

COMMENTARY

The Rehnquist Court

By ARTHUR J. GOLDBERG*

On the first Monday in October, 1986, the Supreme Court of the United States convened for the 1986-87 Term. The rather unconstitutional vocal prayer of the Marshal remained the same: "God save the United States and this Honorable Court." However, there were changes in the personnel and the seating on the Bench.

Justice William H. Rehnquist, a side judge, moved his seat to the center, befitting the office and function of Chief Justice of the United States Supreme Court. Judge Anton Scalia, promoted from the federal court of appeals, occupies the seat of the newest Justice in seniority, on the extreme left of the Bench facing advocates and spectators. He also inherits the unenviable task of acting as the messenger, when the Court is in secret conference, to convey any communication from the Marshal or Clerk to the Chief Justice.

The Senate and the media commented extensively about these changes in the Court's seating and personnel. These comments, by and large, reflect grave misconceptions about how the Supreme Court functions.

With respect to Justice Rehnquist, it is reported that entrenched in the office of Chief Justice and, by Court standards, being relatively youthful—sixty-one years old—and possessing a sharp intellect, he will dominate the Court. The same reports say that Chief Justice Burger was incapable of doing so.

For those who fear or expect changes, the simple fact is that Chief Justice Rehnquist will undoubtedly continue to vote and write as he did during his fifteen years as an Associate Justice. He so testified during his confirmation hearing before the Senate Judiciary Committee.

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Further, the concept that as Chief Justice he is in a position to dominate the Court and impose his views, overlooks the nature and functioning of our highest tribunal.

Americans too glibly use the phrase "The Warren Court" or "The Burger Court," just as the media is now speaking of "The Rehnquist Court." But, a Chief Justice is only first among equals. Each Justice speaks his or her own mind and casts his or her own vote.

Earl Warren was a beloved and dear friend and an outstanding Chief Justice. But, during my three years of service on our nation's highest court, I do not recall a single instance where any Justice deferred to our deservedly respected Chief, contrary to the Justice's own strongly held convictions. And similarly, Chief Justice Warren did not change his strong views because of the convictions of any other Justice. Justices of the Supreme Court are notably and historically strong minded and independent. They are not subject to dominance or influence by a Chief Justice, whomever he or she may be.

True, the Chief Justice presides at oral arguments, Court conferences, the Judicial Conference, the swearing in of Presidents (Calvin Coolidge, interestingly enough, was administered the oath of office by his father, a notary public), and most importantly, assigns opinion writing when he is in the majority. But, even in selecting Justices for opinion writing, there are institutional inhibitions against a Chief Justice selecting a colleague who most nearly reflects the Chief's point of view. A Chief Justice who does not fairly distribute cases among his colleagues, whatever their views, will incur articulate protests.

Further, a Chief Justice who assigns opinions, in the hope that the writer will reflect his point of view, will soon find that Associate Justices are not puppets, even those selected by him to write the majority opinion. The writer of a majority opinion, particularly in a closely divided case, must, in order to speak for the Court, obtain five votes. This writing, therefore, must reflect a consensus of the five rather than the slant of the Chief Justice who assigned the writing to his designee.

There are, as I have said, other aspects of the work of a Chief Justice. Administration of the Federal Court system occupied much of Chief Justice Burger's time and concern. It is of interest that Justice Rehnquist has made it known that he is less enthusiastic than former Chief Justice Burger about these administrative tasks. But I am confident that Chief Justice Rehnquist, despite his misgivings, will not abdicate his role as the leader of our federal judiciary. If there are fears that Chief Justice Rehnquist will dominate the Court, his administrative du-

ties will curtail his ability to do so. Further, we now have an efficient bureaucracy to attend to these administrative matters.

I turn now to Judge Scalia and to the commonly expressed viewpoint that with his distinguished academic background, acknowledged intellect, and disarming manner, he will be able to influence wavering Justices to his conservative viewpoint. Justice Frankfurter had a similar notion only to find that his pedagogy and charm often alienated rather than influenced his colleagues.

Justices do not take kindly to being treated as second-year law students. The Supreme Court is not a classroom; its function transcends academic dialogue.

Ever since John Marshall's time, the Supreme Court has been a tribunal charged with conflict resolution of the gravest magnitude—between the Executive and Congress, between the state and the federal government, and between minorities and majorities. Judge Scalia is surely aware of this. If not, he will soon learn that his colleagues, while welcoming good manners, also expect of their associates brevity in conference discussions and on the Bench during oral argument. They have little time or interest in pursuing largely irrelevant pedantic inquiry. Plausible pundits are not influential in the Supreme Court.

A review of Judge Scalia's court of appeals opinions and former Chief Justice Burger's opinions indicate that, with minor variation, Scalia's votes will be substantially the same as Burger's, but perhaps better written and better reasoned.

This is not to say that if Justices William J. Brennan, Jr., Thurgood Marshall, Harry A. Blackmun, and Lewis F. Powell were to retire during the remaining years of the Reagan Administration, a significant change might not then take place.

The only conclusion, from the given circumstances, is that the present changing of the guard on the Court will not affect its accustomed way or recent decisions, including the controversial abortion and prayer opinions. Conventional wisdom notwithstanding, all that has happened as a result of the changes in the Court is that Justice Rehnquist has moved his seat to the center and Judge Scalia has filled the vacancy resulting from Chief Justice Burger's retirement. But essentially there will be no change in the voting pattern of the Court.

In sum, the Rehnquist Court, absent further changes in personnel, with some minor exceptions, will not be as conservative as conservatives hope, and not as conservative as liberals fear.

The same was true of the Burger Court.

Therefore, with regard to the Rehnquist Court, the old French adage seems fitting: "Plus ca change, plus c'est la meme chose."¹

1. "The more things change, the more they remain the same."