The Justice Department's totalitarian blueprint

by Leo F. Scanlon

In the opening of his final dissent from the U.S. Supreme Court bench, retiring Associate Justice Thurgood Marshall warned: "Power, not reason, is the new currency of this Court's decision-making." He condemned the new Court majority, and identified a long "hit list" of decisions which they intend to overturn in the next few years.

Exposing the long-term strategy of Chief Justice William Rehnquist and the Bush and Reagan appointees, Marshall warned that "today's majority ominously suggests that an even more extensive upheaval of this Court's precedents may be in store. . . . The majority declares itself free to discard any principle of constitutional liberty which was recognized or reaffirmed over the dissenting votes of four Justices and with which five or more Justices *now* disagree. . . . The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration."

Marshall was referring to the majority opinion in *Payne v. Tennessee,* in which Rehnquist said that the Court will exercise caution in matters relating to property and contract law, but it will eagerly look to override its precedents involving criminal justice.

Marshall continued: "By limiting full protection of the doctrine of *stare decisis* to 'cases involving property and contract rights' . . . the majority sends a clear signal that essentially *all* decisions implementing the personal liberties protected by the Bill of Rights and the Fourteenth Amendment are open to reexamination. . . . The continued vitality of literally scores of decisions must be understood to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of this Court."

The Justice Department 'truth' series

The "hit list" identified by Justice Marshall includes an array of specific precedents dealing with First Amendment speech and association rights, civil rights and discrimination, search and seizure, protections against compelled self-incrimination and double jeopardy, the right to counsel, and various death penalty issues.

There is a clear method to the systematic manner in which the Court is dismantling existing case law. Over the past five years, a series of eight reports have been drafted by the Department of Justice's (DoJ) Office of Legal Policy (OLP) calling for a drastic revision of criminal procedure. The reports were published by the University of Michigan *Journal of Law Reform* (Spring-Summer 1989), and ironically entitled the "Truth in Criminal Justice Series."

As Stephen J. Markman, the editor and spokesman for the series, makes clear, the ideas are drawn directly from the writings of Jeremy Bentham, the British liberal polemicist who devoted his life to destroying the U.S. Constitution and the concept of natural law which it reflects. Bentham, like his American epigones, focused his venom on the Bill of Rights (and the Declaration of Independence), precisely because they assert the legal sovereignty of the individual, *not the interests of the state,* as the basis of civil government and criminal jurisprudence. This view holds that in matters of criminal law, society's interests are served only by successful prosecutions, not by the administration of justice to the individual. At its core, it is a doctrine of vengeance.

The Rehnquist kindergarten at work

As head of the Office of Legal Counsel during the Nixon administration, Rehnquist has been associated with this project from the beginning. His contemporary, James Vorenberg, later key in the creation of the Law Enforcement Assistance Administration, was the head of the DoJ's Office of Criminal Justice, the earliest predecessor to the OLP. Vorenberg worked 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 Counsel during that time was Charles Cooper, who, in turn, had been a law clerk for Rehnquist after he was appointed to the Supreme Court. Associate Supreme Court Justice Antonin Scalia served as head of the Office of Legal Counsel during the Ford administration.

The plan of this cabal is to invite prosecutors to bring cases to the Court which will allow them to overturn precedents in criminal law, focusing on cases which involve the close connections among the Fourth, Fifth, and Sixth Amendments. The current public champion of this apparatus is George Bush, who has aggressively sought restrictions on federal *habeas corpus* appeals, especially in death penalty cases, and has pushed to eliminate the exclusionary rule

(which bars illegally seized evidence from being introduced at trial) in each of his recent proposed crime bills. The arguments presented by Markman in the DoJ blueprint are the basis for Bush's claim that crime can be controlled by destroying the Constitution. They are carefully constructed lies.

Eliminating habeas appeals

The issue of *habeas corpus* reform (or more properly, the elimination of federal *habeas corpus* appeals) is central to this debate, since it is by means of this device that the most egregious errors in state courts—where most criminal convictions and nearly all death sentences are imposed—are corrected. Bush, Markman, Rehnquist, et al. claim that the courts are flooded with spurious *habeas* appeals filed by clever criminals who are misusing the process to delay their executions.

Putting aside the absurd premise that the average criminal (or his unpaid defense attorney) is capable of outwitting government prosecutors and several layers of federal judges who could dismiss a spurious petition at any time, the figures expose the fraudulent nature of Bush's campaign theme. It is true that from 1978 to 1987, federal *habeas* filings increased 36% and the number of *potential habeas petitioners* (prisoners) rose by 94%. But, contrary to the propaganda claims of Bush, the *rate* of *habeas corpus* filings (the percentage of potential applicants who sought *habeas* relief), dramatically *declined* from 2.54% in 1978 to 1.84% in 1987.

Markman and the OLP study further lie in asserting that "there are frequently enormous delays" between conviction and the filing of *habeas* petitions, and point to the flurry of appeals filed on the eve of execution as proof of the subversive use of the great writ. In fact, the study on which Markman bases his claim (done by a Rutgers professor and his students), *found no evidence of such delay,* and numerous observers point out that the reason so many *habeas* petitions are filed just before executions is that this is the point at which prisoners finally get an attorney. In recent terms, the Supreme Court has lashed out at the notion that a defendant has any right to competent post-conviction representation, further reducing the possibility of successful appeals by indigent defendants.

It is not *habeas corpus* filings, but the legislative initiatives of the Bush administration—which have criminalized the most trivial "environmental" infractions and federalized all manner of state crimes—that are swamping the federal judiciary. Bush and Rehnquist seek to eliminate federal *habeas* appeals in order to increase the rate of executions and make a bloody spectacle of their so-called "anti-crime campaign."

The exclusionary rule hoax

Another campaign theme raised by Bush involves the so-called "exclusionary rule," which prevents the use at trial of evidence seized during searches in violation of the Fourth Amendment. The Supreme Court has already created a gaping "good faith" exception to these limitations, so that evidence discovered during a search can be admitted if the police officer believed he had grounds for conducting the search. That is not enough for Bush and the DoJ. They want an "inclusionary rule" which would allow prosecutors to introduce any evidence no matter how it was obtained—or manufactured. This is no small issue. There are a growing number of cases where the Court has been presented with evidence of criminal mendacity by prosecutors who brazenly hide or destroy exculpatory evidence, only to have the action labeled "harmless error."

This issue is the front end of a campaign to overthrow constitutional protections afforded to a citizen during the time he is most defenseless before the power of the state—the pre-trial period. For example, the OLP calls for a dramatic increase in the use of undercover informants against an indicted suspect. This year, the Supreme Court decided a case (*McCleskey v. Zant*) in which prosecutors planted an informant (a felon who had a court record of fabricating stories for his case officers) in jail with a defendant. On the dubious testimony of that informant, the defendant was convicted of murder and sentenced to die. The fact that the witness was an informant for the prosecution had been concealed and withheld from the defense. Nevertheless, the Court upheld the denial of the *habeas* petition.

Entrapment of one indicted person by another is not limited to prisoners. The DoJ is engaging in widespread use of defense attorneys, who are facing indictment on some charge, to *set up their own clients* and to run stings implicating associates of their clients. Clients are likewise being used to entrap their attorneys. These and other practices openly carried out by DoJ prosecutors make a mockery of the constitutional right to counsel.

Similarly, the inquisitors at the OLP call for the right to conduct interrogations without counsel. The Supreme Court has gone one better, ruling that coerced confessions are now acceptable in the U.S. It must be remembered that torture was found to be widely used throughout the United States, even as late as 1931, when the Wickersham Commission brought the matter to national attention. Convictions based on torture then, were most common in the South, where, as now, the death penalty is overwhelmingly applied to impoverished black defendants.

Justice Marshall concluded with a chilling forecast of the fate of justice in the United States. Accusing the new Court majority of a "blatant disregard for the rule of law," Marshall said that this past term's overturning of key precedents "is but a preview of an even broader and more far-reaching assault on this Court's precedents. Cast aside today are those condemned to face society's ultimate penalty. Tomorrow's victims may be minorities, women, or the indigent. Inevitably, this campaign . . . will squander the legitimacy of this Court as a protector of the powerless. I dissent."