Justice Rehnquist led the U.S. into a police state

by Edward Spannaus

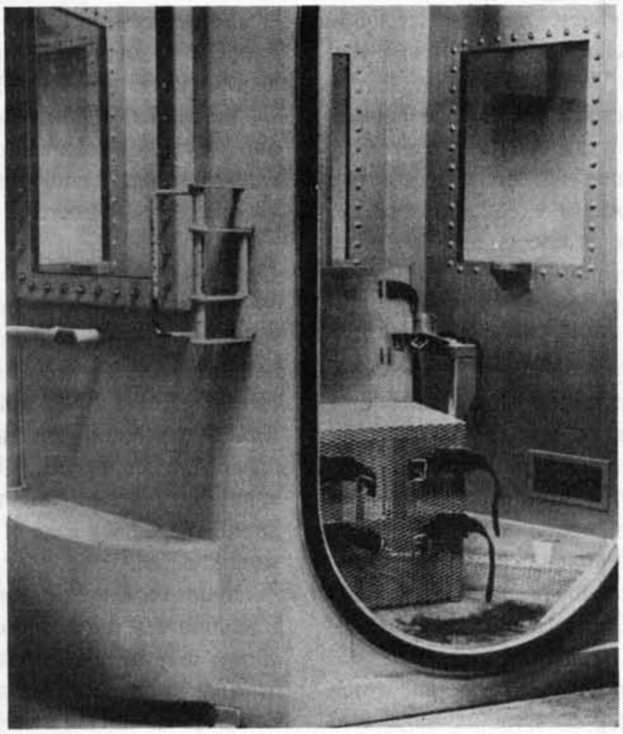
One of the biggest hoaxes of our time is the commonly peddled idea that William Rehnquist, the Chief Justice of the United States Supreme Court, is a "conservative." A conservative at least has some respect for tradition. A conservative may be hidebound, reactionary, hostile to change, and so forth, but at least he clings to the traditional way of doing things.

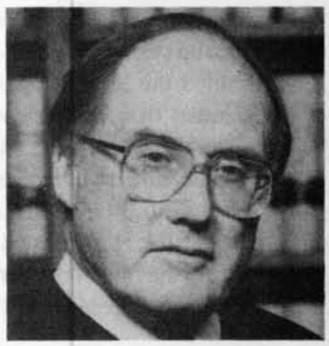
William Rehnquist is no conservative.

Our current Chief Justice is a philosophical enemy of of the Founding Fathers and the Framers of the Constitution. Rehnquist is an avowed 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. We don't even need to consider Rehnquist's own confessions on this matter. The proof is in his record as a Supreme Court justice for the past two decades—showing how he has systematically dismantled the rights and protections which the Constitution and the Supreme Court have provided over the past two centuries.

Rehnquist is a statist. He believes in big government—a police state. Whenever it comes to a question of the rights of the individual versus the government, he 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, Rehnquist consistently denies the rightful constitutional powers of the federal government over the other branches or the states. As Rehnquist has consolidated his control over the Supreme Court in the past few years, he has turned the outlook of the Founding Fathers on its head, denying federal supremacy where it





Supreme Court Chief Justice William Rehnquist (above) and his philosophical mentor, Thomas Hobbes (left), known as "the father of modern totalitarianism." Shown in the middle is the gas chamber in North Carolina. Rehnquist is at the front of the mob demanding more executions, and his Court has stripped away virtually every constitutional protection that an inmate on death row previously had.

is proper, but expanding the police powers of the government.

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 "qualified martial law." Then, after being put on the Court, he cast the deciding vote upholding the constitutionality of military surveillance of civilians in the case *Laird v. Tatum*.

The Hobbesian state

Not without reason has Thomas Hobbes been labeled "the father of modern totalitarianism." Hobbes's state of nature is the "war of every man against all every man"; to overcome this brutish condition, men enter into a social contract in which they give up all rights to the sovereign. Since the purpose of the sovereign is to protect the people against themselves, the subject owes unquestioning obedience. The sovereign literally can do no wrong; he cannot commit an illegal act, because the sovereign *is* the law. As an avowed enemy of religion, the church, and natural law, Hobbes's ideal state was a political dictatorship (preferably a monarchy) combined with economic *laissez faire*.

Our nation was founded on the contrary principle, however imperfectly realized, that reason, not might, makes right. That man is created in the image of God, and bears within him the divine spark of creative reason. That the end of society and government is to foster the happiness and the moral perfection of its citizens, which is most efficiently accomplished by promoting scientific and technological progress.

Thus, in the American colonies Hobbes was universally viewed an an evil apologist for the British monarchy. Virtually everyone in the colonies believed in natural law, which was prior and antecedent to the state. All believed in some form of "natural rights," that men possessed God-given, inalienable rights which no government could usurp. Even if one wrongly interprets the Declaration of Independence as a Lockean document—it is far superior to anything John Locke could have inspired—it is still utterly opposed to the outlook and prescriptions of Hobbes.

Rehnquist and Hobbes

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.' " The recognition that "government is a necessary restriction on unbridled individual freedom" comes from entirely divergent sources, he goes on. Locke and Hobbes, says Rehnquist, were diametrically opposed in their view of life in "the state of nature." Locke believed that "every person had a right to liberty and property, quite apart from any constitutional declarations by reason of what Locke called the 'law of nature.' "

Rehnquist then declares where he stands: "To Thomas Hobbes, on the other hand, 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."

Rehnquist vs. natural law

To be a consistent Hobbesian, Rehnquist would of course have to attack the very idea of natural law. This he explicitly did in the same speech, where he 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: Morality has nothing to do with law. Moral judgments only have validity to the extent they have been adopted into positive law. 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." In the same speech, he says (still following Holmes): "Value judgments take on a form of moral goodness because they have been enacted into positive law."

Rehnquist's view that the Supreme Court should follow the "will" of the majority (for example, on capital punishment) is pervasive throughout his writings and opinions. But 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 to insulate the institutions of power, particularly the judiciary, from the 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." 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

To put it bluntly, Rehnquist believes that a citizen has no rights which the courts are bound to protect. This is the way he thinks, and it is the way he rules from the bench. He has conceded (in a 1978 article) 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 continues, "is the ultimate guardian against a state of anarchy in which only the strong would be free."

In this same article, Rehnquist gleefully points to Article I, Section 9 of the Constitution (which provides that *habeas corpus* may be suspended under certain emergency conditions) as demonstrating that, "in certain rare conditions, the Founders viewed the individual as, at least temporarily, having *no* rights which he might assert against the government."

Rehnquist does put his Hobbesian outlook to work from the bench. Numerous studies of his rulings have been published in the law journals, showing their consistency. 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.

The Rehnquist record

During the 1990-91 term, probably the worst Supreme Court term in memory with respect to individual rights, Rehnquist consolidated his "police-state" majority. The newest justice, David Souter, voted with Rehnquist 80% of the time, giving him a 6-3 majority on many of the key cases discussed below.

Following are some of the specific provisions of the Constitution and the Bill of Rights which Rehnquist has ripped up in recent years:

Habeas corpus (Art. II, Sec. 9): The "great writ," by which federal courts are empowered to review convictions of prisoners for constitutional violations, has long been targeted by Rehnquist and the Justice Department for extinction. *Habeas corpus* was considered so important to the Founding Fathers that it was written into the text of the Constitution itself. This past term, the Supreme Court drastically narrowed the use of *habeas* by prisoners in two important cases.

In *Coleman v. Thompson,* the Court held that state prisoners who fail to comply with procedural (i.e., technical) rules cannot have their cases reviewed by a federal court, even if the procedural default was the fault of the lawyer and not the prisoner. This case involved a death row inmate whose lawyer filed a *habeas* petition to a Virginia state court three days late.

In *McCleskey v. Zant,* the Court said that state prisoners (and by implication federal prisoners as well) get only one chance to bring a *habeas* petition before a federal court—even if new evidence is discovered after the first petition is heard. This ruling was particularly outrageous, because state authorities had lied and hidden the relevant evidence from the prisoner and his lawyer.

Two years ago, in *Teague v. Lane,* the Court said that new decisions could not be applied retroactively to challenge existing convictions if they create "new rules" that courts could not have been expected to have known at the time. Then last year, the Court said that death row inmates aren't entitled to the benefits of changes in constitutional law decided while their cases are pending. In a dissent, Justice William Brennan, Jr. said that this "strips state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration . . . the court has finally succeeded in its thinly veiled crusade to eviscerate Congress' *habeas corpus regime*. . . . After today, despite constitutional defects in the state processes leading to their conviction or sentencing, state prisoners will languish in jail—and others like Butler will die—because state courts were reasonable, even though wrong."

Trial by jury (Art. III, Sec. 2; Sixth Amendment): In *Mu'Mim v. Virginia,* the Court wiped out the right to be tried by a fair and impartial jury. The case involved a capital murder trial, in which 8 of 12 jurors admitted having been exposed to extraordinarily prejudicial publicity about the murder. Rehnquist, writing for the Court's majority, said that as long as the jurors said they could be impartial, a judge need not question them further about the effect of their exposure to pre-trial publicity. (This was precisely the same reasoning by which the 1988 frameup conviction of Lyndon LaRouche and six associates was upheld.) The *Mu'Mim* ruling was a particularly cynical one, because any lawyer who has ever tried a case in court knows that potential jurors lie through their teeth in order to get on juries, and that initial professions of impartiality are totally worthless without additional probing.

Search and seizure (Fourth Amendment): Rehnquist has never met a search or a seizure he didn't like. For years, the Fourth Amendment has been under attack by the Burger and Rehnquist Courts; this continued last term.

In *County of Riverside v. McLaughlin,* the Court said that a suspect can be detained for 48 hours (longer on holidays and weekends) without probable cause being shown in either a hearing or a warrant.

In *Florida v. Bostick,* the Court held that police can board a bus and ask to search passengers' baggage without violating the Fourth Amendment. A passenger can always refuse, the Court said with a knowing wink.

In *California v. Acevedo,* the Court again broke precedent and allowed police to search an entire car and and to search closed containers (luggage, etc.) within it.

In *California v. Hodari,* evidence dropped by a fleeing suspect can be used as evidence, even if the police did not have any reason to chase the individual.

Last year, in *U.S. v. Verdugo-Urquidez* (a Thornburgh Doctrine case), the Supreme Court said that the United States does not need a search warrant to search property abroad owned by foreign citizens. (In other words, anybody anywhere in the world can be prosecuted for violating U.S. law, but the government can freely violate U.S. law in the course of prosecuting such a person.)

Self-incrimination (Fifth Amendment): Rehnquist and the Justice Department have been unrelenting in their desire to eliminate the 1966 *Miranda* ruling. The Supreme Court began cutting *Miranda* back in 1971, and Rehnquist carved out a big "public safety" exception to Miranda in the 1984 case *Quarles v. New York.* In 1987 the Court said it was "harmless error" for a prosecutor to question a defendant about his post-arrest silence. And in this last term, the Court ruled that the use of a coerced confession in a trial does not violate the constitutional provision against self-incrimination if it is determined to be "harmless error."

Due process (Fifth and Fourteenth Amendments): For years, Rehnquist has been extending the concept of "harmless error" in criminal proceedings. "Harmless error" is a particularly insidious doctrine, and thus a favorite of Rehnquist. It states that even if the Constitution was violated, it is "harmless" if there is otherwise sufficient evidence of guilt. In practice, what it really means is that if a judge thinks a defendant is guilty, any violation of his or her constitutional rights is "harmless." No longer do such "technicalities" as the Constitution of the United States stand in the way of getting a conviction.

The right to counsel (Sixth Amendment): *Coleman v. Thompson,* the *habeas* case cited above, in which the prisoner is to die because of the lawyer's mistake, also clearly bears upon this fundamental constitutional right.

In the 1989 *Giarratano v. Virginia* case, the Court said that a state prisoner does not have the right to a lawyer after his first appeal.

In the 1990 case *Michigan v. Harvey,* the Court allowed prosecutors to use statements taken from criminal defendants in violation of their right to counsel, in order to impeach their inconsistent testimony in court.

In 1989, the Court upheld the provisions of the RICO (racketeering) act which prevent defendants from hiring lawyers of their choice by freezing their assets before trial.

Cruel and unusual punishment (Eighth Amendment): Just this last term, Rehnquist upheld the use of prejudicial "victim impact" evidence in capital cases. Justice Antonin Scalia, who has been a fervent proponent of introducing the community "consensus" into Supreme Court rulings, cited the "victim rights" movement in his concurring opinion. In his dissent, Justice John Paul Stevens called this ruling "a dramatic departure from the principles which have governed our capital sentencing jurisprudence for decades." Victim-impact evidence, said Stevens, "sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."

In keeping with Rehnquist's policy of allowing the states virtually unlimited leeway in criminal cases, the Court allowed Michigan to impose a mandatory, no-parole life sentence for selling a relatively small amount of drugs.

Just about eliminating the ability of prison inmates to sue for unhealthy or unsafe conditions, the Court said that inmates cannot sue prison officials over conditions unless they can show "deliberate indifference" on the officials' part; this allows budgetary considerations to override any claim of constitutional rights.

In 1990, the Court said that state officials can require prisoners who are diagnosed as dangerous and mentally ill to take anti-psychotic drugs without seeking court approval.

Rehnquist is right at the front of the mob which is howling for more and more executions. (Ironically, the death penalty bloc on the Court is virtually the same as the "pro-life," anti-abortion bloc.) Many of the decisions cited above involved death penalty cases. Among the barbarous actions which have especially disgraced the United States among civilized nations, was the 1989 upholding of executions of juveniles and the retarded.

Separation of powers: Rehnquist has abdicated the Supreme Court's responsibility to enforce the Constitution with regard to the Executive and Legislative branches. In case after case, his and his Court's declared policy is that the "political" branches should be able to do pretty much what they want, and they should be free from such annoyances as civil rights suits brought by citizens seeking to enforce legal or constitutional rights.

Another egregious example was the Court's upholding of the 1986 sentencing reform act, which imposes mandatory minimum sentences for most offenses. Here the Court violated the separation of powers by giving the U.S. Sentencing Commission the power to fix mandatory sentences and taking all discretion away from judges.

Supremacy clause: This is probably the single most important specific provision of the Constitution, which gives effect to the commitments of the Preamble "to form a more perfect Union, establish justice . . . and secure the blessings of liberty to ourselves and our posterity." This clause provides that the Constitution, and the laws made pursuant thereto, "shall be the supreme law of the land," and that judges in every state shall be bound by federal constitutional law.

Rehnquist's view is precisely the opposite: that the federal courts should not interfere with state governments and state courts. Thus he has limited the access of citizens to the federal courts under the doctrine of "abstentionism." Today it is virtually impossible to get into federal court to challenge the constitutionality of police-state actions by state officials. State officials, not federal courts, now have the final say as to the constitutionality of their actions. (This was the irony of President Bush's recent endorsement of the ongoing federal court intervention against the pro-life demonstrators in Wichita, Kansas. Rehnquist and his backers have vigorously opposed the exercise of federal jurisdiction to protect the civil rights of minorities.)

As early as 1975, in the *National League of Cities v. Usery* case, Justice William O. Brennan accused Rehnquist of repudiating principles of federal supremacy which had governed the Supreme Court since John Marshall's time.

It is thus not surprising that Rehnquist should praise former Chief Justice Roger Taney, the states' rights advocate who dismantled much of John Marshall's nation-building work, and who was the author of the contemptible *Dred Scott* decision. Calling Taney a "first-rate legal mind," Rehnquist says: "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 constitutional jurisprudence of the Marshall Court."

It is not surprising that Chief Justice Rehnquist, as an avowed opponent of the philosophy and principles on which our Constitution is based, should be the instrument of destroying the role of the federal judiciary as the guardian of the Constitution. He has intentionally left no barrier between the citizens and the Hobbesian tyranny of the police state.

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