Rehnquist court heralds a return to the 'status quo ante bellum'

by Sanford Roberts

The sudden retirement in the second week of June of Chief Justice Warren Burger was an ominous event for the republic. While Burger was no shining paragon of constitutional wisdom, his successor, Associate Justice William Rehnquist, is a hardcore Anti-Federalist, whose chief justiceship will probably return the Supreme Court to a view of the Constitution articulated by Roger B. Taney. The Taney Court (1837-63) produced several of the worst opinions in American history, including the notorious Dred Scott decision of 1857.

In the early days of the Burger Court, Associate Justice Rehnquist labored in obscurity as a brilliant, but crankish, dissenter from the Court's majority opinions. The ascension of President Ronald Reagan and his "New Federalism" marked a corresponding rise for Rehnquist as well, but, unfortunately, the "New Federalism" is really the "Old Anti-Federalism."

The historical background

The principal problem with today's so-called conservatives, including those Reaganites who are enthusiastic about the Rehnquist appointment, is their conception that the U.S. Constitution is a document which confers limited powers upon the federal government and leaves all other governmental authority in the hands of the states. This belief runs counter to the views of the Federalists, led by Benjamin Franklin and Alexander Hamilton, who directed the 1787 Constitutional Convention which swept away the Articles of Confederation and bestowed full sovereign powers upon the national government. The sovereign prerogatives of the various state governments were subordinated to federal authority by virtue of the Constitution's supremacy clause.

The Anti-Federalists, who emerged after the adoption of the Constitution and the Bill of Rights, asserted the supremacy of state sovereignty. Their plan of government differed very little from the unworkable Articles of Confederation. However, they came to power with the election of Thomas Jefferson in 1800, and their influence is still felt today.

The Federalist conception, based upon Hamilton's vision that the United States should be an industrial and commercial republic, was masterfully enshrined in the fundamental principles of constitutional law by John Marshall, our nation's greatest Chief Justice, who served from 1801-35. Marshall and fellow members of his Court, particularly Associate Justice Joseph Story, strengthened the powers of the federal government in the face of the centrifugal tendencies of the several states. The constitutional framework which fostered the development of the United States as a great nation was established during the Marshall period.

The process of consolidating the powers of the national government over and against the states provoked extreme reactions from the Anti-Federalists. In the 1819 case of *Cohens v. Virginia,* the Marshall Court for the first time decided that the U.S. Supreme Court could overturn a decision by a state court. The Anti-Federalist jurist Spencer Roane, whom Thomas Jefferson wanted to appoint as Chief Justice if the opportunity arose, railed against Marshall and his colleagues. The Supreme Court of the United States, he said, has as much power over the sovereign state of Virginia as it does over Russia.

After the death of Marshall, the Anti-Federalists took control of the Court under the leadership of Roger Taney. The Taney Court, most of whose members became overt Confederate sympathizers during the Civil War, either overturned or significantly undermined many of the landmark precedents of the Marshall era. In contradistinction to Marshall and Story, Taney articulated a constitutional theory which came to be known as dual sovereignty. It maintained that the U.S. Constitution had established a bilateral system, in which the federal government and the governments of the several states exercised different powers, neither being supreme or subordinate to the other. The result of the Taney Court's approach was a disintegration of the federal government's power to establish a National Bank (Taney himself was the architect of President Jackson's policy to destroy the Second National Bank), regulate commerce, provide a uniform currency, and legislate against slavery.

Rehnquist: a Taney Court disciple

William Rehnquist is a latter-day follower of the judicial philosophy of the *ante bellum* Taney Court. Being an ardent

champion of "states rights," he has acted to prevent the exercise of authority by the federal courts. The more parochial state courts, where judges are frequently subject to popular election, are just as capable of providing justice.

Under Rehnquist's stewardship, the federal courts, traditionally the bastion for litigants seeking to vindicate their constitutional and civil rights, have virtually become padlocked to these litigants. In a line of decisions starting with the 1971 case of *Younger v. Harris,* the Burger Court, frequently with Rehnquist as the upfront spokesman, has instructed the federal courts to abstain from exercising jurisdiction in civil-rights cases where there are pending state court proceedings. The full sweep of the Younger doctrine is not completely defined, but under the Rehnquist regime, it can be expected that Younger will be extended to apply to any and every state court proceeding.

The effect of Younger has been monumental. Anytime the state authorities initiate a state court proceeding, however trumped up, the citizens who are the subjects of the proceedings will be foreclosed from litigating their constitutional claims, no matter how viable, in federal court. They will be forced to litigate their civil rights in state court, or not at all.

Even those who manage to make it into federal court on a constitutional or civil-rights claim, will wonder if it was worth the effort. Under Rehnquist, it can be expected that Bivens suits (money-damages claims based upon violations of constitutional rights committed by federal officers) will be eliminated. FBI agents, the chief targets of Bivens suits, will probably rest easier knowing that they can commit constitutional violations with impunity and not be held monetarily accountable. Injunctive relief from unconstitutional actions by federal or state officers will also be harder to sustain.

The Fourteenth Amendment, which applies the basic constitutional liberties embodied in the Bill of Rights against the governments of the several states, will be gutted. This is because Chief Justice Rehnquist does not believe that the Fourteenth Amendment was meant to do anything but redress a few constitutional deficiencies arising from the problem of slavery and the Civil War. The sweeping applications of the Fourteenth Amendment will be curbed in some areas and rescinded in others.

Civil rights are not the only rights which the Rehnquist Court will consign to the states. Two years ago, the Supreme Court, in an opinion clearly inspired but not authored by Rehnquist, decided that the Eleventh Amendment to the Constitution precluded the federal courts from enjoining the states or any state agency on the basis of state-law claims. This case, *Pennhurst State Hospital v. Haldeman,* was a radical departure from all previous Eleventh Amendment jurisprudence, which had severely limited the sweep of this "states rights" amendment. An outraged dissent from Justice John Paul Stevens claimed that Pennhurst overturned 26 precedents dating back almost 100 years.

The plenipoteniary power of Congress to regulate commerce may also fall. In 1976, Rehnquist authored a majority opinion for the Court which held that the federal government could not legislate minimum-wage standards for state workers. The Rehnquist opinion invoked a long-discredited theory of the Tenth Amendment, which Roger Taney frequently employed to strike down or circumscribe congressional legislation. Even though this 1976 opinion was overturned last year by a 5-4 majority, the elevation of Rehnquist to chief justice and the appointment of new justices in his mold, could quickly tip the balance back in favor of the 1976 ruling.

Antonin Scalia, the man selected to replace Rehnquist as associate justice, can certainly be considered in the Rehnquist mold. He is an expert in administrative law who supports deregulation of the economy. In 1982, the Reagan administration brought Scalia from the University of Chicago to the circuit bench of the D.C. Circuit Court of Appeals. There is no better place from which to carry out a plan for deregulation than the D.C. Circuit, which predominantly oversees litigation involving the federal government and regulatory agencies.

Judge Scalia's best-known opinion was delivered at the begining of this year, in the case of *United States v. Synar,* the lawsuit involving the constitutional challenge to the Gramm-Rudman budget-cutting legislation. Rather than strike the statute as an abuse of congressional power, Scalia wrote an opinion literally asking the Supreme Court to overturn a 50-year precedent which is the constitutional foundation for every regulatory agency in Washington. Judge Scalia's attempt to carry out deregulation in one fell swoop was apparently ignored, since neither the attorneys nor the justices raised the issue when the Synar case was argued before the Supreme Court on April 23.

The present appointments are only the beginning. Four of the present Supreme Court justices are 77 years or older. The likelihood is that President Reagan will have the opportunity to pick several more justices in the very near future. If the Rehnquist and Scalia appointments are any indication, the nation's highest bench may return to the bygone days of the Taney Court.

Coming next week . . .

The Supreme Court on June 9 decided to strike down the Reagan administration's controversial "Baby Doe" rulings, which protect the lives of handicapped infants. Read about the far-reaching implications of this hideous victory for the "right to die" lobby, in next week's *EIR*.