Rehnquist’s influence lives on through key Fourth Amendment decisions


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

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

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

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

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

The Warren court in the 1960s effected a revolution in criminal law. It did this by ruling that the 14th Amendment’s due process clause “selectively incorporated” many of the criminal-related provisions of the Bill of Rights against the states. There are 15 criminal procedure provisions in the Fourth, Fifth, Sixth and Eighth amendments. Fourteen of them have been either explicitly or implicitly incorporated to apply in state court cases. It is already clear that this one of William Rehnquist’s most significant legacies.”

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CRIMINAL PROCEDURE

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For example, if police activity is not a “search,” then the Fourth Amendment is simply irrelevant.

Therefore, one technique is to refuse to characterize police activities as searches. Thus, Rehnquist helped develop the concepts that police conducting airplane and helicopter surveillance, rummaging through curbside trash and going into privately owned “open fields” were not technically “searches” and therefore not covered under the Fourth Amendment.

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


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

Finally, Rehnquist was a supporter of the “good faith exception” to the exclusionary rule. It is a technique that only continues to grow stronger. See Davis v. U.S., 311 S.Ct. 2419 (2011).

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