4-1-1991

The Incredible Shrinking Bill of Rights

Donald E. Wilkes Jr.
University of Georgia School of Law, wilkes@uga.edu

THE INCREDIBLE SHRINKING BILL OF RIGHTS

Published in Athens Human Rights Festival, p. 2 (April 1991).

Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.

"The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal against the state; a constant heart-searching by all charged with the duty of punishment; a desire and an eagerness to rehabilitate . . .; tireless efforts toward the discovery of creative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which . . . mark and measure the stored-up strength of a nation . . . proof of the living virtue in it"--Winston S. Churchill, in a speech delivered in the House of Commons in 1910 while he was Home Secretary.

"They [i.e., the basic human rights protections guaranteed in the Bill of Rights to persons charged with crime] are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safekeeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government"--Underwood v. State, 13 Ga. App. 206, 213, 78 S. E. 1103, 1106 (1913) (Benjamin H. Hill, C. J.).

Bill of Rights Underprized on its 200th Anniversary

On its 200th anniversary the Bill of Rights, insofar as criminal defendants are concerned, is in the midst of a disappearing act.

I have been teaching criminal procedure for almost 20 years, and during that time I have watched in astonishment as the protections secured by our cherished Bill of Rights for Americans dragged into the toils of the criminal justice system on a criminal charge have steadily shrunk due to many factors, including most notably an increasingly conservative Supreme Court.

My discussion of the Bill of Rights focuses on the provisions of that sacred document securing the rights of criminal suspects and defendants. After all, it must not be forgotten that the majority of the provisions of the Bill of Rights deal with criminal procedure and impose restrictions on the power of government to investigate, apprehend, try, and punish criminal offenders.

The public, the polls show, thinks that court decisions interpreting the Bill of Rights have been too generous to "criminals" and that as a result the courts have made it almost impossible for police to investigate crime, or for prosecutors to convict criminals, or for corrections officials to punish them. The popular impression is wrong. It is my job to explain how wrong the popular view is.

Rehnquisition at the Supreme Court

For over 20 years right-wing, law and order Republican presidents have been appointing conservative Supreme Court justices. The results are before us. A total of 6 of the 9 justices have been appointed by Nixon, Reagan, or Bush. We now have U.S. Supreme Court headed by a right-wing extremist, William Rehnquist, who got his start in the Richard Nixon/John Mitchell Department of Justice. Most of the other justices are almost as reactionary. Examples: Antonin Scalia (chosen above all for his opposition to a woman's right to abortion) and Sandra Day O'Connor.

As the far-right has succeeded in packing the Supreme Court, not to mention the lower federal judiciary (which now reeks with conservative Republican-appointed white male millionaires), and as the effects of such disastrous choices for the courts become obvious, we have entered a new era in criminal procedure--the criminal procedure counterrevolution, or, as some call it, the new rehnquisition.

Here are a few of the most notable hallmarks of this new rehnquisition. First, in a criminal case where the defendant asserts a right and the government denies that right exists, the government almost always wins. Chief Justice Rehnquist's opinions for the Court are illustrative. Since he joined the Court in 1972, Rehnquist has written over 100 criminal procedure opinions for the Court in favor of the government, and less than a dozen in favor of the defendant.

Second, too many of these pro-government decisions of the Supreme Court have treated the Bill of Rights with scant respect. It is as though the Court simply thought things would be better without a Bill of Rights and proceeded to act as if there were none, thus making a mockery of that which is precious. Examples:

* Although the 1966 Miranda decision requires that arrested indigent suspects be given a free attorney before questioning, in a 1989 opinion by Rehnquist the Court

held Miranda satisfied where the police, after giving the proper Miranda warnings, additionally told the defendant: "We have no way of giving you a lawyer, but one will be appointed to represent you if you wish if and when you go to court (!)."

* In another case, in 1986, where the police interrogated a suspect incommunicado and gave him the Miranda warnings, but did not tell him that his lawyer was trying to reach him, and where the police furthermore falsely told the lawyer that her client would not be interrogated, the Court held that this was perfectly constitutional in America. Using language that typifies the Court's inhumanity and insensitivity these days, O'Connor wrote:"[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights (!)" Note particularly the dehumanizing language typical of this Court; it is as though the Court is talking about adjusting a piece of machinery rather than the cherished constitutional rights of Americans.

* In 1971 the Court held that undercover policemen and their secret informers using concealed electronic devices may, without a warrant or probable cause, surreptitiously record or transmit the conversations of Americans for use in court as evidence of guilt of some crime. The Court's rationale: in America, every time we citizens speak we are deemed to take the risk that the person with whom we speak may be an undercover agent working for the government. The Court thought that the risk that someone in whom we confide may be a rat-fink and tell what we said is no different from the risk that the rat-fink may be an undercover policeman be equipped with hidden recording or transmitting devices! In other words, the Court thinks we live in a police state where all of use are liable to constant and random clandestine surveillance by the gendarmarie.

* In a 1979 case the Court held that the Constitution permits jailors to subject pretrial detainees, not convicted of anything but simply awaiting trial and unable to obtain release on bail, to rules whereunder the detainee may be denied receipt of packages from friends and relatives; may be strip-searched; and may be forced to allow guards to examine his or her naked genitals and anus (a practice this cold-hearted Court euphemistically refers to as "bodily cavity inspection"!). In upholding this and other restrictions on unconvicted inmates, Justice Rehnquist wrote:"The presumption of innocence . . . has not application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun (!)."

*In a followup case decided five years later, appropriately enough in 1984, the Court held that the Fourth Amendment of the Bills of Rights, which bars unreasonable searches and seizures, does not protect jail inmates in their cells, and that pretrial detainees may constitutionally be denied contact visits with relatives and friends, i.e.,

forced to communicate with visitors only through a glass partition! No hugs or kisses or embraces for the unconvicted, if common jailors want to deprive you of them; and this is just peachy with this Supreme Court.

* In 1986, the Court upheld the validity of Georgia's sodomy law, which makes it a 20-year felony for consenting adults, even married ones, to privately engage such sex acts as oral sex.

* The Court has held that police, without a warrant or probable cause, may hover in a helicopter 400 feet above our homes and spy on us without violating the Constitution.

* The Court has held that a person may, without violating the Constitution, be tried and sentenced to death by a death-qualified jury--i.e., a jury from which have been excluded persons so opposed to the death penalty that it would impair their duties at sentencing--even though this produces somewhat more conviction-prone juries. This means, for all practical purposes, that the only persons who sit on juries in capital punishment cases are those who believe in the death penalty--all of which is perfectly fine with this Court.

* In an astonishing, disgraceful miscarriage of justice (to quote Professor Norval Morris, of the University of Chicago Law School), a 1987 decision of the Court upheld the death penalty against accusations of racial bias, despite what Morris calls the"starkest" evidence of racial bias.

* In criminal cases, even death penalty cases, the Court now insists that defendants and their lawyers comply with all sorts of technical and procedural niceties, and if a client's lawyer makes a mistake the client is required to pay for it, so that the Court sometimes allows people to be executed, even though their rights were violated, if the lawyer failed to make a timely and procedurally correct objection.

* In 1990, for the first time in history, the Court has held that a prosecution witness who appears at a criminal defendant's trial may testify against the defendant outside the physical presence of the defendant. The Court upheld a Maryland law permitting, in certain child abuse cases, the child who claims to have been victimized to testify live through closed-circuit television rather than in the courtroom.

* The Court has upheld the validity of police drunk driver roadblocks--called by the Court, which loves to used Orwellian euphemisms to disguise the naked state power it is legalizing,"highway sobriety checkpoints (!)"--conducted by stopping every car passing through the roadblock and questioning the driver, all without warrant, probable cause, reasonable suspicion, or any indication of criminal activity (!).

* The Court has upheld the validity of prevention detention statutes, which permit the government to detain who are thought to be dangerous, even though the person would appear for trial and would otherwise be eligible for release on bail. According to the Court, locking up a defendant prior to trial not for what he has done but for what he might do is perfectly okay in America, since preventive detention is not punishment prior to trial, but only a regulatory procedure. This Court thinks that a person subjected to pretrial detention on account of what he might do in the future is only being regulated, not punished!

* The Rehnquist Court has increasingly opened the courthouse door to the use of evidence obtained by the police in violation a citizen's constitutional rights, on the theory that this will help suppress the crime problem. Thus, this Court thinks that police violations of our basic rights are an acceptable and even necessary part of the criminal justice system and the war on crime. Expecting the police to comply with constitutional requirements and limiting their use of evidence to constitutionally obtained evidence is too big of burden on the police, this Court seems to think. Evidently the Bill of Rights is a casualty of the crime war.

Third, increasingly the Court is hearing cases appealed by prosecutor and wardens dissatisfied with pro-defendant decisions of lower courts, and hearing fewer and fewer cases brought by defendants. In other words, this Court regards itself as a Court of Errors and Appeals for Aggrieved Agents of the State who claim that the lower courts overextended the rights of the defendant, rather than as the last hope of citizens who claim their rights were violated. When the Court hears an appeal by a prosecutor or warden, it almost always reverses the lower court for being too generous in protecting constitutional rights. Needless to say, this sends a message--the wrong message to America's judges: the rights of citizens are not that important. The great god government and its powers are what's important.

Since the Supreme Court is now packed with enemies of liberty, and since there seems little possibility that we will soon have a president who picks federal judges not hostile to constitutional rights, we may expect a bleak future for the Bill of Rights. This, the 200th anniversary of the Bill of Rights, is hardly a year to celebrate. If anything, we should be in mourning. A nation that elects presidents who act as though they are running for sheriff and who pledge to appoint judges favorable to the law enforcement establishment, a nation that permits policeman-mentalities such as William Rehnquist to serve as Chief Justice rather than as an officer on the beat, is not a country that currently is truly wedded to the Bill of Rights and all it stands for.

In truth, we as a nation have so lost sight of the Bill of Rights and its underlying principles of respect for human dignity and privacy that if we really looked we would see only cleverly disguised but unmistakable movements in the direction of fascism

on the part of the highest court of the land, the court that is supposed to be our final resort for the vindicating of our liberties. Fascism has a distinctive view of criminal procedure. The essence of fascist criminal procedure is twofold: the individual is required to strictly obey draconian laws, and lawbreaking--in particular, violations of constitutional rights of citizens--by agents of government is overlooked, or minimized, or even encouraged. The private citizen must obey the law, but the government official need not. This fascist approach to criminal procedure, however veiled in Orwellian language, is clearly perceptible in Supreme Court decisions during the rehnquisition. Since the Rehnquist gang was appointed by presidents who wrap themselves in the flag and patriotism while spouting their law and order rhetoric, and since many uninformed citizens see the Supreme Court's recent decisions as a blow for the "peace forces" as opposed to the criminal elements, it is hardly surprising that in the 1930's Huey Long astutely observed, "If fascism came to America, it would come on a program of Americanism."

Eventually, of course, things will improve. Soon or later we will recognize that the law enforcement juggernaut is out of control and suffocating our liberties. We can't keep moving toward fascism forever. People can't be fooled forever into thinking that a huge prosecutorial, police, and prison system is the panacea for our society's problems, or that watering down our precious rights will solve the crime problem. I only hope that by the time we return to our true values we will not be living a country named "The United States of Amerika" whose motto is "Penal law consists of war measures employed to rid oneself of the enemy."

If there is any justice, these words will be carved on Rehnquist's tombstone: Inimicus libertatis (liberty's enemy). And on the tombstones of the other justices who have joined him in diluting and dissecting and demeaning the Bill of Rights, this will be written: Impius et crudelis judicandus est qui libertati non favet (he is to be judged impious and cruel who does not favor liberty).

If the Bill of Rights is not tossed into the dustbin of history, and I believe it will not, then the Rehnquist Court will be treated by history with the scorn it so richly deserves now.