Has the Chief Justice Lost the Supreme Court?

by Edward Spannaus

For many years, Chief Justice William Rehnquist was the dominating feature of the U.S. Supreme Court, along with that radical nominalist ("textualist"), Associate Justice Antonin Scalia. The hard-right trio of Scalia, Rehnquist, and (since 1991) Justice Clarence Thomas could generally pull a couple of others along, to constitute a guaranteed majority in most cases.

That has now changed, even though the composition of the Court itelf has not changed for a decade—since Justice Stephen Breyer was added in 1994, following the first Clinton appointee, Ruth Bader Ginsberg, in 1993. While the Court's makeup is the same, its alignment is not. Rehnquist, Scalia and Thomas haven't changed much—as could be seen in the Guantánamo ruling where they were the dissenters in a 6-3 decision—but now, these three are, more often than not, in the minority.

What has accelerated this shift, is the Court's reaction to the Bush-Cheney Administration's assertion of unlimited Executive power, especially since Sept. 11, 2001. As was seen most clearly in the "torture memos" (see *EIR,* July 2), the Bush-Cheney Administration has asserted stridently, that neither the courts, nor international treaties, nor domestic law, can restrain the President when acting in his capacity as Commander-in-Chief.

The Supreme Court is now vigorously asserting its own authority, as one of the three co-equal branches of government, and is instructing the Bush-Cheney Administration that it is not above the law.

'Every Reason To Weep'

Striking confirmation of the shift in the Court came in a July 9 speech by the outgoing U.S. Solicitor General, Theodore Olson, who was the featured speaker at the annual roundup of the Supreme Court's term held by the Washington, D.C. Chapter of the Federalist Society, an umbrella group for self-styled "conservative" lawyers.

Olson was introduced by one of his law partners, who bemoaned the emergence of a new majority on the Supreme Court which does not include Federalist Society heroes Scalia, Rehnquist, and Thomas. Olson's partner suggested that, with the court's new configuration, "blunter techniques will be necessary," and that the Administration might decide that Olson's successor should be Dick Cheney, with his "pithy and succinct style of argument." To guffaws and applause from the audience, he went on to say that "perhaps all that is needed, to awaken the court from its dreams about French law, are a few Anglo-Saxon words"—i.e., "Go f– yourself."

Olson himself declared that, looking at the just-completed Supreme Court term, "conservatives have every reason to weep"; and, he lamented, "help is not on the way." He complained that "conservatives lost virtually every important case" before the Supreme Court this past term, and he cited a broad array of cases on various matters, not just the enemy combatant cases. And this is despite the fact, Olson pointed out, that seven of the nine Justices now on the Court are Republican appointees!

Olson cited, and seemingly agreed with, a July 3 analysis published by the *New York Times,* which suggested that "the 2003-04 term may go down in history as the term in which Chief Justice Rehnquist lost his court." As the Justices head into their 11th term together, this is now, "surprisingly and in new ways, a new court," *Times* Supreme Court reporter Linda Greenhouse wrote. She noted that in close decisions (i.e. 5-4 votes), Rehnquist was in the minority more times than not, in 10 of 18 such rulings. In contrast, two years ago, Rehnquist was in the majority in 15 out of 21 such 5-4 rulings, and last year, it was half and half.

What is true for Rehnquist, is even more so for Antonin Scalia and Clarence Thomas, who were in the minority even more than the Chief Justice. Thomas had the most dissenting votes of any member of the court; Sandra Day O'Connor, usually described as the court's leading "pragmatist," had the least.

A feature story in the July 4 *Washington Post Magazine* went so far as to portray O'Connor as the new, *de facto* Chief Justice. But, probably more accurately, Olson described 84-year-old Justice John Paul Stevens (a Ford appointee) as the court's most influential member.

At another event reviewing the Supreme Court's term, held by the Heritage Foundation on July 12, most speakers expressed similar views, noting that this could no longer be considered a "conservative" court.

More strikingly, a number of speakers put this not so much in sterile "conservative-liberal" categories, but in terms of the Court once again asserting judicial supremacy in matters of law and the Constitution. One panelist, failed appeals court nominee Miguel Estrada, sardonically put it this way: The Justices are deeply unanimous in agreeing that they should be governing the country; they just disagree as to how.

Cheney Fails To Prevail

In addition to the enemy combatant cases, which we reviewed in our July 2 issue, the Cheney Energy Task Force case was also a setback for the Vice President's view of unrestricted Executive power. This involved the efforts of two watchdog groups to obtain access to records of the Task Force, to determine to what extent executives and lobbyists from

Enron and other corporations were involved; Cheney resisted *all* discovery on "constitutional" grounds of separation of powers and the powers of the Executive.

Contrary to the general perception of the case, Cheney never even asserted Executive Privilege over any of the documents; rather, he just baldly claimed that the Constitution barred any discovery of evidence from the President or the Vice President. After the Federal District Court ordered broad discovery, Cheney went to the Court of Appeals, and then the Supreme Court, demanding that they order the lower court to prohibit all discovery.

The Supreme Court refused to accept Cheney's overarching definition of Executive power (only his hunting partner Scalia, and Clarence Thomas agreed with him), and instead, sent the case back to the appeals court for reconsideration of Cheney's efforts to bar the lower court's discovery order—which it clearly considered to be overly broad.

Impact of the Torture Memos

The most dramatic defeats for the Cheney doctrine of the "imperial Presidency" were of course in the enemy combatant cases, of Yaser Hamdi and the Guantánamo detainees.

Many observers believe that these defeats were self-inflicted: By refusing even the most minimal procedures under international and American military law for determining the status of detainees, the Administration not only thumbed its nose at the law, but then did the same to the Federal courts, when challenges were brought.

Secondly, the disclosure of the "torture memos" coming out of the White House and the Justice Department unquestionably played a crucial role in determining the outcome of these cases.

The first photos of the prisoner abuse at Abu Ghraib were shown on CBS-TV on the evening of oral arguments in the *Padilla* and *Hamdi* cases, on April 27. During that day's arguments, two Justices had asked the government: What inhibits the use of torture against a prisoner, in light of the government's argument that in war-time, the law is what the President says it is, and that the courts have no say in the matter? The government's response, was that the United States is bound by international treaties, that the courts should not get involved, and that "you have to trust us."

EIR questioned Solicitor General Olson about this at the Federalist Society event, pointing out the questioning of Olson's deputy Paul Clement about torture, just before the photos of Abu Ghraib came out. "To what extent," *EIR* asked, "do you think that the disclosure of the memos written by [Vice President Dick Cheney's legal counsel] David Addington and by the Office of Legal Counsel, turned the tide in the 'enemy combatant' cases?"

Olson at first said that he didn't think that Addington, who is the Vice President's top lawyer, had written any of the memos, and he added that he didn't accept *EIR*'s characterization of the colloquy at the Supreme Court. Olson said that he didn't think that we will ever know what effect the disclosure of the memos had on the court, but he noted: "The justices are human, and they may have been affected."

Olson also repeated something he had said earlier: that he believed that the court was being very conscious of its legacy in light of earlier cases involving human rights—which, he said, had not been the court's finest moments—such as the Dred Scott case and the World War II Japanese internment cases.

Torture and Cancelling Elections

EIR elicted more substantive answers to a similar question at the Heritage Foundation forum on the Supreme Court held on July 12. Here, none of the four panelists—former U.S. Attorney General Edwin Meese, former U.S. Solicitor General Walter Dellinger, former DOJ official Miguel Estrada, and Pepperdine University law professor Doug Kmiec—disputed the notion that Cheney's lawyer Addington had written a key memo which was then generally attributed publicly to White House Counsel Alberto Gonzales.

Dellinger, a Solicitor General in the administration of Bill Clinton, answered that he believed that the disclosure of the torture memos—with their assertion that criminal laws such as the anti-torture statute do not bind the President when he is acting as commander in chief—"must have been quite startling to the Justices." He gave other examples, to illustrate that the Administration was acting as if it had decided that the Supreme Court was simply not relevant to the issue.

Kmiec, who had headed the DOJ's Office of Legal Counsel during the Reagan Administration, said that "the real sad thing about the torture memo story" was that it was leaked, and that therefore, "it illustrates the importance of the deliberative process, and the confidentiality aspect of Executive Privilege."

But then Kmiec revealed why he considers this confidentiality to be so important: Hard questions arise which have to be confronted, "including the hard question that was recently asked of the Office of Legal Counsel and the Department of Justice: 'What do you do if you suffer a terrorist attack on the day of the national elections? Do you postpone it? Do you have it after a week? After a couple of days?' "

Kmiec went on to say that such questions—whether on torture, or on the elections—"have to be asked and answered"; but that it is very different if this is done in public, rather than with the type of candid discussion that goes on privately in the Office of Legal Counsel.