Criminal Justice: New Developments in the Judicial Art of Repression

CRIMINAL JUSTICE: NEW DEVELOPMENTS IN THE JUDICIAL ART OF REPRESSION

By Michael Deutsch

As the U.S. economic crisis deepens, foreign military intervention escalates, and the band-aid solutions and explainations of the past become less and less viable, the Government is finding it necessary to develop new weapons and strategies to contain and control the inevitable, growing, militant opposition to the injustices of capitalism in decline. Of course it is true that militant and in some cases armed resistance has a long tradition in the Black, Puerto Rican, Mexican and Native American national movements, and to a lesser extent within sectors of the multi-national working class, and that severe repression involving use of the criminal justice system has been the traditional response. Most recently, however, and particularly in response to the emergence of armed clandestine activity in the Puerto Rican Independence Movement, the Reagan Justice Department has developed and refined a panoply of highly repressive legal devices, involving further, radical perversions of fundamental constitutional rights, which, coupled with a new level of unquestioning cooperation from the Establishment press, constitute a broad new threat to progressive political activists and movements.

The use of these methods, many of which were first developed supposedly to fight "Organized Crime",* is restricted in the first instance to those movements which, with the help of media outlets who willingly publish the false, grossly distorted and one-sided information it purveys, the Government is able to isolate and brand as "terrorist". In this way they gain initial judicial and public approval for such measures with a minimum of public opposition. In particular, in prosecutions of several groups of armed combatants said to belong to the Puerto Rican F.A.L.N., and grand jury operations against numerous public activists in the Puerto Rican independence movement, and in the state and federal prosecutions arising from the failed holdup of a Brinks' armored truck in Nyack, New York in October, 1981, the Government has inaugurated the use of several new judicially based repressive mechanisms. The Guild lawyers most familiar with the ways the purported rule of law is used to accomplish political repression, must take a leading role in exposing and organizing against these new invasions of the people's rights.

While most progressive people are familiar with the use of grand juries to investigate political movements, and to imprison activists who refuse to testify for civil contempt,** recent developments have sharply escalated the conse-

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*In the words of U.S. Attorney General William F. Smith when he announced the new FBI guidelines:

> "We must ensure that the criminal intelligence resources which have been brought to bear so effectively on organized crime are effectively employed in domestic security/terrorism cases."

**Imprisonment for civil contempt can last for the life of the Grand Jury, up to 18 months or until the witness agrees to cooperate by giving information.

quences for refusing to cooperate with a grand jury inquiry. In response to a unified position of non-collaboration, several activists and supporters of the Puerto Rican Independence movement have been resubpoenaed after already having spent months in jail in civil contempt for refusing to cooperate with purported investigations concerning armed sectors of the movement. In resubpoenaing these grand jury resistors, who by their prior incarceration and public political work and statements have made it absolutely clear that they would never testify, the Government has no expectation of gathering evidence. Their intention is nothing more or less than the incarceration of political and community activists without any charge of criminal wrongdoing, i.e. political internment American style.

Further, the Government on this 'second time around' has substantially raised the stakes, by proceeding in criminal rather than civil contempt for non-collaboration. This allows them to criminalize grand jury resistance as well as greatly increasing the potential term of imprisonment. The criminal contempt statute (18 U.S.C. Sec. 401(3)) contained no limit on the available penalty, allowing a sentence up to and including life imprisonment. Since the same act of refusal to testify could result in civil or criminal contempt, or both, and there are no definite standards for differentiation, the intimidating and coercing power of the grand jury subpoena, and the price of non-collaboration, have been greatly increased.

The use of criminal contempt which heretofore has been confined to a few isolated cases against organized crime figures, also involves a perverted use of the petit jury, since, under Bloom v. Illinois, 391 U.S. 194 (1965), the possibility of a contempt sentence in excess of six months entitles the accused to a jury trial. It appears that the only function of the jury in a criminal contempt case, however, is to "decide" the cut-and-dried question of whether the defendant testified; so that the petit jury, like the grand jury, is in reality converted into a rubber stamp for the prosecutor. While, it is of course possible for a strong minded juror to reject this obvious usurpation of the independent power, the basic likelihood is that a jury will see no choice but to convict under these circumstances.*

In a recent criminal contempt prosecution against five militant supporters of Puerto Rican independence in Brooklyn, New York, U.S. vs. Rosado, et al., (E.D.N.Y., Sifton, J.), the Court ruled that the jury could consider why the defendants refused to testify in determining whether the contempt was serious or petty. Subsequently, however, when two independence leaders from Puerto Rico were tried by another judge in that district for the same offense, the Court refused to permit any evidence of mitigation or extentuation, and the jury convicted the defendants in less than one hour. (U.S. v. Noya & Cintron, E.D.N.Y., Nickerson, J.)

To enhance the political effect of a criminal contempt prosecution, the Government may attempt to publicly link those called before the grand jury to the

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*In the Noya-Cintron case, the conviction came in a second trial, after the first trial ended with a hung jury.

alleged criminal wrongdoing supposedly being investigated. Thus, in the case of the subpoenaed Puerto Rican independence supporters, the Government, through a media campaign initiated by an official FBI press release, and repeatedly in open court, directly accused the defendants of being members of the F.A.L.N. Even though they were only charged with failing to speak to the grand jury, the Government used the contempt charge as a vehicle to publicly accuse them of serious criminal involvement, without having to formally prove such charges.

The use of the petit jury with no real issue to decide, in the criminal contempt context, appears as part of a more general effort to limit the historic independence of the American jury, which in the last year has also led to the emergence of the anonymous jury in political cases. In the Rosado case, and again in both the state and federal cases against those accused in the attempted Brink's holdup in Nyack, the defense was not allowed to know the name of the jurors or where they lived or worked. The jurors were identified by numbers only.

The anonymity of the prospective jurors, which severely limits intelligent selection and wholly prevents any chance of checking jurors out through community networks, is still not the most damaging aspect of this process. The real danger results from the direct implication that the defendants and/or their supporters are so dangerous that there is a direct threat to the jurors' safety merely by virtue of their participation in the case.

In the Rosado case, the Court granted the Government's demand for an anonymous jury without even the slightest evidentiary showing that one was necessary. Then, in an attempt to explain the problem to the jurors themselves, the Court told them that "...given the statements and allegations that have been made concerning the interest in these matters of groups engaged in violence, I myself thought it was a wise procedure to follow". The clear implication of this explanation is that jurors' safety could be threatened by third parties purportedly associated in some way with the defendants.*

Coupled with this procedure is the ostentatious and exaggerated use of special courtroom security measures, including armed guards and metal detectors searching everyone who enters the courthouse as well as the courtroom. In the state Brinks' trial, the jury was assembled at a building several miles from the courthouse and brought to court in a bus with black drapes covering the windows and then escorted into the courthouse through a phalanx of armed

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*The Rosado case, which is on appeal to the Second Circuit, directly raises the issue of prejudice caused by the use of an anonymous jury and the court's explanation to the prospective jurors. In an earlier case involving an organized crime heroin conspiracy the Second Circuit upheld the use of the anonymous jury against a challenge based upon the inadequacy of voir dire. See U.S.A. v. Barnes, 604 F.2d 121 (2nd Cir. 1979), cert.denied 446 U.S. 907 (1980).

police. In this kind of atmosphere, it is clear that the jury cannot help but be convinced of the dangerous nature of the accused, before the trial even begins.

Further, the State in a pre-trial hearing in the Brinks case was also permitted to use an anonymous witness, claiming that the revelation of identity could also jeopardize safety. The overwhelming prejudice from such a process is obvious.

Much has been written lately about the special statute developed to fight organized crime, the Racketeering Influenced Corrupt Organizations Act (RICO) and the real threat it holds for progressive organizations and movements. The statute allows the conviction of members of any group found to be a "criminal enterprise", based upon the prior conviction of two members of any of a broad list of offenses over a period of ten years. The broad scope of the statute allows for the conviction of members of political groups because of individual activities or other alleged members of that group, and the conspiracy section permits admission of the broadest hearsay.

The Second Circuit recently rejected a claim that the statute is limited to dealing with groups who are concerned with illicit monetary goals and has condoned its use against groups motivated by political considerations, and the recent federal trial of alleged Black Liberation Army cadre and supporters in the Brinks case, resulting in the conviction of two political activists on substantive and conspiracy counts under RICO, shows that the threat of RICO against political people is a reality.

The Government also has resurrected the seditious conspiracy statute to prosecute Puerto Rican independence fighters accused of being part of the F.A.L.N. The statute, Title 18 U.S.C. Sec. 2384, makes it a crime to conspire to oppose the authority of the U.S. government by force. In a current case in federal court in Chicago, four Puerto Rican activists are accused of conspiring to oppose the authority of the U.S. government by joining the F.A.L.N. in order to obtain independence for Puerto Rico. This charge, in which the political motivations of those accused are the key element of the offense, has been used almost exclusively against the Puerto Rican independence movement over the last fifty years, with mass prosecutions against leaders of the Puerto Rican Nationalist Party working in Puerto Rico and the United States in 1937 and 1955, and against accused members of the F.A.L.N. in 1981, 1982 and 1983. The statute, in that it permits a criminal conspiracy conviction without any showing of an overt act, is clearly a dangerous and important potential weapon against outspoken militant members and sectors of different progressive movements.

Special Prison Constitutions for Political Prisoners

Another element of the broad, new strategy of repression being implemented by the Government today is the confinement of those accused in political cases to 24-hour isolation while they are in prison awaiting trial, thus denying them fresh air and exercise, as well as the visiting, telephone and correspondence privileges afforded to other pre-trial detainees. In the Chicago F.A.L.N. case, Alejandrina Torres, a 44 year old mother and wife of a congregationalist minister, was held for five months in an isolation unit with all male prisoners and guards, where she was not even able to use the toilet in her cell without being spied upon. When these clearly discriminatory and repressive conditions have

been challenged in court, the Government has submitted secret ex parte affidavits supplied by the FBI to justify the punitive isolation.

The increasing use of secret ex parte affidavits in political cases is also an alarming development. At various stages of pre-trial litigation the Government now seeks to submit secret information to the judge, claiming disclosure to the defense would be harmful to their ongoing investigation or compromise informants. Such secret applications have been submitted by Government prosecutors in response to motions to quash grand jury subpoenas, to justify Draconian prison conditions for those accused and the setting of high bail, as well as for purposes of revoking bond after conviction and prior to sentencing.

The perversion of the adversary process and the fundamental rules of evidence has also begun to emerge at the sentencing stage. Relying on special provisions of the RICO statute which allow the Government to show that a defendant to be sentenced is a member of a "racketeering influenced" organization, the Government is now seeking to use that statute as well as the general reasoning behind it to prove political affiliations as a basis to enhance the sentence.

After the criminal contempt conviction of the five Puerto Rican supporters in Brooklyn, (not a RICO case) the Government demanded a special hearing in which they would prove that the convicted criminal contemnors were members of the F.A.L.N. in order to justify the 15 year sentence it was demanding on the contempt conviction. The Government requested the right, clearly not provided under the federal pre-sentence procedures, to prove through informants, FBI agents, and circumstantial physical evidence, as well as the political statements and affiliations of the Defendants, that they were members of the F.A.L.N. When the Court required that they submit any relevant evidence to the probation department before it could be considered by the Court, the Government refused and instead prepared a 150 page sentencing memorandum, replete with scurrilous, false and purposely misleading accusations, defaming not only the defendants but also their lawyers and innocent third parties.

When the Court refused to consider such an improper pleading, the Government filed it anyway, and then immediately released it to the media, who willingly printed the lies and slanders it contained. While the Government's efforts to convert the sentencing into a political witch hunt failed on this occasion, a more receptive judge could have easily allowed such a proceeding.

Informants and Traitors

Another important feature of the repression of the 1980's is an increasing reliance on informants, and, in particular, the evident application of sophisticated thought reform techniques, many of which have been developed in the federal prison system, to change political prisoners into traitors against their comrades and movements. The turning of a single prisoner enables the Government to justify all kinds of repressive attacks against political movements with the claim that they are relying on information supplied by the cooperating prisoner. In the case of Alfredo Mendez, a one-time F.A.L.N. member now in the Government Witness Protection Program, the Government has falsely claimed to have relied upon information supplied by him to justify grand jury subpoenas, to obtain judicial warrants for wiretapping, break-ins and buggings, and to leak scurrilous lies to the press in order to discredit the independence movement.

Not surprisingly, increased attacks on political activists by way of the criminal justice system are accompanied by increased attacks on radical lawyers representing political people who are under attack. As in West Germany, attempts have been made to bar lawyers from representing political prisoners because of their support for the politics of their clients. Recently, lawyers have been subpoenaed to grand juries, specifically targeted for entrapment by electronically wired government agents, arbitrarily barred from seeing their clients in prison, accused without being charged of assisting in escapes and harboring, as well as threatened and surveilled by the FBI. Indeed, the recent history of government movements against Guild members could and should be the subject of a whole separate article.

But it is a venerable truth that we must not wait until we ourselves become the victims of political attacks by the Government -- to say nothing of the urgent obligation upon all anti-imperialists to recognize and respond to the critical fight against colonialism and for self-determination and independence for Puerto Rico. The time to organize and mobilize against such attacks is now, regardless of any apparent remoteness of the struggles of the initial targets from those we ourselves may be involved in. The sharply escalated use of secret procedures of all kinds within the criminal justice system, coupled with increasing resort to direct manipulation of public opinion through the media, should confirm the overall seriousness of the government's plans and intentions. Our own must be equally cogent and broad. The fight against Government political attacks made by means of the criminal justice system, which are really attacks upon the criminal justice system, must be a top priority for the Guild.