Supreme Court nominee must reject police-state law

by Leo F. Scanlon

In its deliberations over the nomination of Judge David Souter to fill the Supreme Court position vacated by Justice William Brennan, the U. S. Senate must answer a question which is foremost in the minds of freedom fighters throughout the world: Does the United States have the political will to reject the police-state law which is choking the life out of its republican institutions? That question can be answered by determining where the nominee stands with respect to the nostrums contained in the "Truth in Criminal Justice," a series of reports prepared by the Office of Legal Policy of the Department of Justice and just published by the *University of Michigan Journal of Law Reform*. The series contains eight research papers which, taken together, outline a strategy for eliminating the constitutional limits which the Founding Fathers wisely imposed on the federal government's powers of surveillance and prosecution. Under a government as thoroughly corrupt as the Bush administration, these restrictions on government power, as embodied particularly in the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution, constitute a serious obstacle to those among the Anglo-American policymaking establishment who believe that only a police-state apparatus will keep them at the helm during the tumultuous months ahead.

It is therefore of the utmost urgency that when the U.S. Senate convenes to examine Judge David Souter as a candidate to fill the vacant Supreme Court position, the Senate challenge Judge Souter to take a position of violent opposition to the proposals contained in the Justice Department study. He should not merely be challenged to take a general stand, but should be grilled in detail on each single point of the proposed revisions, which we review below, and he should not meet with the Senate's approval unless he vows to use every means at his disposal to ensure that they never become law—even if this means going head-to-head against the President of the United States. Any promises short of that will not have the required effect of reversing the current slide of the Supreme Court, and of the Bush administration, into the new Dark Age probably even more brutal and murderous than the last one.

Return of 'Star Chamber' justice

Throughout the 20th century, ever since the U.S. Department of Justice took on the unconstitutional role of federal police agency, U. S. courts have been confronted with the potential that abuses of the investigatory and prosecutorial powers of the government would become the stock-in-trade of such an apparatus.

The U.S. courts have dealt with this threat—rather ineffectively—by utilizing a series of legal precedence cases, dealing with procedural issues in criminal law, to outline law enforcement procedures which respect the constitution, particularly so with questions relating to the Fourth Amendment's limitations on search and seizure actions, the Fifth Amendment's protections against compulsory self-incrimination, and the Sixth Amendment's guarantee of a right to counsel.

What impelled the Founding Fathers to spell out these protections in the Bill of Rights, was the experience of the bloody inquisition carried out by the Star Chamber Courts established in the 17th century by the Tudor and Stuart monarchies as weapons against dissent. In a treason trial held in the Court of the Star Chamber, a panel of royal justices, rather than a jury, tried the accused. The Star Chamber was charged with discovering and prosecuting known and unknown acts of treason and dissent, and in its proceedings, the accused had no representation, no confrontation with the witnesses against him, and could be convicted of the charge if he refused to respond to interrogation (see box). These abuses, and the protections against them embodied in the Bill of Rights, are first and foremost political, and only secondarily relevant to criminal justice procedure.

This fact was turned on its head by the popularity of the writings of the radical liberal Jeremy Bentham (1748-1832), particularly his *Treatise on Judicial Evidence* and the *Rationale of Judicial Evidence*, which have become the rallying point for an attempt to reduce these issues to matters of simple criminal law. The authors of "Truth in Criminal Justice" utilize the following quote from Bentham to legitimize their own assault on the premises of the Constitution: "[If] an

accused person . . . is . . . asked any question from which evidence of his guilt may be deduced . . . he is not bound to answer it, and his silence is not to be held to furnish any legal presumption against him. . . . If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence."

In his introduction to the report, Joseph D. Grano, former deputy assistant in the Office of Legal Policy, says: "The world of constitutional procedure would be quite different were the reforms proposed by the Office of Legal Policy to be adopted. The new world would be one without *Miranda, Massiah* [a series of cases which address the issue of the right to counsel], the Fourth Amendment exclusionary rule, and federal *habeas corpus* review of state convictions. It would be a world in which federal courts could not employ a 'supervisory authority' to adopt rules . . . that intrude upon the executive's authority to enforce the law. It would be a world in which comment upon the defendant's failure to testify would be permissible and in which the rules of evidence would aim primarily at the discovery of truth."

Stephen J. Markman, the author of the reports, develops a methodical blueprint for the construction of the prosecutorial police state which was so feared by the Founding Fathers. The following is a summary of the reports, in the order of their production, between 1987-89. In some cases, the reports deal with specific constitutional amendments from which the case law under discussion derives; but are in all cases aiming at the close connections among the Fourth, Fifth, and Sixth Amendments, which form the core of criminal procedure under the Constitution.

Interrogations without counsel

Report No. 1, "The Law of Pretrial Interrogation," addresses the proposition that the *Miranda* rules governing pretrial interrogation should be eliminated, in favor of mechanisms which permit "fair" interrogations of suspects without counsel. Even the author of the report notes that in addition to the political abuses which such pre-trial interrogation lends itself to, the Supreme Court ruling on this issue noted that physical abuse of criminal suspects had been commonplace up through the 1930s, and that incidents of torture had continued to occur up to the time of the *Miranda* decisions.

Even more important is the Justice Department's objection to the line of *Massiah* cases which restrict the use of undercover informants once a suspect has already been indicted. The "Enterprise Theory" guidelines of the FBI already breach this principle, but the Justice Department wishes to open the possibility of the use of informants for a continuous process of frameup and indictment of targeted individuals and organizations.

Markman proposes that the warnings read to suspects upon their arrest should include a threat to the effect that the "failure to cooperate with the interrogation" will be used to impeach any testimony they give in open court. The implications of this in the nightmare world of conspiracy indictments are enormous.

Legalizing illegal search and seizure

Report No. 2, "The Search and Seizure Exclusionary Rule," proposes that the *Mapp v. Ohio* rules which govern exclusion of evidence gained in an illegal search and seizure should also be overturned, so that evidence found in what a court deems to be a "good faith" search could be admitted at trial. The Supreme Court endorsed the basic premise behind this scheme with a series of rulings in its recent session.

Of course, the agents of the Crown frequently made "good faith errors" in the preparation of treason and libel indictments against the American colonials, and Markman hopes to legitimize that tradition as well, going so far as to quote approvingly from a leading English case in which it was stated, "It matters not how you get it; if you steal it even, it would be admissible in evidence."

This concept is a cardinal principle of the Thornburgh Doctrine's attack on sovereignty, as asserted in the *Verdugo-Urquidez* case. (See *EIR*, May 25, 1990, "The Thornburgh Doctrine: The End of International Law," by Freiherr von der Heydte).

Entrapment of indictees

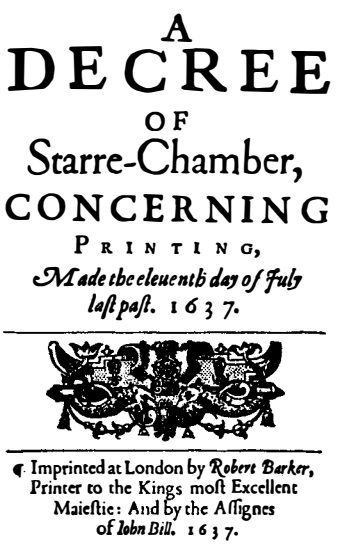
Report No. 3, "The Sixth Amendment Right to Counsel under the *Massiah* Line of Cases." The *Massiah* line of cases, which affirmed the prohibition of the government's use of undercover agents to elicit incriminating statements from a defendant who has been formally charged with a crime, should similarly be overturned, according to the Justice Department.

Markman admits that even a population enraged by the spread of lawlessness might have difficulty swallowing the idea that the government should have the right to gather evidence in secret, even after a charge has been brought and a trial begun, so he suggests that, "It would be desirable for the Department, therefore, to undertake a 'consciousness-raising' program aimed at making the *Massiah* doctrine a more visible public issue. . . . This can best be done by avoiding the characterizations employed by the Court, such as 'the *Massiah* right to counsel,' and by speaking instead of 'the *Massiah* right not to be questioned.' " Such a propaganda campaign would feature stories emotionally harping on the burdens that these procedures currently impose on isolated municipal police.

The object of the reform is to strengthen the secret informant apparatus, built up by the federal police agencies, which has become essential to political frameups. The role of this measure in expanding the entrapment capability of the

What was the Court of Star Chamber?

From the 1630s to the present day, the term "Star Chamber proceedings" have signified legal proceedings against the subject (or the citizen) in which the individual has none of the constitutional rights which Americans fashioned for themselves in the shaping of their nation. The defendant before the British monarchy's Star Chamber had no right to counsel, no right not to bear witness against himself, and no right to confront and examine his accusers. These rights were not well established in the common law courts of the time, as the trial of Sir Walter Raleigh for treason provides luridly attests.


A
DECREE
OF
Starre-Chamber,
CONCERNING
PRINTING,
Made the eleuenth day of July laſt paſt. 1637.

¶ Imprinted at London by *Robert Barker*, Printer to the Kings moſt Excellent Maieſtie: And by the Aſſignes of *Iohn Bill.* 1637.

The Star Chamber was one of the British "prerogative courts," so-called because they were governed by the royal prerogative, and not controlled by statute and common law. It had formerly served a useful function in enabling the monarchy to centralize state power, as against the centripetal tendency of the "over-mighty subject"—the dukes and earls who sought to be absolute in their own regions and who might well seek to put themselves on the throne.

But when, after the accession of Charles I in 1625, a parliamentary opposition of unprecedented strength and coherence developed against royal policies, Charles and his councilors attempted simply to eliminate it by use of the Star Chamber and similar methods.

Three celebrated cases in Star Chamber were those of John Bastwick, Henry Burton, and William Prynne, all tried for libel in June 1637. Burton, a clergyman, published two sermons against the ceremonies of the established Anglican Church. Bastwick, a physician, wrote against the rule of the church by bishops, as had Prynne. Each was fined £5,000 and ordered to stand in the pillory. Their ears were lopped off, and they were sent to prison for life in a remote castle. These men had done more than commit an offense against the Star Chamber decree of Elizabeth's time against unlicensed printing: they had publicly challenged some of the foundations of the theocratic state.

In 1641, Star Chamber and licensing of the press was abolished—and Bastwick, Burton, and Prynne released—when Parliament got the upper hand. The three men became heroes of the ensuing lawyers' and Puritans' revolution to limit royal power that led to the Venetian-modeled limited monarchy of 1688. But Star Chamber and what it stood for remained a hated memory of the republican movement that forged and fought for the U.S. Constitution, because it trenched upon the sovereignty of reason of the individual mind, and upon the conceptions of justice that flow therefrom.—*David Cherry*

FBI is highlighted by Markman's argument that "there is no element of compulsion—let alone compulsion by the government—when a person not in custody chooses to confide in someone whom he does not believe to be a government agent."

Discrediting the defendant

According to report No. 4, "The Admission of Criminal Histories at Trial," rules limiting the admission of criminal histories at trial should be relaxed in order to allow "admission of the conviction records of defendants and other persons whose conduct or credibility are at issue in a criminal case."

The protections afforded by the "exclusionary rules" are drawn directly from the defenses against Star Chamber treason trials, and were first attacked by Bentham, as noted above. A 20th-century assault was begun with the publication of J. Wigmore's *Evidence,* and continued with the widespread circulation of material written by Julius Stone. This school argues that constitutional justifications for exclusion of evidence which violates "fair notice" in a trial, is a perversion of common law, and should not be respected—especially so with regard to evidence of prior convictions or bad acts.

Explicitly racialist behavioral science theories about the "propensity to crime" of certain personalities are always associated with these polemics, which argue that behaviorist predictive models of human behavior are a legitimate form of trial evidence. The work of the notorious "Behavioral Sciences Support Unit" of the FBI would be greatly enhanced by Markman's proposed elimination of the exclusionary rules.

The use of court proceedings to vilify a political enemy are revived with this reform. Markman proposes to "offer

evidence of uncharged misconduct" as well as previous convictions, at trial.

Introducing corrupted evidence

Report No. 5, "The Judiciary's Use of Supervisory Power to Control Federal Law Enforcement Activity," recommends elimination of the power of the federal judiciary to impose "rules that impede the truth-seeking function by excluding reliable evidence in order to control the extrajudicial behavior of executive officers." With this change, the courts would not be allowed to exclude illegally obtained evidence from trials, which is one of the few mechanisms the courts do have for constraining federal police agents.

No double jeopardy protection

Report No. 6, "Double Jeopardy and Government Appeals of Acquittals," argues that the government be allowed to appeal "wrongful acquittals" when an acquittal is the result of judical error in a bench trial, and where it would not subject the accused to a new felony trial. The Justice Department is irked by the double jeopardy protections of the Fifth Amendment, and is proposing this as a step toward the radical restriction of the double jeopardy clause of the Fifth Amendment.

No federal habeas corpus review

Report No. 7, "Federal *Habeas Corpus* Review of State Judgments," proposes ending the practice of federal *habeas corpus* review of state judgments—an action which is already part of S. 1970 just passed by the Senate.

Silence interpreted as incriminating

Report No. 8, "Adverse Inferences from Silence," recommends that juries be permitted to draw adverse inference from a defendant's silence, particularly overturning the *Griffin v. California* line of cases, which have held that permitting adverse comment and inferences concerning a defendant's failure to testify violates the Fifth Amendment's prohibition of compelled self-incrimination; and the *Doyle v. Ohio* decisions, which limit disclosure and consideration at trial of the defendant's silence before trial.

In this report, Markman also outlines the basis for weakening the principle that a criminal conviction can only be secured upon "proof beyond a reasonable doubt." Markman complains that defenders of the Fifth Amendment falsely assert that "the government should have to 'shoulder the whole load' in a criminal case, establishing guilt without any help or cooperation from the defendant. The Constitution, however, does not say this; it only says that a person cannot be compelled to be a witness against himself."

This radical notion is unfortunately well established in modern U.S. criminal practice—a product of the trend that RICO author G. William Blakey calls the "merging of law and equity" in the 20th century, and that is implicit in RICO's breach of the wall separating civil and criminal requirements for proof.

The head of the Office of Legal Council during the Nixon adminsitration, William Rehnquist, has been intimately associated with this project from that day to this. His contemporary, James Vorenberg, later a key figure in the creation of the Law Enforcement Assistance Agency, was the head of the Justice Department's Office of Criminal Justice, the earliest predecessor to the Office of Legal Policy. Vorenberg worked very closely on criminal code matters with Charles Fried, who became the solicitor general during the second Reagan administration, when these reports were prepared. The head of the Office of Legal Council during that time was Charles Cooper, who, in turn, had been a law clerk for Rehnquist after he was appointed to the Supreme Court. The critical role of the Office of Legal Counsel is highlighted by Associate Justice of the Supreme Court Antonin Scalia, who served as head of the Office of Legal Council during the Ford administration.

The DoJ and drugs

The grouping of lawyers and legal experts who back this shift to a police state can make no claim to any previous success in fighting crime, and therefore have even less ground to claim that their current proposals will do so, either. This is the same grouping which, collectively, has presided over (and in some cases directly assisted) the spread of the rock-drug-sex counterculture during the 1960s and 1970s. The explosion of crime in the 1970s and 1980s is a direct result of that shift in social values. Yet, there is not one word devoted to this issue in all the 1,000-plus pages of "Truth in Criminal Justice." In fact, any initiative coming out of the Justice Department purporting to fight drugs is a sick joke, so long as a number of their more prominent figures—such as Criminal Division head Henry Barr, onetime Supreme Court nominee Douglas Ginsburg, and former U.S. Attorneys William Weld, Frank McNamara, and others—have been surrounded by reports that they admitted to using "recreational" drugs. The Justice Department has made no effort to deny press accounts of cocaine sales going on in the halls of the Justice Department's headquarters. And why has the Justice Department mounted a lawsuit in order to exempt its employees from mandatory drug testing?

In an effort to conceal this hypocrisy, Justice Department officials cloak their proposals in the jargon of "procedural matters," because in fact, they have accepted the drug trade all along as an "instrument of policy." The involvement of Charles Cooper and other paladins of this cabal in the coverup of the Oliver North Iran-Contra drug-running apparatus is only the most recent demonstration of that orientation.

Judge David Souter therefore has heavy responsibility to Americans today, and to future generations, to declare his violent opposition to everything proposed by this grouping, lest he, too, become an accessory to crimes committed against the U.S. Constitution before and upon the bench.