wrong to permit the Democratic Party to throw out over 53,000 lawfully-cast votes for LaRouche in the May 2000 Democratic Primary, and to refuse to award LaRouche the convention delegates which LaRouche won in that state-run primary election?

Power Politics and The Supreme Court

by F.A. Freiherr von der Heydte

The following excerpts are taken from "The Thornburgh Doctrine: The End of International Law," published in the May 25, 1990 issue of EIR. *The late Professor von der Heydte was a noted expert on civil and international law, and is the author of the book* Modern Irregular Warfare, *published in English in 1986. In 1962, he was named Brigadier General of the Reserves for the West German army; during 1966-70, he was a member of the State Parliament of Bavaria for the Christian Social Union (CSU). We reprint these excerpts here, because of their extreme relevance to the doctrines of Chief Justice William Rehnquist and Associate Justice Antonin Scalia, which are even more evident ten years later.*

The so-called Thornburgh Doctrine, according to which all traditional international and constitutional law is strictly subordinated to considerations of power politics and opportunism, a doctrine pushed aggressively by the Bush administration and already used on a grand scale in the invasion of Panama, received the blessing of the Supreme Court, the highest court of the United States, in a ruling of Feb. 28, 1990. . . .

With the aforesaid decision in the case *United States v. Verdugo-Urquidez,* the Supreme Court decided that American officials abroad can undertake searches and can seize materials without restriction and in circumvention of orderly legal proceedings. The court quashed an earlier decision of the Ninth Circuit Court of Appeals which decided that, without a court-ordered search warrant and without observing the limitations of the Fourth Amendment in a search of a Mexican residence, the evidence found by the appellant could not be used against that Mexican citizen. The Supreme Court, by a majority of 6-3, found that the Fourth Amendment, which prohibits unlawful government search and seizures, cannot be claimed by foreigners in foreign countries, since the relevant activities of American officials are not subject to the provisions of the U.S. Constitution and the Bill of Rights.

The decision follows a line of development of U.S. legal opinions and justice policy that has been recognizable for some time. . . .

With equal clarity, the justification written by Chief Justice William Rehnquist shows a conscious rejection of any legal principles that are superior to positive law; indeed, they show a total absence of principled legal-ethical considerations. . . .

Justice Rehnquist's legal argument, which derives a whole structure of argumentation from two words, is the expression of an extreme legal positivism that must necessarily come continually into conflict with constitutional principles founded on natural law. . . .

The U.S. legal positivism criticized here, does not attempt to appeal to this sort of superior principles of law. The principle unmistakenly applied—"might makes right"—is subject to only one restriction, that of utilitarianism. What is justified, is what "serves the national interest."

Thus, we find repeated reference to pragmatic considerations in recent legal opinions of the U.S. Department of Justice and the Supreme Court decision under discussion here. Abraham Sofaer, then legal adviser to the State Department, to shore up his legal position, used a quote from former Secretary of State Henry Kissinger in which Kissinger speaks of "moral and practical imperatives" and the parallel goals of "law and pragmatism."

Purely pragmatic grounds are also drawn upon for the selective application of U.S. penal law without simultaneous consideration of all constitutional provisions: Justice Rehnquist thinks that any other decision would too sharply impair U.S. activities abroad. . . .

Justice Kennedy goes even further in his pragmatic evaluation of the case. In general, he does not want to contest the validity of constitutional provisions in foreign countries, but believes that the specific form of the case makes an application of the Fourth Amendment appear to be "not practical and anomalous."

Quite in the spirit of the Thornburgh Doctrine, Justice Rehnquist comes to the conclusion that the highest necessity is the ability of the government to act in "the national interest." Germans who read this cannot help recalling the time of the National Socialists and their leading legal ideologist, Carl Schmitt, who considered any action in "the national interest" to be justified.

However this so often belabored "national interest" may be defined, it has nothing to do with the law, even if there are many historic examples for such pragmatism being the determining factor of government actions or even legal opinions. . . . Complying with the Constitution may in individual cases appear to be "impractical" and complicated; but violating it—even if in the supposed "national interest"—is always illegal. Law is the counterpole to power, and the mixing of the two can never establish law.