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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1. paper	re William Rehnquist (p. 2, partial)	n.d.	~~P5, P6~~ B6
2. paper	re Ralph Winter (p. 3, partial)	n.d.	~~P5, P6~~ B6
3. paper	re Ralph Winter submitted by Department of Justice (p. 1, partial)	n.d.	~~P5, P6~~ B6

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]
P-1 National security classified information [(a)(1) of the PRA].
P-2 Relating to appointment to Federal office [(a)(2) of the PRA].
P-3 Release would violate a Federal statute [(a)(3) of the PRA].
P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA].
P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA].
P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA].

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Freedom of Information Act - [5 U.S.C. 552(b)]
F-1 National security classified information [(b)(1) of the FOIA].
F-2 Release could disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA].
F-3 Release would violate a Federal statue [(b)(3) of the FOIA].
F-4 Release would disclose trade secrets or confidential commercial or financial information [(b)(4) of the FOIA].
F-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA].
F-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA].
F-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA].
F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

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- F-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA].

WILLIAM H. REHNQUIST

Biographical Information

AGE: 61

BORN: October 1, 1924; Milwaukee, Wisconsin

COLLEGE: Stanford University, B.A. (with great distinction) 1948

GRADUATE SCHOOL: Stanford University, M.A. 1948; Harvard University, M.A. 1949

LAW SCHOOL: LL.B., 1952

MILITARY SERVICE: U.S. Air Force, 1943-46

PARTY: Republican

RELIGION: Lutheran

FAMILY: Married since 1953; three children

RESIDENCE: Not available

HEALTH: Hospitalized twice for "minor" surgery and once treated for withdrawal reaction to potent drug used for chronic back pain (which caused slurred and halting speech)

(See attached biographical materials.)

Judicial History

Associate Justice of the U.S. Supreme Court since 1971; appointed by President Nixon

Professional Experience

Assistant Attorney General, Department of Justice, 1969-71.
Private practice with various firms in Phoenix, Arizona, 1953-69.
Law clerk to Justice Robert H. Jackson, U.S. Supreme Court, 1952-53.

General Considerations and Confirmability

Justice Rehnquist is universally considered to be the Supreme Court's most consistently conservative and ideological judge. He is usually described as the leader of the Court's

conservative wing, holding particularly strong views on states' rights, criminal matters and freedom of religion. He writes well and is extremely creative. Some commentators have described him as too far to the right to dominate Supreme Court (at least as presently constituted). His legal acuity and personal amiability, however, have enhanced his ability to work successfully with the other Justices.

Justice Rehnquist may be less "restrained" than other conservative judges. He is sometime said to be guided more by an inner compass than by established precedent. His statutory interpretation have, on occasion, been criticized for being perhaps too creative and strained.

In his own works, Justice Rehnquist "generally inclines against broad interpretations of constitutional provisions." He is against concentrating power in any one branch of the federal government, or the federal government vis a vis the states. Federalism and separation of powers are two driving principles in Rehnquist's jurisprudence.

Rehnquist is undeniably an intellectual giant. He was graduated number one in his class from Stanford Law School. Given his impressive abilities and his philosophical commitments, he should be able to exert considerable influence on the direction of the court.

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REDACTED

REDACTED

REDACTED

On top of all of the other considerations raised above, the confirmation process will undoubtedly cause Rehnquist's old memorandum to his former boss, Justice Jackson, to reemerge. In that memorandum, Rehnquist had argued against the principles adopted in Brown v. Board of Education. An allegation of racial prejudice is absolutely one of the last things the President's judicial nominees need at this time.

Overall Judicial Philosophy

I have not attempted to assess all of Justice Rehnquist's judicial philosophy because time does not permit and I believe his record at the Supreme Court is well established. He is plainly a compatible candidate for the job of Chief Justice.

I have previously supplied a number of articles on Justice Rehnquist. Another article is attached here.

Positions on Certain Critical Issues

Criminal Justice. On criminal justice issues, Justice Rehnquist is precisely the kind of judge that the Administration wants on the court. In New Jersey v. T.L.O., Rehnquist wrote for a 6-3 majority that the Fourth Amendment's search warrant requirement did not apply to searches of students by school officials. In Wainwright v. Witt, Rehnquist wrote for a 7-2 majority which permitting the exclusion of jurors who opposed the death penalty from capital cases. In 1984, Rehnquist wrote a 5-4 majority opinion which provided a "public safety exception" to the requirement that a suspect be given a Miranda warning before being questioned. "Overriding considerations of public safety" where the suspect possessed a gun justified the failure to advise of the right against self-incrimination.

Justice Rehnquist also wrote the majority opinion upholding New York's pretrial preventive detention statute allowing juveniles to be held before trial. This decision reversed Judge Winter's decision below. Rehnquist wrote that "protecting a juvenile from the consequences of his criminal activity" was a special obligation of the state.

Federalism. Justice Rehnquist's views on federalism are well known and embodied in his majority opinion in National League of Cities and his dissent in Garcia v. San Antonio Metropolitan Transit Authority. I do not believe any prospective Supreme Court candidate is as committed to the concept of states' rights as Justice Rehnquist.

Separation of Powers. Justice Rehnquist is a strong supporter of separation of powers as well as deference to the executive branch. For example, in Goldman v. Weinberger Rehnquist wrote the 5-4 decision affirming the military's authority to require an officer not to wear his yarmulke while in uniform. Rehnquist

also wrote the 1984 decision reinstating U.S. curbs on tourist travel to Cuba. Rehnquist said the regulations were consistent with the Constitution and federal law and were "justified by weighty concerns of foreign policy." Similarly, Rehnquist refused to block the government's deportation of Cubans in a case where he individually heard an emergency appeal from the Eleventh Circuit.

Other Matters. In a December 1984 speech, Rehnquist noted that it would be "a recipe for anarchy" if the Supreme Court automatically upheld all civil liberties claims.

bert L. Reeves, Son; Ruth

: Aug. 9, 1821,
(M) ied: Jan. 30, 1908
Cemetery, Dallas, TX
ntment: Court: Territorial,
Cleveland, Res: Palestine,
eb. 28, 1887 **Employment:**
847-, lawyer; State of TX,
363, J., 9th Judl. Dist.;
of Am., Richmond, VA,
of TX, Austin, TX, 1864-
f Sup. Ct.; State of TX,
J., 9th Judl. Dist.; Self,
874, lawyer; State of TX,
6, assoc. Justice, TX Sup.
TX, 1876-1887, lawyer;
wyer **Memberships:** mem.,
em., TX B.A., -1908; del.,
Convention, 1866-1866
h, Jan. 29, 1846 Children:
ghter; C.M. Reeves, Son;
William Q. Reeves, Son;
H. Reeves, Son.

TING Born: Mar. 26, 1911,
hool(s): St. Louis U. 1924-
f Law Degree: LL.B.
ntment: Court: E.D. MO,
3, 1962 **Employment:** St.
y., 1939-1942, trial atty.;
MO, 1949-1962, presiding
'35- '1945-1949, atty.
it i Lawyers Assn.,
B.A.; MO B.A.; St. Louis
ctice: 1935, MO **Family:**
other, Elvia N. Married:
1946 Children: John K.
ard Regan, Son.

E **SCOTT** Born: Nov. 27,
M) Died: Mar. 18, 1972
) **School(s):** Jamestown C.
of MI -1926 Degree: J.D.
ntment: Court: D. ND,
s: Bismarck, ND, Party:
loyment: ND, 1928-1929,
Burlington County, ND,
.; Self, 1953-1955, Atty.
D., Wesley C., 1951
.B.A.; mem., ND B.A.;
res. **Admitted to practice:**
ier, George M.; Mother,
race C., Sept. 21, 1934
. Register Hubbard,
ert Register, Son.

REHNQUIST, WILLIAM HUBBS Born: Oct. 1, 1924, Milwaukee, WI (M) **School(s):** Stanford U., Palo Alto, CA 1950-1952 Degree: LL.B.; Harvard C., Cambridge, MA 1948-1950 Degree: M.A.; Stanford U., Palo Alto, CA 1946-1948 Degree: B.A., M.A. **Nominations for appointment:** Court: U.S. Sup. Ct., Pres: Nixon, Res: DC, Oct. 21, 1971 **Employment:** Private Practice, Phoenix, AZ, 1953-1969, ptnr.; USAAF, 1943-1946; Law Clerk to Justice Robert H. Jackson, Sup. Ct., June 1952-1953, clerk; Govt., Jan. 1969-Jan. 1972, asst. atty. gen. **Honors:** Order of Coif **Admitted to practice:** 1953, AZ **Family:** Father, William Benjamin; Mother, Margery Married: Natalie, Aug. 29, 1953 Children: James Rehnquist, Son; Janet Rehnquist, Daughter; Nancy Rehnquist, Daughter.

REID, ROBERT RAYMOND Born: Sept. 8, 1789, Prince William Parish, SC (M) Died: July 1, 1841 **School(s):** SC C., Columbia, SC **Nominations for appointment:** Court: Territorial, FL Territory, Pres: Jackson, Res: Augusta, GA, Party: Dem., May 23, 1832; Court: Territorial, FL Territory, Pres: Jackson, Res: St. Augustine, FL Territory, Party: Dem., Feb. 22, 1836 **Employment:** Self, GA, 1810-1816, lawyer; State Govt., Atlanta, GA, 1816-1819, J.; U.S. Govt., DC, 1819-1823, **Mem.**, U.S. Ho. of Reps.; State Govt., Atlanta, GA, 1823-1825, J. of Middle Cir.; Self, Augusta, GA, 1825-1827, lawyer; City Govt., Augusta, GA, 1827-1832, pres. J.; City Govt., Augusta, GA, mayor; U.S. Govt., DC, 1840-1841, gov. **Family:** Married: Anna Margaret, 1811; Elizabeth Napier, May 8, 1829; Mary M., Nov. 6, 1837.

REID, SILAS HINKLE Born: Sept. 27, 1870, DuQuoin, IL (M) Died: Interred: DuQuoin, IL **School(s):** Northern IL Normal Sch., DeKalb, IL 1887-1890; Wesleyan Law C., Bloomington, IL 1890-1891 Degree: LL.B. **Nominations for appointment:** Court: D. AK Territory, Pres: Roosevelt, T., Res: Valdez, AK, Party: Repn., Dec. 3, 1907 **Employment:** Self, DuQuoin, IL, 1891-1901, lawyer; City of DuQuoin, IL, city atty.; Self, El Reno, OK, 1901-1907, lawyer; County of Canadian, El Reno, OK, county atty.; Chicago, IL, lawyer **Admitted to practice:** IL **Family:** Father, William; Mother, Artemisia Married: Florence E., Jan. 2, 1901.

REINHARDT, STEPHEN ROY Born: Mar. 27, 1931, NYC (M) **School(s):** Pomona C., Claremont, CA Sept. 1948-June 1951 Degree: B.A.; Yale Law Sch., New Haven, CT Sept. 1951-May 1954 Degree: LL.B. **Nominations for appointment:** Court: 9th Cir., Pres: Carter, Res: Los Angeles, CA, Party: Dem., Nov. 29, 1979 **Employment:** USAF, DC, 1954-1956, 1st Lt.; D. DC, 1955-1957, Law clerk; O'Melveny & Myers, 1957-1959, Assoc.; Bodle & Fogel, 1959-1964, Assoc.; Fogel, Julber, Reinhardt, Rothschild & Feldman, 1964-1980, Ptnr. **Memberships:** mem., council, sect. on labor law, A.B.A., 1974-1975; Co-chm., state labor legis. comm., A.B.A., 1965-1966; Co-chm., comm. on labor arbitration and law of collective bargaining agreements, A.B.A., 1967-1973; mem., comm. on 9th Cir., A.B.A., 1966-1977; mem., comm. on prac. and procedure under Natl. Labor Relations Act, A.B.A., 1973-1974; mem., comm. on legis., CA Bar, 1973-1977; Los Angeles County B.A., mem., labor law sect., 1974-1980; mem., vice chm. (1969-1974), CA advisory comm. to U.S. Commn. on Civil Rights, 1962-1974 **Family:** Children: Mark Reinhardt, Son; Justin Reinhardt, Son; Dana Reinhardt, Daughter.

RELLSTAB, JOHN Born: Sept. 19, 1858, Trenton, NJ (M) Died: Sept. 22, 1930 **School(s):** Pub. schs., Trenton, NJ **Nominations for appointment:** Court: D. NJ, Pres: Taft, Res: Trenton, NJ, Party: Repn., May 6, 1909 **Employment:** Borough of Chambersburg, NJ, 1884-1888, solicitor; City of Trenton, NJ, 1889-1892, solicitor; City of Trenton, NJ, 1894-1896, solicitor; Dist. Ct., Trenton, NJ, 1896-1900, J.; Mercer County, NJ, 1900-1909, county J. **Read law:** Levi T. Hannum **Admitted to practice:** 1889, NJ **Family:** Father, John; Mother, Theresa Married: Mary L., Aug. 1, 1880; Mary J., May 4, 1905.

RENFREW, CHARLES BYRON Born: Oct. 31, 1928, Detroit, MI (M) **School(s):** Princeton U., Princeton, NJ Sept. 1948-June 1952 Degree: A.B.; U. of MI Law Sch., Ann Arbor, MI Feb. 1954-June 1956 Degree: J.D. **Nominations for appointment:** Court: N.D. CA, Pres: Nixon, Res: San Francisco, CA, Party: Dem., Nov. 29, 1971 **Employment:** USN, July 1946-May 1948, electronics technician; U.S. Army, July 1952-Oct. 1953, 3d class forward observer; Pillsbury, Madison & Sutro, San Francisco, July 1956-Jan. 1972, ptnr. **Publications:** Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases, 57 Chicago Bar Record 130-143 (Nov.-Dec.), 1975; Sentence Review by the Trial Court, 51 Indiana Law Jour. 355-366 (Winter), 1976 **Admitted to practice:** 1956, CA **Family:** Father, Charles W.; Mother, Louise Married: Susan, June 28, 1952 Children: Taylor Allison Renfrew, Daughter; Charles Robin Renfrew, Son; Todd Wheelock Renfrew, Son; James Bartlett Renfrew, Son.

1961-65 Judge U.S. Court of Appeals, Second Circuit appointed by President Kennedy; 1965-67 Solicitor General of U.S. appointed by President Johnson; 1967-date Associate Justice U.S. Supreme Court appointed by President Johnson.

Member National Bar Association, American Bar Association, D.C. Bar Association, New York County Lawyers Association, Alpha Phi Alpha, Masons.

Harry A. Blackmun Born Nov. 12, 1908 in Nashville, Illinois; married Dorothy E. Clark; children Nancy Clark Coniaris (Mrs. John C.), Sally Ann Elsberry (Mrs. Michael V.), Susan M. Perkins (Mrs. Michael).

Harvard University, B.A. (summa cum laude) 1929, LL.B., 1932; admitted to Minnesota bar 1932.

1934-38 associate Dorsey, Coleman, Barker, Scott & Barber, Minneapolis, Minnesota, 1939-42 junior partner, 1943-50 partner; 1935-41 instructor St. Paul College of Law; 1945-47 instructor University of Minnesota Law School; 1950-59 resident counsel Mayo Clinic; 1959-70 Judge U.S. Court of Appeals, 8th Circuit appointed by President Eisenhower; 1970-date Associate Justice U.S. Supreme Court appointed by President Nixon.

Member American Bar Association, Minnesota Bar Association, Olmstead County Bar Association, Phi Beta Kappa.

Lewis F. Powell, Jr. Born Sept. 19, 1907 in Suffolk, Virginia; married Josephine P. Rucker; children Josephine Powell Smith, Ann Powell Carmody, Mary Powell Sumner, Lewis F. III; Presbyterian; 1942-46 USAAF to Colonel, decorated Legion of Merit, Bronze Star, Croix de Guerre with palms.

1932-71 law practice Richmond, Virginia, 1937-71 member Hunton, Williams, Gay, Powell and Gibson; 1972-date Associate Justice U.S. Supreme Court appointed by President Nixon.

Member American Bar Association, Virginia Bar Association, Richmond Bar Association, Bar Association of the City of New York, National Legal Aid & Defender Association, American Law Institute, Society of Cincinnati, Sons of Colonial Wars, Phi Beta Kappa, Phi Delta Phi, Omicron Delta Kappa, Phi Kappa Sigma.

William H. Rehnquist Born Oct. 1, 1924 in Milwaukee, Wisconsin; married Natalie Cornell; children James, Janet, Nancy; Lutheran; 1943-46 USAAF.

Stanford University, B.A. (with great distinction) 1948, M.A., 1948; Harvard University, M.A., 1949; Stanford University, LL.B., 1952; admitted to Arizona bar.

1952-53 law clerk Justice Robert H. Jackson U.S. Supreme Court; 1953-55 Evans, Kitchel & Jenckes, Phoenix, Arizona; 1956-57 member Ragan & Rehnquist, Phoenix, Arizona; 1957-60 partner Cunningham, Carson & Messenger, Phoneix, Arizona; 1960-69 partner Powers & Rehnquist, Phoenix, Arizona; 1969-71 assistant Attorney General, Department of Justice; 1971-date Justice U.S. Supreme Court appointed by President Nixon.

Member American Bar Association, Federal Bar Association, Arizona Bar Association, Maricopa County Bar Association, Phi Beta Kappa, Order of the Coif, Phi Delta Phi.

MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUSTICE REHNQUIST

JUSTICE WILLIAM REHNQUIST

Before and during his tenure on the Supreme Court, Justice Rehnquist has established himself as the paridagmatic example of a jurist committed to principles of judicial restraint in all of its contexts. In all areas of constitutional law -- e.g., criminal procedure, due process, civil rights, freedom of press and religion -- Rehnquist's jurisprudence has been scrupulously premised on the principles of federalism and separation of powers and he has resisted any attempt to engage in unwarranted judicial evisceration of traditional values or democratic choices through the invention of "rights" discerned in "penumbras" emanating from a "living" Constitution.

Most notably, Rehnquist pioneered the rehabilitation of federalism principles by his landmark decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which revived, albeit temporarily, the presumed - dead Tenth Amendment as an affirmative safeguard against federal encroachment into the states' sovereign prerogatives. See also Rizzo v. Goode, 423 U.S. 362 (1976) (federal courts are prohibited from entering injunctions against local governments absent clear evidence of a continuing pattern or practice of unlawful activity); Pennhurst v. Halderman, 451 U.S. 1 (1981) (Pennhurst I) (congressional statutes imposed on states pursuant to the spending power must be narrowly construed to avoid infringement of state prerogatives); Pennhurst v. Halderman, 465 U.S. 89 (1984), (Pennhurst II) (Eleventh Amendment prohibits federal courts from requiring states to follow state law) (opinion joined, not authored, by Rehnquist). Indeed, in every important (and unimportant) decision during his time on the Court, Rehnquist has penned or joined the opinion which best reflects the intent of the legislative or constitutional authors, not his own personal policy preferences.

In Roe v. Wade, 410 U.S. 113 (1973), Rehnquist dissented from the Court's creation of a right to abortion on demand. In United Steelworkers v. Weber, 443 U.S. 193 (1979), and all the school desegregation cases, Rehnquist strongly resisted distorting legislative and constitutional principles of nondiscrimination into mandates for a particular degree of racial balance. See, e.g., Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976); Columbus Board of Education v. Penick, 439 U.S. 1348 (1978). His dissenting opinion in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), masterfully demonstrated, through exploration of historical evidence revealing the Framers' intent, that the First Amendment's religion clauses were designed to prevent an establishment, not an acknowledgement or accommodation, of religion, a principle he has adhered to in all the religion cases. He also led the Court's effort to cut back significantly on New York Times v. Sullivan, 376 U.S. 254 (1964), in which the Warren Court, notwithstanding 600 years of common law and the Framers' contrary intent, invented First Amendment immunity for false, libelous statements. See, e.g., Time Inc. v. Firestone, 424 U.S.

443 (1976). The same is true of the criminal and prison context, where he has pushed the Court to reverse the excesses of the Warren Court with respect to the exclusionary rule created by Miranda v. Arizona, 384 U.S. 436 (1966), the cases all but abolishing the death penalty and those outlawing legitimate penal practices that "shock the conscience" of liberal judges but not of the Framers. See, e.g., New York v. Quarles, 467 U.S. 649 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); Bell v. Wolfish, 441 U.S. 520 (1979).

Perhaps more importantly, by dint of his personal qualities, intellect and sheer cleverness in reshaping erroneous precedent, Rehnquist has formed a consensus on a generally rudderless Court behind fundamental principles which might well have otherwise been rejected. His landmark desegregation opinion in Spangler, for example, established the fundamental principle that the Constitution does not require racial balance in government programs notwithstanding potentially contrary precedent. His accomplishments in the areas of of federalism, libel and criminal law listed above were similarly achieved in the face of inconsistent precedent. Moreover, virtually every beneficial decision listed above grew out of a small seed of legal principle that Rehnquist had planted in a prior, seemingly innocuous case, thus further demonstrating his mastery at looking beyond the facts of an individual case to gradually achieve fundamental reform in constitutional law. In General Electric Company v. v. Gilbert, 429 U.S. 125 (1976), for example, Rehnquist used a footnote buried in a prior decision, (Geduldig v. Aiello, 417 U.S. 484 (1974)) to establish the principle that pregnancy-based discrimination does not constitute impermissible discrimination on the basis of sex. In Lloyd Corportation v. Tanner, 407 U.S. 551 (1972), Rehnquist persuaded a majority of the Court to distinguish, on the thinnest of reeds, a very recent precedent (Logan Valley, 391 U.S. 308 (1968)), thus effectively reversing the holding that privately-owned shopping centers were state actors for purposes of the First Amendment. He built on this precedent, in turn, to effectively overrule Warren Court precedent that had converted a multitude of purely private activities into "state action" subject to constitutional constraints. See e.g, Moose Lodge v. Irvis, 407 U.S. 163 (1972); Jackson v. Metropolitan Edison, 419 U.S. 345 (1974).

Further, Rehnquist possesses all the leadership qualities required to make a superb Chief Justice. No one can question the depth of his scholarship or intellect, the clarity of his philosophical vision or his ability to build a consensus to implant that vision in the Court's decisions. Moreover, he enjoys a warm collegial relationship with, and is genuinely respected by, all of his fellow justices, even those with whom he often disagrees. His fourteen year tenure on the Court has given him valuable insights into the predilections of these justices and the politics and machinations of the Court. Although he had significant problems with his back three years ago, this is no longer a real health problem. In sum, Justice Rehnquist would add immeasurably to the development of proper constitutional jurisprudence if appointed as Chief Justice.

SCALIA TAB A

LIVE WIRE ON THE DC CIRCUIT

Antonin Scalia's ebullient personality and deeply conservative opinions are shaking up the circuit. Already people are posing the question: Can he beat colleague Robert Bork to the Supreme Court?

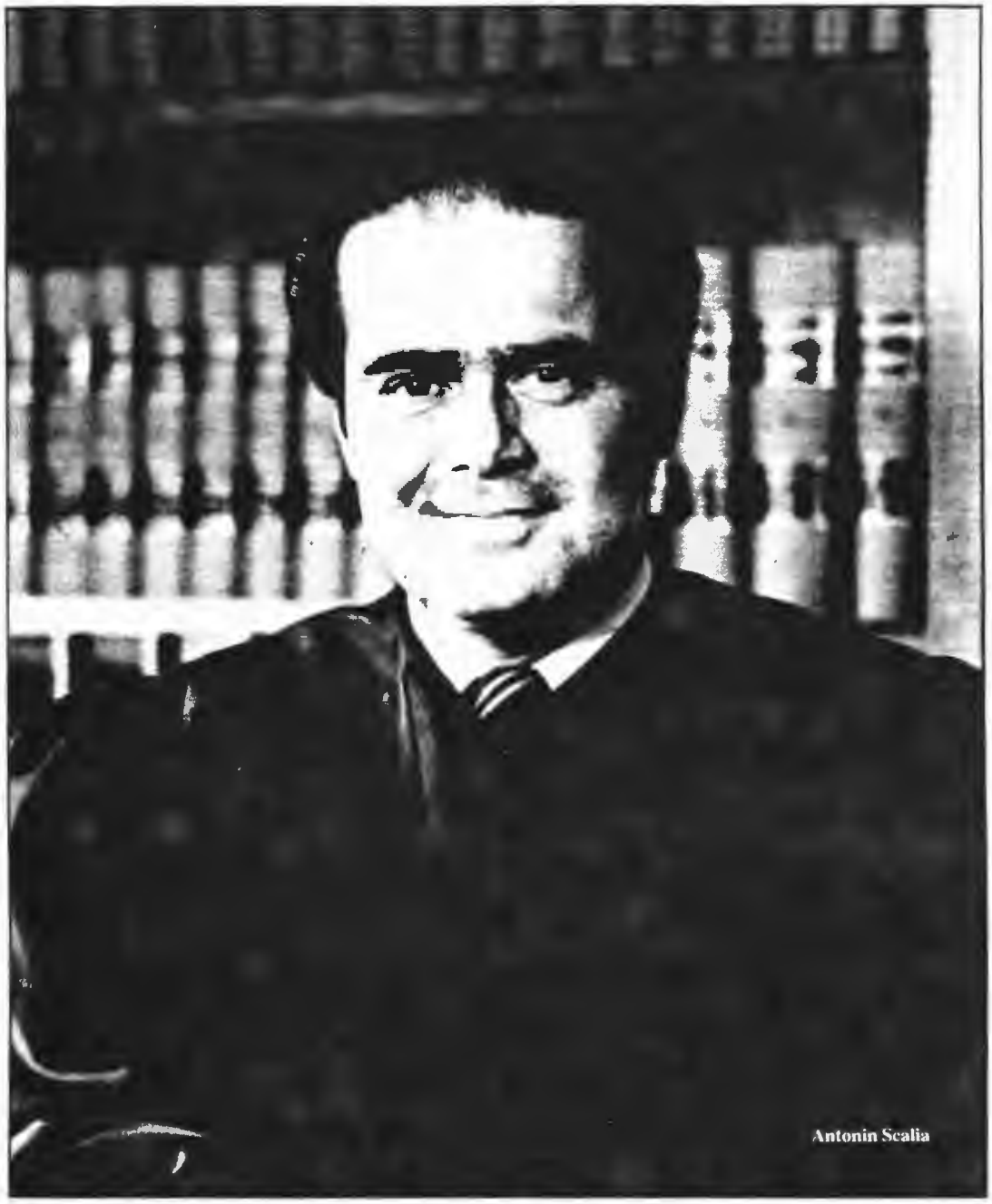
BY STEPHEN J. ADLER

WHEN A CONSERvative law professor named Antonin Scalia was appointed to the District of Columbia Circuit Court in August 1982, few lawyers had heard of him. But while attorneys in Washington were asking each other, "Who's he?" lawyers at Cleveland's Jones, Day, Reavis & Pogue were celebrating.

For years the firm's lawyers had been telling stories about their former associate, a brash, instantly likable guy who lit up the firm with his legal ability and eager conservatism. And for years, Jones, Day partners had been giving Scalia an extra push at key moments in his career.

The bond between Scalia and Jones, Day was forged 25 years ago on the campus of Harvard Law. James Lynn, then a partner at Jones, Day and now the chairman of Aetna, was roaming the halls of Gannett House—headquarters of the *Harvard Law Review*—looking for prospects. He came upon notes editor Scalia, a stocky student from Queens with wavy black hair and an almost comical intensity, hunched over a manuscript. Although Scalia was engrossed in his reading, Lynn decided to interrupt. "By one or two in the morning I had convinced him to come out for bacon and eggs in Harvard Square," Lynn says. "Then I convinced him to come out and see Cleveland and Jones, Day."

Two months later Scalia was at Lynn's home in Cleveland, mixing with Jones, Day partners and associates at a recruitment party. As partner Richard Pogue remembers it, Scalia took on a group of eight lawyers, enthusiastically defending a law review note he had edited that supported blue laws. "We argued until three in the morning, one against the eight," says Pogue. Adds Lynn, "He has those bushy eyebrows that fur-



Antonin Scalia

row up when he's concentrating, and for forty-five minutes on end, he had that furrowed look. It never bothered him that everyone was on the other side."

Scalia signed on at Jones, Day. Six years later, he moved into teaching and then into jobs in the Nixon executive office and the Ford Justice Department. All the while, he impressed colleagues with his independence, the strength of his views, his consensus-building skills—and his ability to land on his feet, even during the stormiest days of the Nixon era.

His reputation was confined to a small circle of government lawyers and academics, however, and when he arrived at the appeals court from the University of Chicago, his forcefulness and political savvy took some of his colleagues by surprise. In a short time, he has distinguished himself by being better prepared and more activist in the exchange of ideas among the chambers than many of the other judges. Most important, his aggressively argued, deeply conservative opinions have grabbed attention and earned him a place as a leader of the court.

The biggest surprise could be yet to come. In the next four years President Reagan may have to choose as many as four Supreme Court justices; according to the three dozen top Washington lawyers interviewed for this story—a group that includes a dozen with strong administration ties—Scalia is a strong contender. Robert Bork, a fellow conservative on the D.C. Circuit, is considered the front-runner. Aside from Bork and Scalia, the names most often mentioned are Second Circuit judge Amalya Kearse, Seventh Circuit judge Richard Posner, and William Clark, a Reagan confidant and former California supreme court justice.

Although Scalia is unquestionably an archconservative, those who

ook at his social and political views [to predict how he would rule] if he's appointed to the Supreme Court will be sorely disappointed," says Ernest Gellhorn, dean of Case Western Reserve University law school. "He's a very independent thinker." Scalia has attacked the Freedom of Information Act as costly and dangerous; as a judge he has also granted several FOIA requests. He has lobbied hard to take the legislative veto away from Congress—but he has fought just as hard to take the sovereign-immunity defense away from the executive branch.

Despite his conservatism, Scalia has not become closely identified with any one school of jurisprudence—unlike Bork, a constitutional scholar and strict constructionist, or Posner, whose name is almost synonymous with law and economics. Scalia's special interest, administrative law, is limited and procedural in nature, and he has not often sought publicity for his views. In keeping with his habit of turning attention away from himself, he declined to be interviewed for this article.

This is a story of how Scalia got where he is—with a little help from Jones, Day—and a guide to what kind of judge he might become.

Outshining Bork

Six months before Scalia arrived in shington, President Reagan had ointed Bork to the D.C. Circuit. ork was seen by many in the administration as a Supreme Court justice-in-waiting, an heir apparent whose leadership of the D.C. Circuit was presumed. Litigators and federal agency lawyers who argue frequently before the court say they assumed Scalia would defer—at least initially—to Bork. Scalia did nothing of the kind. Instead, he made it clear from the start that he didn't intend to ease into the job.

One of the first things the other judges noticed was that the newcomer was nosing into their opinions. Unlike most members of the court, Scalia pores over other judges' drafts, covering them with detailed and often critical marginal comments, even if he isn't on the panel deciding a case. Several of the judges say they like the attention; none admit to disliking it, although some clerks say they find it excessive.

Also in contrast to most of his peers, Scalia sometimes writes his own opinions without the benefit of a clerk's first draft, using the word processor he installed in his chambers. He always prepares for oral arguments by reading all the briefs himself. Rather than requiring his clerks to prepare bench memos summarizing the two sides, he asks them to take a position in each case and argue it with him. By the time Scalia gets to oral argument, litigators say, he is enomenally well prepared. He ks sharply pointed questions to rce counsel into admitting the weaknesses in their positions. "Scalia comes across as a knife-fighter, but a friendly knife-fighter," says a lawyer who has attended oral arguments.

Judge Harry Edwards, a Carter appointee and one of the most active questioners in arguments, finds Scalia's approach refreshing. "He thinks as do I that if you are going to have oral argument, it should have a purpose," says Edwards.

While Scalia was making his presence felt during his first term, Bork was falling behind in his case load and, according to clerks of judges on the court, seemed uninterested in the unbalanced diet of administrative law cases coming before the panel. A dozen former clerks all agreed in interviews that Scalia has been more engaged in the court's work—and more of a leader—than Bork.

Bork says he doesn't feel he is competing with Scalia for a Supreme Court nomination. "We're good friends," he says. "I'd be delighted if he got [a nomination]. . . . He's too good a friend to get into competition with anyway." Bork says he did have a backlog, which he has cleared up. "When I first came to the court, [the case load] seemed very heavy. It hasn't eased up, but I find it easier to deal with," he says. Asked whether he is understimulated by the court's cases, he says, "I'm not bored." Then he adds that he would prefer it if the court heard a greater variety of cases, including more criminal, antitrust, and constitutional matters.

While Bork and Scalia come out on the same side in most cases, their approach to legal issues is quite different. "Bork may tend to think more jurisprudentially or globally than Nino does and has more of a record in that area," says a former top-level Justice official. "Nino has tended to look more at the procedural and administrative practice."

Top Justice lawyers who have recently left government—while denying that Bork has slipped—say they have noticed that Scalia has been particularly effective. "He is ideally suited by his intellect and his philosophy to be very carefully considered [for the Supreme Court]," says Theodore Olson, a Gibson, Dunn & Crutcher partner who headed the office of legal counsel from 1981 to 1984. "He's also within the right age range." (Scalia is 48, Bork 58.) GTE general counsel Edward Schmults, former deputy attorney general under William French Smith, says, "Certainly Nino is establishing a record as an outstanding judge, and I like to think of him as someone who would get extremely close consideration." And Michael Uhlmann, a former assistant attorney general who left his position as White House counsel last August for the D.C. office of Philadelphia's Pepper, Hamilton & Scheetz, says of a possible Scalia nomination, "Would I celebrate such a thing? You bet. He's good stuff."

One of the things attracting attention to Scalia is how well his opinions have fared before the Supreme Court. Of the 11 cases in which he has written dissents, *cert* was requested in four and granted in three. Of the 53 cases in which he wrote majority opinions, *cert* was requested in four cases; all were denied. In other words, the High Court has sided with Scalia in seven of eight reviews.

Bork, when asked about his record, said he did not know the breakdown for his cases, but added that the Supreme Court has never granted *cert* on a majority opinion he has written.

In his 60-odd opinions so far, Scalia has revealed the outlines of his intellect and philosophy. In a 1983 case, he tangled with one of the court's liberal icons, Judge J. Skelly Wright, who had written a farfetched majority opinion requiring the Food and Drug Administration to consider whether lethal injection of condemned prisoners met FDA standards for safe and effective drugs. Scalia fired back a lawyerly dissent, arguing that the FDA has no authority over drugs used for execution because they are not the sort of consumer drugs that Congress intended the FDA to regulate: "The condemned prisoner executed by injection is no more the 'consumer' of the drug than is the prisoner executed by firing squad a consumer of the bullets," he wrote caustically.

Even if the FDA *did* have jurisdiction over those drugs, Scalia reasoned, it would also have the right to decide not to exercise its authority without being second-guessed by the judiciary. In what has become a theme of his dissents, he chided his colleagues for interfering in what he sees as extrajudicial matters, complaining that the majority position had "less to do with assuring safe and effective drugs than with preventing the states' constitutionally permissible imposition of capital punishment."

The Supreme Court took *cert* in the case, hearing arguments in December 1984. (As of this writing, the Court has not ruled.) Says Case Western Law dean Gellhorn, a former colleague of Scalia's at University of Virginia law school, "Scalia's dissent was just penetrating. . . . I think with the argument in the dissent the Court felt obliged to resolve the question . . . and that's what you really look at in an intermediate appellate court judge."

In another case, Scalia showed that he could position himself to the right of some of the court's other conservatives. In an appeal involving the right of protesters to sleep in Lafayette Park across from the White House, he wrote a separate dissent to the 6-to-5 *en banc* opinion granting First Amendment protection to the demonstrators. Rather than nitpick about when sleep might be protected, as the other dissenters had done, he took the extreme position, denying "flatly . . . that sleeping is or can ever be speech for First Amendment purposes." Although it didn't go as far as Scalia, the Supreme Court's ruling reversed the majority decision.

Officials in Reagan-controlled administrative agencies applauded the Scalia dissents in both cases. Former White House counsel Uhlmann says of the lethal-injection dissent, "It showed Nino at his best. He took a pail of very cold common sense and poured it on."

At oral arguments, Scalia loves forcing counsel to admit the weaknesses of their positions. 'Scalia comes across as a knife-fighter, but a friendly knife-fighter," says one lawyer.

"He'll Be Effective Far Beyond His Vote"

Despite the vehemence of his opinions, Scalia has managed to stay on the good side of his colleagues, who work in close quarters on two floors of the federal courthouse. "He is a very politic person, as opposed to political . . . a hail-fellow-well-met, and an extrovert," observes Daniel Mayers, a partner at Wilmer, Cutler & Pickering who knows Scalia well. Several of the judges on the D.C. Circuit, interviewed on the condition they would not be identified, say Scalia is so personable that he has created a feeling of good will that pervades the court.

Last winter Scalia had the judges over to his house in Virginia to celebrate the appointment of the third Reagan judge to the court, Kenneth Starr. As the evening mellowed, Scalia moved to the piano, where he banged away while he, Starr, Bork, and others sang old songs. It was a far cry from the days when the open feud between now–Chief Justice Warren Burger and senior circuit judge David Bazelon put the court's members on a war footing.

Scalia has also won points among the judges for his good political instincts in not pushing anyone too far. Says Judge Edwards, "If you get to a point in discussing a thesis when he doesn't have an answer, he's not going to hard-line you just to get a result. I have never had a situation with him where he admitted what he intended to do was difficult or improbable to explain but he would do it anyway."

Lawyers who don't share Scalia's conservative philosophy now say they consider him particularly dangerous because he seems to be so widely liked and appears likely to excel at building majorities for his positions. According to one lawyer who worked with him in the ABA administrative law section, which Scalia chaired before joining the court, "The reason he was so good was that he had the way to take issues of hot dispute and come up with formulations—an amendment or a deletion—that tended to create a consensus. As a judge that will make him effective far beyond his vote."

"He would be more of a consensus builder than Justice Rehnquist," says

one liberal Washington lawyer who knows Scalia well. "I would worry more about having Nino on the court [than Bork]."

Although Scalia may be a potential consensus-builder, he's no centrist. He has been a vociferous, argumentative, and persuasive conservative all his life, and people who have known him well say there is nothing he enjoys more than debating "issues of hot dispute." Friends and fellow members of the law review, where Scalia was notes co-editor in 1960 with now-Harvard Law professor Frank Michelman, remember Scalia as having delighted in chiding Stevenson liberals about the excesses of government regulation.

Despite political differences, however, his classmates were intrigued by Scalia's personality, a combination of scholarly seriousness and life-of-the-party gregariousness. A graduate of Georgetown University, and the son of a professor of Romance languages at Brooklyn College, Scalia loved to pull classmates aside for a spirited debate, usually managing to put a humorous spin on even the most arcane subjects. "I don't remember anyone I thought was more fun to be with and argue with," says Michelman.

Scalia built the kind of academic record that law firms were ready to [illegible] and when Jones, Day came [illegible]e had already been actively [illegible] by Philadelphia's Morgan, Lewis & Bockius and had all but decided to go there. But after a year in Europe on a fellowship, Scalia went to Jones, Day as an associate in 1961. There, according to Jones, Day lawyers, he did real estate, corporate financings, labor, and antitrust discovery, but little if any actual trial work.

"He was one of the last of the real generalists in the sense that he wanted to do as much of everything as he possibly could," says Jones, Day partner Herbert Hansell. "And he did damn near everything and he did it well."

If Scalia had a weakness as a lawyer in a firm, says Lynn, it was that "perhaps he wanted to spend more time on a problem than you might like in a practice. But that's part of what drove him to teach and later drove him to be a judge." Nonetheless Pogue, Hansell, and Lynn agree he was on the partnership track during his six years as an associate.

Scalia's political commitment was no secret, even to recruits. Daniel Elliott, Jr., now vice-president for law at White Consolidated Industries, Inc., and a one-time Jones, Day associate and partner, interviewed with Scalia and others at the firm in 1963. "I remember the guy vividly," says Elliott. "He was a real hard-core Goldwater person. I interviewed in the fall of 1963 before Goldwater had [illegible]d of steam, and he was a very [illegible]ate advocate." Says partner Snow, "He was one of the first [illegible] Buckley–type conservatives and was a big *National Review* fan. . . . In the sixties, I can recall him being perturbed by the liberalizations in the Catholic Church." (A Catholic, Scalia is the son of an Italian immigrant father.)

By 1967 Scalia had decided to move into academia, where he could devote more time to exploring legal problems without worrying about running up a client's bill. Scalia's tongue-in-cheek farewell, one partner recalls, captured his good humor and more-than-modulated conservatism: "I'll be glad to get away from such a liberal place," he remarked, to the astonishment of the establishment lawyers he was leaving behind.

Scalia's tenure as a law professor at the University of Virginia turned out to be more of an entrée into Washington government circles than a retreat to the ivory tower. He spent only three years full-time at Virginia, where he taught contracts, commercial code, and comparative law before getting his first government job in the Nixon executive office. And he got the job only as the result of a timely push from a Jones, Day connection.

The head of the newly created presidential Office of Telecommunications Policy, Clay Whitehead, recalls that in 1970 he had been looking without success for a first-rate general counsel and that he had lamented about his problem to James Lynn, the former Jones, Day partner who had recruited Scalia and who was then general counsel at the Department of Commerce. Lynn says he recommended Scalia.

The telecommunications office had been created to help break the logjam in cable TV development, to oversee the growth of the fledgling Corporation for Public Broadcasting, and to supervise telecommunications within the executive branch. But as a practical matter Whitehead's office immediately became the focal point for Nixon's attack on the autonomy of public TV, which Nixon viewed as anti-administration and antiwar.

Key assists from Jones, Day led to White House jobs and a judgeship.

As general counsel, Scalia had to fend off pressures from White House aides as high up as John Ehrlichman and H.R. Haldeman and still appear loyal enough to maintain his good reputation with Republican leaders. "We were on the hot seat," Whitehead recalls. "Haldeman, Ehrlichman, and crew were yammering at us to try to get the [broadcasting] board to do this or that."

One day, says Whitehead, he "received a rather incredible memo from the White House" directing that a certain TV program be eliminated: "Nino said, hell, write back a memo that says it's illegal." Scalia noted that it wasn't clearly illegal, then added, "Hell, they don't know that," according to Whitehead, who says he took Scalia's advice and wrote the memo. Whitehead says he never heard from the White House again on the subject.

At another point Haldeman, Ehrlichman, and other White House aides were circulating memos (which became part of the public record in 1979 as the result of an FOIA request) in which ideas for crippling public TV were enthusiastically discussed, including a plan to cut off all federal funds. Whitehead and Scalia, who received copies of the memos, agreed that public TV programming was too liberal, but they opposed such drastic moves. On December 23, 1971, Scalia sent an "Eyes Only" memo to Whitehead. "I have concluded that the most likely eventuality is that the plan will fail and the administration's role will become public knowledge," Scalia wrote. "Naturally, this is the worst possible development. . . . Since my initial recommendation to abandon this plan has been rejected, at the very least I urge you to point out to the White House staff all of the risks and difficulties."

Although few of Whitehead's and Scalia's warnings were heeded by the Nixon administration, officials in the Carter administration reviewed Nixon's efforts in the area and issued a report. "Scalia actually comes off looking very good," says Robert Sachs, who worked on the report as an aide in the telecommunications office under Carter. "He's about the only one."

The telecommunications job exposed Scalia to administrative law for the first time, sparking an interest that grew into a specialty. He played the leading role in negotiating a compromise among the television networks, the cable industry, and the motion picture industry to regulate the growth of cable television. Cable development had been frozen by the FCC in 1966 because cable owners and program copyright holders couldn't agree on how to compensate for retransmission of copyrighted programs on cable.

Scalia shuttled among the parties and created a formula that would allow cable to develop. After six months of meetings, he drafted the Cable Compromise of 1971, which the industries accepted and which the FCC later incorporated into rules. The compromise also helped form the basis for the 1976 amendment to the Copyright Act providing for cable retransmission. The compromise "brought out Nino's ability to deal with real people and real situations that are inherently messy," says Whitehead. Adds former Scalia aide Henry Goldberg: "Something that impressed me was that despite his academic outlook he was able to hammer out this sort of compromise. . . . Some people doubted that Nino could mix it up at this level, but he could."

Scalia left the telecommunications office in 1972 to serve as full-time chairman of the Administrative Conference of the United States, a federal interagency think tank that is-

sues reports on legal and management issues affecting executive agencies.

The Nixon Papers: "Welcome To The Job, Mr. Scalia"

President Nixon rewarded Scalia for his work by appointing him to head the office of legal counsel in the Justice Department in 1974. As had happened in the telecommunications office, Scalia got a big push from a Jones, Day partner—this time Jonathan Rose, who was an associate deputy attorney general at the time. Rose recommended Scalia to then-deputy attorney general Lawrence Silberman.

The outgoing head of the office of legal counsel, Robert Dixon, "had been chewed up psychologically" by Watergate-related issues, says Silberman. (Dixon left to teach at Washington University law school in St. Louis; he died in 1980.) "There was a range of potentially serious constitutional issues, and it was absolutely imperative to have a first-class legal mind and a man of courage," Silberman continues. The appointment to the office of legal counsel was so crucial, he adds, that "I did talk to Jerry Ford about it. It was a very important position."

Although nominated by Nixon in the summer of 1974, Scalia was actually appointed by Ford that August because Nixon had resigned in the interim. As the head of the office in charge of drafting opinions on the lawfulness of executive actions, Scalia faced one of the toughest and most politically charged tasks imaginable. On his first day on the job, he had to decide whether the presidential tapes and papers piled high in the White House belonged to Nixon or to the government. Remembers James Wilderotter, yet another Jones, Day partner who was then associate counsel to President Ford, "His initial day on the job the question was: Who owns the tapes and papers? Welcome to the job, Mr. Scalia."

Scalia set to work on the opinion and, drawing on historical precedents, drafted a ruling that determined that the papers belonged to Nixon. The final opinion, signed by then-Attorney General William Saxbe after top Justice Department officials tinkered with Scalia's draft, was issued on September 6, 1974. According to the opinion, "To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the government since the beginning of the Republic, and to call into question the practices of our presidents since the earliest times." Scalia cited George Washington's letters and moved through to more recent examples. Later, however, Congress passed legislation that gave the government possession of much of the material.

Scalia was soon branching into work involving intelligence agency conduct, an area in which he has shown great interest as a judge. Scalia was tapped to work with then-attorney general Edward Levi on a sweeping and potentially explosive review of the intelligence-gathering powers of the CIA and the FBI. Two congressional committees were at work on legislation seeking to curtail domestic spying and to place limits on how far covert international operations could go. The plan inside the Ford administration was to come up with an executive order that would derail more restrictive legislation.

Scalia was actively involved in developing the executive order, attending top-level White House meetings, and working on drafts, says Philip Buchen, then counsel to Ford and now a partner in Dewey, Ballantine, Bushby, Palmer & Wood's Washington office. According to Uhlmann, who was then a legislative assistant to Ford, "You were trying to codify practices that skirt along the edge of the very meaning of nationhood and wars being waged other ways. There were multiple, multiple drafts of everything."

In a later fight to prevent challenges to classification of documents—and in a recent opinion in a suit involving U.S. activities in Honduras—Scalia displayed particular deference to the goals of the military and of intelligence agencies, and consistently made separation-of-powers arguments to oppose judicial involvement. In the Central America case, a U.S. citizen who owned a cattle ranch in Honduras claimed that the United States had set up a military training school for Salvadoran soldiers on his ranch. The district court rejected his plea for an injunction on the grounds that the dispute was a nonjusticiable political question. A three-judge panel of the D.C. Circuit upheld the district court, with Scalia writing the opinion. But the full court voted to hear the case *en banc*, and by a 6-to-4 vote reversed the decision, saying that a suit could be heard.

Scalia responded in his dissent that in addition to the broad separation-of-powers problem, which alone should have prompted the court to stay out of the issue, there were more technical jurisdictional reasons why the plaintiff could not bring his case to court. A citizen could seek mone-

"He would be more of a consensus builder than Justice Rehnquist," says a liberal D.C. lawyer who knows Scalia well. "I would worry more about having Nino on the court [than Bork]."

compensation only—not an injunction—when making a claim that the government had taken his property, Scalia argued, and moreover the plaintiff lacked standing because his property was incorporated in Honduras.

According to one D.C. lawyer sympathetic to the plaintiff's position, "The case is illustrative of the way that he thinks in that he found a lot of reasons for courts not to get involved. . . . The standing issue was raised by Scalia for the first time at arguments. The government's argument had been that it was a political question."

Blowing The Whistle On Sovereign Immunity

Scalia's attention to the details of standing and other procedural issues had its roots at least as far back as his work at Justice in the mid-seventies. The department, especially the civil division, had always strongly backed the legitimacy of sovereign immunity—a defense automatically claimed by the government whenever anyone sued it for injunctive relief. Although Scalia is strongly pro-executive, the administrative law professor in him felt that sovereign immunity was a medieval vestige that was intellectu- dishonest and ill-suited to weed- ut unwanted litigation. "The nub s argument is [usually] not what ne sees as the best substantive position, but whether all of the institutions involved were performing as they are supposed to or if one is going beyond its authority," says Walter Olson, a staffer at the American Enterprise Institute.

With much the same tenacity that he had shown in defending the law review note on blue laws 15 years earlier, Scalia now buttonholed department members and debated the sovereign immunity issue with them, bringing them over to his view. Next he wrote to Senator Edward Kennedy, then chairman of the subcommittee on administrative practices and procedures, announcing Justice Department support for the elimination of the sovereign immunity defense in suits for equitable relief. After noting that "the department in the past opposed such a change," Scalia couldn't resist a playful pat on his own back. He wrote, "In light of the tenacious and well-reasoned support of this proposal by such knowledgeable and responsible organizations as the Administrative Conference of the United States [the federal think tank that Scalia himself had headed for two years, from 1972–74] we have reconsidered that opposition."

Thomas Susman, then chief counsel of the Kennedy subcommittee now a partner at Ropes & Gray, that before the Scalia memo sup- ers of the anti-sovereign immu- y legislation had been unable to get it through Congress in 1970 or 1972. "It's not a subject that had a broad constituency," Susman says, and Justice Department opposition had been enough to kill it. But after Scalia turned the department around, the legislation passed easily in 1976. "I think what probably won that sovereign immunity debate was that nobody matched him in the rigor of his argument," recalls Uhlmann, who was then at Justice.

Attacking FOIA

When President Carter took office in 1977, Scalia left Justice and moved to the University of Chicago law school to teach. He chose Chicago, according to University of Virginia professor A.E. Dick Howard and other colleagues, in part because the school paid tuition for faculty children—and Scalia had a houseful of them (he now has nine children, ranging in age from four to twenty-three).

Robert Bork: Considered the front-runner for a nomination.

But, as happened at Virginia, Scalia couldn't keep his attention away from politics and government. He soon became involved in crusading against the legislative veto, a method by which Congress reserved the right to reject individual decisions by executive agencies. He also poured hours into editing the conservative American Enterprise Institute's *Regulation* magazine, and into heading the ABA's administrative law section. Students say his outside efforts kept him on the plane back and forth from Washington and that he wasn't always as well prepared for class as they would have liked.

The lure of a good fight appeared to be irresistible to Scalia. He testified at least a half-dozen times against legislation that would have expanded the legislative veto. In addition, he drafted the ABA's *amicus* brief in the *Chadha* case, in which the Supreme Court in 1983 finally ended the debate by finding legislative veto to be unconstitutional. "He was one of the four or five people to whom that victory was ultimately attributable," says Lawrence Simms, who worked under Scalia as deputy assistant attorney general in the office of legal counsel.

Among Scalia's many articles during the period, one stands out as an example of his stark conservatism and aggressive, lively style in stating his case. In a 1982 *Regulation* magazine piece, "The Freedom of Information Act Has No Clothes," he argued that the act went too far, that it was too expensive to administer, and that openness isn't always a virtue, particularly when it interferes with law enforcement, privacy, and national security. Of FOIA, he wrote, "It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Ridiculing the expansive 1974 amendments as products of an era when " 'public interest law,' 'consumerism,' and 'investigative journalism' were at their zenith," Scalia argued that "the defects of the Freedom of Information Act cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press."

"He Came Up On Every List"

All the while, Scalia was chalking up a record that would make him irresistible to the new Reagan Justice Department, which starting in 1981 was beginning to consider possible appointments to federal judgeships. Here was as purely conservative an academic as could be found, who had extensive experience in two Republican administrations, was likely to be sympathetic to the executive branch, and yet had managed to collect admirers from both parties—and who apparently had no enemies. Even better for Scalia, the Jones, Day connection was still alive and well in the Reagan administration.

Jonathan Rose, a Jones, Day partner, was then head of the Justice Department's office of legal policy, which screened potential candidates for judicial appointments. Rose knew Scalia from working with him in the Nixon and Ford administrations. "We were looking for outstanding academics [for the D.C. Circuit] who shared the president's political philosophy," says Rose. "He came up on every list." Says Theodore Olson, then head of the office of legal counsel: "He was a very obvious choice. There were very few people who had the expertise he had in administrative law issues that come before the D.C. Circuit."

After his nomination, however, Scalia didn't get such a resounding vote of confidence from the ABA committee that rates judicial nominees. The committee, chaired by Arnold & Porter partner Brooksley Born, gave Scalia only a "qualified" rating, on a scale in which a nominee can get the higher ratings of "well qualified" or "exceptionally well qualified." The only lower rating is "not qualified." Born declines comment on why the committee gave Scalia only a passing grade, but a source on the committee says that members were concerned that Scalia didn't have courtroom experience.

Rose confirms that that was the committee's concern. "This was the continuing argument we had with the ABA panel. They have a rather inflexible view," says Rose. "They said that we will consider [nonlitigators] up to the point of being labeled qualified but anyone who would get highly or extremely qualified would have to have substantial litigation experience."

Scalia faced no opposition in his confirmation hearing, and he arrived at the court in time for the fall 1982 session. He was followed on to the bench by Kenneth Starr, another former Justice Department official, leaving the panel once dominated by liberals David Bazelon and J. Skelly Wright with a tantalizingly thin 6-to-5 liberal-conservative margin. (Since then, one conservative, Malcolm Wilkey, has taken senior status, and one judgeship has been added to the circuit. With two vacancies about to be filled by Reagan appointees, the court will be split 6-to-6. The conservatives are Bork, Scalia, Starr,

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and Edward Tamm.)

Scalia has begun to show that the consensus-making skills he picked up in the White House, the Justice Department, and the ABA haven't gone to waste. For example, Edwards, a much more liberal judge, joined in Scalia's recent opinion reversing summary judgment for the media defendant in *Liberty Lobby, Inc.* v. *Jack Anderson*. (Edwards declined comment.) In that case, in which Anderson was accused of defaming Liberty Lobby founder Willis Carto by linking him and his group to neo-Nazism, Scalia made it easier for judges to deny summary judgment to libel defendants in suits by public figures. He wrote that summary judgment may be denied to libel defendants even when it is unclear that the public-figure plaintiff will be able to show malice with "convincing clarity" at trial. The decision conflicted with the view of the Second Circuit and in the opinion of libel plaintiffs' lawyers also conflicted with the 1970 D.C. circuit opinion, *Wasserman* v. *Time Inc.*

Also, the Supreme Court had ruled in an earlier case that "actual malice" might be found in a story that was "based wholly on an unverified anonymous phone call," but in *Liberty Lobby* Scalia appeared to extend that rule to include a phone call in which the source was identifed by name. Wrote Scalia: "[The reporter] never even looked [the source] in the eye until after the story was published, but spoke to him only once over the telephone." Says Robert Sack, a libel law specialist at Patterson, Belknap, Webb & Tyler: "That obviously misperceives how reporting is done. The vast majority of interviews—like this one—are telephone interviews."

Libel lawyers were quick to cite the opinion as evidence of Scalia's restrictive view of press freedoms and of how effective he may become in altering the direction of First Amendment law, particularly if he continues to bring along judges like Edwards. "This is an academic's opinion," complains David Branson, a partner in the D.C. office of White & Case, who represented Anderson in the case. "His decision is a complete departure from anything that's happened in twenty years since *Times* v. *Sullivan* on the summary judgment test." Branson adds, "If this decision stands, it's a definite signal to trial courts not to grant summary judgment in libel cases."

Such opinions can't help but make Scalia even more attractive to the Reagan administration. And so far he hasn't provoked so much as a rumble of disapproval among administration conservatives. It doesn't hurt that he is ardently pro-executive. Says one Washington litigator who has argued before him: "He's a great believer in the powers of the presidency. . . . I think he will find significant areas where the president has done something and the courts shouldn't touch it."

But when the time comes to select a Supreme Court nominee, the vagaries of politics could play more of a role than credentials. For one thing, timing is sure to be crucial: Most of Scalia's most loyal partisans have left government, including such present and former Jones, Day lawyers as Lynn, Wilderotter, and Rose, as well as others such as Whitehead, Schmults, and Silberman. While many still have strong administrative ties, they are not as well positioned to help him as they once were. The quirkiness of the decision-making process could hurt Scalia—President Reagan could, for example, decide to name a woman, a black, or a fellow Californian to the High Court—but it also might help him. For example, if New York governor Mario Cuomo was a likely Democratic presidential candidate when a Supreme Court seat became vacant, Scalia, also of Italian descent, might become more attractive politically as a counterpoint.

One thing Scalia has going for him is that, unlike Bork or Richard Posner of the Seventh Circuit, he would face little or no politically embarrassing opposition to his nomination. "If you're looking for someone you're trying to confirm, maybe Posner has ruffled enough feathers, but not Scalia," says one Washington lawyer.

Of the many liberal lawyers interviewed for this article, none plans to lobby against a Scalia nomination. Indeed, it is remarkable that in as partisan a place as Washington Scalia can garner the respect and even the support of people who find his politics repugnant. "I've known him for yea these many years and we've disagreed on many, many things, but I've never known him to be unprincipled," says Ropes & Gray partner Susman.

Remarks liberal D.C. lawyer Daniel Mayers of Wilmer, Cutler: "I think it would be an abuse of the process for the Senate to try to block a Scalia nomination. While my political views are very different from his, I'd say that of the conservative candidates for the court I think he'd be the strongest intellectual nominee and the most qualified." □

> "Scalia's a great believer in the powers of the presidency," says a litigator. "I think he will find significant areas where the president has done something—and the courts shouldn't touch it."

Resident scholar American Enterprise Institute, Washington, 1977, adjunct scholar 1977-82; trustee Woodrow Wilson International Center for Scholars. Member Presidential Task Force on Antitrust 1968; consultant Cabinet Committee on Education.

Author *The Antitrust Paradox: A Policy at War With Itself* (1978).

Antonin Scalia United States Courthouse, 3rd & Constitution Avenues, N.W., Washington, D.C. 20001 (202-535-3356). Orig. App't. Dt. 8-17-82.

Born Mar. 11, 1936 in Trenton, New Jersey; married Maureen McCarthy; nine children.

Georgetown University, A B. 1957; University of Fribourg (Switzerland), 1955-56; Harvard Law School, LL.B., 1960; admitted to Ohio bar 1962.

1960-67 associate Jones, Day, Cockley & Reavis; 1960-61 Harvard University, Sheldon Fellow; 1967-71 professor University of Virginia Law School; 1971-72 general counsel, Executive Office of the President, Office of Telecommunications Policy; 1972-74 chairman Administrative Conference of the U.S.; 1974-77 Assistant Attorney General, Office of Legal Counsel; 1977 visiting professor of law Georgetown University Law School; 1977 resident scholar American Enterprise Institute; 1977-82 professor University of Chicago Law School; 1980-81 visiting professor Stanford University Law School; 1982-date Judge U.S. Court of Appeals for District of Columbia Circuit appointed by President Reagan.

Kenneth W. Starr U.S. Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C. 20001. (202-535-3000).

Born July 21, 1946 in Vernon, Texas; married Alice Mendell; two children.

Harding College, 1964-66; San Antonio College, 1966; George Washington University, A.B., 1968; Brown University, A.M., 1969; Duke Law School, J.D., 1973; admitted to California bar 1973, Virginia bar 1979, D.C. bar 1979.

1973-74 law clerk to Hon. David W. Dyer, Fifth U.S. Circuit Court of Appeals; 1974-75 associate Gibson, Dunn & Crutcher, Los Angeles, California; 1975-77 law clerk to Hon. Warren E. Burger, U.S. Supreme Court; 1977-80 associate Gibson, Dunn & Crutcher, Washington, D.C.; 1981-84 Counselor to the Attorney General of U.S.; 1984-date Judge U.S. Court of Appeals for District of Columbia Circuit appointed by President Reagan.

Laurence H. Silberman Born October 12, 1935 in York, Pennsylvania; married Rosalie Gaull; 3 children.

Dartmouth College, A.B., 1957; Harvard Law School, LL.B., 1961; admitted to Hawaii bar 1962, D.C. bar 1973.

1961-67 associate then partner Moore, Torkildson & Rick; 1967-69 attorney National Labor Relations Board, Office of General Counsel, Enforcement division; 1969-73 Department of Labor, 1969-70 Solicitor, 197073 Under Secretary; 1973-74 partner Steptoe & Johnson; 1974-75 Deputy Attorney General, Department of Justice; 1975-77 Ambassador to Yugoslavia; 1977-78 Senior Fellow, American Enterprise Institute; 1977-78 Dewey, Ballentine, Busby, Palmer & Wood, Of Counsel; 1978-79 partner Morison & Foerster; 1985-date

Antonin Scalia

Circuit Judge
D.C. Circuit
U.S. Courthouse
Washington, D.C. 20001
(202) 535-3356
Appointed in 1982
by President Reagan

Born: 1936

Education Georgetown Univ., A.B., 1957; Harvard Univ., LL.B., 1960, Editor, Harv. L. Rev.

Private Practice Associate, Jones, Day, Cockley & Reavis, Cleveland, 1960-67

Government Positions General counsel, Office of Telecommunications Policy, Executive Office of the President, Washington, D.C., 1971-72; Chairman, Administrative Conference of the U.S., 1972-74; Assistant Attorney General, Office of Legal Counsel, Department of Justice, 1974-77

Academic Positions Sheldon Fellow, Harvard Univ., 1960-61; Professor of Law, Univ. of Va., 1967-71; Visiting Professor of Law, Georgetown Univ., 1977; Professor of Law, Univ. of Chicago, 1977-82; Visiting Professor, Stanford Univ. Law Sch., 1980-81

Other Employment American Enterprise Institute: Resident Scholar, 1977; Editor, Regulation, 1977-82

Professional Associations A.B.A.; Ohio Bar Assn., 62; Va. Bar Assn., 1970

Noteworthy Rulings

Community for Creative Non-Violence v. Watt, 703 F.2d 586 (1983)(en banc): The D.C. Circuit reversed the district court's decision that the U.S. Park Service could lawfully deny demonstrators permission to sleep in tents erected in Washington parks as part of a demonstration of the plight of the homeless. The Park Service had granted a permit for 24-hour, round-the-clock demonstrations, but (pursuant to a recent regulation) would not permit demonstrators to sleep at the site. The demonstrators insisted that sleeping was an integral part of their demonstration, that it was symbolic speech—like tossing tea into Boston Harbor. They were seeking to communicate that they had no regular place to sleep. Judge Mikva wrote the majority opinion (see coverage under his name), concluding that the government had "failed to show how the prohibition of sleep, in the context of round-the-clock demonstrations for which permits have already been granted, furthers any of its legitimate interests." Id. at 587. Judge Scalia dissented, opposing inclusion of "symbolic speech" within the guarantees of the first amendment. He asserted that "when the Constitution said 'speech' it meant speech and not all forms of expression." Id. at 622. The Supreme Court reversed, upholding the Park Service. Clark v. Community for Creative Non-Violence, No. 82-1998, 52 U.S.L.W. 4986 (6-29-84).

Chaney v. Heckler, 718 F.2d 1174 (1983): The D.C. Circuit vacated and remanded the district court's ruling, holding that the FDA had jurisdiction to interfere with a state's use of prescription drugs for lethal injections employed for executions, and that the FDA's refusal to exercise this jurisdiction was arbitrary and capricious. Judge Wright wrote the majority opinion, which concluded that the court had jurisdiction to review the FDA's refusal under § 10 of the Administrative Procedure Act, which established a "strong presumption" of reviewability. Scalia dissented, asserting that even if the FDA had jurisdiction, it should be able to decline exercising it without judicial second-guessing. On the merits of the petition, he asserted: "The condemned prisoner executed by injection is no more the 'consumer' of the drug than is the prisoner executed by firing squad a consumer of the bullets." The Supreme Court essentially agreed with Scalia and reversed, holding that the FDA's refusal to comply with the convict's requested interference was not subject to review under the APA. Heckler v. Chaney, No. 83-1878, 53 U.S.L.W. 4385 (3-20-85).

Media Coverage

An article by Richard Vigilante discussed Scalia's views. Referring to the tradition of respect for individual rights, Scalia said: "But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions."

Regarding Scalia's views on the separation of powers, Vigilante reported that he believes the courts are "designed to protect the rights even of one man against the entire state." The single individual with one vote and no friends will have his day in court but will receive little help from the legislature, whose function is to provide for the needs of majorities. "Courts exist not to balance majority interests but to defend a short list of unassailable minority rights," Scalia was reported to have asserted. R. Vigilante, "Beyond the Burger Court: Four Supreme Court Candidates Who Could Head a Judicial Counterrevolution," Policy Rev., No. 28 (Spring 1984), at 22-23.

A column in the Legal Times chose the following words by Scalia as its quote of the week: "This case, which involves legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that, 'No man should see how laws or sausages are made.'" Legal Times, Dec. 17, 1984, at 3.

Scalia was featured in an American Lawyer article in March 1985. According to the article, when Scalia first joined the D.C. Circuit he started poring over other

Antonin Scalia (cont.)

judges' draft opinions, "covering them with detailed and often critical marginal comments, even if he [wasn't] on the panel deciding a case."

Scalia appears to be well liked by the other judges, however, according to the article. "Several of the judges on the D.C. Circuit, interviewed on the condition they would not be identified, say Scalia is so personable that he has created a feeling of good will that pervades the court."

The article noted that when Carter administration officials were reviewing the Nixon administration's efforts to control the Corporation for Public Broadcasting, they found that Scalia—while general counsel of the Office of Telecommunications Policy—fended off Nixon's attempts to reduce the autonomy of public television. "Scalia actually comes off looking very good," according to a Carter administration aide. "He's about the only one."

According to the article, Scalia attacked the Freedom of Information Act in a 1982 piece he wrote for the conservative American Enterprise Institute's magazine, Regulation. Of FOIA he wrote: "It is the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Scalia insisted that FOIA's defects "cannot be cured as long as we are dominated by the obsession that gave them birth—that the first line of defense against an arbitrary executive is do-it-yourself oversight by the public and its surrogate, the press."

The article noted that Scalia's chances for nomination to the Supreme Court are good: "One thing Scalia has going for him is that, unlike Bork or Richard Posner of the Seventh Circuit, he would face no politically embarrassing opposition to his nomination." As one Washington lawyer put it, "If you're looking for someone you're trying to confirm, maybe Posner has ruffled enough feathers, but not Scalia."

"Of the many liberal lawyers interviewed for this article, none plans to lobby against a Scalia nomination," the author observed. "Indeed, it is remarkable that in as partisan a place as Washington Scalia can garner the respect and even the support of people who find his politics repugnant." The article quoted one lawyer saying: "I've known him for yea these many years and we've disagreed on many, many things, but I've never known him to be unprincipled." S. Adler, "Live Wire on the DC Circuit," The American Lawyer, March, 1985, at 86.

In his New York Times essay "Free Speech v. Scalia," William Safire called Judge Scalia the worst enemy of free speech in America today. In a dissent to a decision in which the appeals court held that an Op-Ed page was "the well recognized home of opinion and comment," Scalia wrote: "The expectation that one who enters the 'public, political arena'... must be prepared to take a certain amount of 'public bumping' is already fulsomely assured by the New York Times Co. v. Sullivan... requirement of actual malice in the defamation of public figures." Safire wrote that since the word "fulsomely" means "foully, disgustingly, offensively," or at least "excessively," and since Scalia has "too precise a writing style to have lapsed into a misuse of the word to mean 'fully'," Scalia must be sending a message to "Justice-pickers" that he would tear down the free speech protection in Sullivan. W. Safire, "Free Speech v. Scalia," N.Y. Times, April 29, 1985, at 19, col. 5.

Lawyers' Comments

Very courteous, very conservative, highly regarded in all categories, admired even by those who strongly disagree with him. He is often mentioned as a possible Supreme Court nominee.

Additional comments: "Personable, politically astute, becoming a leader on the court, is very conservative, will probably go to the Supreme Court." "Off the charts, spectacular rise, friendly, brilliant, conservative but generally not doctrinaire, active in arguments, has a clear writing style, has a flair in everything he does." "A conservative activist, very able." "Very conservative on statutory construction and judicial review." "He scares me. Very smooth, bright, and dead wrong on key issues—including the first amendment. He also does not seem to have learned from history. For example, his views on demonstrators sleeping on the Mall betrays ignorance, it seems, of the calamitous mess we had with the bonus marchers during the Depression." "He has gotten a lot of favorable publicity, seems to be a healer on the court, but is definitely aligned with the conservatives of the Supreme Court." "Very influential within the court, is well liked by the other judges, has lots of influence, is worth watching." "Quick, usually concise, charismatic." "Overwrites opinions." "Academic." "Very pleasant, an arch conservative on civil rights, pro-government, pro-executive." "I'd appoint him to the Supreme Court ahead of Bork; he doesn't get irritable; a most able jurist." "Very sharp, very capable, pleasant personality, holds controversial views on many issues, is likely to go to the Supreme Court."

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SCALIA TABB.

June 10, 1985, UNITED STATES EDITION

SECTION: JUSTICE; Pg. 93

LENGTH: 1460 words

HEADLINE: Free-Market Jurist

BYLINE: ARIC PRESS with ANN McDANIEL in Chicago

HIGHLIGHT:
Can Richard Posner go from judge to justice?

BODY:

The first thing that a visitor notices in Judge Richard Posner's chambers are the floor-to-ceiling windows that look out over the Chicago skyline and natural beauty of Lake Michigan beyond. The second is that his desk is set so that when he works at his word processor, Posner's back is to the spectacular view. And when a visitor inevitably comments on the discrepancy the judge looks mildly surprised. The view? "I rarely notice," he says.

When would he have time? Appointed three years ago to the U.S. court of appeals, Posner has become the most prolific federal appeals judge in the nation, the author of more than 300 opinions. Before taking the bench he was best known as the dean of an influential branch of legal scholarship called law and economics, which trumpets efficiency and the maximization of wealth as bedrock legal principles. On the bench he has maintained a publish-or-perish pace, cranking out three books and 20 academic articles. His latest work, published this spring, * is a largely abstract account of the caseload crisis facing the federal judiciary and his dramatic suggestions for reform. (But don't misunderstand: he isn't overworked.) The result of all this prodigious lifting is twofold: his influence on the law continues to grow, and he now regularly appears on all the tout sheets as a potential Ronald Reagan appointee to the U.S. Supreme Court.

* The Federal Courts: Crisis and Reform. Harvard University Press. $25.

Indeed, with the high court beginning its annual monthlong stretch run this week, the speculation about possible resignations has heated up again. While five of thejustices are over 75, and only one is under 60, most attention has been focused on Lewis F. Powell Jr. Hospitalized in January for a prostate operation, the 77-year-old Virginian was slow to recover and did not return to the bench until late March. Still, Powell has shown no inclination to retire. He has hired law clerks for next year, and if he has courteously informed the White House that he intends to leave, neither side is saying.

But the guessing goes on. Besides Posner, most of the press attention has gone to two conservative judges appointed by Reagan to the federal appeals court in Washington. The almosthousehold name there is Robert Bork, a former Yale law professor and solicitor general who fired Archibald Cox during the Saturday Night Massacre. When he w appointed in 1981, Bork was dubbed justice-in-waiting. He's still waiting and, in news-media circles at least, has been momentarily eclipsed by Antonin Scalia, a former University of Chicago

law professor who could be the first Italian-American named to the high court. At 49, Scalia, who is routinely referred to as Nino by journalists who couldn't pick him out of a lineup, is nine years younger than Bork and may be even more conservative.

If the 46-year-old Posner eventually gets a seat on the high court he will be returning to the marble chamber where he began his career as a clerk to Supreme Court Justice William Brennan, one of the court's leading liberals. Brennan took Posner under his tutelage -- later calling him one of only two "geniuses" he had known (the other was Justice William O. Douglas) -- but the political lessons clearly didn't take. Instead, first briefly at Stanford and then at the University of Chicago, Posner taught himself freemarket economics -- much as he's mastering the Italian language today -- and applied his learning to the law. At that point Posner irrevocably embraced, as his critic Columbia law Prof. Bruce Ackerman puts it, "the great god Efficiency." For instance, in his seminal "Economic Analysis of Law" (soon in a third edition) Posner argued that "when people describe as "unjust' convicting a person without trial [or] taking property without just compensation . . . they can be interpreted as meaning nothing more pretentious than that the conduct in question wastes resources. And . . . it will come as no surprise that in a world of scarce resources, waste should be regarded as immoral."

Much like thejudge he's become, Professor Posner had opinions about nearly everything and one lens through which most topics could be seen. His view of the free-press clause of the First Amendment: "a form of protective legislation extracted by an interest group . . . who derive pecuniary and non-pecuniary income from publication and advocacy." On medical malpractice, he thought a patient should be able to receive a lower price in exchange for surrendering his right to sue: "It is an open question whether the benefits in the increased safety incentives . . . are proportionate to the costs." Even on race discrimination, he thought the market could work wonders, writing that "one of the reasons that bigotry has diminished in this country is that competition between firms puts a premium on hiring the most able person . . . Competition erodes [discrimination] just the way it eroded the color bar in baseball: teams could not afford to exclude qualified people."

Baby Sales: Except in antitrust, where his big-can-be-good theories have won the high ground, the influence of Posner's scholarship has been more provocative than direct. "More often than not, Posner has been the scholar setting the terms of the debate," says University of Chicago law Prof. Douglas Baird. "He went from one field to another making massively broad statements." But that set many professorial teeth on edge. "His reputation is largely a function of how prolific he is," argues Vincent Blasi of the Columbia Law School, "not really how thoughtful."

But even his critics admit he gets their attention. Critical of adoption procedures, Posner coauthored a 1978 article recommending private sales of babies. Most children would go for no more than $3,000, he suggested, and consumer satisfaction would likely increase. Moreover, putting a price tag on the baby might guarantee its welfare. "In general," he wrote, "the more costly a purchase, the more care a purchaser will lavish on it." He resents the criticism that he's received for advancing this modest proposal but some foes find it typical of his work. Says Yale law dean Guido Calebresi: "I think his views are limited by both the economic theories he relies on and his lack of attention to other crucial matters such as how wealth should be distributed and how values

and tastes are formed."

On the bench, Posner's output has been so vast that he has been difficult to categorize. Critic Blasi, for instance, gives him high marks for "good, candid opinions" that don't "twist precedent to get the results he wants." One example of his following a Supreme Court rule he disagreed with came in an antitrust case in which he found a business practice illegal even though his own theories would have permitted it. There are cases, however, that call into question Posner's respect for precedent. The most notorious involved his reversal of a contempt citation and denial of a pretrial document search that had been ordered by a lower-court judge. Sitting as an appealscourt judge in that case, retired U.S. Supreme Court Justice Potter Stewart rebuked Posner's holding for its indifference to both fact and law.

Radical Notion: Posner's economic analysis on the bench has been unmistakable. In one controversial case, he dissented from a decision that gave an Indiana prisoner the right to a state-paid lawyer to sue prison officials whose failure to treat him, he charged, had blinded him. Posner argued that the market should govern, if the prisoner "cannot retain a lawyer on a contingency-fee basis, the natural inference to draw is that he does not have a good case." Another might be that prisoners are hardly free to shop among law firms or that the prospect of hard cases yielding small awards would not attract many entrepreneurial attorneys.

Posner's considerable intellect is not content with conventional thinking. In his new book on the federal court system he endorses a handful of familiar reform ideas, such as raising filing fees and shifting attorneys' fees. But he's honest enough to say that all of these ideas combined are mere "palliatives." So he advocates a bolder step, one he calls "separation-of-powers judicial restraint." That mouthful means "reducing the power of the courts vis-a-vis the other organs of government"; federal judges should leave social issues such as capital punishment or pornography to state legislators. That's a radical notion, he says, but "today's radical speculations may easily become the conventional wisdom of just a few years from now." True enough: who would have thought a few years ago that, for good or ill, a radical speculator like Posner might be beckoned to the highest bench?

GRAPHIC: Pictures 1 and 2, Scalia, Bork: One's hot, the other waits, PHOTOS BY BRUCE HOERTEL; Picture 3, Posner: A provacative legal scholar blitzes the bench, JEFF LOWENTHAL -- NEWSWEEK

Beyond the Burger Court

SCALIA
TABC

Four Supreme Court Candidates Who Could Lead a Judicial Counterrevolution

Richard Vigilante

One of the most important issues at stake in the 1984 presidential election is the future of the Supreme Court. Five of the nine justices currently sitting—Harry Blackmun, William Brennan, Chief Justice Warren Burger, Thurgood Marshall, and Lewis Powell—are 75 or over, and not all are as healthy as Ronald Reagan. Whoever wins in November may well have the opportunity to appoint at least three and perhaps as many as five new justices. That President will therefore be able to determine the direction of the Supreme Court over the next 10 to 20 years.

Should Ronald Reagan or another conservative win the election, he will have an excellent opportunity to reverse the intellectual drift, the liberal interventionism, and the antireligious bias of the Warren and Burger courts. Opposition to "legal realism"—the belief that neutral interpretations of the Constitution are impossible and that judges must therefore impose a collage of sociological assertion and personal opinions on the Constitution—is more sophisticated than 20 years ago. An impressive battery of conservative legal minds in prominent law schools, on the federal circuit, and in state courts is preparing to challenge much of what the Court has wrought in the last 50 years.

A conservative victor in 1984's presidential election would have the chance to appoint one of the most intellectually powerful Supreme Courts in history. Should this happen, we could expect conservative judicial ideas to become suddenly fashionable in places where they are now ignored.

I recently asked prominent legal conservatives around the country what candidates they would recommend for the Supreme Court. They made clear that there are at least two dozen qualified conservatives whose appointments would raise the quality of the current Court.

John Marshall
Chief Justice of the Supreme Court, 1801–1835

What is needed, however, is not simply improvement but a judicial counterrevolution. And in conversations with conservative legal scholars and judges, four candidates keep coming up as having the intellectual stature and the fighting spirit to change the Court's direction despite the weight of judicial precedent. They are Robert Bork, Antonin Scalia, Richard Epstein, and William Bentley Ball.

Robert Bork

Judge Bork, now sitting on the U.S. Court of Appeals for the D.C. Circuit, the second most prestigious and powerful court in the country, former professor at the Yale law school, solicitor general under Presidents Nixon and Ford, has for so long been considered the obvious candidate for the next conservative appointment that he has been a "justice-in-waiting" for at least a decade. Liberal and conservative colleagues are united in recognition of his ability.

RICHARD VIGILANTE, *a Washington-based journalist, is executive producer of Victory Video.*

Mr. Bork is widely regarded as the most prominent and intellectually powerful advocate of "judicial restraint." He has long criticized the judiciary for interfering in policy and political questions by redrawing them as constitutional or procedural issues. Unless rights that are found in the Constitution by standard means of interpretation are violated, he argues, the courts should defer on matters of policy to democratic majorities in the states and in the political branches of the federal government.

In determining how it is proper for courts to intervene, he is an "interpretivist." Judges, in his view, should interpret the Constitution as they would a statute or any other legal document—by focusing on the meaning of the text and the history of its writing, without bringing in their own policy preferences and personal values. Thus, for example, he has publicly criticized the Supreme Court's use of the right to privacy—a right to be found nowhere in the Constitution—as the basis for overturning state prohibitions on abortion in its 1973 decision *Roe v. Wade*.

Mr. Bork's judicial interpretivism would restore to legislatures and the people such questions as whether and how pornography should be restricted. It would provide a coherent basis for sustaining state laws on capital punishment. It would keep the Court from imposing one man, one vote in reapportionment cases. It would keep the courts from running school systems, prisons, and mental hospitals under the guise of enforcing civil rights. It would uphold state legislation regulating the sale of contraceptives to minors or requiring that parents be notified when a minor seeks an abortion.

Mr. Bork says he was a New Deal liberal when he entered the University of Chicago law school in 1948. But at Chicago he was heavily influenced by Aaron Director, founder of the "law and economics" school of jurisprudence, which analyzes legal principles in terms of their economic efficiency, and by free-market economist George Stigler.

Mr. Bork applied the principles of economic efficiency and cost-benefit analysis to antitrust law, first as a partner in the Chicago law firm of Kirkland & Ellis, which he entered after law school, and then on the faculty of Yale law school, which he joined in 1962. In his book, *The Antitrust Paradox*, published in 1978, he argued that many antitrust policies, including some court decisions, have often been contradictory: Though designed to protect the consumer and promote competition, these antitrust policies have in practice often hurt consumers and discouraged competition by protecting inefficient enterprises.

At Yale, Mr. Bork became a close friend and colleague of Alexander Bickel, a moderate "legal realist" and in his day the dominant intellectual force on the Yale law faculty. Mr. Bickel saw the judge as scholar-king who would interpret the Constitution in the light of the lasting values of Western civilization: "The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets.

Robert Bork

The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition." While greatly admiring Mr. Bickel, Mr. Bork learned from him mostly by disagreeing. "The choice [by the Court] of fundamental values cannot be justified," Mr. Bork argued. "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way [for the Court] to prefer any claimed human value to any other."

Mr. Bork set forth the essence of his judicial philosophy in "Neutral Principles and Some First Amendment Problems," a now-classic article published in 1971. Always aggressive intellectually, he picked the most controversial possible ground on which to make his argument that judges should not impose their personal values on the Constitution: He argued that the freedom of speech provision of the First Amendment protects only "explicitly political speech." And he challenged the nearly sacrosanct writings of Justices Brandeis and Holmes that have been used to defend this century's expanded First Amendment protections. The Brandeis-Holmes arguments, Mr. Bork contended, weren't constitutional arguments at all but simply paeans to the worth of free discourse.

Mr. Bork could hardly have written anything better

calculated to infuriate the liberal judicial community. The article is still controversial today. Just recently, a headline in the American Bar Association *Journal*, summarizing an article in *The Nation*, compared Mr. Bork to Attila the Hun. He has been accused of being against free speech. He is not. And today he admits that the First Amendment covers a broader ground than "explicitly political" speech.

Some conservatives, too, have been worried by Mr. Bork's relentless disapproval of courts that make value judgments. He is sometimes accused of moral skepticism or relativism.

But Mr. Bork is entirely innocent of the charge. He is not a moral skeptic. Instead, he has a strong faith in the moral sense of the electorate. What he forbids to courts, he endorses in legislatures because it is the job of the elected representatives "to make value choices . . . these are matters of morality, of judgment, of prudence. They belong, therefore, to the political community." And as for freedom of speech not protected by the First Amendment, it rests, "as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives."

Judicial activists would argue that Mr. Bork's "judicial restraint" would minimize constitutional protections. It would be more accurate to say that judicial restraint expands the number of questions open to discussion by citizens and their legislatures.

As Mr. Bork said in a recent address, judicial activism causes the "area of judicial power [to] continually grow and the area of democratic choice [to] continually contract . . . Activism . . . is said to be the means by which courts add to our constitutional freedom and never subtract from it. That is wrong. Among our constitutional freedoms or rights . . . is the power to govern ourselves democratically . . . G. K. Chesterton might have been addressing this very controversy when he wrote: 'What is the good of telling a community it has every liberty except the liberty to make laws? The liberty to make laws is what constitutes a free people.'"

Mr. Bork left Yale temporarily in 1973 to become solicitor general of the United States. In this role he is best remembered as the man who, at Richard Nixon's order, fired Watergate Special Prosecutor Archibald Cox after Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than do so. Even today it is rare for Mr. Bork to be mentioned in a newspaper story without being linked to the Cox firing.

It is a credit to Judge Bork's reputation for integrity and the respect he has among his peers that his perfectly correct explanation for his decision—Mr. Nixon had every legal right to fire Mr. Cox, and government could not function if legal orders were not carried out—has been widely accepted. Watergate came up at his confirmation hearings for his appointment to the D.C. Circuit in 1982 but provided little difficulty.

Judge Bork's reputation, his writing and public statements, and even his speaking style suggest that he would be an aggressive justice. He is intellectually aggressive—an imposing man to speak with. As a writer his inclination is toward sharpening rather than blunting points of possible disagreement. He would presumably be willing to reverse bad precedent.

Nevertheless, his brief career on the D.C. Circuit so far has been relatively quiet. From July 1982, when he wrote his first opinion, through March 1984 he had written about 30 majority opinions, somewhat fewer than might be expected. He dissents fairly often, but few of the cases have been controversial.

Judge Bork is 56. His first wife died in 1980 after an illness that lasted many years. He remarried in 1982. He has three children.

Antonin Scalia

Along with Mr. Bork, the most respected advocate of judicial restraint interpretivism is Judge Antonin Scalia, also of the D.C. Circuit and recently of the University of Chicago law school.

If Mr. Bork's emphasis is on democracy, Mr. Scalia's is on separation of powers. He would bring to the Court an acute sensitivity to the role of institutions and procedures in the preservation of liberty.

As Mr. Scalia would explain, the separation of powers is vital to the preservation of liberty because the different branches are suited to protecting different sorts of rights. The courts, in which there is no voting, no marshaling of forces, just one litigant against another, are uniquely well designed to protect the rights even of one man against the entire state. During that one man's day in court the entire power of the state will be focused on the resolution of his problem, the vindication of his rights. That solitary man with just one vote and no friends would get little help from a legislature.

For exactly the same reason, courts are no good at

Antonin Scalia

providing for the needs of majorities—organizing society, spending money, getting things done. The state's budget is determined not by disputing the rights of individuals but by resolving the differences of overlapping interest groups.

Let this scheme of not only separation but also specialization of powers break down and both sorts of decisions—those about individual rights and those about majority needs—will become increasingly arbitrary and government will become increasingly crude.

Mr. Scalia's experience has been largely in administrative law, the rules that govern regulatory agencies. Graduating from Harvard law school in 1960, he joined a prestigious Cleveland law firm, taught at the University of Virginia law school, and in 1971 entered government. "Just to see how the big monster works."

He had every opportunity to find out because he chose some of the most monstrous parts, laboring mostly in jobs where the issues involved were at best even more complex than they were dry. From 1971 through 1977 he was successively general counsel to the President's Office of Telecommunications Policy, chairman of the Administrative Conference of the United States, and assistant attorney general for the Office of Legal Counsel. He started teaching at the University of Chicago in 1977 but continued to dabble in government, serving as a consultant to the Federal Communications Commission and the Federal Trade Commission.

From 1977 until his appointment to the D.C. Circuit in mid-1982, he also served as editor of the American Enterprise Institute's scholarly but sprightly *Regulation* magazine. His editorials were marked not only by a coherence that made their subject matter accessible to any layman but also by a sharp sense of humor that was all the more welcome for being completely unexpected in a magazine that chronicled the doings of bureaucrats.

In a recent law review article, "The Doctrine of Standing as an Element of the Separation of Powers," Mr. Scalia drew on his vast experience in administrative law to give a full-bodied expression of his constitutional ideas. He argued that one of the primary purposes of the traditional rule of standing—which forbids lawsuits that do not allege a concrete injury—is to prevent courts from becoming legislatures of last resort.

Recently, however, courts have allowed increasingly broad interpretations of standing, consequently increasing their own "legislative authority." Mr. Scalia focused on one recent case under the liberalized doctrine of standing, the S.C.R.A.P. case, in which a group of Georgetown law students sued to stop the Interstate Commerce Commission (an administrative agency) from granting an increase in rail freight rates. They claimed standing on the basis of a dubious economic analysis purporting to show that higher freight rates would cause a drop in the use of recyclable goods and a correspondent increase in litter and pollution.

Stressing his separation of powers theme, Mr. Scalia argued that the Georgetown students' desire for less pollution was not an individual legal right of the sort the courts enforce but an interest shared by a majority of society. Similarly, a majority of society, including many of the same people, shares an interest in good railroads and thus perhaps in approving the rate increase. The conflicting interests of the majority are supposed to be balanced in the political process by the political branches.

Courts exist not to balance *majority* interests but to defend a short list of unassailable *minority* rights. By intervening in the students' behalf, the courts would be elevating one particular interest to the status of a right and making it uncontestable in the political process.

When that happens, Mr. Scalia says, almost inevitably the interests thus elevated are those the judges find worthy. "Where the courts do enforce . . . adherence to legislative policies that the political process itself would not enforce, they are likely . . . to be enforcing the prejudices of their own class. Their greatest success in such an enterprise—ensuring strict enforcement of the environmental laws . . . met with approval in the classrooms of Cambridge and New Haven, but not, I think, in the factories of Detroit and in the mines of West Virginia."

Everything about Mr. Scalia's first year and a half on the bench indicates that he would be not only a conservative justice but also an influential one.

Circuit court decisions are initially issued by three-judge panels, though they sometimes are reversed by the entire court voting *en banc*. No majority opinion filed by Mr. Scalia has ever been reversed *en banc*. But of the nine cases in which Mr. Scalia had written dissents as of December 1983, four had been accepted by the Supreme Court for review. That is an impressive record. One of those dissents was to the Community for Creative Non-Violence case, in which the D.C. Circuit decided that sleeping in a federal park was a form of speech and thus protected by the First Amendment.

Mr. Scalia is also one of the best writers on the federal bench, and history shows that a well-written opinion can have far more influence even than it deserves. In one recent case Mr. Scalia, responding to a colleague's vague references to the tradition of respect for individual rights, wrote: "But that tradition has not come to us from La Mancha, and does not impel us to right the unrightable wrong by thrusting the sharpest of our judicial lances heedlessly and in perilous directions." That sort of remark is calculated pertectly to embarrass and intimidate generations of judicial Don Quixotes.

Judge Scalia is 47. He and his wife have nine children, which may or may not be the reason his first involvement in politics was in a fight for tuition tax credits. He is a principled critic of racial goals and quotas on both constitutional and political grounds.

A Catholic, he is personally opposed to abortion. He would be the first Italian-American ever appointed to the Court.

Richard Epstein

"Judicial restraint" does have its conservative critics. Some conservative legal scholars think that there is a sound constitutional basis to overturn much restrictive economic regulation on the ground that economic liberties are entitled to protection similar to that afforded to freedom of speech and religion.

Richard Epstein

Perhaps the most impressive of these is Richard Epstein of the University of Chicago. Mr. Epstein is a brilliant young legal philosopher who would bring to the Court constitutional arguments for overruling many liberal restrictions on economic freedom, for restoring a concept of genuine justice to those areas of the law where justice has been supplanted by redistributionism, and for systematically defending individual rights as conservatives tend to understand them, including the rights of unborn children.

His appointment to the Court would accomplish a great deal precisely because he represents a different strand of conservative legal theory, a minority within a minority. Like the judicial restraint conservatives, he is an interpretivist who has a great deal of respect for the Constitution and believes in a close interpretation of it. He does not want to impose his own moderately libertarian views as an act of raw judicial power.

But he believes that the Constitution provides more direct guidance than judicial restraint conservatives. He is critical that economic regulation and other intrusions on individual rights get a free ride in the courts because liberal judicial realists like such legislation and conservative judicial restraint types don't have the heart to strike it down.

The key to Mr. Epstein is that he is a philosopher as much as a lawyer. As an undergraduate at Columbia, he was particularly influenced by the philosopher Ernest Nagel, whom he describes as a "tough, no-nonsense man." Professor Nagel believed that a philosopher's role was not to hear ridicule on common-sense beliefs but to find compelling philosophical arguments for ordinary beliefs and intuitions. That is an approach Mr. Epstein carries over into his legal scholarship. Thus, Mr. Epstein is comfortable with the ordinary meaning of justice—allowing each person to retain what is rightfully his. He rejects, as most ordinary people would, the equation by many modern legal theorists of justice with the equality of wealth or social status.

Though he considered becoming an academic philosopher, Mr. Epstein decided "the way to do philosophy was to go to law school, where a philosopher could depend on a constant infusion of new issues" on which to work. He studied law first at Oxford and then at Yale. He started teaching law at the University of Southern California in 1968 but in 1972 moved to the University of Chicago. Since 1981 he has been editor of the *Journal of Legal Studies*, which specializes in historical analysis of the common law as well as the descriptive and normative implications of modern economic theory.

His philosophical inclinations cause him to paint with a broader brush than the judicial restraint conservatives. The key to his approach is his belief in respecting "the theory of governance that inspired [the Constitution]."

Despite differences of detail among the Founders, that theory of governance, he would argue, rests comfortably on classical 18th-century liberalism. It thus has a great deal in common with the moderate libertarianism shared by most conservatives today.

The Founders were about the business of creating a commercial republic. As Mr. Epstein writes, they "came to the [constitutional] convention with a powerful presumption that trade and commerce was a social good, best fostered by institutions that restrained the use of force and stood behind private contractual arrangements."

Thus, much of Mr. Epstein's work is devoted to reinvigorating two mostly moribund clauses of the Constitution: the contracts clause—"no state shall . . . pass any . . . law impairing the obligation of contracts"; and the just compensation clause—"nor shall private property be taken for public use, without just compensation." These he reads as part of the Founders' attempt to guard the republic against the dangers of faction by limiting the power of government.

Mr. Epstein argues that a prime reason the Founders endorsed the principle of limited government was their fear that a too-powerful government might tempt factions to use the government to deprive men of their liberty and property. Give legislators too much power over property not their own and they may seek to dispose of "property of minority interests for personal gain," including reelection.

We see this evil in the present plague of interest-group politics, he maintains. Because we have given the government too much power over private property, we are encountering precisely the evils of faction that the Founders, in the *Federalist Papers*, argued the new Constitution

was designed to avoid. He argues that within close limits—and Mr. Epstein is a cautious analyst—the Court would be justified in reversing that trend and restoring the Founders' intent.

Citing the contracts and takings clauses, he has, for instance, broached the possibility that minimum wage laws and rent controls may be unconstitutional. Indeed, he thinks that the contracts clause places extensive limitations on the state power to restrict commercial agreements between consenting adults. He also believes that the government is limited in its ability to use the power of eminent domain to aid private business interests.

Mr. Epstein's full-bodied philosophical approach to the Constitution shows up in social issues as well. *Roe v. Wade* has been widely criticized, and Mr. Epstein joins in the criticism. But where much interpretivist scholarship has been devoted to debunking Justice Blackmun's assertion of a constitutional right to privacy, Mr. Epstein's criticism goes directly to the impropriety of deciding the case without considering the legitimate claims of the unborn child.

Mr. Epstein is 40 years old. He is married and has two children. He is probably too young to be on the administration's "short list," and his unusual views may keep him from having the sponsorship he would need to get appointed.

Nevertheless, appointing Mr. Epstein would accomplish a great deal. He is a brilliant advocate of a conservative view of the Constitution that is useful, more than respectable, and largely ignored. An Epstein appointment would not only produce an excellent justice, it would also give Mr. Epstein's ideas the status that only power can confer—a very useful thing for a conservative administration to do.

William Bentley Ball

Another leading conservative legal figure wary of judicial restraint is William Bentley Ball. Mr. Ball has become famous arguing free-exercise-of-religion cases before the Supreme Court, including the landmark *Wisconsin v. Yoder*, in which he successfully defended the rights of a group of Amish parents to keep their children out of state-accredited school systems, and the Bob Jones University case, in which he unsuccessfully argued that the college had a right to retain its tax exemption despite a religiously inspired rule against interracial dating among students. Though he was a *pro bono* lawyer for civil rights groups during the 1960s, Mr. Ball defended Bob Jones because he believes that the free-exercise clause of the First Amendment requires tax exemptions for religious institutions.

Like Mr. Epstein, Mr. Ball would bring to the Court an aggressive willingness to defend individual rights as many conservatives tend to define them. He would provide a powerful voice against the Court's antireligious bias, particularly its reading of the establishment clause of the First Amendment. He would also bring to the Court long experience as a litigator. He describes himself as "primarily an advocate." Colleagues call him brilliant. And he has spent decades devising practical legal strategies for defending liberty.

Mr. Ball has, in some ways, had an odd career. He has argued before the Supreme Court seven times and has been counsel for appellee or appellant in 20 cases considered for review by the Court—a remarkable record, but he is a graduate of Case Western Reserve University who got his law degree from Notre Dame, not—at least not in 1948—the conventional route to becoming one of the most important constitutional lawyers in the country.

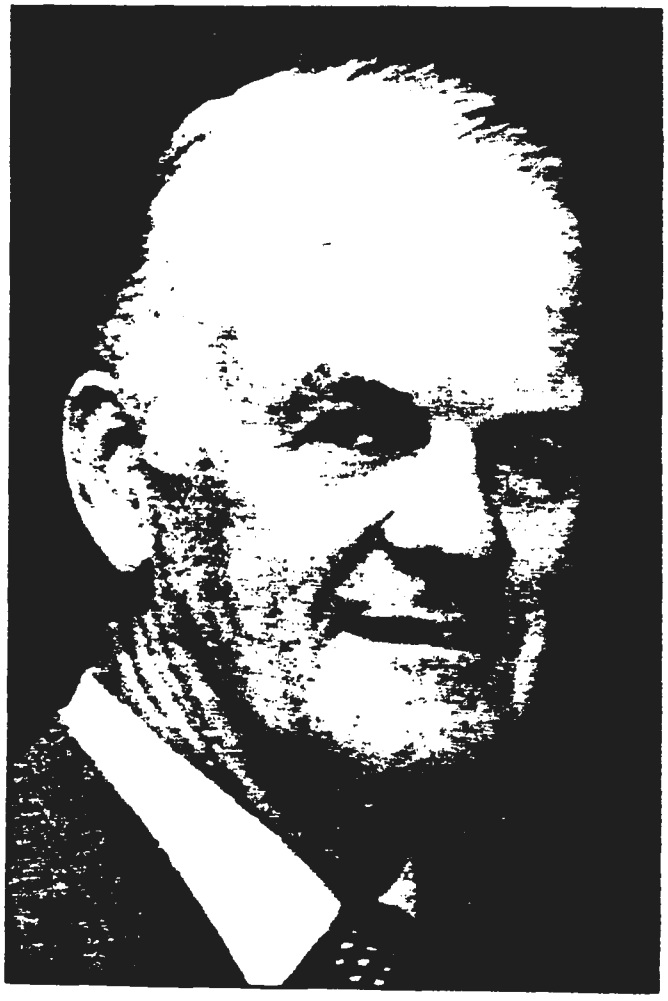
After leaving Notre Dame, he went to New York and joined the legal staff of W. R. Grace, the multimillion-dollar firm founded by one of Notre Dame's greatest patrons. It was a good job but, especially in New York, did not carry the prestige of a place in a major law firm, where great legal careers are made.

After another corporate job with Pfizer Inc., he taught constitutional law at Villanova's first law faculty. In 1968 he founded his own firm, Ball & Skelly, in Harrisburg, Pennsylvania.

Today the firm has a grand total of six attorneys. Yet it is one of the most important constitutional law firms in the country and has done more in recent years to defend religious liberty than any other firm in America.

Long before he became famous for his free-exercise cases, Mr. Ball was involved in civil rights litigation. In 1967 he entered a brief on behalf of 25 Catholic bishops in *Loving v. Virginia*, where the Court for the first time

William Bentley Ball



strike down a state law against interracial marriage. He urged for the Court's eventual position, which denied "the constitutionality of measures which restrict the rights of citizens on account of race."

During the same period he served, typically *pro bono*, as counsel to the Pennsylvania Equal Rights Council, which was defending the civil rights of blacks. Of himself he says that he has always been primarily interested in "human rights and individual liberty."

There is no doubt that Mr. Ball is a conservative. "We are," he says, "drowning in government, greatly overtaxed and desperately in need of evenhanded justice to protect free citizens from unnecessary government intrusion."

He is critical of the Warren Court, saying that though "it did go to great lengths to protect some citizens, it would be nice if future courts would consider the civil liberties even of those citizens who are not portrayed as subversives or accused criminals."

But in that criticism there is some grudging respect. However erratic the Warren Court might have been, he will explain, with-mile it ended up finding ways to protect some rights that ought to have been protected. He is now deeply concerned that a new judicial conservatism will be narrow and niggardly where religious liberty is concerned. "Religious civil rights cases," he says, "must be treated with all the liberality accorded racial civil rights cases."

As in the 1960s, when he was arguing against racial discrimination, Mr. Ball is still wary of the judicial conservatives' tendency to defer to Congress or the states. In free-exercise cases the rights of religious schools often turn on the courts' attitude toward general state education statutes that do not specifically attack religious schools but dictate what they must do to meet educational standards.

This is a thorny area. All parties agree to the states' right to impose safety and health regulations and minimal curriculum standards—that is, required classes in English, math, and civics. But once that is admitted, can the states impose detailed and aggressive curriculum standards, licensing, and methodological standards?

Judicial restraint conservatives might overrule such detailed regulations, but they might not. Because of their justified wariness of turning political questions into constitutional ones, they would tend to ask whether the regulations were contrived to discriminate against religious schools, or whether they were impartially imposed on the entire state education system. In the latter case the judicial restraint conservatives *might* say that the regulations were legitimate exercises of the same authority by which the states impose mandatory education requirements.

Mr. Ball, on the other hand, and probably Mr. Epstein, would argue that detailed instructions to religious schools would be unconstitutional even if they were the same regulations imposed on state schools.

In voicing his fears about judicial restraint, Mr. Ball points to one of his recent cases, the Grace Brethren case, in which the Court refused to interfere with state imposition of unemployment taxes on nonchurch religious schools. The Court, with the concurrence of several relatively conservative justices, essentially decided to defer to the relevant state courts.

Mr. Ball is firmly antiabortion and was one of the attorneys for the 238 members of Congress who filed an *amicus* brief with the Supreme Court defending the Hyde Amendment's restriction against using Medicare funds to pay for abortions. One of his hopes for a new Court is that it would overrule *Roe v. Wade* as well as *Bob Jones*.

Mr. Ball is married and has one daughter. He is 67 years old, older than any other candidate recommended here. But he is a "daily five-miler" who, like President Reagan, does not look or act his age. He is extraordinarily well respected by his colleagues. His addition to the Court, like Mr. Epstein's, would significantly advance a conservative judicial point of view that is insufficiently noticed at present.

The appointments of Messrs. Bork and Scalia would do a great deal to persuade both the lower courts, and more importantly, the nation's prestige law schools, to take the Constitution more seriously. The more aggressive attitude of Messrs. Epstein and Ball would fill in some of the gaps left by the judicial restraint school and would quickly come to represent the point position in conservative jurisprudence. With Messrs. Epstein and Ball arguing for an aggressively conservative Court, judicial restraint suddenly becomes the moderate position.

Strategically, Messrs. Bork, Scalia, Epstein, and Ball would make a great combination. Add Justice Rehnquist's own powerful intellect and the five would together dominate one of the most distinguished Courts in American history. ■

THE WHITE HOUSE

WASHINGTON

June 5, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ALAN CHARLES RAUL ACR

SUBJECT: Summary Information Regarding Certain Judges

This memorandum sets forth summary information (distilled mostly from press accounts) and conclusions regarding Judges Scalia, Bork and Winter, and Justice Rehnquist. I have concentrated on Judges Scalia and Bork. Please advise if you would like me to follow up on any of the preliminary thoughts expressed here.

ANTONIN SCALIA

Biographical Information

AGE: 50

BORN: March 11, 1936, Trenton, New Jersey

COLLEGE: Georgetown University, A.B. 1957

LAW SCHOOL: Harvard Law School, LL.B., 1960

MILITARY: Apparently none

PARTY: Republican

RELIGION: Probably Roman Catholic

FAMILY: Married since 1960; nine children

RESIDENCE: McLean, Virginia

HEALTH: No negative indications

(See attached biographical materials.)

Judicial History

APPELLATE COURT: D.C. Circuit, appointed by President Reagan, 1982

Professional Experience

Visiting Professor, Stanford Law School, 1980-81.
Professor, University of Chicago Law School, 1977-82.
Resident Scholar, American Enterprise Institute, 1977.
Visiting Professor of Law, Georgetown University Law School, 1977.
Assistant Attorney General, Department of Justice, 1974-77.
Chairman, U.S. Administrative Conference, 1972-74.
General Counsel, Office of Telecommunications Policy, Executive Office of the President, 1971-72.
Professor, University of Virginia Law School, 1967-71.
Sheldon Fellow, Harvard University, 1960-61.
Private practice in Cleveland, Ohio, 1960-67.

General Considerations and Confirmability

Scalia has been a life-long conservative. Supposedly, even while in law school, he chided classmates about favoring excessive government regulation. He was a hardcore Goldwater supporter and a fan of Bill Buckley and the National Review.

Scalia is said to be "phenomenally well prepared" at oral argument -- he reads all the briefs himself, rather than relying on clerks' summaries. He also writes his own opinion, sometimes without using clerks' drafts. Scalia writes well and is accessible to the non-lawyer. Though he is called an archconservative, he is also an independent thinker who does not bend his principles to suit the circumstances. According to reports, for example, when he served in the Nixon White House he actively opposed a plan to control certain programming on public television. In 1985, he struck down part of a deregulatory scheme adopted by FERC to loosen government controls over natural gas prices. In another case, Scalia, joined by Judges Bork and Starr, decided that Washington's M.T.A. acted unconstitutionally in refusing to rent subway advertising space to someone who wanted to post an anti-Reagan photomontage.

Like Bork, Scalia is uniformly considered a first-rate legal scholar. Even liberal Democrats concede this. The confirmation process, consequently, should be relatively easy, especially in light of the fact that a conservative Justice is being replaced. Also enhancing Scalia's confirmation prospects, I would imagine, is the fact that he is an Italian-American -- he would be the first appointed to the Supreme Court. Another significant point is that he does not seem to have antagonized any particular groups or powerful individuals in his rise to prominence.

No press accounts raise the issue of Judge Scalia's health. All indications are that he is an extremely vigorous and dynamic fifty-year-old. He is described as an extroverted, hail-fellow well-met-type person. According to a feature story in American

Lawyer on Judge Scalia (Tab A), his personality has imbued the previously fractious D.C. Circuit with a general feeling of good will and collegiality. He is thought of as a consensus-builder who blunts disagreement, rather than sharpens it. He is said to differ in this regard from Judge Bork, who is more contentious. Judge Scalia is described by former D.C. Circuit clerks as more of a leader than Bork. He started strong on the D.C. Circuit and did not, even initially, defer unduly to other judges, including Bork. His political savvy and forcefulness are evidently quite impressive.

A couple of minor difficulties could arise in a Scalia nomination. He received only a "qualified" rating from the ABA when he was considered for the D.C. Circuit. (Bork, by comparison, received an "exceptionally well-qualified.") A higher rating was not bestowed, apparently, due to Scalia's relative inexperience in the courtroom. This handicap may have now abated as a result of Judge Scalia's almost four years on the bench. (Although the need for experienced litigators on the Supreme Court, in any event, is questionable, Sandra Day O'Connor faced the same ABA problem during her confirmation. The ABA had reported that, from a professional standpoint, she was "only qualified." Nonetheless, she sailed through the Senate without a nay vote.)

Another negative factor, however, could be Scalia's position on the First Amendment and libel law. A conservative columnist, William Safire, denounced Scalia as the "worst enemy of free speech." See New York Times column, April 29, 1985. The causus belli for Safire's attack was Scalia's dissent in Ollman v. Evans and Novak the case where a Marxist economics professor sued columnists for libel because they called him a Communist. Scalia dissented from the court's en banc decision in favor of the defendants. (Judge Bork concurred in favor of the defendants.) Scalia reasoned that the column's defamatory statement was not opinion, but rather was a garden variety libel. (Judge Bork's concurrence was pro-free speech in that he argued for construing "opinion" broadly, thereby enlarging the scope of the constitutional defenses available to the columnists.) Judge Scalia's approach is anathema to the media since it would allow a greater number of libel cases to proceed to trial.

(Another potential confirmation issue is that Judge Scalia is -- or was -- a member of Washington's all-male Cosmos Club.)

Other than Safire, however, the media appear to have treated Scalia extremely well. Recent press accounts suggest he may have "eclipsed" Bork as the likely next Supreme Court nominee. (E.g., Newsweek, June 10, 1985, Tab B.) It is noted that Scalia is nine years younger than Bork, and perhaps more conservative.

Judge Scalia also has a good track record in cases appealed to the Supreme Court. As of early 1985, the Supreme Court agreed to review three out of the four cases in which Scalia dissented and in which the losing party appealed to the Supreme Court. Even more impressive, the Supreme Court did not review any of the fifty-three majority decisions he authored.

Overall Judicial Philosophy

Judge Scalia believes in a strong executive, a strong legislature and a relatively weak court. Strong emphasis on "separation of powers" is the hallmark of his jurisprudence. Prior to becoming a judge, Scalia drafted the ABA's amicus brief in Chadha in which he argued that the one-House legislative veto was unconstitutional. On the bench, he has been particularly deferential to the military, and the executive's conduct of foreign affairs.

Judge Scalia has said that courts are bad at, and therefore the wrong institution for, organizing society, spending money and generally getting things done. (See Policy Review, Tab C.) Scalia has supposedly said that the judiciary exists not to balance majority interests but to defend a short list of individual minority rights. In his dissents, he often chides colleagues not to get involved in extra-judicial matters.

Scalia, an administrative law specialist, believes that Congress has delegated too many policy judgments to the agencies. As a result, neither Congress nor the President can properly supervise the results. He said in 1979 that policy judgments require political decisions and should be made by elected representatives. If Congress fails to make the hard choices by enacting legislation, agencies should not do Congress' work by implementing policies that were never embodied in a statute.

This analysis plainly bespeaks judicial restraint and suggests Scalia would not be an activist judge or rely on his own preferences to fill interstices in legislation. This approach, however, does not necessarily signify a "limited government" philosophy, because he does recognize Congress' broad power to make choices. On the other hand, he would resist stretching the terms of legislation beyond what Congress narrowly addressed. In a sexual discrimination case, for example, Scalia dissented (with Bork) from a decision extending the civil rights laws to cover sexual harassment in the workplace.

Further evidence of Scalia's conservative approach to statutory construction is his view on legislative history. He has noted that Committee reports should be given only marginal significance in interpreting laws because they generally do not come to the attention of, much less are approved by, the enacting members of Congress. He thus cautions against "routine deference" to such reports since they are usually prepared by

liberal committee staffers who use the opportunity to gloss statutes with a more sweeping meaning than Congress would have approved. On the other hand, he indicated that the President's "signing" statement could be looked at as evidence of executive intent.

Positions on Critical Issues

Criminal Justice. Scalia is not especially known for his views on criminal matters.

Federalism. Scalia is not especially known for his views on states' rights.

Separation of Powers. This is the major area in which Judge Scalia leaves his mark. Scalia wrote the lower court decision holding Gramm-Rudman unconstitutional. In another case, he rejected arguments by members of Congress that the President could not constitutionally support the Contras in Nicaragua. He felt that case involved a non-justiciable, political question. He manifested concern in this decision that U.S. foreign policy not be obstructed. Scalia also authored the panel's opinion in Ramirez v. Weinberger holding against a U.S. citizen who claimed that his ranch in Honduras was "taken" by the U.S. in violation of the Fifth Amendment. The D.C. Circuit reversed en banc, but the Supreme Court upheld Scalia's position.

Economic Matters. Scalia has voted with Judge Bork in a number of cases involving economic regulation. He is known to oppose excessive government regulation. He dissented, for example, in a case where the majority overturned the FDA's decision not to regulate the drugs used for capital punishment. This opinion suggests that he would draw narrow lines on regulatory matters. The Supreme Court agreed with Judge Scalia in Heckler v. Chaney. In another case, however, he held that FERC's deregulation of natural gas prices was improper.

Other Cases. Judge Scalia dissented from the D.C. Circuit's ruling in Community for Creative Non-Violence v. Watt that sleeping by demonstrators in Lafayette Park was a protected First Amendment right. He indicated that "symbolic speech," such as sleep, was not protected because the constitutional guarantee does not cover all forms of expression. The Supreme Court reversed in favor of Scalia's position.

MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUDGE SCALIA

ANTONIN SCALIA

Judge Scalia is also an articulate and devoted adherent to the interpretavist theory of adjudication described more extensively in the memorandum on Judge Bork. Scalia's primary focus has been on separation of powers, justiciability and administrative law questions. He has repeatedly emphasized that the judicial role is solely to decide the rights of individuals. Thus, absent an express statutory mandate, he denies standing to persons who seek to have courts resolve generalized grievances and otherwise assiduously ensures that cases are susceptible to judicial review, most notably in a number of ground-breaking opinions on congressional standing. Scalia couples his appreciation for the limited role of the courts with respect for coordinate branches and has written several very significant opinions dealing with the deference due to the Executive, particularly in foreign affairs and the enforcement of laws.

In short, Scalia's judicial philosophy almost precisely mirrors that of Bork, with the exception of one subtle difference in emphasis which may affect their decision-making in a quite narrow range of cases. In seeking to determine the breadth of rights contained in the constitutional text, Scalia would probably be more inclined than Bork to look at the language of the constitutional provision itself, as well as its history, to determine if it grants an affirmative mandate for the judiciary to inject itself into the legislative process. Absent such an affirmative signal, Scalia's natural belief in the majoritarian process and his innate distrust of the judiciary's ability to implement, or even to discern, public policy or popular will, would probably lead him to leave undisturbed the challenged activity. While Bork certainly shares these precepts of judicial restraint, he will be somewhat more inclined in certain circumstances to give broader effect to a "core" constitutional value. Bork would look less to history, and more to the general theory of government reflected by the Constitution's overall structure, to provide guidance on the limits of judicial action. In the broader scheme of things, this divergence is quite minor, but it is the reason that Scalia severely criticized Bork's "sociological jurisprudence" in the Ollman libel case.

Scalia is obviously a superb intellect and scholar who has produced an extraordinarily impressive body of academic writings on a broad range of issues, particularly administrative law. He has also written probably the most important opinions of any appellate court judge during the last 4 years, without a single mistake. While he has not focused on the "big picture" jurisprudential questions to quite the same extent as Bork, his writings on separation of powers and jurisdictional questions reflect a fundamental, well-developed theory of jurisprudence in an area that had received all too little attention. He also reasons and writes with great insight and flair,

which gives additional influence to his opinions and articles. He has been particularly diligent in ferreting out bad dicta in his colleagues' opinions and otherwise aggressively attempted to reshape the law through dissents and en banc review. Like Bork, he would not slavishly adhere to erroneous precedent. More so than Bork, he is generally respected as a superb technician on "nuts and bolts" legal questions.

Scalia is an extremely personable man, although potentially prone to an occasional outburst of temper, and is an extremely articulate and persuasive advocate, either in court or less formal fora. Unlike Bork, he would have to undergo a relatively brief "get-acquainted" period on the Supreme Court and it is conceivable that he might rub one of his colleagues the wrong way. Scalia's background as a private practitioner for six years, a law professor at the Unviersity of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications. While he received only a "qualified" rating from the American Bar Association for the D.C. Circuit, this can only be described as slanderous nonsense. Scalia just turned 50 years old and exercises regularly. Although he smokes heavily, and drinks, he should have a lengthy career on the Court.

J. CLIFFORD WALLACE

Biographical Information

AGE: 57

BORN: December 11, 1928, San Diego, California

COLLEGE: San Diego State University, B.A., 1952 (age 23)

LAW SCHOOL: University of California at Berkeley, LL.B., 1955 (age 26)

MILITARY: Navy, 1946-49, 2nd Class PO Officer

PARTY: Republican

RELIGION: Mormon

FAMILY: Married since 1957; four children

RESIDENCE: La Mesa, California

HEALTH: No negative indications

Judicial History

TRIAL COURT: S.D. California, appointed by President Nixon, 1970

APPELLATE COURT: Ninth Circuit, appointed by President Nixon, 1972

Professional Experience

Adjunct Professor, San Diego State University, 1975 to present
Gray, Cary, Ames & Frye, San Diego, California, associate and partner, 1955-1970

Former Vice President, Executive Board, San Diego County Council, Boy Scouts of America

General Considerations and Confirmability

Judge Wallace has long been known to have aspirations to the Supreme Court. He is a consistent conservative. He is known as distant from his colleagues, including his law clerks, according to private remarks by Matthew Neumeier, currently a law clerk for Chief Justice Warren Burger and previously a law clerk for Judge Wallace, and according to another former Wallace clerk

presently clerking for Justice William Rehnquist. His opinions are generally long and discursive, but according to commentators only occasionally are they brilliant. Judge Wallace was proposed for the Supreme Court in 1981 by Senator Orrin Hatch, a fellow Mormon. Judge Wallace was also among a select few included on a list of Supreme Court nominees compiled by Bruce E. Fein, described in a National Journal article of July 6, 1986 as "one of Washington's most outspoken and prolific conservatives on legal matters." His article was published by the Center for Judicial Studies, a conservative group. A UPI story in November 1984 also included Judge Wallace on a "short list" of potential Supreme Court nominees. His name has likewise appeared in other articles attempting to divine future Supreme Court nominations. In 1975, when President Ford considered him for the Supreme Court, Wallace was quoted as having said, "I don't think the Constitution was developed to answer all questions or cure all social ills." He described the Burger Court as "more in keeping with my view of judicial philosophy."

Judge Wallace's strong conservative streak shows in virtually all of the opinions he writes. Earlier this year, Judge Wallace wrote a panel decision affirming an INS ruling that provisional Irish Republican Army militant Peter McMullen should be denied political asylum, despite his testimony that he was considered a traitor by the IRA and would be killed unless granted asylum in the United States because he became an informer for both the British and U.S. governments. Wallace wrote that McMullen's "active membership and leadership, including his training of terrorists and gun-running, by which he knowingly followed IRA's campaign of terrorist atrocities," required his deportation.

Judge Wallace also wrote the panel decision that refused to free Andrija Artukovic on bail while he challenged his extradition to Yugoslavia, where he faced murder charges as an official of the Nazi puppet state during World War II. (Alex Kozinski was also on the panel.) The panel said bail in such circumstances is reserved for "extraordinary cases" in which the likelihood of a successful challenge is great or unusual factors are involved.

Judge Wallace dissented from a panel decision to leave in place a stay order withholding any further action in the California reapportionment case brought by Republican Congressman Robert Badham and Republican Assemblyman Robert Naylor. The Republicans complained that Willie Brown's reapportionment plan, which draws district lines for the California legislature and Congressional delegation, favored Democrats, calling it a "partisan political gerrymander" in violation of the constitutional rights of California voters. Judge Wallace argued that the burden of working out a solution to the reapportionment problem in time for the 1986 elections was outweighed by the detrimental impact of the stay on Republicans. He called the stay order "excessive in scope" and suggested that

a means of avoiding the time and expense of drawing new districts prior to the 1986 elections would be to "order an at-large election."

In Spaulding v University of Washington, decided in 1984, Judge Wallace wrote a lengthy opinion criticizing the concept of "comparable worth."

In an exceptionally unusual procedure, six judges of the Ninth Circuit, including Judge Wallace, issued a sharply critical "dissent" to an earlier panel opinion in the case of Students of California School for the Blind v. Honig, decided in 1984. The six judges could not muster a necessary majority of the 24 judges on the Ninth Circuit to reconsider the panel opinion en banc, so they simply filed a "dissent," even though the opinion was no longer pending before the court. The dissent was written by Judge Joseph T. Sneed. It rebuked the panel for its "unnecessary and erroneous" analysis which, said Judge Sneed, "reflects an insensitivity to the most recent relevant Supreme Court pronouncements and to the principles of federalism those pronouncements sought to explicate." At the heart of the controversy was the doctrine of judicial restraint and the question of how wide the federal courts should open their doors to interpreting state laws -- an issue that clearly divides conservatives and liberal judges. The issue was whether the California Department of Education had adequately tested a Fremont, California school for seismic safety, as required by the state's Education Code. A group of handicapped students brought suit in federal court claiming that the Department's alleged failure to follow state law violated the Education for All Handicapped Children Act of 1975, and the Rehabilitation Act of 1973. The three-judge panel held that California had waived its immunity to suit in federal court under the 11th Amendment by participating in federally funded and regulated programs.

The panel decided not to apply Pennhurst State School and Hospital v. Halderman, 104 S.Ct. 900 (1984), which relied on principles of state sovereignty to hold that the 11th Amendment bars federal injunctions ordering state officials to obey state law. The panel distinguished Pennhurst, finding that state officials were being ordered only "to abide by federal statutes, which incorporate certain aspects of state law." It was this aspect of the panel's rationale -- described by Education Department lawyers as "back-door pendant jurisdiction" -- that the dissent challenged. According to Judge Sneed, the panel "disregarded the limits on statutory interpretation which I believe are implied by the doctrine of separation of powers." According to press reports, legal scholars were "puzzled by issuance of the dissent, but agreed it seems to be an invitation to the Supreme Court to take the case."

However, Judge Wallace did not dissent from a Ninth Circuit case which held that the circuit's judges would no longer defer to

federal district judges' decisions on state law, but would instead substitute their own judgment. Previously, Circuit judges did so only with respect to federal law questions, and deferred on state law issues -- reversing only for "clear error." Stanford Professor Gerald Gunther found the ruling "strikingly ironic . . . in light of the long campaign to get rid of diversity jurisdiction and check federal courts' work loads." Most observers agreed that the decision was likely to increase the number of appeals in the Ninth Circuit.

During the 1984 Olympics, Judge Wallace rejected claims by 82 women from 27 countries that their rights were violated by the Olympics' conducting two distance races for men but not for women. Writing for the Ninth Circuit panel, Wallace said the rule used by the International Olympic Committee to decide which event should be included applied equally to men's and women's events, and thus was not discriminatory.

A noteworthy en banc criminal procedure decision written by Judge Wallace reversed a panel opinion that had followed a precedent of the D.C. Circuit in vacating a narcotics conviction after the defendant had admitted guilt and been sentenced to concurrent sentences on four related counts. The panel rejected the concurrent sentence doctrine previously in effect in the Ninth Circuit which held that if one count was affirmed on appeal, a related count that would not affect a defendant's prison term was automatically affirmed on the basis that there was no need for appellate judges to spend time reviewing it. The District of Columbia precedent followed by the panel calls for vacating, rather than affirming, concurrent convictions. Judge Wallace's en banc opinion, however, found that vacating convictions without considering their merits "would impermissibly infringe on the prosecutorial function of the executive branch." The District of Columbia rule has been rejected by the Fifth and Eleventh Circuits, and the en banc panel of the Ninth Circuit rejected it as well. Instead, the en banc court decided on a compromise: each count will now be reviewed on its merits, even if it does not affect sentencing. The new rule will create more work for the appellate courts.

In a suit involving a plaintiff who permanently lost hearing in her left ear because of normal pressurization on a 1985 airline flight, the Ninth Circuit ruled that airlines can be held responsible for the injuries of passengers even if they occur during normal operations. Judge Wallace dissented from this ruling, saying that it makes airlines "absolutely liable for any happening causing injury to a passenger." Judge Wallace illustrated the problems created by the decision as follows: "Assume a cardiac patient, excited by a normal takeoff, has a heart attack and dies. The majority would have the carrier pay. I would not. The heart attack would not arise from an accident; while the smooth takeoff would not be an unusual occurrence, it might be a proximate cause of death. . . . Recovery for

damages . . . requires more than travel or an occurrence; it requires an accident. Normal cabin depressurization is no accident."

In a decision weighing family values more heavily than enforcement of plain meaning in construing contracts, Judge Wallace held that a man who won back custody of his two children from a federal witness protection program only after agreeing not to sue the United States could sue for damages against the government nonetheless. Judge Wallace's panel opinion, reversing the district court, held that the plaintiff's written promise not to sue the government may have been signed under "duress." According to Wallace, the government "may not, as a matter of law, avoid any potential liability . . . by denying responsibility for the continued separation of [plaintiff/appellant] from his children." This case arose only after the plaintiff signed a release absolving the United States from any liability for relocation of his children. The decision permitted the plaintiff to procede against the United States with a damage claim.

Positions on Critical Issues

Criminal Justice. With few exceptions, Judge Wallace has been consistently tough in the areas of criminal procedure and criminal law. "Defendants in the public want superior justice," Wallace has been quoted as saying. As a federal appeals judge, he said, the important thing is to decide if the trial was fair, not whether there were trial errors. "There are no error-free trials. If a mistake didn't prejudice the trial, I see no reason to try the case again." Judge Wallace's religious views feature prominently in his approach to criminal justice. A 1981 profile of Judge Wallace compiled by the Associated Press quoted him as saying that the Bible gives "great scriptural support for the death penalty." In Who's Who in America, Judge Wallace's biography is followed by an unusual italicized personal statement to the effect that the teachings of Jesus Christ provide the basis for his life and work. Wallace has served as President of his Mormon stake. "As a religious leader," Wallace said in 1975, "I have no objection to the death penalty. I know mercy is a great principle, but so is justice."

Federalism. As illustrated by Judge Wallace's joining in the unusual six-judge dissent filed in connection with the Honig case, he believes strongly in the principles of federalism and states' rights. Federalism issues are frequently raised in his opinions, even where the parties themselves have not raised such questions.

Separation of Powers. "The framers of the Constitution never intended to build a wall between the state and religion," Judge Wallace has been quoted as saying, adding, "sometimes, in trying

to enforce the principles [of the Constitution], we bend over so far backward that it [the principle] becomes illogical." The framers of the Constitution "had a delicate balance established," Wallace said once. "Once a judge determines he should decide social problems, he is taking the wrong step."

Economic Matters. Judge Wallace is not noted for his decisions in this area, although he is generally pro-individual and derivatively anti-regulation. San Francisco attorney Charles B. Renfrow, who served with Wallace on the federal court, calls Wallace "a moderate conservative on social and economic issues and very strong on individual rights."

Other Matters

The following lawyers' comments about Judge Wallace are reported in the Almanac of the Federal Judiciary (1985): "Courteous, conservative, an active questioner, smart, informed, prepared, articulate. Additional comments: 'Conscientious, scholarly, asks many questions and good ones, is conservative, works very hard, and writes well.' 'Good, competent, doesn't reveal himself during argument.' 'Very bright, one of the best minds on the court, but is result-oriented and stretches--or misconstrues--precedents. He can pin attorneys to the wall.' 'Asks a lot of questions. Doesn't let go if he wants to make a point. Good writer.' 'Insensitive to government abuse of power.' 'Very smart. Can get impatient and sarcastic with lawyers. Relatively conservative. Strong on antitrust law. Very well prepared. Writes well.' 'Can be very tough. Follow procedures or expect a tongue lashing.' 'His writing is effective, not colorful.' 'I did not find him aggressive in argument. His opinions are solid, not brilliant.' 'Very sharp. Lots of ideas. Articulate.'"

Judge Wallace has written lengthy articles outlining his philosophy of jurisprudence. In "The Jurisprudence of Judicial Restraint: A Return to Moorings," 50 Geo. Wash. L. Rev. 1 (1981), he discusses the relationship of judicial restraint to liberty and democracy. Judge Wallace also has definite and innovative ideas on reshaping our legal system. In "American Inns of Court: A Way to Improve Advocacy," 68 A.B.A.J. 282 (1982), he proposes that inns of court be established as the means of training trial lawyers in the United States. In "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or Molehill?," 71 Cal.L.Rev. 913 (1983), he outlined his opposition to the national court of appeals favored by Chief Justice Burger and recommended by the Hruska Commission in 1975. Instead, he calls for a national en banc court. He also proposes a reduction in the number of circuits.

Conclusion

Judge Wallace, by virtue of his tenure on the Ninth Circuit Court of Appeals and his consistent conservatism, is a worthy Supreme Court candidate. His public statements concerning the relationship of his religion and his decisions could, if used unfairly against him, present confirmation problems. However, he is personally unblemished, a family man and a serious legal scholar who occasionally attains brilliance. He would make a solid appointment.

MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUDGE WALLACE

J. CLIFFORD WALLACE

Judge Wallace is clearly an interpretavist in practice and theory. In two articles on this subject, he has defended judical restraint on the grounds that it leads to more stability and allows more room for democracy. Both articles are unpersuasive and reflect a lack of insight and well-developed theoretical underpinnings. Although he has not written any landmark decisions, his opinions show him to understand judicial restraint much better in practice.

The best description of Wallace's judicial opinions is that they are generally eminently reasonable but unremarkable. He is clearly an excellent and dedicated technical judge but has never sought to reshape the law in any fundamental way. He is very insistent on justiciability requirements (with one exception), appropriately defers to state and coordinate branches, particularly in immigration law, and takes an appropriate view of criminal law and its procedures. His most serious substantive flaw is that he has demonstrated a marked, and inexcusable, tolerance for racial and gender quotas in three different cases. On the other hand, he wrote a very good opinion objecting to the "comparable worth" theory of sex discrimination.

In sum, it is fair to say that Wallace has been a very good, but not extraordinarily outstanding circuit judge. He has been on the bench long enough really to leave his mark on the law, and has not done so.

Wallace is 57 years old and a graduate of the University of California at Berkeley Law School. He was in private practice for 15 years and served as a district court judge for two years until he was appointed by Nixon to the Ninth Circuit in 1972. He has taken an active interest in issues affecting court administration.

RALPH K. WINTER, JR.

Biographical Information

AGE: 50

BORN: July 30, 1935, Waterbury, Connecticut

COLLEGE: Yale University, B.A., 1957

LAW SCHOOL: Yale Law School, J.D., 1960

GRADUATE SCHOOL: Yale University, M.A., 1968

MILITARY: Apparently none

PARTY: Republican

RELIGION: Not available

FAMILY: Married; one child

RESIDENCE: Connecticut

HEALTH: Portly stature, no other negative indications

(See attached biographical materials.)

Judicial History

APPELLATE COURT: Second Circuit, Appointed by President Reagan, 1982

Professional Experience

Professor, Yale Law School, 1961-82.
Law Clerk to U.S. Circuit Judge Thurgood Marshall, 1961-62.
Law Clerk to U.S. District Judge Caleb Wright, 1960-61.
Senior Fellow, Brookings Institution, 1968-70.
Adjunct Scholar, American Enterprise Institute, 1972-82.

General Considerations and Confirmability

Judge Winter is considerably less well-known than either Judge Bork or Scalia. There are relatively few press reports discussing his decisions. His professional background is not particularly varied in that he has only been either an academic or law clerk since graduating from law school.

Judge Winter is certainly a conservative, but he is not really identified with any particular ideology or strong philosophical bent. He is also certainly smart, but I do not believe that he is generally regarded as intellectually powerful as either Bork or Scalia.

Winter was sworn in as a Circuit Judge by Justice Thurgood Marshall, for whom Winter had clerked. Justice Marshall said that Winter would be "a great judge . . . . But he's got a heart, and more and more we need it." This praise could be merely polite, or it could suggest that Justice Marshall foresaw a closet soulmate in his former law clerk.

Winter once described himself as a "centrist," but when he was sworn in he said he would leave it to others to characterize him. (See New York Times article, Tab A.) Winter also concedes that he was "not the most diligent student" when he was in law school. The dean of the law school said at Winter's swearing in that "unlike most jacks of all trades, Ralph is the master of most," and that Winter's scholarship "shows his conservative bent but also his receptiveness to a good idea no matter what its ideological pedigree." Again, one could infer not only that Winter is loosely committed to conservatism, but also that he is susceptible of damnation with faint praise.

Winter was lead counsel in Buckley v. Valeo, which struck down portions of the 1974 federal election law and forced Congress to restructure the FEC. He represented the Republican National Committee again in a case challenging limits on independent expenditures during Presidential campaigns. (I was a law clerk present at one of the oral arguments in that case, Common Cause v. Schmidt. Winter was a truly impressive advocate.)

As a professor at Yale Law School, Winter had a somewhat checkered reputation. He was considered smart, but not a very good teacher. In addition, he was not known for intensive preparation for class or rigorous commitment to scholarship. At the law school, Bork was viewed as really being in another league from Winter.

With the limited resources I have been able to apply to evaluating Judge Winter, it does not appear that his rulings from the bench can be characterized as falling into any one particular category or another. He is on record as being against "expansion of judicial power and the trend toward the constitutionalization of every perceived problem." He has also adopted conservative positions on economic matters. In short, Winter is frequently mentioned as a potential Supreme Court nominee, but very little detail supports any of these references.

In the Baby Jane Doe case, Winter dissented in favor of the U.S. government's position. The government claimed that it needed

access to certain medical records of Baby Jane in order to see whether the hospital had discriminated against a severely handicapped baby by denying surgery. Winter would have allowed such access. Winter has also written a decision which rejected a claim against Cornell University for discrimination against female faculty members. His opinion found that the statistics offered to prove the discrimination were unpersuasive.

REDACTED

REDACTED

REDACTED

REDACTED

The press accounts do not provide any insight into Judge Winter's health, though they do note that he is "portly."

Overall Judicial Philosophy

I cannot add much to the comments above regarding Judge Winter's judicial philosophy. As far as I can tell, he is not associated with any particular philosophical "school."

Positions on Critical Issues

Criminal Justice. I have a general sense that Judge Winter is conservative on criminal justice issues, but there are exceptions. In U.S. v. Cote, for example, Judge Winter reversed a conviction finding that the trial judge's cautionary instruction to the jury was not, under the circumstances of the case, adequately protective of the defendant's rights. In Martin v. Strasburg, Judge Winter held that a provision in the New York Family Court Act authorizing preventive pretrial detention of accused juveniles was unconstitutional. He found that it violated the due process clause of the Fourteenth Amendment because pretrial detention was used mainly for punishment rather than prevention of crimes. The Supreme Court reversed, holding that the provision was valid because the statute's objective was compatible with "fundamental fairness" and the statute provided sufficient procedural safeguards to protect against unconstitutional deprivations of liberty.

Federalism. In a number of contexts, Judge Winter has indicated that he is respectful of states' jurisdiction. He has indicated his view that corporate fiduciary duties are a matter of state, not federal concern. Also in the area of corporate governance, Winter has argued that a national approach would be undesirable because it would undercut competition among the states which leads to optimal results.

Separation of Powers. I do not believe Judge Winter is particularly well-known for decisions in this area. In one case

regarding the Warsaw Convention's limits on air-carrier liability for lost goods, Judge Winter felt that selecting the proper formula for converting gold into dollars was a political questions not properly resolved by the courts. The Supreme Court affirmed Winter's decision in part, but rejected his declaration that the limits were unenforceable prospectively.

Economic Matters. Judge Winter is generally regarded as highly conservative on economic and business matters, but I am unable to comment on that here. At Yale Law School, he was viewed as a very conservative, economics oriented, pro-business professor.

1979 Senior Associate Justice, Appellate Division, Fourth Department; 1980 served as Acting Presiding Justice of Appellate Division, Fourth Department; 1981-date Judge U.S. Court of Appeals, 2nd Circuit appointed by President Reagan.

Member Oneida County Bar Association, New York State Bar Association, American Law Institute.

Member board of visitors, College of Law, Syracuse University, 1970-date; member of Executive Committee, Syracuse Law College Association, 1973-79; member, director Slocum Dickson Foundation, Inc., Utica, N.Y., 1980-date; trustee St. Luke's Memorial Hospital Center, New Hartford, New York, 1981-date.

Member New York State Commission on Judicial Conduct, appointed to four-year term by Charles D. Breitel, then Chief Judge of the Court of Appeals of New York.

Lawrence W. Pierce U.S. Courthouse, Foley Square, New York, New York 10007. (212-791-0951). Orig. App't. Dt. 11-30-81.

Born Dec. 31, 1924 in Philadelphia, Pennsylvania; married Cynthia Straker; children Warren, Michael, Mark; Republican; 1943-46 U.S. Army.

St. Joseph's University, Philadelphia, B.S., 1948; Fordham University School of Law, LL.B., 1951.

1954-61 assistant District Attorney Kings County; 1961-63 deputy Commissioner of Police, New York City; 1963-66 director New York State Division for Youth; 1966-70 chairman New York State Narcotic Addiction Control Commission; 1970-71 visiting professor, Graduate School of Criminal Justice, State University of New York at Albany; 1971-81 Judge U.S. District Court for New York, Southern appointed by President Nixon; 1978-81 member U.S. Foreign Intelligence Surveillance Court; 1981-date Judge U.S. Court of Appeals, 2nd Circuit appointed by President Reagan.

Member American Bar Association, Judicial Council of National Bar Association, Second Circuit-Federal Bar Council Historical Committee, New York City Bar Association, American Judicature Society, Brooklyn Bar Association.

St. Joseph's University, L.H.D.; Fairfield University, LL.D.; Fordham University, LL.D.; board of trustees, St. Joseph's University; board of directors Fordham Law Alumni Association. Board of managers Lincoln Hall for Boys. Member United States delegation meeting in England, Sweden, and Japan to study prevention of crime and treatment of offenders; secretary of the Army's Special Civilian Committee to study Army confinement facilities in the United States, Europe and the Far East; President's Task Force on Prisoner Rehabilitation.

Ralph K. Winter, Jr. 142 Orange Street, 3rd Floor, New Haven, Connecticut 06510. (203-773-2353). Orig. App't. Dt. 1-5-82.

Born July 30, 1935 in Waterbury, Connecticut; married Kathryn Higgins; one

Yale University, B.A., 1957; Yale Law School, J.D., 1960; admitted to Connecticut bar 1973.

1960-61 law clerk to U.S. District Court Judge Caleb Wright; 1961-62 law clerk to U.S. Court of Appeals Judge Thurgood Marshall; 1961-82 professor of law Yale Law School; 1982-date Judge U.S. Court of Appeals, 2nd Circuit appointed by President Reagan.

Adjunct professor University of Chicago Law School, 1966; senior fellow Brookings Institute 1968-70; adjunct scholar American Enterprise Institute 1972-82.

George C. Pratt Uniondale & Hempstead Turnpike, Uniondale, New York 11553. (516-485-6510). Orig. App't. Dt. 6-21-82.

Born May 22, 1928 in Corning, New York; married Carol June Hoffman; children George W., Lise M., Marcia S., William T.; United Church of Christ.

Yale University, B.A., 1950; Yale Law School, LL.B., 1953; admitted to New York bar 1953, U.S. Supreme Court bar 1964.

1953-55 law clerk to Hon. Charles W. Froessel, Court of Appeals for State of New York; 1955-60 associate, partner Sprague & Stern, Mineola, New York; 1960-65 partner Andromidas, Pratt & Pitcher; 1965-75 partner Pratt, Caemmerer & Cleary; 1975-76 partner Farrell, Fritz, Caemmerer & Cleary; 1976-82 Judge U.S. District Court for New York, Eastern appointed by President Ford; 1982-date Judge U.S. Court of Appeals, 2nd Circuit appointed by President Reagan.

Member American Bar Association, New York State Bar Association, Nassau County Bar Association, Nassau Lawyers Association.

Adjunct professor of law St. John's University Law School; distinguished visiting professor of law Hofstra University Law School. Attorney for Syosset school district, Village of Old Westbury, Village of Roslyn Harbor and Brookville on Long Island; special counsel Nassau Board of Supervisors, Town of Hempstead, Town of North Hempstead and Town of Babylon; member committee to advise and consult with Judicial Conference on the CPLR 1963-76.

Roger J. Miner Post Office and Courthouse Building, P.O. Box 868, Albany, New York 12201. (518-472-2480).

Born Apr. 14, 1934 in Hudson, New York; married Jacqueline Mariana; two children; 1956-59 U.S. Army.

Columbia College, 1951-53; New York Law School, LL.B. (cum laude) 1956; State University of New York, External Degree Program, B.S., 1977; admitted to New York bar 1956.

1959-75 partner Miner and Miner, Hudson, New York; 1961-74 corporation counsel Hudson, New York; 1964 Assistant District Attorney Columbia County; 1975-81 Judge New York Supreme Court, Third Judicial District of New York; 1981-85 Judge U.S. District Court for New York, Northern appointed by President Reagan; 1985-date Judge U.S. Court of Appeals, 2nd Circuit appointed by

84TH STORY of Level 1 printed in FULL format.

Winter
Tab A

January 6, 1982, Wednesday, Late City Final Edition

SECTION: Section B; Page 2, Column 1; Metropolitan Desk

LENGTH: 770 words

HEADLINE: A YALE PROFESSOR OF LAW SWORN IN AS U.S. JUDGE

BYLINE: By RICHARD L. MADDEN, Special to the New York Times

DATELINE: NEW HAVEN, Jan. 5

BODY:

In an unusual judicial ceremony at the Yale Law School, where he has taught for nearly 20 years, Ralph Karl Winter Jr. was sworn in today as a judge on the United States Court of Appeals for the Second Circuit.

As more than 500 colleagues, friends and students looked on in the Law School auditorium, Mr. Winter took the oath from Associate Justice Thurgood Marshall of the United States Supreme Court. Mr. Winter had been a law clerk to Justice Marshall when Mr. Marshall was appointed to the Court of Appeals in 1962.

Justice Marshall said Mr. Winter would be ''a great judge' ' with ''a scholarly and draining'' mind. ''But he's got a heart, and more and more we need it,'' Justice Marshall added as he criticized unspecified members of the judiciary who, he said, ''are so hellbent on getting rid of due process.''

Judge Winter, 46 years old, was nominated for the Court of Appeals for the Second Circuit, which covers New York, Connecticut and Vermont, by President Reagan and was confirmed late last year by the United States Senate. The court sits at Foley Square in Manhattan, but Chief Judge Wilfred Feinberg and several Federal District Court judges journeyed to New Haven for the ceremony, which was marked by good-humored needling.

A 'Lateral' Move Cited

Harry H. Wellington, dean of the Yale Law School, said Mr. Winter was making ''a magic transformation'' from professor to judge and suggested to laughter from the judges and the audience that Mr. Winter was moving ''laterally.''

In an interview as he awaited the nomination last July, Mr. Winter mused about the constraints that will be put on his life as a Federal appellate judge after so many years of teaching. It will limit his writing and his ''intellectual wanderings,'' he said, and also end the fun and the stimulation of teaching law students. ''Part of the fun is to be the devil's advocate and say outrageous things and let them drive you back,'' he added.

Mr. Winter was regarded by others on the faculty as a conservative among liberals at the law school. He once described himself as a ''centrist,'' but he said he would leave it to others to categorize him.

He is a Republican but had not been politically active. His wife, Kathryn, is active in Republican politics in the suburban town of Woodbridge, where the Winters live. He said he had never thought of becoming a judge until early last year when someone from the Justice Department called to asked if he would be interested in a judgeship.

A Challenge to Election Law

He was lead counsel in Buckley v. Valeo, which struck down portionsof the 1974 F ederal Election Law and forced Congress to restructure the Federal E lection Commission. He also represented the Republican National Comm ittee in a case two years ago that challenged the campaign spen ding limits of the public financing of Presidential campaigns. He has worked with the American Civil Liberties Union as well as the A merican Enterprise Institute.

A portly man with a booming laugh, Mr. Winter was born in Waterbury, Conn., on July 30, 1935. He received a bachelor's degree from Yale in 1957 and went on to the Yale Law School.

He once described himself as ''not the most diligent student'' who spent a lot of time playing bridge. But by the third year of law school, he said, ''I began to really like it and it's been with me ever since.''

He became a law clerk for Judge Caleb M. Wright of Federal District Court in Delaware, who also attended the ceremony today, before becoming a clerk to Mr. Marshall. Mr. Winter joined the Yale Law School faculty in 1962 and has been a full professor since 1968.

Never in Private Practice

''Unlike most jacks of a ll trades, Ralph is the master of most,'' Dean Wellington told the audience today. Mr. Winter's scholarship, the dean continued, ''shows his conservative bent but also his receptiveness to a good idea no matter what i ts ideological pedigree.''

Mr. Winter said last year that while he had never been in private law practice, ''teaching has been about as good a preparation as you could have for arguing a case.'' He also noted that he coached a Little League baseball team on which his 11-year-old son, Andrew, played.

''That certainly does give you experience in trials and the adversary system,'' he said.

GRAPHIC: Illustrations: photo of Judge Ralph Karl Winter Jr.

SUBJECT: 006-20-69; APPOINTMENTS AND EXECUTIVE CHANGES; UNITED STATES POLITICS AND GOVERNMENT

MATERIALS SUBMITTED BY

THE DEPARTMENT OF JUSTICE

JUDGE WINTER

RALPH WINTER

Before and during his tenure on the Second Circuit bench, Ralph Winter has proven to be an able legal scholar with a strongly interpretavist approach to constitutional law. Certain articles and opinions of his, however, suggest a not insignificant note of caution.

Generally, Winter believes that constitutional interpretation is properly a search for original intent. Several of his statements, however, indicate that there may well be more play in the joints of his interpretative philosophy than appropriate. For example, he describes constitutional analysis as a "multidimensional task" in which "constitutional language, structure, and history" serve only as "the main sources of constitutional law". Moreover, Winter defended, albeit pursuant to a different rationale, the Supreme Court's indefensible holding in Shelley v. Kraemer that judicial enforcement of private racially restrictive covenants was state action subject to the Equal Protection Clause. Although his judicial writings are almost uniformly excellent, there are some glaring flaws and inconsistencies in his approach to several important legal issues. For example, in two significant cases, Judge Winter did not accord sufficient deference to administrative decisionmaking. The Supreme Court reversed him in both of these cases by votes of 9-0 and 8-1. In the criminal law area, Winter struck down a juvenile preventive detention statute as facially unconstitutional because statistics showed that most juveniles are ultimately released. The Supreme Court again reversed in a 6-3 opinion by Justice Rehnquist. In an opinion with federalism implications, Winter opined in dissent that the state had no authority to immunize its regulation of alcoholic beverages from federal antitrust laws. Finally, notwithstanding seemingly contrary Supreme Court precedent, Winter granted standing to plaintiffs in a housing discrimination case, an opinion which evidences a lack of sufficient respect for the importance of justiciability requirements.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

Winter is 50 years old. He was a law professor at Yale from 1962 until his appointment to the Second Circuit in 1982. Finally, it should be noted that Winter wrote an article expressing "grave doubt" about the desirability of employment discrimination laws because they were not addressed to the economic plight of minorities and would inevitably result in racial quotas and preferences. Civil rights groups could make much of this article, either taken within or without its context, at a confirmation hearing.