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The Burger Court: Tearing Up the U.S. Constitution

by Ed Spannaus and David Heller

Next to Edward Levi's Justice Department, the one institution most responsible for creating the conditions for police-state rule in the U.S. is the United States Supreme Court. The "Burger Court" — which has had a majority of its present Justices appointed under Presidents Nixon and Ford starting with Burger himself in 1969 — has conducted a frontal assault on the U.S. Constitution and the Bill of Rights, with fundamental constitutional protections for the U.S. population being subverted and destroyed.

With the staged debate on the notorious S-1 bill dominating the current scene, and every police-controlled "left" group and countergang from the CPUSA to the Weathermen conducting boisterous anti-S-1 campaigns, actual S-1 police-state measures are being smuggled in through the back door by the Supreme Court. Without a massive public campaign against the police-state rulings and impeachment of key criminals on the present Supreme Court, the defeat of S-1 could be a pyhrric victory. This article begins that campaign.

The Court's recent **Rizzo v. Goode** ruling demonstrates clearly how the Supreme Court has tossed aside legal tradition to create police-state conditions. The Court jumped at the opportunity to review this case from a lower court — a review highly unusual for this type of case — and used it to establish a precedent against the use of conspiracy suits. This precedent has one political purpose: to be used against the crucial civil conspiracy suits now being conducted by the Labor Party and the Labor Organizers Defense Fund.

In this suit, a class action filed against Philadelphia police chief Rizzo and other top police officials citing a pattern of illegal harassments and arrests of minority-group citizens, the Supreme Court ruled that Rizzo and the other police commanders were not liable for the actions of persons under their command. This principle, if extended into other cases, would virtually eliminate the possibility of conducting successful conspiracy suits against police officials and of holding police or FBI officials accountable for illegal acts by policemen or FBI COINTELPRO activities. William Rehnquist, writing the Court's decision, also ruled that a Federal District Court had acted beyond its powers in setting up a Civilian Review Board to deal with police abuses!

The political significance of the **Rizzo** ruling could not be lost on anyone who has been following the U.S. Labor Party's legal offensive. The **Rizzo** ruling will be used to attempt to knock out many of the Labor Party's civil conspiracy suits now under litigation, including numerous suits against local and state police officials, and the Labor Party's suits against the FBI which name FBI Director Clarence Kelly and Attorney General Levi as defendants.

The original **Rizzo** suit — prepared with the help of the Philadelphia ACLU — was extremely sloppy. It did not name individual policemen as defendants; it did not allege a policy of harassment or conspiracy; it did not establish a nexus between the victims of past harassment and the counter-insurgents claiming to represent the class of victims. But now a critical precedent has been established for the purpose of knocking out **competent** conspiracy cases such as those brought by the Labor Party. Under emerging police-state conditions, this decision represents a crucial loss of redress procedure for the population that must be nipped in the bud.

The Bill of Rights

The **Rizzo** decision is no fluke; it is entirely in line with the subversive record of the Burger Court, which has been consistently chopping away at both the Bill of Rights and at the rights of citizens to bring suit and obtain redress. The latter rights are usually denied by this court on grounds of "jurisdiction" and "standing," dismissing a lawsuit on the grounds that a particular individual has no right to bring a particular action.

In this way the four most important of the first ten amendments to the Constitution have been consistently reduced in scope by the Burger court. Democracy is on the verge of being virtually legislated out of existence.

First Amendment: The first amendment, which expresses most clearly the "right to organize," has predictably suffered heavily at the hands of the Burger court. One of the most important restrictions of First Amendment rights affecting working-class organizing was the **Lloyd v. Tanner** decision which ruled that shopping centers are essentially private property. Earlier court rulings had held that shopping centers in today's society are "public access' areas comparable to the town squares of an earlier period of history. The Burger Court's rollback of this concept in the **Lloyd** decision is now the present interpretation which is used to lock out Labor Party newspaper sales and campaign organizing at thousands of shopping centers across the country.

The Burger court has generally been liberal with respect to "free speech" in the abstract, i.e. the right of anarchists to use four-letter words, etc. It is in substantive areas of freedom of speech for political purposes, freedom of assembly, and so on that the court has reduced the scope of First Amendment protections.

One major exception where the court has generously extended First Amendment protections is for capitalist politicians. The court's recent decision holding the Federal Election Commission to be unconstitutional including the overruling of spending limits for political candidates — on the grounds that this restricted freedom of speech. (Within days, Senator McCarthy took advantage of the court's ruling by selecting as his running mate for his financially-ailing campaign an unknown but wealthy heir to the Ford Motor Company fortune.)

Another key ruling from the court was Justice Thurgood Marshall's upholding the government's legal right to place

informers in political groups. This ruling came, not accidentally, in a case involving the Socialist Workers Party which is not a political group, but rather a branch office of the FBI and the Ford Foundation. Nonetheless, Marshall's ruling that the FBI can use undercover agents in political groups has been repeatedly cited by Justice Department lawyers in legal arguments against the Labor Party. The court's distinction between "active" and "passive" informers is quite meaningless, especially since it was admitted that the FBI agents in the SWP were so active that they would stick out like a sore thumb if they were restricted from participating fully in the SWP convention.

Fourth Amendment. This amendment, which insures to the people the right to be free from random searches, seizures, and arrests, has been virtually destroyed by the Burger Court. Leading the assault on the Fourth Amendment has been William Rehnquist — formerly a member of both the John Birch Society and the Justice Department.

Previous Supreme Courts have been remarkably cautious with respect to the Fourth Amendment, after a cause celebre for conservatives as well as liberals. Justice Felix Frankfurter, for example, cited the right of the people to be free from random, unpredictable, or systematic intrusions on their privacy as the precondition for the rights of free speech, free press, and freedom from self-incrimination. The Fourth Amendment originated as a reaction to the use by the British of "general warrants" for searches and arrests.

Because of the legal tradition surrounding the Fourth Amendment, Rehnquist was compelled to resort to pathological lying in order to justify the reversal of this tradition. This was obvious in decisions Rehnquist wrote in two important 1973 cases, **U.S. v. Robinson** and **U.S. v. Gustafson**. In these rulings Rehnquist tries to justify his argument that once police arrest someone, the subject has **automatically** consented to a random search for evidence, even evidence unrelated to the offense for which he was arrested. In 20 cases Rehnquist cites, three did not concern arrests at all, 14 did not concern searches of the person, and of the six that did, three were from the turn of the century. In 16 of the cases cited, the evidence seized was evidence sought for the same reasons that the arrest was made — which does not then justify search for and seizure of evidence unrelated to the cause of the arrest. After more lies on citations which are totally off the point, Rehnquist then argues directly contrary to 200 years of Supreme Court rulings: "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."

The court's assaults on the Fourth Amendment are continuing to the present day. A recent decision, in **U.S. v. Watson**, upheld the right of police to arrest a person without a warrant even where it is possible to obtain a warrant, and also ratified subsequent searches without giving notice of the right not to consent to such a search. Justice White reached back to an obscure 1851 Massachusetts statute and Blackstone's Commentaries to justify the majority decision.

Justice Marshall, dissenting for himself and Justice Brennan, came as close as a judge could be expected in noting the majority's dishonesty. "It is always disheartening when the Court ignores a relevant body of precedent and eschews any considered analysis. It is more so when the result of such an approach is a rule that leaves law-abiding citizens at the mercy of the officer's whim or caprice...and renders the constitutional protection of our 'persons' a nullity."

Fifth Amendment. The Fifth Amendment, particularly the rule against self-incrimination, has been long a cornerstone of American jurisprudence. At times, it was all that provided a judicial reason for disallowing torture-chamber methods on the Gestapo model. The **Miranda** decision of the 1960s — making it compulsory for an arresting officer to inform a prisoner of his rights — has predictably come under attack from several directions. The Supreme Court has now ruled that statements taken without the Miranda warning having been given, can now be used to rebut a defendant's testimony — thereby allowing illegally-obtained evidence to be admitted in court, and also having the effect of keeping a defendant from testifying in his own defense. Miranda warnings, once given, can now be effectively ignored by police.

The right not to be forced to testify against oneself has also come under attack with regard to the practice of granting judicial immunity. This practice has now been transformed into a rope-and-mirrors apparatus in which a person can be given immunity, forced to testify on pain of being jailed for contempt, and then prosecuted anyway. A prosecutor can then prosecute someone for offenses described under immunity — if he can show he obtained confirming evidence elsewhere. In other words, after a person is forced to testify, the prosecutor pays off a witness, has his "independent" evidence, and the right under self-incrimination is abolished.

Sixth Amendment. This amendment, giving a defendant the right to counsel and the right to confront his accusors has not yet been totally butchered. Burger — who was rewarded with his first judgeship for arguing that Communists have no right to face their accusors, when no one else could be found to make such an argument — has openly maintained his hostility toward the provisions of the Sixth Amendment. For the first time in history, the prosecution has now been granted the right to look through a defense attorney's files, and certain types of defense strategies must now be disclosed in advance or they are banned from usage. The right to counsel for persons who cannot afford to hire counsel and who face prison is likely to get the ax soon.

In addition to the above attacks on the Bill of Rights, the Burger Court has also dismantled basic constitutional rights on numerous "procedural" grounds, usually whether a person has "standing" to bring an action and whether or not a court has jurisdiction to hear a certain legal question. This has created a netherworld of Catch-22 situations where an individual is threatened, attacked, or abused, but can never get into Federal court for a catalog of reasons so abstruse that only a reader of "Bleak House" could confuse them with serious legal reasoning.

Time to Fight

It has never been more the case than now that the working class and the entire population will only possess those rights which they are prepared to fight for and defend. The United States Constitution is by no means a document intended to be favorable to the working class or to actual democracy, but the protections embodied in the Bill of Rights cannot be allowed to be wiped out.

If the subversion of democracy and the Constitution by the present Supreme Court is allowed to continue, police-state rule in the United States is assured. The effect of recent rulings is to give police agencies a free hand in violating citizens' rights and conducting legalized frameups, and then to deny to citizens the rights of redress against such repressive actions.

This is legalized police-state justice — no rights, no redress. The present Supreme Court must be forced under massive public pressure to either repudiate its present subversion or it must be impeached by Congress. The alternate basis for a humane system of criminal justice is spelled out in the Labor Party's new Law Enforcement Reform Act of 1976. Any citizen or politician who does not join in this campaign is inviting the imposition of legalized Nazi justice in the U.S.