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COMMENT

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I. INTRODUCTION

The recent escape of Pablo Escobar, head of the Medellin drug cartel, from his luxury "maximum security" jail represents another sad chapter in the long history of a criminal justice system in crisis. For decades, judges have been threatened or bribed into compliance with the demands of criminals from both left and right. Further, Columbia's antiquated criminal justice system, with little emphasis placed on criminal investigation, has produced one of the highest impunity rates in the world.[1]

Colombia desperately needs to reform its criminal justice system. The existing judicial crisis is an abdication of the state's fundamental and primordial function—to protect its citizens from a Hobbesian state of war.[2] Without an adequate criminal justice system, Colombia will remain one of the world's most violent democracies, unable to achieve what Alexis de Toqueville called in Democracy in America the "great aim of justice . . . to substitute laws for the idea of violence."

Fortunately, Colombia is a country ripe for reform. In 1991, Colombia ratified a new constitution, affecting numerous areas of Colombian political life. The rights of indigenous peoples have been recognized, and important human rights reforms have been adopted.[3] Equally important, the new constitution promotes pluralistic participation in political life by eliminating the power-sharing agreement between the two main political parties. This agreement was adopted in the mid-1950s in order to end the decade-long civil war known as "la violencia" in which an estimated

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1. *See* Gabriel Gutierrez Tovar, *Reflexiones sobre la Impunidad*, in JUSTICIA, DERECHOS HUMANOS E IMPUNIDAD 225 (Hector Peña Diaz, ed.,1991).

2. *See* Armando Borrero, *Constitucion y Orden Publico*, 13 REVISTA FORO 34 (1990).

3. *See generally* CONST. COLOM. arts. 11-94.

200,000 Colombians were killed.[4] As a result, former leftist guerrillas and other traditionally marginalized and powerless groups[5]—workers, peasants, and indigenous peoples—have played an active role in the new government. The 1991 Constitution is thus seen by many as a political and social revolution, a commendable exercise in the re-creation of constitutional democracy in a country long bled and drained by civil strife.[6]

In 1991, Colombia enacted important changes in its criminal justice system. One of the most interesting changes was the creation of a secret court system for drug and terrorism cases. The hope is that judges who are granted anonymity by having their identities concealed will be protected from threats or assassination, enabling the judges to bring criminals to justice. The crucial question, however, is whether these secret courts can achieve the twin goals of protecting the judiciary and increasing the conviction rate, without sacrificing the rights of criminal defendants which are guaranteed in the new constitution.

The short answer is that these rights are sacrificed. Although the secret court system has increased the conviction rate and provided some protection to the judiciary, it has done so at the cost of basic rights of the criminal defendant. Moreover, the secret court system has been used for political ends, punishing legitimate political protesters as "terrorists." As such, the secret court system should be abandoned, as the pursuit of justice is too precious a jewel to be bought with authoritarian coin.

II. BLOOD ON THE ROBE: COLOMBIA'S EMBATTLED JUDICIARY

Violence against the Colombian judiciary has been pervasive, persistent, and deadly. According to a recent study[7] by the Andean Commission of Jurists, a human rights group in Bogotá, an average of twenty-five judges and lawyers have been assassinated or have been attacked each year since 1979. In all, 515 cases of violence against judges and lawyers have been reported between 1979 and 1991, 329 of which have been murders or attempts to murder.[8] And, of the approximately 4,500 Colom-

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4. *In Colombia, Killings Just Go On and On*, WALL ST. J., Nov. 17, 1987, at 10.

5. *See* HERNANDO VALENCIA VILLA, THE GRAMMAR OF WAR 1-2 (1986).

6. For a less sanguine view, see William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. OF MIAMI INTER-AM L. REV. 39, 85-86 (Fall 1991) ("It is unclear whether the invocation of popular sovereignty to legitimate the reform process in Bogotá reflects a genuine public demand for a new set of societal rules and institutions. Instead, it could simply be another episode of constitutional reform serving as a shield to protect the less populist and shorter term political goals of those in power. Legally, it makes no difference. The Colombian electorate indicated by plebiscite that they wanted a chance to vote for a constitutional assembly, and did just that by conferring their primary sovereignty upon a popularly elected body").

7. For a thorough description and in-depth analysis of the violence facing Colombia's judiciary, see Guido Bonilla & Alejandro Valencia Villa, *Justice for Justice: Violence Against Judges and Lawyers in Colombia: 1979-1991* (1992) (on file at the Andean Commission of Jurists: Colombian Section, Bogotá, Colombia).

8. COLOMBIAN SECTION, ANDEAN COMMISSION OF JURISTS, JUSTICIA PARA LA JUSTICIA: VI-

bian judges, roughly 1,600 have received threats to themselves or their families.[9]

Although Colombia is popularly perceived as a country besieged by drug-related violence (narcoterrorism), it is important to note that judicial intimidation has been neither exclusively nor primarily linked to drugtrafficking.[10] According to the Andean Commission study, of the 240 cases of violence against the judiciary with a known author or cause, eighty have been linked to paramilitary groups, fifty-eight to drugtraffickers, forty-eight to state agents (including the military and the police), thirty-two to guerrillas, and twenty-two to other factors.[11] Corruption and violence, like blood, runs thick in Colombia, and few have kept their hands clean.

Violence to the judiciary is as widespread as it is deadly. No sector of the judicial hierarchy has been untouched. While criminal trial court judges are the most effected, Justice Ministers and Supreme Court justices have been threatened or killed as well. Perhaps the most graphic and poignant illustration of Colombia's embattled judiciary occurred in November of 1985, when M-19, a leftist group, stormed the Palace of Justice, taking twenty-four Supreme Court justices hostage. The government refused to negotiate, choosing a military option instead. In the ensuing raid, involving over twenty-eight hours of intense fighting and the bombing of the Palace of Justice by the government, thirty-five members of M-19, several dozen hostages, a dozen soldiers, and eleven Supreme Court justices were killed.[12]

What has happened to those who kill members of the judiciary? Virtually nothing. According to the Andean Commission study, in over eighty percent of the cases reported, there is no evidence of criminal action being carried out.[13] As a result, criminal sentences have been imposed in only 2.1 percent of cases.[14] The inability of the justice system to investigate and prosecute the crimes committed against it reflects the dire situation of Colombia's judiciary: how can the judiciary protect others if it cannot protect itself?

III. JUECES SIN ROSTRO: FACELESS JUDGES

In response to this drastic situation, Colombia has created a special jurisdiction of secret courts with *jueces sin rostro*, or faceless judges, to protect the judiciary. These courts are known as Courts of Public Order, dealing with crimes disproportionately affecting the public order, such as

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OLENCIA CONTRA JUECES Y ABOGADOS EN COLOMBIA: 1979-1991, 1992 [hereinafter JUSTICIA].

9. *Colombia Struggles to Seal Its Judges' Armor*, N.Y. TIMES, Oct. 13, 1991, at 10.

10. JUSTICIA, *supra* note 8.

11. *Id.*

12. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, COLOMBIA: A COUNTRY STUDY 298 (Dennis M. Hanratty & Sandra W. Meditz eds., 1990).

13. JUSTICIA, *supra* note 8.

14. *Id.*

drug trafficking, terrorism, kidnapping, and the illegal transportation of arms.

These special courts were established in 1984 for drug cases and were expanded in 1987 to include "political crimes" — rebellion, sedition, and other acts of violence committed with criminal intent.[15] In November of 1991, the current President Cesar Gaviria unified both systems under the Statute for the Defense of Justice. These courts were originally implemented under state of siege legislation and considered "exceptional", as a scaffolding to be used only until a solid structure of criminal justice could be constructed. However, with the passage of the New Code of Criminal Procedure on November 30, 1991, they became a permanent fixture in Columbia's criminal justice infrastructure[16]

Eighty-two judges (of which forty-nine are trial judges and thirty-three are investigative judges) currently sit in these secret courts. All communication is done either through two-way mirrors using Darth Vadaresque voice distorters, or in writing. Witness statements are authenticated by a complex system of fingerprints in lieu of signatures. Opinions are unsigned, with only a judicial number affixed to the decision. The identity of police agents and informants may be kept secret as well.[17] As a final protection, a chief of security is assigned to each court to coordinate threat assessments, and the judges are provided with armed escorts to and from work.

The Colombian secret court system, with no known analogue in the world, has received accolades from the international law enforcement community, who finally see Colombia cracking down on drugs.[18] Indeed, in terms of effective law enforcement, the secret court system is to be commended. After all, the conviction rate is estimated to have jumped from approximately 10% in ordinary courts to 70% in the secret courts.[19] And, according to the Andean Commission study, threats against judges have dropped dramatically, by eighty percent. But at what cost?

IV. PROCEDURAL NIGHTMARES IN COLOMBIA'S SECRET COURTS

The high conviction rate in these special courts should come as no surprise, given the absence of basic constitutionally-protected procedural rights that criminal defendants in the United States take for granted. If one were to red-line the U.S. Bill of Rights and drastically reduce or eliminate many protections for criminal defendants, the result would be similar to the situation facing the accused in Colombia's secret courts.

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15. AMERICAS WATCH, POLITICAL MURDER & REFORM IN COLOMBIA: THE VIOLENCE CONTINUES 98 (1992).

16. *Id.*

17. COLOMBIAN SECTION, ANDEAN COMMISSION OF JURISTS, UNA JUSTICIA AMENZADA: COMMENTARIOS AL ESTATUTO PARA LA DEFENSA DE LA JUSTICIA 2 (1991).

18. *See* Steven Flanders & Ana Maria Salazar, *Colombia's Purgatory*, N.Y.L.J. 2 (Jan. 21, 1992).

19. *Colombia Struggles to Seal Its Judges' Armor*, *supra* note 9.

For example, the criminal defendant in the Colombian secret court system has no 8th Amendment right to a bail hearing.[20] Under U.S. law, by contrast, pre-trial detention through the denial of bail is considered the exception rather than the rule. The Framers of the U.S. Constitution prohibited the imposition of excessive bail in the Bill of Rights to prevent the recurrence of the harsh treatment suffered by colonists in British jails during the Colonial Period.[21] From this constitutional basis, U.S. law has developed to the point that in the federal system, pre-trial detention is only available if the government can demonstrate by clear and convincing evidence that the defendant is likely to flee the jurisdiction, or that no release conditions "will reasonably assure. . .the safety of any other person and the community."[22]

In Colombia's secret courts, by contrast, the accused must suffer the indignity of incarceration, separated from family and friends, with absolutely no burden on the government to justify this deprivation of liberty. More importantly, the absence of 8th Amendment protection may seriously prejudice the criminal defendant in the preparation of his defense. Stuck in jail with no hope of release, the criminal defendant may find it difficult to contact and prepare witnesses for his defense, or confer with his lawyer at his leisure.

At the trial stage the treatment of the accused turns from bad to worse. Secret proceedings eliminate the 6th Amendment right to a public trial,[23] ensuring that violations of constitutional rights are concealed from

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20. *See* COLUMBIA SECTION, ANDEAN COMMISSON OF JURISTS, SISTEMA JUDICIAL Y DERECHOS HUMANOS EN COLOMBIA 43 (1990).

21. Ironically, the "bail clause [adopted by the Framers] was lifted with slight changes from the English Bill of Rights Act." *See* Carlson v. Landon, 342 U.S. 524, 545 (1952), *reh. den.*, 343 U.S. 988. The right to a bail hearing, however, has not been extended to state prosecutions. *See* Collins v. Johnston, 237 U.S. 502, 59 L.Ed. 1071, 35 S.Ct. 649 (1915).

22. *See* United States v. Salerno, 481 U.S. 739, 95 L.Ed.2d 697, 107 S.Ct. 2095 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Expressed in a different vein, the Federal Bail Reform Act, codified in 18 U.S.C.S § 3142(f), requires that a judge inclined in the first instance towards the release of an accused on his own recognizance or upon unsecured bond.

23. The Sixth Amendment right to a public trial has been made applicable to the States through the Fourteenth Amendment. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). Exceptions to a right to the public trial have been held permissible in certain exceptional circumstances. As stated by the Supreme Court, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). As an illustration, *see* United States v. Hernadez, 608 F.2d 741 (9th Cir. 1979) (exclusion of spectators allowed when witness had been subjected to pretrial threats); United States *ex rel.* Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969) (exclusion of spectators who threatened witness at trial); United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2d Cir. 1975), *cert. denied*, 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (exclusion of spectators during the testimony of an undercover agent engaged in ongoing investigations proper); United States *ex rel.* Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965) (exclusion of spectators permissible when necessary to preserve order in the courtroom).

public scrutiny.[24] On the political level, secret courts also militate against the openness in government reflected in the new Columbian Constitution. Through public trials, citizens may learn about the machinery of their government, acquiring confidence that the judicial process is not being used for abusive ends.[25] Further, as a practical matter, public trials make the proceedings known to possible witnesses who otherwise might be unknown to the parties.[26]

The system of secret witnesses, violates the 6th Amendment right to confront witnesses, one of the most valuable defense tools. In these courts, defense lawyers may neither question witnesses before trial nor cross-examine them at trial. This prevents the defense from calling a witness' demeanor, credibility, or bias into question (although a conviction cannot be based on a single secret testimony). As a result, a central principle of the U.S. trial system—that truth is best revealed through an adversarial process in which both parties present their case, with witnesses subject to cross-examination and evidence subject to contradiction—is severely curtailed.

Colombians may be familiar with the adversary system in action through the popular television show "*Las Leyes de Los Angeles*," or "L.A. Law." But the adversary system's utility extends far beyond making exciting television episodes. Rather, on the philosophical level, the adversary system attempts to check what Weber called the modern state's monopoly on force[27]—its power to investigate, prosecute, and punish—through giving the defense the opportunity to put into question the government's evidence and witnesses. Regrettably, in Colombia's secret courts, there is little to control the Leviathan. The danger is that the judge will consider only the evidence and uncontroverted testimony proferred by the government; tipping the scales of justice in their favor.

The criminal defendant is further prejudiced by the massive system of protection provided for government informants. The cornucopia of benefits provided those who collaborate with the authorities by testifying against the accused include pecuniary compensation, a new identity, exit from the country, immediate conditional release, and exemption from punishment.[28] While the Federal Witness Protection Program[29] in the

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24. *See* In re Oliver, *supra* note 23 ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarcy's abuse of the *lettre de cachet*. . .[W]hatever other benefits the guarantee to the accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution").

25. *See* Ravinsky v. McKaskle, 772 F.2d 197 (5th Cir. 1984).

26. *See* 6 J. WIGMORE, EVIDENCE § 1834 (Chadbourn rev. 1976).

27. For a discussion of the moral justification of the modern state's monopoly on force, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 89-119 (1974).

28. *Id.*

29. The Federal Witness Protection Program, established by Congress in 1984, autho-

U.S. provides similar benefits and protections,[30] there is a crucial difference.

In the U.S. system, the witness must still be present at trial. This subjects the witness to the moral constraint of lying in front of the accused, and, more importantly, to the cross-examination of an aggressive defense attorney.[31] Further, having the witness present at trial tends to assure testimonial trustworthiness by inducing fear that any false testimony will be detected.[32] The danger in Colombia is that the government, in its zealous pursuit of convictions, may play the role of the serpent in the Garden of Eden—tempting witnesses and informants to lie with the fruit of governmental goodies—unchecked by the power of a probing and thorough cross-examination.

In short, the Colombian secret court system amounts to a criminal defendant's nightmare. Colombia has its Gabriel Garcia Marquez to describe the *realismo fantastico* of Colombian life; what it lacks is a Franz Kafka to describe the judicial absurdity its many Joseph K's face in the secret court system. Criminal defendants are being convicted by unknown witnesses paid by the state, absent from the trial, and immune from cross-examination. Further, if the judge decides the evidence must be kept secret, the "judicial decision" may be a mere piece of paper, containing only the judge's number. The concept of feeling guilty without knowing why may make for interesting existential novels, but it has no place in criminal law—especially when one is being punished for crimes that carry penalties of up to thirty years in jail. A system that cripples a solid criminal defense, and leaves judicial decisions unexplained, reflects a process of judgment more reminiscent of the Medieval Inquisition than of modern standards of criminal justice.[33] The "miracle" of the Colombian secret court system is not that seventy percent of those accused are convicted, but that thirty percent go free.

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rizes the Attorney General to take such action as he deems "necessary to protect the person involved from bodily injury and otherwise to assure the health, safety, and welfare of that person [or an immediate family member or close associate], including the psychological well-being and social adjustment of that person, for as long as, in the judgment of the Attorney General, the danger to that person exists." 18 U.S.C. § 3521(b)(1).

30. Among these include new identification documents, housing, moving expenses, employment assistance, and "a payment to meet basic living expenses." 18 U.S.C. § 3521(b)(1)(A)-(H).

31. For a sample of an effective cross-examination, *see* Frank Rubino's cross-examination of Federal Witness Protection Program participant Danny Martinez in *Dealing with the Devil (and Lesser Imps)*, 20 Crim. Prac. Man. (BNA) 464 (Sept. 30, 1992); *see also Expert can show how Sweet Cooperating Witness's Deal Is*, 5 Crim. Prac. Man. (BNA) 465 (Oct. 2, 1991).

32. *See* WIGMORE, *supra* note 26.

33. *See* Alejandro David Aponte, *Como matar a la justicia en la tarea de defenderla: "Estatuto para la defensa de la justicia,"* 11 ANALISIS POLITICO 77 (1990).

V. CASTING THE CRIMINAL NET: POLITICAL ABUSE OF COLOMBIA'S SECRET COURTS

The lack of procedural rights in the secret court system are problematic; however, its potential for political abuse is even more concerning. Latin America is notorious for its *caudillos* or dictators of both left and right, from Castro to Pinochet, who have abused power to strengthen their regimes while violating basic human rights. Accordingly, any increase in the state's power, particularly the removal from the public eye of the state's power to discipline and punish, must be subject to the strictest scrutiny.

The Colombian government has claimed that the purpose of the secret court system is two-fold and inter-related: to protect judges and to combat terrorism. While fighting terrorism is a valid and essential goal, a wide criminal net can be cast over that rubric. The danger is that the Colombian government, seeking a surcease of the violence that has made Colombia one of the world's most violent democracies, will use an over-expansive definition of "terrorist" to mask prosecutions against political dissidents or to cover daily arbitrary violations of human rights.[34]

The problem of interpretation is essentially one of language. As Anglo-American legal theorists from H.L.A. Hart to Albert Saks have noted, restricting legal terms to one fixed literal meaning is difficult, for words are inherently ambiguous. Continental deconstructionists such as Michel Foucault or Jacques Derrida would go even further, claiming that the meaning of the written word eludes even the author herself, and must be interpreted in a sociological and contextual framework.

While this presents problems for a judge seeking the "literal" meaning of a statute, it can have grave consequences when applied to a slippery term such as "terrorist" or as manipulable a phrase as "acts of rebellion or sedition." For, as Montesquieu sagely noted, ". . .not defining what is meant by treason is enough for the government to become despotic."

Who has been caught in Colombia's terrorist net? Human rights advocates report that student protestors, peasants, and others critical of the present regime have been convicted in these secret courts for legitimate acts of social protest.[35] Indeed, the irony is that a liberal interpretation of the phrase "acts of rebellion or sedition" could be applied to the very grass-roots student movement which led to the important constitutional reforms of 1991. An over-broad net has been cast in the fight against narcoterrorism as well, dragging in both major drugtraffickers such as Pablo Escobar, with millions to spend in his defense, and mere consumers

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34. *See* Fernando Velasquez V., EL ESTATUTO PARA LA DEFENSA DE LA JUSTICIA: UN RETORNO A LA INQUISITION!, 51 NUEVO FORO PENAL 4 (1991).

35. Interview with Alejandro David Aponte, Professor of Law, Universidad de Los Andes, at the Andean Commission of Jurists, Bogotá, Colombia, Aug. 18, 1992.

too poor to afford their own lawyer.[36]

By punishing acts of political protest, the Colombian government is frustrating the purpose of the new constitution, which seeks dialogue for the resolution of social conflict. Voices muted in the past by a *de jure* power-sharing arrangement between the two main political parties and *de facto* class stratification, will remain silent if the government continues to abuse the secret courts for political ends. Further, expanding the criminal net in this manner violates a time-honored and internationally-respected principle of criminal law, *nulla poena sin lege* ("no punishment without a crime"). According to this doctrine, criminal statutes are to be narrowly construed as a check on the government's power, to protect citizens from arbitrary and unanticipated incarceration. No one should be judged and punished without conforming to the preexisting law for which he is punished.[37] Regrettably, such is the situation facing these erstwhile political protestors turned "terrorists" by the secret court system.

VI. CONCLUSION

The Colombian secret court system has been a moderate success. Supporters of the system point to the degree of security it provides to a beleaguered judiciary, helping to remove the death sentence under which many judicial officials worked in the past. They note as well that criminal convictions have risen dramatically, helping to lower the high impunity rate plaguing the country.

Supporters of the system fail to recognize two critical points, however. The first is the limited efficacy of the protection the system provides. The second is the tremendous cost to personal liberty and political participation of the secret court system.

The argument that the secret court system provides greater protection for judges is specious in several aspects. First of all, security is limited to a minority of judges—*jueces sin rostro* and Supreme Court justices—while the great majority of judicial functionaries go unprotected. Even the protected judicial elite is only safe from 9 to 5. Further, it appears that the efficacy of the secret court system will be of limited duration. As recently as September 19, 1992, a *jueza sin rostro* and her three bodyguards were assassinated in front of her home by *sicarios* in Medellin.[38] As critics had predicted, the veil of secrecy has been irreparably torn. Finally, the decrease in violence to the judiciary should not be too quickly accredited to the secret court system. The ban on extradition of Colombian nationals and the inclusion of leftist groups in the new consti-

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36. *Id.*; *see also* Aponte, *supra* note 33, at 79.

37. In the United States, constitutional due process requires that the statute which defines a substantive crime must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

38. *Asesinada una jueza sin rostro*, EL TIEMPO, Sept. 19, 1992, at 1A; *see also Narcos amenazan a jueces sin rostro*, EL TIEMPO, June 6, 1992, at 1A.

tution have played an equally important role in the recent cessation of attacks on the judiciary.

The second argument in favor of the secret court system, that it has increased the conviction rate, is equally troubling. High conviction rates can always be achieved by clipping the rights of criminal defendants. Furthermore, troublesome political "enemies" can always be more easily dealt with through the long arm of the law rather than through the long and arduous process of negotiation and dialogue which, democracy demands. Colombia is a country seeking to create itself anew, to secure a respite from the violence which has plagued the country for years on end. The 1991 Constitution, promoting pluralistic participation in political life and the laying down of arms, is a step in the right direction. The secret court system, with its clipping of procedural rights and criminalization of dissent—is not. Justice, like the beautiful emeralds for which Colombia is renowned, is too precious a jewel to be bought with authoritarian coin.