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THE SUPREME COURT

The High Court Assumes a Conservatively Lower Profile

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By David J. Garrow

The U.S. Supreme Court no longer occupies the place it once did on the cutting edge of America's most important public issues. In its 1995-96 session, the Court agreed to decide only 75 cases, in contrast to nearly twice as many (a peak of 151 cases) each year between the late 1970s and the early 1980s.

The shrinking number of "landmark" decisions reflects the quiet, conservative success of Chief Justice William H. Rehnquist in the ten years since his promotion to the Court's top job.

A few exceptions shadow this portrait of control. Four years ago, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* a 5-to-4 Court majority stunned most onlookers by upholding, rather than voiding, the constitutional protection of a woman's right to choose abortion, first established in *Roe v. Wade* in 1973.

Then, just this past May, in a firmly worded 6-to-3 decision, a Supreme Court majority declared in *Romer v. Evans* that a state could not legally discriminate against gay citizens, even if the people of Colorado sought to impose that discrimination by a popularly adopted state constitutional amendment. Come this fall, the Court may or may not choose to hear either or both of two important cases asserting the right to die that have been decided affirmatively by federal appeals courts. They involve the rights of the terminally ill in New York and the state of Washington.

LOW OUTPUT—But landmark decisions like *Casey* and *Romer* aside, the ten years of the Rehnquist-led Court have produced fewer and fewer decisions that have widespread impact. Aside from *Romer*, the gay rights case, only one other ruling during the Court's 1995-96 term seems to be remembered by most Americans. That one was *U.S. v. Virginia,* which held that the state-supported Virginia Military Institute's (VMI) exclusion of women was a violation of the 14th Amendment's equal protection clause, and that VMI had to begin admitting women.

Politically attuned citizens in some Southern states—North Carolina, Georgia and Texas—are probably aware of the Court's unclear and sometimes contradictory effort, starting in 1993 in *Shaw v. Reno,* to limit, but not prohibit, the creation of "majority minority" Congressional districts containing concentrations of black and Hispanic voters. These redistricting decisions are not as easily grasped as *Romer* and the VMI ruling.

The race, gender and gay rights cases all involved an interpretation of the 14th Amendment's guarantee of "equal protection of the laws." The Court's other major area of activity during its last session was the First Amendment's guarantee of free speech. All three of the leading decisions—involving cable television, election campaign spending and commercial advertising for liquor—produced fractured outcomes in which no majority of five Justices could agree on a unified analysis.

Just as in the equal protection cases, these "speech" rulings were not representative of the Rehnquist Court's record. In two generally underappreciated areas—criminal law and states' rights—the Chief Justice and his four most dependable allies—Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas—have gradually and increasingly brought about a quiet conservative revolution in Supreme Court jurisprudence.

In criminal law, Rehnquist as Chief Justice has presided over a host of important doctrinal shifts that he had first advocated as a dissenting voice—sometimes as a lone dis-

Lawyers Sometimes Feel Like Plebes at a Military Academy

When a lawyer arguing for black voting rights in a Congressional redistricting case before the Supreme Court used the words "black opportunity districts," he was abruptly interrupted by Justice Antonin Scalia.

"Why don't we just call them majority minority districts?" Scalia demanded. "I mean, you're entitled to use whatever terminology—you can call them, you know, motherhood-apple pie districts if you like, but you will be insulting my intelligence every time you say it."

—The Editor

senter—during his initial 14 years on the Court, then presided over by the unremarkable Chief Justice Warren E. Burger. The "Burger Court" was not the conservative antithesis to its "Warren Court" predecessor, as some seem to think. The Court's ten years under Rehnquist as Chief Justice have brought a far more conservative advance than anything during Burger's tenure as Chief Justice, from 1969 to 1986.

But the areas in which Rehnquist has won his most significant victories are those that neither the broadcast media nor newspapers have given any emphasis.

HABEAS CORPUS—One of Rehnquist's most successful, high-stakes battlegrounds of the past decade has been federal habeas corpus jurisdiction. A ruling by the conservative Court majority—which now has Congressional and presidential support—has drastically cut back on the opportunities of state prisoners to challenge in the federal courts the validity of their state court criminal convictions and sentences.

Habeas corpus (Latin for "thou shalt have the body") was enshrined by Chief Justice Salmon P. Chase (1864-1873) as "the most important human right in the Constitution." It allows citizens in detention to challenge before a judge their arrest, trial and commitment.

Death row inmates in state prisons have drawn most of the public attention in the habeas corpus struggle. But Rehnquist's commitment—one that reaches back over 40 years to the time of his own youthful Supreme Court clerkship for Justice Robert H. Jackson in 1952-53—is to cutting back on multiple federal appeals by all criminal petitioners, not just those under sentence of death.

This spring, when Congress passed—and President Clinton enthusiastically signed—the oddly titled Anti-Terrorism and Effective Death Penalty Act of 1996, Rehnquist and his most energetic Congressional allies (they include Utah's Republican Senator Orrin G. Hatch, the chairman of the Senate Judiciary Committee) accomplished what for them was a great leap forward.

The anti-terrorism statute says expressly that no state death row inmate may present more than one habeas corpus petition in federal court, except in extraordinary circumstances.

The new law generated an immediate Supreme Court challenge by a Georgia convict who had been scheduled for execution. Over the objection of the Court's four least conservative Justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—a five-vote Rehnquist majority instantly accepted the opportunity to give Supreme Court blessing to the new statutory restrictions by scheduling an accelerated decision on the prisoner's petition in *Felker v. Turpin.*

Less than eight weeks later, in a unanimous opinion written by Rehnquist himself, the Court upheld the law's limits on death row habeas corpus appeals. The decision was one more advance for the Chief Justice in the largely unheralded rewriting of state prisoners' access to federal courts.

STATES' RIGHTS—Rehnquist's other area of remarkable change, involving basic principles of federalism, may seem even more obscure. One year ago, in *U.S. v. Lopez,* another five-vote Rehnquist majority upheld a constitutional challenge to Congress's authority to make the possession of a firearm near a school a federal crime, as distinct from a state or local offense.

Many commentators saw *Lopez* as an unprecedented judicial limitation of federal legislative power. But then this spring yet another five-vote Rehnquist majority voided a Congressional enactment authorizing Indian tribes to sue states in federal court.

The precise content of *Seminole Tribe of Florida v. Florida* would be forbidding to anyone who cannot spontaneously identify and explain the 11th Amendment, which limits the power of federal courts to hear suits against states brought by citizens of another state. But in tandem with *Lopez*, the Seminole Indian case further signified the Rehnquist Court's resolute commitment to protecting state autonomy from federal legislative and judicial power, whether the issue involves prisoner appeals, gun possession or the rights of Native Americans.

REHNQUIST'S MAJORITY—In most cases involving criminal appeals or questions of federalism, the Chief Justice is able to count on a dependable five-vote majority. Only if Justice Anthony Kennedy goes astray, as he did in joining with the moderates in a 1995 case overturning Arkansas' Congressional term limits, is Rehnquist reduced to a minority. In many important criminal cases the Chief Justice's conservative preferences prevail by a margin of 9-to-0 or 8-to-1 rather than merely 5-to-4.

The one Justice who is far and away most likely to dissent from the Rehnquist majority's rulings is the Court's second-most-senior member, John Paul Stevens, a Chicago Republican named to the Court by President Gerald Ford in 1975 to replace the retiring William O. Douglas. An independent and often iconoclastic judicial voice, Stevens is now arguably the Court's most liberal member, though his proclivity for going his own way greatly outstrips his interest in functioning as any sort of anti-conservative leader.

Counterpoised to Stevens is the Chief Justice himself. An outwardly strict and dour figure when presiding at the

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Court's public sittings. Rehnquist in private is a pleasant, low-key and unusually humble man. He is personally popular with all of his colleagues; and although many of them don't share his jurisprudential views, he is liked by his own and by the other Justices' young law clerks.

Within "the conference," where the nine Justices meet behind closed doors to vote, Rehnquist is a firm taskmaster. The Justices' private discussions of cases are brief, and when the votes are tallied, Rehnquist, if he is in the majority, has the authority to assign the task of writing the majority opinion to any Justice he may choose.

Both Chief Justice Warren Burger and his predecessor, Earl Warren, were widely thought to play favorites and inflict punishment in their opinion-writing assignments. Rehnquist is said to be less vindictive. Some of the other Justices' law clerks contend that Anthony Kennedy, the Court's ultimate swing vote, has fared very well in opinion-writing assignments.

At least as much as Stevens, the other Justice who serves as a counterbalance to the Court's energetic conservatives, is the New Hampshire Republican David H. Souter, named to the Court in 1990 by George Bush at the recommendation of former Senator Warren Rudman (R-NH). Souter's close friend and longtime mentor.

Hard-working and extremely intelligent, Souter has become one of the most popular and well-respected Justices, but his impact is limited by the degree to which he disagrees with the Rehnquist majority.

HIGH DUDGEON Among those Rehnquist conservatives, no one draws more attention—or more pointed reactions from colleagues and commentators—than the rhetorically hot-tempered Antonin Scalia. Now celebrating his own 10th anniversary on the Court, Scalia has proved to be something of a disappointment to most conservative ideologues. Scalia's willingness -some would say his eagerness—to lash out at fellow Justices who have failed to agree with him in high-profile cases such as *Casey* on abortion and *Romer* on gay rights has made him a far less influential conservative voice within the Court.

Scalia's invective has most often been targeted at Sandra Day O'Connor, the generally conservative but sometimes amazingly noncommittal Arizona Republican whom Ronald Reagan named as the Court's first woman Justice in 1981. On questions of federalism or crime, O'Connor provides a reliably conservative vote. But in both *Casey* and *Romer* she joined Anthony Kennedy in breaking with Rehnquist and Scalia, siding instead with the Court's more moderate members. O'Connor's indecisive ambivalence in racial preference cases has made her the target of much criticism from academic commentators, but her location close to the ideological center of the Court makes her vote a crucial one in almost any non-unanimous case.

More crucial than O'Connor is the Ronald Reagan appointee Anthony Kennedy, who in 1988 took the seat for which Robert H. Bork had been unsuccessfully nominated six months earlier. Kennedy has emerged as a thoughtful and sometimes unpredictable conservative, and has cast decisive and high-profile votes in cases upholding abortion and the right of protesters to burn the American flag.

Reagan-era ideologues, who expected Kennedy to be an unfailing conservative, reacted with angry allegations of betrayal when he joined with Souter and O'Connor in writing the 1992 abortion opinion upholding *Roe*. Kennedy's powerful majority opinion in *Romer*, rejecting Colorado's anti-gay bias, once again made him a top target of right-wing commentators.

CLARENCE THOMAS—The fifth and most junior member of the Court's conservative majority, yet the one receiving the widest press attention, is Clarence Thomas, its only black member. Now five years past the personal trauma of his bitterly opposed 1991 Senate confirmation, Thomas has emerged as a substantial presence inside the Court, especially in cases involving race.

Critics err in imagining that Thomas is simply a passive clone of Scalia, and other observers misinterpret Thomas's silence during oral arguments in the Court's public sessions. From the bench, interrogations by Scalia, Souter, Stephen Breyer, and sometimes by Rehnquist can put attorneys through a wringer and leave them all but gasping for breath. But Thomas's quiet should not be mistaken for quiescence.

Ruth Ginsburg and Stephen Breyer, the two Clinton appointees to the Court, have so far had relatively less impact on the institution than the two Justices they replaced, Byron R. White, appointed by John F. Kennedy, and Harry A. Blackmun, chosen by Richard Nixon.

Ginsburg is less a liberal than a moderate, and has sometimes sided with the Court's conservatives, particularly in criminal cases. Some observers believe that if Rehnquist retires sometime during a second Clinton administration, Ginsburg may be named as the first female Chief Justice, with her own seat perhaps going to a Hispanic nominee. But within the Court itself, Ginsburg as Chief Justice would not be a popular or a particularly effective choice.

Stephen Breyer is likely to emerge as a far more substantively influential Justice than Ginsburg, and in time the team of Souter and Breyer may well become the intellectual center of a post-Rehnquist Court.

Close observers of the Court are not betting heavily on any 1997 retirements. Former law clerks of the Chief Justice now guess that Rehnquist, whose wife died in 1991, is much more likely to stay on rather than retire early in a second Clinton term. Court observers can muster no good reason why either John Stevens or Sandra Day O'Connor, the other two most senior Justices, would choose to retire soon either.

Should the Rehnquist Court continue on toward the turn of the century largely intact, no dramatic changes or surprises are likely to occur. The Chief Justice and his dependable majority of conservative allies will continue their steady march toward increased state autonomy from federal power. Further conservative decisions especially in the area of race-conscious affirmative action programs may well be in store.

In areas where Kennedy and O'Connor have already cast their lot with the moderates, such as abortion and gay rights, conservative impulses will continue to be frustrated. But the predominance of moderate or somewhat liberal outcomes in high-profile cases such as *Casey* and *Romer* should not mislead anyone.

Rehnquist has failed to achieve some of his objectives, but he has quietly attained a good many of them, and the low-profile victories that have marked the first decade of the Rehnquist Court represent the greatest advances that conservatives have won from the Supreme Court in well over half a century.