William Rehnquist's Southern Strategy

by Edward Spannaus

The Democratic and Republican Parties have not been the only ones pursuing a "Southern strategy" in past decades. The U.S. Supreme Court, under the reins of Chief Justice William Rehnquist, has been following the same course for many years.

Rehnquist is an unabashed advocate of the principles of the Confederate Constitution, and an avowed admirer of the most evil Chief Justice of the U.S. Supreme Court ever to occupy that position: Roger Taney, the author of the notorious *Dred Scott* decision of 1857, which held that persons of African descent were inferior beings and could not be citizens or have any rights under the Constitution.

To justify his ruling in the *Dred Scott* case, Taney resorted to a falsified version of the "original intent" of the Constitution, which is no doubt envied by Rehnquist and his fellow-traveller Antonin Scalia. Taney declared that at the time of the adoption of the Declaration of Independence and the U.S. Constitution, the universal opinion of all the world, was that blacks "were beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."

At the time of the Declaration of Independence and the Constitution, Taney lied, "No one seems to have doubted the correctness of the prevailing opinion of the time."[1]

This is the degenerate Roger Taney, whom Rehnquist praises as "a first-rate legal mind." He writes of Taney: "His willingness to find in the Constitution of the United States the necessary authority for states to solve their own problems was a welcome addition to the nationalist jurisprudence of the Marshall court"—a reference to the great Chief Justice John Marshall (served 1801-35) who, over fierce opposition, shaped the Supreme Court in line with the "American System" outlook of Alexander Hamilton and the early Federalists.

By allowing "the states to solve their own problems," Rehnquist means allowing the states to do what they want without hindrance by the Federal courts or the Federal Constitution. What Rehnquist refuses to admit, is that the Federal judiciary, and especially the Supreme Court, were established by the Constitution as instruments for enforcing the Federal Constitution over the states. Marshall put this "Federal supremacy" into practice, but Taney systematically dismantled and destroyed it for generations.

Rehnquist's peculiar view of "federalism" is nothing more than a revived Confederate doctrine. His outlook is fundamentally antagonistic to those who wrote and fought for the U.S. Constitution, who were dedicated to creating a government with the power to promote the general welfare of all of its citizens; Rehnquist instead takes the side of the anti-Federalist arguments of 1787-89, mixed with Taneyite and Confederate states-rights ideology. It is as if the Civil War never happened.

Power vs. the People

It would be a monstrous error to assume that Rehnquist's states-rights outlook makes him a Jeffersonian democrat, or an advocate of smaller government. In truth, as we will show, Rehnquist, like his crony Scalia, is an advocate of more government power, and *brutal* government power—so long as it is used against the citizenry, especially minorities and dissenters.

Rehnquist has often argued that the Supreme Court is the least democratic of the three branches of government. That, of course, is true, and with good reason. Under the plan of government framed in Philadelphia in 1787, the Justices of the Supreme Court are supposed to be the guardians of the Constitution, against the whims and caprices of temporary, or even permanent, majorities.

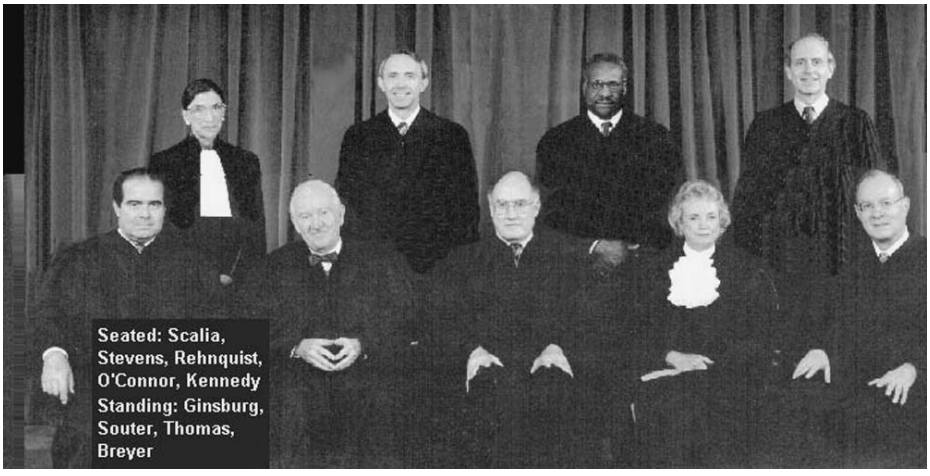
But Rehnquist often cites the "undemocratic" nature of the judiciary as his justification for his doctrine of "Federal abstentionism"—that is, that the Federal courts should abstain from intervening in disputes between a citizen and a state, for example, to protect the rights of the citizen when those rights are being abridged by a state.

This is the argument he uses—along with his colleague Antonin Scalia—in many death penalty cases. Since polls showed, at least up until recently, that the majority of the American people want the death penalty, then why should some Federal judge frustrate the will of the majority by halting an execution just because a few constitutional rights have been violated? Who is a Federal judge to stand in the way of the lynch mob?

Rehnquist the Segregationist

What does Rehnquist really mean when he talks about "democracy" and "majorities"? In 1952, when he was a clerk to Justice Robert Jackson at the U.S. Supreme Court, a case involving the "Jaybird primaries" in Texas, which were used to exclude black voters from participation in the Democratic

1. What Taney says wasn't even true for England, much less the United States. There was massive opposition to slavery at the time of the Constitution, and in fact black freed men were treated as citizens in at least five states—as a dissenting opinion in the *Dred Scott* case pointed out. In fact, the term "slave" or "slavery" was never used in the Constitution. At the insistence of South Carolina and Georgia, the slave trade was permitted to exist for 20 years, until 1808. The assumption of almost everyone was that slavery and the slave trade would die out by that time.



The Rehnquist Supreme Court, which has provoked a Constitutional crisis with its intervention into the 2000 Presidential election. "Rehnquist is an unabashed advocate of the principles of the Confederate constitution, and an avowed admirer of . . . Roger Taney, the author of the notorious Dred Scott decision of 1857, which held that persons of African descent . . . could not be citizens or have any rights under the Constitution." Upper right, Dred Scott; lower right, Roger Taney.

Party, came before the court; Rehnquist wrote the following in a memorandum:

"The Constitution does not prevent the majority from banding together, nor does it attaint success in the effort. It is about time the court faced the fact that the white people in the South don't like the colored people."

Likewise, when the school desegregation cases, including *Brown v. Board of Education,* came to the Supreme Court in the early 1950s, Rehnquist argued that the court should *uphold* segregation.

The future Chief Justice wrote another memorandum for Jackson, stating that *Plessy v. Ferguson* (the 1896 case which established the Jim Crow "separate but equal" principle) was correct, and should be reaffirmed.

Thurgood Marshall, then head of the National Association for the Advancement of Colored People legal defense fund, was arguing that a majority cannot deprive a minority of its constitutional right. To this, Rehnquist said: "The answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."

When confronted with this memorandum in later years, Rehnquist tried to explain it away by asserting that he was expressing Jackson's views, not his own. However, the views expressed in the Rehnquist memoranda were absolutely inconsistent with Jackson's views, and a longtime secretary to Justice Jackson said that Rehnquist's explanation "smeared the reputation of a great Justice." Other former clerks at the court confirmed that Rehnquist had often promoted segregationist views, in discussions with clerks around the lunchroom table.

Voter Harassment

Rehnquist had the opportunity to put his views into practice, when he went back to Arizona after completing his tour as a clerk at the Supreme Court. There, he carried out an aggressive campaign during 1964 *against* a proposed public accommodations ordinance in Phoenix which would prohibit discrimination on the basis of race, color, or creed.

In 1967, Rehnquist wrote a letter to the Phoenix *Republic,* saying that "we are no more dedicated to an 'integrated' society than we are to a 'segregated' society." Rehnquist has never dissociated himself from this statement.

During his confirmation hearings in 1971 (when he was first appointed to the U.S. Supreme Court by President Richard Nixon), and again in 1986 (when named Chief Justice by President Ronald Reagan), charges were raised that Rehnquist had been part of a Republican Party effort to keep blacks and Hispanics away from the voting booths in Arizona during the 1960s.

One eyewitness, Dr. Sidney Smith, testified that he had seen Rehnquist pull up in a car, get out, and confront two black men. After holding up a card for the two men to read, Rehnquist told them: "You have no business being in this line trying to vote. I would ask you to leave."

Rehnquist denied the allegations—while nonetheless conceding that he *had* been part of a Republican "ballot security" effort in the 1960, 1962, and 1964 elections.

Sen. Edward Kennedy (D-Mass.), who opposed Rehnquist's confirmation as Chief Justice in 1986, said, "He [Rehnquist] denied that he harassed and intimidated voters in Arizona in the early 1960s, but the evidence is substantial that he did."

When Rehnquist was presiding over the Senate impeachment trial of President Clinton—who was accused of perjury—it was reported in the Phoenix *Republic* that some local citizens who had witnessed Rehnquist's conduct in the 1962 and 1964 incidents, believed that Rehnquist himself had lied concerning these incidents, while under oath, at both of his confirmation hearings.

How did he get away with it? It was the Senate Judiciary Committee, a stronghold of unreconstructed Dixiecrats, which was in charge of the confirmation hearings.

In 1971, when Rehnquist was first confirmed, the chairman of the Senate Judiciary Committee was the arch-segregationist James O. Eastland, a Democrat from Mississippi. Eastland headed that committee for 22 years (1956-78).

In 1986, when Rehnquist was nominated for Chief Justice, his confirmation was steered through the Senate by Judiciary Committee Chairman Strom Thurmond (S.C.), another old Dixiecrat who by this time had turned Republican.

Rehnquist the Police-Statist

Rehnquist does not hesitate to wield the powers of the judiciary and the Federal government like a truncheon when it suits his purpose. He is a professed follower of Thomas Hobbes, whose views were anathema to Eighteenth-Century Americans. Hobbes's ideas were thoroughly rejected by the Founding Fathers, so much so that he was only cited when they wished to attack him. To Alexander Hamilton, Hobbes's ideas constituted an "absurd and impious doctrine." To John Adams, Hobbes was "detestable for his principles."

But to William Rehnquist, Hobbes is a "realist" in his view of the nature of man and law.

In a 1980 speech entitled "Government by Cliché," Rehnquist set out to debunk the "cliché" that the Constitution is a charter "which guarantees rights to individuals against the government." People have learned, said Rehnquist, "that it is better to endure the coercive force wielded by a government in which they have some say, rather than risk the anarchy in which neither life, liberty, nor property are safe from the 'savage few.' "

After setting up a dichotomy between Hobbes and Locke (the latter hardly a model for the U.S. Constitution, with his endorsement of slavery), Rehnquist declared his partiality toward Hobbes. "To Thomas Hobbes," he said, "who was much more of a realist, life in the so-called state of nature was 'nasty, brutish, and short.' It was to escape this world of violence, insecurity, and the like that men formed governments, and they were better off for having formed them even though the governments themselves proved to be tyrannical."

As a Hobbesian, Rehnquist of course attacks the very idea of natural law—as does his closest co-thinker on the Supreme Court, Antonin Scalia. In the 1980 speech, Rehnquist argued that our constitutional system is "a system based on majority rule, and not on some more elitist or philosophical notion of 'natural law.' " Over the years, Rehnquist has attempted to justify his police-state practices both by appealing to the presumed sentiments of the majority of the population, and by denying any connection between law and morality.

Particularly revealing is a 1976 speech, in which Rehnquist ridiculed the notion that the Supreme Court should be the "voice and conscience of contemporary society." He identified his view of the Constitution with that of Oliver Wendell Holmes, who insisted that morality has nothing to do with law. Moral judgments only have validity to the extent they have been adopted into positive law, both Holmes and Rehnquist contend. If a society adopts a constitution and safeguards for individual liberty, this does not mean that these protections have a general moral rightness. "They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice, but simply because they have been incorporated into a constitution by the people," said Rehnquist.

Rehnquist's demand that the Supreme Court should follow the "will" of the majority is pervasive throughout his writings and opinions—for example, those pertaining to capital punishment.

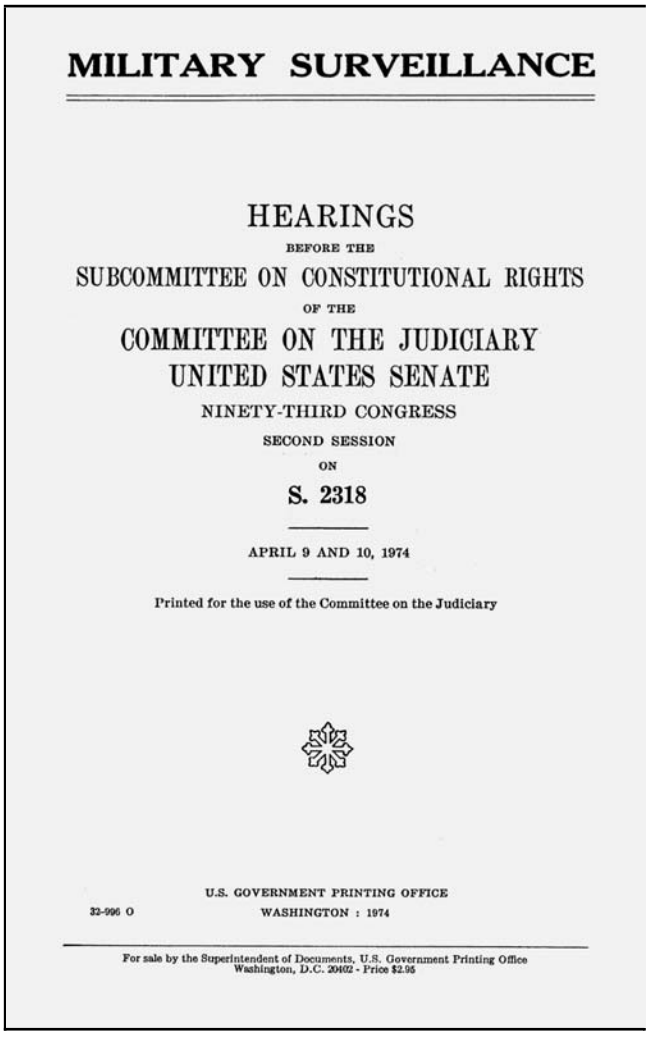
But even a cursory reading of the *Federalist Papers,* for instance, will demonstrate that the Founding Fathers deliberately took great pains in creating our scheme of government in such a manner as to insulate the institutions of power, particularly the judiciary, from the whims and passions of popular majorities.

In the Federalist No. 78, Hamilton argued that the independence of the judges (that they would be appointed, not elected), was necessary "to guard the Constitution and the rights of individuals from the effects of those ill humors" which can arise from designing men, or which "sometimes disseminate among the people themselves." Judges must not act on their presumptions or even their knowledge of the sentiments of the population, if they are to carry out their duties as "faithful guardians of the Constitution," Hamilton wrote. The integrity and moderation of the judiciary must be prized, "as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."

Rehnquist, on the other hand, has repeatedly cited the unrepresentative character of the court as a reason for abdicating the court's constitutional role as the guardian of individual rights and liberties.

Law as Authority

Before Rehnquist was nominated for the Supreme Court, he was already an outspoken advocate of police-state measures. He toured the country as a spokesman for the Nixon Justice Department in the late 1960s, advocating military surveillance of civilians, warrantless wiretaps, and what he termed "qualified martial law." Then, after being put on the court, Rehnquist cast the deciding vote upholding the constitutionality of military surveillance of civilians in the case



MILITARY SURVEILLANCE

HEARINGS
BEFORE THE
SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
SECOND SESSION
ON
S. 2318

APRIL 9 AND 10, 1974

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During the Nixon administration, William Rehnquist was a public spokesman for the Justice Department, and advocated the use of "qualified martial law" against anti-war demonstrators. From 1971 to 1975, Congress held extensive hearings on secret military surveillance of U.S. citizens.

Laird v. Tatum. This, despite the fact that he should have disqualified himself from participating in the case, because he had played a significant role in drawing up plans for domestic military surveillance, while he was head of the Justice Department's Office of Legal Counsel from 1969 through 1971.

Incidentally, Scalia is also a veteran of the Nixon Administration, serving in the White House in 1971-72, and then later heading the same Justice Department Office of Legal Counsel, during 1974-77.

Since being placed on the Supreme Court by Nixon, Rehnquist has systematically worked to dismantle the rights and protections which the Constitution and the Supreme Court have provided over the past two centuries.

Whenever it comes to a question of the rights of the individual versus the government, Rehnquist invariably sides with the government. But, on the other hand, when it is a matter where the power of the Federal government is properly invoked for a constructive purpose, i.e., the promotion of the general welfare, Rehnquist consistently denies the rightful constitutional powers of the Federal government over the other branches or the states.

In this respect, his outlook is much closer to the Confederate Constitution of 1861—which, despite its superficial similarity to the Federal Constitution, eliminated the "general welfare" clause and all powers of the national government to promote economic growth and industrial progress.

In a 1978 article, Rehnquist conceded that "there is an element of authoritarianism in the views I have advanced." The very idea of law, he argued, is based on the authority of the state to enforce that law. Authority, he said, "is the ultimate guardian against a state of anarchy in which only the strong would be free."

Rehnquist definitely applies his Hobbesian outlook from the bench. Numerous studies of his rulings have been published in the law journals, demonstrating the consistency of those rulings. After he had been on the Supreme Court for only five years, his record was well established. A study published in the *Harvard Law Review* in 1976 showed that Rehnquist's rulings were guided by three basic propositions:

1. Conflicts between the individual and the government are to be resolved in favor of the government;

2. Conflicts between the states and the Federal government are to be resolved in favor of the states; and

3. Disputes involving the exercise of Federal jurisdiction are to be resolved against the exercise of such jurisdiction.

Another study, of his rulings from 1971 to 1986 (prepared for his confirmation hearings as Chief Justice), reveals two striking examples of Rehnquist's hostility to the rights of the individual. During this period, the Supreme Court heard 30 cases concerning allegations of cruel and unusual punishment. The court as a whole found constitutional violations in 15 of these cases. Rehnquist found none. In the same period, the court heard 124 cases involving claims of unconstitutional action against an individual. Rehnquist cast the deciding vote against the constitutional claim in 120 of the 124 cases.

Thus, the Southern-dominated Judiciary Committee enthusiastically confirmed Rehnquist not just once, but twice. At every opportunity, he lines up with the enemies of the Constitution, whether it be Thomas Hobbes—whose views were irreconcilably opposed by the Founding Fathers and nearly all Eighteenth-Century Americans—or those anti-Federalists who opposed the Constitution in 1787, or Roger Taney who tried to destroy it, or the Confederate traitors who broke up the Union and wrote their own slave-owners' charter to replace the U.S. Constitution. Rehnquist's outlook is completely compatible with that of the Confederate slavemasters. He was just born 130 years too late.