefield sometime in 1997.

But such characterizations unintentionally minimize the extent and scale of Rehnquist's long-term agenda and long-term victory. Federal habeas jurisdiction is now only a shadow of what it was when Rehnquist first joined the Supreme Court, and what in 1981 in Coleman was a lonely individual call for action has now won decisive support from a solid Court majority and from bipartisan majorities in both houses of Congress as well as an ostensibly liberal Democratic President. Not long after Ellis Wayne Felker finally goes to the electric chair, the entire pace of death-row executions all across America will pick up substantial speed as one habeas petition after another is quickly cast aside by the courts. Rehnquist's victory may not yet be 100 percent complete; his triumph nonetheless is remarkably impressive and still growing.

FELKER IS THE LATEST IN A LINE OF FEDERALISM CASES THAT for Rehnquist began with a 1975 solo dissent in Fry v. United States, an opinion that directly foreshadowed the landmark 5-4 majority victory he would win exactly 20 years later in United States v. Lopez. In 1975, writing only for himself, Rehnquist had advocated "a concept of constitutional federalism which should . . . limit federal power under the Commerce Clause." In Lopez, writing on behalf of a 5-vote majority, Rehnquist dismissed the Justice Department's defense of the Federal anti-gun-possession law and declared that "if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."

As early as 1982, a Yale Law Journal analysis of Rehnquist's jurisprudence by H. Jefferson Powell (now a high-ranking Clinton Justice Department appointee) cogently identified "federalism's role as the organizing principle in Rehnquist's work" and persuasively concluded that "Rehnquist's federalism does form a consistent constitutional theory."

More than 10 years later, in one of the three most important decisions of the 1995-96 term, Seminole Tribe of Florida v. Florida, another 5-vote Rehnquist majority forthrightly declared that "each State is a sovereign entity in our Federal system." Dissenting vigorously, Justice Souter protested how Rehnquist was deciding "for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a Federal court at the behest of an individual asserting a Federal right." Souter's objection brought him a harsh rebuke from the Chief: the dissent's "undocumented and highly speculative extralegal explanation . . . is a disservice to the Court's traditional method of adjudication."

One core principle of Rehnquist's federalism, as the habeas battle has reflected, is a firm belief in a modest -- some would say excessively modest -- political and supervisory role for the Federal courts. Back in the early 1980's, the annual docket of the Supreme Court itself -- the number of cases it chooses to hear, not the thousands upon thousands it turns aside -- had grown to a peak of 151. Many voices, including both Burger and Rehnquist's, called unsuccessfully for the creation of a new, nationwide court of appeals to ease the pressure on the High Court's docket, but the idea died aborning and in recent years has completely vanished from both public -- and private -- discussion.

At his 1986 confirmation hearings, Rehnquist told the Senate Judiciary Committee that "I think the 150 cases that we have turned out quite regularly over a period of 10 or 15 years is just about where we should be at." Addressing whether that load might be too great and noting how the caseloads of Federal district and appellate courts were increasing rapidly, Rehnquist said that "my own feeling is that all the courts are so much busier today than they have been in the past, that there would be something almost unseemly about the Supreme Court saying, you know, everybody else is deciding twice as many cases as they ever have before, but we are going to go back to two-thirds as many as we did before."

A year later, in his 1987 book, Rehnquist cited the 150 figure and observed that "we are stretched quite thin trying to do what we ought to do." Privately, inside the Court, Rehnquist brooded about the annual "June crunch" of backlogged decisions awaiting finished opinions and suggested to his colleagues the "desirability of cutting down the number of cases set for argument in April," toward the end of the Court's year. But year by year the Court's annual caseload has shrunk further and further: from 132 cases in 1988-89 to 129 in 1989-90, to 112 in 1990-91, to 108 in 1991-92, to 107 in 1992-93, markedly to 84 in 1993-94, then to 82 in 1994-95 and finally to 75 in the just-completed term of 1995-96.

In 1986, Rehnquist had volunteered that a one-third decline in the Court's annual caseload from 150 to 100 would be "unseemly," but on the 10th anniversary of his statement, the Court had reduced its annual workload by more than half -- from 151 to 75. Granted, a 1988 statute had virtually eliminated some mandatory appeals that the Court previously had been obligated to hear, whether or not a minimum of four Justices voted to accept the case, but the issue of the "incredible shrinking docket" -- what Court watchers call it -- has been one of the most striking developments of the Rehnquist years.

The Court, of course, issues no explanations for even so momentous a trend, but in April 1995, at the Third Circuit's annual dicial conference in White Sulphur Springs, W.Va., Justice Souter spoke extemporaneously about the docket shrinkage in remarks that were virtually unprecedented in their public frankness. Referring back to the early 1980's, when he was still an obscure New Hampshire state judge, Souter recalled that in reading Supreme Court opinions at the time, it "seemed to me . . . some of those opinions had the indicia of rush and hurriedness about them." Now he realized, given the caseloads of those years, that those short-comings "could not have been otherwise and the remarkable thing is that the number of really fine things that came down in that period was as high as it was."

Souter said he was "amazed" that the docket annually had continued to shrink throughout the 1990's, but he stressed that "nobody sets a quota; nobody sits at the conference table and says: 'We've taken too much. We must pull back.' . . . It simply has happened." Identifying a host of contributing factors, Souter noted the "diminishing supply" of new Federal statutes in the late 1980's and early 1990's, and how "not much antitrust work" and "not much civil rights" work, beyond voting cases, had been generated by the Reagan and Bush Administrations' Justice Department. In the criminal area, "drug prosecution does not make for Supreme Court cases these days" because of how Fourth Amendment search-and-seizure standards have "been pretty much raked over. . . . The basic law, the basic standards which have been governing and do govern most of the appeals that people want to bring to us are products of the 60's and the 70's and the 80's. There hasn't been an awful lot for us to take."

In addition, Souter added, according to a comprehensive account of his remarks in the Pennsylvania Law Weekly, 12 years of Reagan-Bush judicial nominations had produced "a relative homogeneity" and "a diminished level of philosophical division within the Federal courts." But, he emphasized, "I know of no one on my Court who thinks that we're turning away cases which by traditional standards . . . we should be taking. In fact, it's just the contrary."

Once, he confessed, when the numbers were declining, "I said out loud as well as to myself that if that continued, I was going to start voting to take interesting Federal questions whether there was a conflict $(among lower Federal courts$) or not." However, Souter went on, "those were rash words," for "as it turned out, I didn't have to make good on that" because more cases began attracting 4 or more affirmative votes. "About 100 a year is about right," Souter concluded, and the number for the upcoming 1996-97 term seems destined to rise from this past year's remarkable minimum of 75.

With a total caseload of 75 (34 of which were decided unanimously), there are not all that many opinions to spread out over nine months of work for nine Justices -- and 34 law clerks. The image of clerks working seven-day-a-week, 12-hour-a-day jobs is a polite fiction of the past, and -- though it is considered rude to mention it -- many Court observers know that a typical at-the-office workday for the Chief Justice of the United States often stretches from about 9:10 A.M. to 2:30 P.M. Some Justices -- Souter, Kennedy and Stevens among them -- work decidedly longer hours, but Rehnquist's crusade to shrink the role and responsibilities of the Federal courts has definitely born fruit right at home.

Rehnquist has certainly registered historic doctrinal achievements -- in habeas law, in United States v. Lopez, in Seminole Tribe and in the 1994 "takings clause" decision in Dolan v. City of Tigard, but there is no denying Rehnquist has been on the losing side in the two most important, highly visible constitutional holdings of the last five years: 1992's vindication of abortion rights in Planned Parenthood v. Casey and, just a few months ago, the remarkable voiding of a homophobic, antigay Colorado state constitutional amendment in Romer v. Evans. The 6-3 Romer ruling, in which two swing Justices, Anthony Kennedy and Sandra Day O'Connor, sided with the "liberal" foursome of Stevens, Souter, Ginsburg and Breyer rather than with Rehnquist, Scalia and Thomas, was without doubt the most important and symbolically momentous decision of the 1995-96 term.

Romer's majority opinion, written by Kennedy, featured a rhetorical verve rare for the High Court. The Colorado amendment "seems inexplicable by anything but animus toward the class that it affects," Kennedy explained, and "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." Declaring that "it is not within our constitutional tradition to enact laws of this sort," Kennedy pointed out that a statute "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." The state amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws."

In a style and tone to which his colleagues have become all too well accustomed, Scalia angrily and vituperatively dissented. Joined by both Rehnquist and Thomas, Scalia protested that the majority's holding "places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." Avowing that his fellow Justices have "no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected," Scalia alleged that "our constitutional jurisprudence has achieved terminal silliness" and complained of how Kennedy's opinion was "so long on emotive utterance and so short on relevant legal citation." Declaring that Colorado's action was "eminently reasonable" since citizens are "entitled to be hostile toward homosexual conduct," Scalia maintained that "the degree of hostility reflected by" the state enactment was "the smallest conceivable." His final blast was explicitly contemptuous: "Today's opinion has no foundation in American constitutional law, and barely pretends to."

BUT THE MOST IMPORTANT JUSTICE ON the 1996 Rehnquist court is not the angry Antonin Scalia; it's the man who ascended to the Court in the wake of Robert H. Bork's rejection: Anthony Kennedy. A quiet and thoughtful Californian, Kennedy throughout his eight-year tenure has been both the crucial fifth vote for virtually all of Rehnquist's major victories and the decisive vote and voice when Rehnquist has suffered historic defeats in cases like Casey and Romer. Occasionally apologetic in tone ("sometimes we must make decisions we do not like," Kennedy volunteered in the 1989 flag-burning decision, Texas v. Johnson), Kennedy term after term has been the balance wheel of the Rehnquist Court. Early on, in 1988-89, when Rehnquist and the now-retired William Brennan disagreed in every one of that year's 31 5-4 outcomes, Kennedy was with Rehnquist 29 times. (Johnson was one of the two exceptions.) In 1991-92, when Kennedy dissented from only 8 of the term's 108 decisions, his crucial "liberal" votes in both Casey and an important school prayer decision, Lee v. Weisman, drew intense flack from conservative critics.

The following term, 1992-93, Kennedy dissented in only 5 of 107 cases, and the year after that, when he was in the majority in every one of the term's 14 5-4 decisions, he again dissented in only 5 cases out of 84. In 1994-95, Kennedy was in the majority in 13 of the term's 16 5-4 cases, including both Lopez and the highly publicized Congressional term limits decision, and in the just-completed 1995-96 term, Kennedy again was the Court's least frequent dissenter (in just 5 of 75 cases) and was in the majority in 9 of the 12 5-4 outcomes.

Now Kennedy is again under fire from extreme conservatives for his memorable majority opinion in Romer (National Review magazine labels him "the dimmest of the Court's intellectual lights"), but among serious Court watchers the impression is growing that Kennedy has more than found his footing. David O'Brien of the University of Virginia calls Kennedy "more principled, less of a Continued on page 85 pragmatist" than other Justices. Peter J. Rubin, a Washington attorney and a former two-year High Court clerk, points out that Kennedy "understands the moment of what he's doing" and stresses how there can be "no question after Romer about his integrity and courage."

Legal historians sometimes wonder whether the "Brennan Court" and the "Powell Court" might actually be more accurate monikers for the 1960's, 70's and early 80's than the "Warren Court" and the "Burger Court." And in that same spirit, Peter Rubin readily agrees that, yes, "it's the Kennedy Court." But, Romer and Casey notwithstanding, in most other particulars the court of 1996 is indeed the "Rehnquist Court," and it is likely to stay the Rehnquist Court for longer than most commentators now think.

Prior to the death of his wife, Nan, in October 1991, most people who knew Rehnquist expected him to step down as Chief Justice sooner rather than later. In July 1991, Rehnquist apologetically turned down the newly retired Thurgood Marshall's request for home-to-office transportation in a court car, while adding that "in all probability I will be in the same boat you are within a couple of years." Eleven months later, Rehnquist told C-Span's Brian Lamb that while he enjoyed his job, "I wouldn't want to hold it forever." In September 1995, when he underwent major back surgery to remedy a long-festering problem that had suddenly mushroomed into crippling pain, what Tony Mauro of Legal Times called Rehnquist's "rumored plan for retiring from the Court after the next Presidential election" looked all the more certain.

But a wide sample of former Rehnquist clerks say "not so" and predict against any Rehnquist retirement in the summer of 1997, especially -- as some of them hesitantly volunteer -- if Bill Clinton is re-elected this November. The Wall Street Journal columnist Paul Gigot has slyly pronounced Rehnquist's scheduled departure, but a former clerk says the Chief already has begun hiring the clerks who will join him next summer.

"I think he's too committed and too interested in winning the battles he's been fighting to retire during the Presidency of a Democrat," says one Court insider with a high personal opinion of Rehnquist. He adds, with emphasis, that the Chief is "extraordinarily politically savvy" and that Bill Rehnquist "plays for the long, long, long run," as his entire career consistently demonstrates.

"He's more inclined to stay," says another former Rehnquist clerk who keeps in regular touch and who feels that the Chief does not want to leave during a Democratic Presidency but "would never say it."

"He enjoys his work," this clerk states."He never expected to be in the majority as much as he is now," and the ongoing victories -- like Lopez and Seminole Tribe on federalism, and in the habeas arena with cases like Felker -- all incline him to stay, not retire. "He's fully in stride right now."

ONE ANGRY MAN -- Antonin Scalia's Decade

William Rehnquist's 10th anniversary as Chief Justice is also Antonin (Nino) Scalia's 10th anniversary as an Associate Justice. Nominated to Rehnquist's seat when Rehnquist was promoted to replace Warren Burger, Scalia -- a four-year veteran of the United States Court of Appeals for the District of Columbia Circuit -- faced no opposition. He was confirmed, 98-0, after less than five minutes of Senate floor discussion.

During Scalia's first few years on the Court, commentators wondered whether his combination of intelligence and gregariousness would make him into the Rehnquist Court's real intellectual leader. As Laurence H. Tribe, a Harvard law professor, told The Boston Globe in 1990: "There is no question Scalia is brilliant. What remains to be seen is if he is wise."

Six years later, the verdict is all but unanimous: Scalia is rash, impulsive and imprudent, a Justice who in case after case would rather insult his colleagues' intelligence than appeal to them. Judge Alex Kozinski, a conservative member of the United States Court of Appeals for the Ninth Circuit, pronounced his judgment as early as 1992: "Commentators said, 'This is the guy who, through his charm and intellect, will forge a conservative consensus.' He hasn't done it." The New Republic's Jeffrey Rosen, contending that Scalia "has intellectual contempt for most of his colleagues," suggests that the relatively young Justice -- Scalia is now 60 -- calls to mind the sad career of another brilliant judicial failure, Felix Frankfurter.

One former Scalia clerk insists that the Justice is "100 percent impervious" to public criticism. But Scalia is hardly ignorant of his bad-boy reputation; three years ago, he insisted to one Washington audience that "I am not a nut." In comments to the Supreme Court Historical Society, Scalia observed that dissenting opinions "do not, or at least need not, produce animosity and bitterness among the members of the Court." But even more revealing was a statement Justice Sandra Day O'Connor made to a Ninth Circuit judicial conference. Reminding her audience of the old saying that "sticks and stones will break my bones but words will never hurt me," O'Connor added, "That probably isn't true."

A colleague confirms that O'Connor has been "deeply wounded" by the insults Scalia has sent her way, starting in 1989 in the abortion case Webster v. Reproductive Health Services. O'Connor's analysis, Scalia wrote there, "cannot be taken seriously."

A former Scalia clerk acknowledges that Scalia "completely alienated" O'Connor and "lost her forever," and a former Rehnquist clerk notes how O'Connor's "personality is in many ways just the opposite of Justice Scalia's. She's very willing to build consensus on opinions." But Scalia, says another ex-clerk, is not only "in love with his own language," he also believes that "what he's doing is a matter of principle. He knows how right he is."

On the next-to-last day of the 1995-1996 term, Scalia turned his rhetorical guns on Rehnquist, who had committed the grievous sin of concurring with the Court's 7-1 majority in striking down the Virginia Military Institute's exclusion of women from a state institution. In his lonely, splenetic dissent, Scalia called the majority's equal protection analysis "irresponsible" and mocked Rehnquist's separate views as "more moderate than the Court's but only at the expense of

being even more implausible." Saying Rehnquist erroneously suggested that Virginia "should have known . . . what this Court expected of it" because of an earlier Court ruling, Scalia truculently asserted that "any lawyer who gave that advice to the Commonwealth ought to have been either disbarred or committed."

Scalia's characterization of the Chief Justice's views represented the first time in memory that one member of the Court had suggested that another might be better situated in a nonjudicial institution, but virtually nothing that Scalia might say could worsen the reputation he has made for himself among students of the Court. Harvard's Laurence Tribe decries Scalia's "extreme stridency and disrespect for opposing views." Another well-known law professor, far less liberal than Tribe and a social colleague of several Justices, ruefully looks back on the Senate's 1987 rejection of Supreme Court nominee Robert H. Bork and concludes that Bork would have been "more civil and more broad-minded than Scalia by a long shot." Indeed, Scalia, he contends, "has become precisely what the Bork opponents thought Bork would be." DAVID J. GARROW

CAPTION(S): Photos: Scalia -- This caustically outspoken conservative has become known as the Court's bad boy. Ginsburg -- More moderate than liberal, she remains intensely interested in gender cases. Stevens -- The Court's second-most-senior member is an iconoclastic liberal. Souter -- This intellectual heavyweight is willing to joust with the Court's conservatives. Rehnquist -- The Court's businesslike leader is winning more victories than expected. Thomas -- Five years after confirmation, the quietest Justice has won respect from Court observers. O'Connor -- An earnest consensus builder but indecisive in race cases. Breyer -- The most junior Justice is an aggressive voice at oral arguments. Kennedy -- Often the decisive swing vote, he wrote last term's landmark gay rights ruling. (PHOTOGRAPH BY ROBERT TRIPPETT/SIPA) (pg. 66-67); Anthony Kennedy being sworn in by the Chief Justice in 1988. (PHOTOGRAPH BY ROBERT TRIPPETT/SIPA) (pg. 70)