

A NOTE ON THE TERM "REHNQUISITION"

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"The term 'Rehnquisition' first appeared in a Harvard Law School publication in the early 1970's." Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 Ind. L. J. 273, 273 (1987). The term originally referred to then-Associate Justice Rehnquist's vision of criminal procedure as indicated in his judicial opinions--a bizarre, quasifascist world in which the basic rights and judicial remedies of criminal defendants are steadfastly belittled and denigrated, and the powers of police and prosecutors are steadily exalted and expanded.

Since the mid-1980's, however, Rehnquisition has referred to the Criminal Procedure Counterrevolution being carried out by the U. S. Supreme Court, of which Rehnquist has been Chief Justice since 1986. There are numerous articles examining the scope and shape of this counterrevolution which has been marked by a constant erosion of the rights of defendants and the inexorable enlargement of the powers of government. See, e.g., Carrafiello, *A Counter-Revolution Gone Too Far? Justice Powell's Valedictory on the New Law of Warrantless Aerial Surveillance*, 16 So. U. L. Rev. 327 (1987); Whitebread, *The Counterrevolution in Criminal Procedure*, 24 Judges J. 40 (1985).

This criminal procedure counterrevolution is not unprincipled. It rests on recognizable principles explicitly stated or implicitly contained in the Court's Rehnquistian decisions. However, these principles are sinister and dangerous to free government. These frightening, alien principles may be summarized as follows.

First, lawlessness in law enforcement is permissible and an acceptable part of the criminal justice system. That is, to expect police or prosecutors to obey the law in administering criminal justice is expecting too much of them. Thus, evidence should not be excluded merely because police or prosecutors violated the Constitution or a criminal law or other law in order to obtain it. Furthermore, other actions taken by police or prosecutors in investigating or prosecuting a defendant should not affect the validity of that defendant's criminal conviction, even though those actions violated the law.

Second, unlike the government, the criminal defendant is held strictly accountable to the law. Lawlessness by a criminal defendant is viewed harshly, and the lawless criminal defendant is deemed to be justly subject to draconian punishments. There are reasons for overlooking lawlessness in law enforcement, but lawlessness by private persons charged as criminal defendants merits no mitigation.

Third, insofar as the courts are concerned, violations of criminal procedure rights usually and normally are to be deemed unremediable. That is, many, perhaps most, violations of basic rights will go unredressed by the courts, since the various remedies for vindicating rights--for example, habeas corpus, civil rights actions, and exclusionary rules--are just as deserving of narrowing as the rights themselves. Thus, one must harden oneself to the realization that in the normal course of things courts must turn their backs on citizens whose rights have been violated and accept

deprivations of rights without offering any judicial redress. This, of course, requires callousness towards the rights of individuals and the suffering that unredressed violations of rights entails, but in world of William Hubbs Rehnquist, as in the world of Nazism, leniency is weakness, adherence to the rule of law is sentimental claptrap, and the role of the judiciary is not to be the guardian of rights but to assure that no "criminals" (except in cases of lawlessness in law enforcement) go unpunished.

When future generations look back at the Rehnquist Court, they will marvel at the time and trouble the Court took to systematically shrink judicial protections for persons accused of crime. Doubtless they will attribute a large part of the Criminal Procedure Counterrevolution to the Court's strong and vociferous support for capital punishment--a fourth Rehnquistian principle. Doubtless they will find the key to understanding the Criminal Procedure Counterrevolution in a Latin phrase, *in favorem mortis*. During the 1980's and 1990's, future generations will conclude, the highest court in the world issued criminal procedure opinions showing that it favored not liberty, not rights, but death.