13. Civil Liberties and Criminal Law

America correctly prides itself on being the world's leader in protection of civil liberties. But in recent decades the war on drugs, the war on guns, and various other panics have resulted in serious infringements of traditional constitutional rights. The damage has been especially severe to the Fourth Amendment, which prohibits searches and seizures without both a warrant and probable cause. Other freedoms, such as the Second Amendment right to bear arms, the Fifth Amendment right to due process, and the Fourteenth Amendment right to equal protection have also been eroded. One of the best measures of whether things have really changed in Washington will be whether new legislation further degrades—or begins to restore—the fundamental freedoms guaranteed by the Constitution.

Search and Seizure

The 104th Congress should

- **allow no-knock, masked, or violent service of search warrants only when specifically authorized by a court;**
- **create a special commission to investigate the increasing militarization and violence of federal law enforcement;**
- **abolish all exceptions to the Fourth Amendment's exclusionary rule in order to meaningfully enforce the constitutional ban on illegal searches. Resist proposals to create any new exceptions.**

Enforcement of laws criminalizing victimless crimes such as possession of drugs or of unregistered guns is made more difficult by the absence of any victim to complain to the police. As a result, a *de facto* "drug exception" to the Fourth Amendment has been created, and efforts are under way to create a similar "gun exception." The authors of the Fourth Amendment were well aware that restrictions on search and seizure would weaken governmental law enforcement efforts, but they considered strong protection of the people's privacy more important than making law enforcement as strong as possible.

Even as the Fourth Amendment has been eroded, governmental law enforcement has grown substantially more violent in the last decade, with no-knock, violent service of search warrants becoming routine. The federal law enforcement establishment has never been larger, better armed, or more violent. The growing intrusion of the federal government into affairs over which it has no constitutional authority (such as drugs and guns) has been accompanied by growing lawlessness on the part of federal law enforcement officers. The fiasco at Waco, where a fraudulently procured warrant to arrest one man was executed through a machine gun, grenade, and helicopter assault on a home containing 126 other people, is only the most visible of the abuses of the warrant process.

The violent deaths of Vicki Weaver in Idaho, the Branch Davidians in Texas, and Donald Scott (in a trumped-up forfeiture case) in California have gained some publicity, but every day the federal law enforcement establishment breaks down doors, waves automatic weapons at innocent people, and sends spy planes and helicopters over private land without a warrant.

Ironically, even as the Fourth Amendment's guarantee of privacy and security has been battered by one "exception" after another to the amendment's requirement that searches and seizures be based on probable cause and a warrant, efforts to destroy what remains of the Fourth Amendment have intensified.

For over a century the Supreme Court has enforced an "exclusionary rule" that prevents the use of illegally obtained evidence in court. The foundation of the exclusionary rule is the integrity of the judicial process itself. In a prosecution in which an individual is accused of having violated a law, it would make a mockery of the rule of law to allow the introduction of evidence that the government (the supposed enforcer of the law) has broken the law to obtain.

A second, independent, basis of the exclusionary rale is to deter the government from violating the Fourth Amendment (and other constitutional protections). The most effective way to keep the government from breaking into people's homes or coercing them into confessing is to keep the government from being able to use the evidence that it illegally obtains. Any exceptions to the exclusionary rule will, of course, reduce the deterrent effect of the rule and thereby promote illegal government searches and seizures. And it should be noted that, as reported recently in *Investor's Business Daily,* "Despite popular notions of large numbers of criminals being turned free because of excluded evidence, there is a consensus on

both sides of the debate that this isn't true. . . . There's also a strong consensus that most of the cases lost are not violent felonies or even property crimes," but cases involving possession of drugs or guns. The various exclusionary rule exceptions created by the Burger Court in the 1970s and 1980s should be promptly abolished.

Richard Epstein of the University of Chicago says, "The Fourth Amendment is not a 'just compensation' clause. It doesn't say that unreasonable searches and seizures may take place if just compensation is made. It is an absolute prohibition on such searches." It is sometimes suggested that allowing citizens to sue police officers for illegal searches and seizures would be an adequate substitute for the exclusionary rule. That is plainly untrue.

Strengthening the tort remedies of persons who are injured by illegal government acts is a fine idea, but tort remedies can only supplement, not supplant, the exclusionary rule. Only in the cases of the most extreme, abusive searches will victims find it worthwhile to spend the many hours and dollars necessary to have even a chance of obtaining a favorable verdict. Unless massive property destruction is involved, damages may be difficult to prove. As a result, many people who are illegally detained for three hours, or whose homes are invaded and ransacked in the middle of the night, will simply decide to put the unfortunate incident behind them and not spend the next several years engaged in a lawsuit, which government attorneys will be certain to fight with every resource at their disposal.

In other words, repeal of the exclusionary rule amounts to a *de facto* repeal of the Fourth Amendment itself.

No constitutional right has been more damaged in the last 15 years than the Fourth Amendment, and no right is more in need of immediate corrective legislation, even as some persons propose to destroy what remains of the right.

Right to Bear Arms

The 104th Congress should take the following actions:

- **Repeal all federal gun control laws, starting with the National Firearms Act of 1934, that do not relate to genuinely federal issues (such as possession of guns on federal property or illegal interstate weapons sales). State governments should set their own policies for gun dealer licensing and the like.**

- **Use its power under section 5 of the Fourteenth Amendment to forbid state or local governments to ban firearms that are not banned by the federal government or to otherwise impose excessive restrictions on the Second Amendment. State governments should not be able to violate the Second Amendment rights of U.S. citizens.**

"Gun control" schemes that focus on law-abiding citizens have never succeeded in reducing crime. To the contrary, they simply empower criminals and affirm the government's mistrust of the people. Moreover, hysteria over guns, like hysteria over drugs, threatens all constitutional rights by creating a "need" for a powerful, intrusive government designed to catch ordinary citizens who choose to possess politically incorrect objects.

In any case, the federal government has no enumerated constitutional authority over general criminal law. Accordingly, Congress has no legitimate power to legislate on noninterstate matters, such as "gun free school zones," or who may possess guns. Such matters are the exclusive prerogative of the states (which, like the federal government, must obey the Second Amendment).

Outright repeal of the Brady bill and the ban on so-called assault weapons could not, however, survive President Clinton's veto. But there are important reforms short or repeal that can be undertaken.

The first step is to make the Brady bill a truly national law. States should be forbidden to impose a waiting period of *more* than five days on handgun purchases. That would help protect the citizens of states like New York and New Jersey, where government bureaucrats make people wait months—and sometimes up to a year—to obtain permission to buy a gun. Those ridiculously long waiting periods endanger public safety by preventing people from obtaining self-defense weapons when they need them.

Within five years, the Brady bill sunsets, to be replaced by the National Rifle Association's preferred "alternative, a nationwide instant computer check on all purchases of handguns and long guns. Congress should amend the instant check provision so that it preempts more repressive state and local laws.

All, of the federal bans on mere possession of firearms are based on the intellectually dishonest assertion that its power to regulate interstate commerce allows Congress to do anything it wants. In contrast, congressional action to protect citizens from unreasonable state or local gun bans is well within the established congressional power, granted by section 5

of the Fourteenth Amendment, to protect Americans from state infringements of their constitutional rights.

The "assault weapon" ban was sold to the public with the dishonest claim that it banned "only" 19 guns. Actually, the ban listed 19 "types" of guns, and then included a separate "generic" ban that brought about 200 guns within the scope of the ban. To comply with truth in labeling, the generic gun ban should be repealed; and the ban on particular guns should be restated so that it actually applies to 19 guns, rather than to an uncountable number of "types."

The ban on "large" ammunition magazines should be changed from a 10-round limit to a 20-round limit. That will keep the ban from interfering with millions of people who own ordinary handguns such as those made by Smith & Wesson, Glock, Colt, Ruger, and Beretta.

Last, the entire prohibition is scheduled to sunset in 10 years. Three years is long enough to inflict this counterproductive law on the American people.

Privacy and Autonomy

The 104th Congress should take the following actions:

- **Repeal the General Agreement on Tariffs and Trade and Internal Revenue Code requirements that children, from the moment of birth, possess a Social Security number in order to be claimed as tax deductions. Congress should forbid all federal agencies, other than the Social Security Administration, to use Social Security numbers.**
- **Resist any efforts to create a national identity card or a federal list of persons permitted to work.**
- **Abolish federal laws that infringe on financial privacy by requiring banks and other financial institutions (and even attorneys) to report receipts of sums of $10,000 or more.**

In a civil, as a opposed to a political, society, not everything that people do is presumed to be within the government's right to know. The notion mat government must have ever-better methods of keeping track of every person in the United States has profound and dangerous implications for civil liberties. Identity-control schemes, such as the Social Security card, are always proposed for limited, seemingly benign purposes. But pressure inevitably builds for use of the identity measures for other purposes. "Show us your papers" should have no place in the federal government's phrase book.

Similarly, a person's property belongs to him by right; it is not a privilege granted by the government. Accordingly, the government has no legitimate authority to invade a person's privacy by requiring that his financial transactions be reported to the government.

Equal Rights

The new Congress should do the following things:

- **Enforce the true colorblind intent of the Fourteenth Amendment and the civil rights statutes by making it illegal for the federal government to consider race, religion, or gender in granting or denying federal benefits.**
- **Forbid the executive branch to discriminate in employment practices by racially "norming" the test scores of job applicants.**
- **Abolish all federal set-asides based on race or ethnicity.**
- **Forbid the federal government to order private or other public entities to supply information about race and gender to the federal government.**
- **Amend the Voting Rights Act to forbid the consideration of race in the drawing of legislative district boundaries.**
- **End discrimination against gays and lesbians in the granting of security clearances. Enact legislation forbidding the federal government to discriminate on the basis of sexual orientation, except when there is a compelling state interest in such discrimination.**

True civil rights require that people be equal before the law, not given legal preferences or disadvantages on the basis of irrelevant characteristics such as race, gender, religion, or sexual orientation.

The Clinton administration has made even worse the policy of previous administrations of granting preferences, not on the basis of merit, but on the basis of race, gender, and sexual orientation. That "affirmative apartheid" is a gross perversion of the Civil Rights Act of 1964 and of the Fourteenth Amendment's guarantee of equal protection.

Discrimination on the basis of race, gender, or sexual orientation not only imposes significant economic harm, it undermines the very basis of America, by encouraging people to think of themselves as members of discrete and insular classes rather than as individual Americans.

The apartheid voting districts created by a twisted application of the Voting Rights Act have, ironically, helped Republican candidates by segregating minority voters into homogeneous voting ghettos. The Clinton Department of Justice, in its apparently single-minded pursuit of voting segregation today, segregation tomorrow, and segregation forever, is doing all it can to make electoral apartheid even worse.

Despite the short-term political advantage of segregating minority voters, Republicans (and all persons of good will) should recognize the long-term damage caused by the federal government's sanctioning separatism, segregation, and groupism as principles of democracy. The Voting Rights Act should be amended to forbid the consideration of race in the drawing of district boundaries.

All taxpayers have a right to an efficient government that hires personnel on the basis of job-related characteristics and nothing else. Since sexual orientation only rarely has any true influence on job performance, the government should not be allowed to use sexual orientation (as a positive or a negative) in personnel decisions.

Due Process and Double Jeopardy

Congress should

- **repeal all federal mandatory minimum sentences, as well as the mandatory sentencing guidelines;**
- **abolish "real offense" sentencing, which allows a person to be sentenced to prison for a crime for which he has been acquitted or with which he has never been charged;**
- **forbid federal prosecution of persons who have already been prosecuted for the same offense under state law.**

Mandatory minimums and rigid sentencing guidelines turn judges into clerks and prevent judges from weighing all the facts and circumstances in setting appropriate sentences. In addition, mandatory minimums for nonviolent first-time drug offenders result in sentences grotesquely disproportionate to the gravity of the offense.

Proposals for even more mandatory mininums should be decisively rejected. Creating mandatory federal sentences for use of a gun in a state criminal offense will, Chief Justice Rehnquist has warned, overwhelm the federal courts and erase the proper boundary between state and federal crime control.

Mandatory sentences for giving drags to a minor will lead to absurd results, such as a 10-year prison term for a college senior who gives her high-school brother a marijuana cigarette. Existing federal law is fully adequate for dealing with drug dealers who specialize in selling to school-children. Moreover, the federal government has no legitimate authority to enforce criminal drug laws that do not involve interstate or international transactions or transactions on federal property.

Most people believe that in the American criminal justice system, a person may only be sentenced for a crime if he pleads guilty to the crime or is convicted of the crime after a trial. Although conviction-based sentencing was the practice in America for most of its history, conviction-based sentencing is being replaced with "real offense" sentencing. Under "real offense" sentencing, incorporated in the federal sentencing guidelines, a person who is convicted of any crime may be sentenced for any other offense the prosecutor alleges was committed—even though the supposed "real offense" was never proven in a court of law. Allegations of supposed "real offenses" may be based on hearsay, reputational evidence, and other unreliable "evidence" that would not be useable at trial to prove guilt.

In one typical case, a defendant was *acquitted* of possessing a certain quantity of drugs and convicted of possessing a smaller quantity. The court sentenced him on the basis of the larger amount, even though he was acquitted *(United States v. Manor,* 11th Cir. 1991).

As police and prosecutors have become aware of the possibilities of ''real offense'' sentencing, it has become increasingly common to manipulate the charges against the defendant, to gain the maximum sentence from the minimum proof. A prosecutor may indict a defendant for only a low-level, easy-to-prove offense. Then at sentencing, the prosecutor will ask that the defendant be sentenced for the alleged commission of other, unproven crimes—crimes that the prosecutor knew could not be proven beyond a reasonable doubt in court.

Simply put, ''real offense'' sentencing destroys the requirement of proof beyond a reasonable doubt, the meaningfulness of a jury acquittal, and the accused's right to confront the accuser.

The federal prosecution and imprisonment of a defendant who has already been prosecuted in state court is referred to as a ''dual prosecution.'' During the Reagan and Bush years, administrative guidelines on dual prosecutions were greatly relaxed, and the Clinton administration has done nothing to reform them.

Thus, there are more and more cases like those of Rufina Canedo. She pleaded guilty to possession of 50 kilograms of cocaine and was serving a six-year state sentence. Federal prosecutors came and demanded that she testify against her husband, which she refused to do. Her guilty plea in state court was usable evidence in federal court. And so she was sentenced to a federal 20-year mandatory minimum. Her state prison time is not credited against the federal sentence.

Similarly, California actor Joe Renteria served 11 months in state prison for conspiring to buy marijuana and cocaine. After returning home, he resumed his career and began writing a script. He was federally prosecuted and sentenced to a five-year mandatory minimum. At the sentencing hearing, Judge David Kenyon stated,

> The court is very bothered that the government would let this man or anybody go through an entire sentencing in state court on the exact same facts, wait until he's out of prison, he's starling a new life, he's married, he's working, and then announce "Now we're going to prosecute you on the federal side." There's something wrong about that. No matter what the person does wrong, that too is wrong.

Dual prosecution is un-American. The attorney general of the United States could stop it with the stroke of a pen. Since she will not, Congress should.

Conclusion

Despite the perversions and abuses of federal power, the American people have never really lost their fundamental freedoms—for those freedoms are not granted by the government; they are inalienable human rights that are merely recognized and guaranteed by the Constitution.

On November 8, the American people told the federal government that it should stop taking what rightfully belongs to the people. Not only should it stop taking people's property through regulation and taxation in the guise of "fairness," it should stop taking their freedoms in the guise of "crime control."

As the Declaration of Independence observes, governments are instituted to protect the preexisting, inalienable rights of the people. It is time for Congress to settle down to the serious work of protecting the fundamental freedoms that are the very basis for America itself.

Suggested Readings

Hyde, Henry. *Forfeiting Our Property Rights*. Washington: Cato Institute, 1995.

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Reed, Terrance G. "American Forfeiture Law: Property Owners Meet the Prosecutor." Cato Institute Policy Analysis no. 179, September 29, 1992.
Reitz, Kevin R. "Sentencing Facts: Travesties of Real-Offense Sentencing." 45 *Stanford Law Review* 523, 531 note 49 (1993).

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