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New Direction For High Court

JUDICIAL RESTRAINT —that principle of caution in the courts which many conservatives admire— seems about the only obstacle to a dramatic turnaround in the newly constituted Supreme Court.

With the confirmation of William H. Rehnquist last Friday, and his swearing in along with Lewis F. Powell Jr. early next month, the court seems destined to show great restraint in its future decisions, even if it does not repudiate all the controversial rulings of the recent past.

Clearly, new majorities on the court can be mustered to overturn what is left of the 1966 Miranda vs. Arizona decision, a symbol of restrictions on police interrogation procedures that have stirred bitter debate between civil liberatarians and law enforcement authorities.

The court's massive docket of petitions for review is almost certain to contain the kind of case that the court could use to re-examine the standards of admissibility of arrested suspects' confessions in the federal and state trial courts.

BUT THE OPEN QUESTION is how and when the new majorities will wield their power. Speculation is idle until the justices convene in January at full strength for the first time since the retirement of John Marshall Harlan and the late Hugo L. Black in September, but the speculation is nevertheless under way.

Already civil liberties and civil rights lawyers are warning each other that they, too, had better exercise restraint in the kind of case they press to the nation's highest tribunal now that the heady days of judicial "activism" are gone.

For example, the legal campaign against unequal educational opportunities met with spectacular success recently when the California Supreme Court struck down a discriminatory system of property taxation for public schooling, but reformers are leary of going "all the way to the Supreme Court" at this time for a ruling that would have nationwide impact.

Fateful cases, postponed to await a full nine-member court precisely because they are controversial and divisive, nevertheless await the justices. The cases involve the basic constitutionality of the death penalty, the power of the federal government to tap certain telephones without a warrant and the power to compel cooperation from reluctant witnesses, including newsmen, in grand jury investigations.

Curiously, the departure of Black costs the states one sure vote for retaining the death penalty, since the late justice proclaimed last June that the Eight Amendment's ban on cruel and unusual punishments could not be a barrier to the execution of duly condemned felons.

Nevertheless, it seems unlikely that the new justices will join William O. Douglas, William J. Brennan Jr. and Thurgood Marshall if those justices continue to press for reduction and perhaps elimination of capital verdicts.

In the short run, some of the most controversial federal cases may pose problems for Rehnquist, 47-year-old assistant attorney general and frequent policy spokesman for Attorney General John N. Mitchell and could cost the government his participation and vote.

During his confirmation hearings, Rehnquist indicated he might disqualify himself in the forthcoming test of federal wiretap powers in probes of suspected domestic radicals. He acknowledged helping the Justice Department thrash out its strategy for the high court.

IF REHNQUIST steps out of the case, the defense side could win on a four-to-four tie. Powell, who has expressed strong views on wiretap controversies, also must decide whether to participate.

In addition, Rehnquist, before his nomination, had been slated to make the oral argument for the Justice Department supporting the constitutionality of compelling balky witnesses to testify under court-ordered limited grants of immunity from prosecution.

In the longer run, a showdown on obscenity seems inevitable, but whether it will produce a solid court policy is far from certain.