The Twilight of Personal Liberty

Introduction to 'A Permanent State of Emergency'

MICHAEL E. TIGAR

"The law is a mask that the state puts on when it wants to commit some indecency upon the oppressed." I put these words into the mouth of a character in my play "Haymarket: Whose Name the Few Still Say With Tears." Jean-Claude Paye has once again done us a service by showing how those words can come true. In theory, the bourgeois democratic state, as defined in the American constitution, was to operate under two basic principles. The first of these was separation of powers. Legislative and executive action would be held to a standard of legality by the action of unelected and therefore presumably independent judges. The second principle, elaborated more fully in the Bill of Rights, is that certain invasions of individual personal liberty are forbidden, and that the judges will provide a remedy against those who commit such invasions.

In the system that calls itself criminal justice, these principles are to apply by a rigorous insistence that guilt is personal and cannot be derived from mere association, and that procedurally evidence will be collected only by lawful means, under judicial supervision, and that the accused will have a fair chance to confront the case against her in court.

It has been obvious for some time that these principles are in jeopardy. In the July–August 2001 issue of *Monthly Review* I wrote an essay, "Lawyers, Judges and the Law's Fake Bargains," as part of a special issue devoted to prisons. I noted:

> Assume that Canada and the Western European countries have about the right number of people in jail. Assume that the social problem of crime is not terribly different in those countries than in the United States. Understand that our incarceration rate is five to seven times that of those other countries. If these assumptions, and this understanding, are even nearly valid, 80 percent of the people in American jails should not be there.

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> The heavy toll of jailed people reflects the extent to which the criminal process is used as a mechanism of social control, directly mainly at the poor and at people of color. That is what I term the substantive aspect of the issue, which could also be called over-criminalization. Minor social deviance makes you subject to criminal punishment, and for terms that dwarf those imposed in other countries.

In the criminal process I described, the actors were at least required to pretend that the forms of justice were observed. Jean-Claude Paye helps us to see that in the wake of September 11, 2001, the bourgeois state feels comfortable in abandoning the pretense and casting aside the forms. One hallmark of this new way of working is, as Paye notes, that "[t]he criminalization of terrorist organizations and the criminalization of participation in or support for such organizations create offenses of collective responsibility." This process, which does bear some similarity to the attacks on Communist Party membership in the 1950s and 1960s, began some time ago. In 1994, during and with the support of the Clinton administration, Congress passed the Anti-Terrorism and Effective Death Penalty Act.

Under the act, many groups seeking to overthrow repressive regimes have been classified as "foreign terrorist organizations," or FTOs. The classification can be based on classified evidence. If the organization objects, it has no right to see the classified evidence on which the designation was based. A reviewing court will not even see all of the evidence. Judicial review is thus a farce.

However, if someone sends money to such an organization, even with the intention of supporting its lawful activities, this is a criminal act. The government takes the position that in the criminal prosecution, the defendant cannot challenge the designation or even see the evidence on which it is based, and cannot defend herself by invoking the well-established rule that one can lawfully associate with an organization that is engaged in unlawful activity provided one has the intent of furthering only its lawful aims. Moreover, many of these organizations are engaged in legitimate civil conflicts in their home countries, and the FTO procedure amounts to intervention in such conflicts that is forbidden by international law. In a recent case involving an Iranian organization, the court of appeals for the Ninth Circuit upheld the government's position. Judge Alex Kozinski, one of the most conservative federal judges, dissented in an eloquent attack on the government's theory as violating due process and freedom of speech and association.

In sum, the Patriot Act and its kindred laws revive the old criminal syndicalism, restraint of trade, and conspiracy laws that have been used against every progressive and liberationist movement in the United States including labor unions, socialist parties, and civil rights organizations. The United States Supreme Court, in a series of cases beginning in the 1950s, had declared those laws unconstitutional one by one. Along the way, the Court reaffirmed the right of associational freedom. During the Vietnam War, when the government went after Dr. Spock, Rev. Coffin, and others for conspiracy to obstruct the draft, a court of appeals upheld the Supreme Court's mandate and reversed their convictions. Now the government has deliberately and expressly challenged what some had hoped was settled law.

By destroying the legal distinction between protected association and criminality, the new legal order also breaks down barriers that protect personal privacy. And when I—or Paye—speak of personal privacy, we are not talking about some bourgeois notion of atomistic individuals with freedom of action within a defined sphere. The English law that led to prohibitions on unlawful search and seizure came into being to protect organized political activity and the writing, publishing, speaking, and acting that went along with it. The Patriot Act authorizes wholesale invasion of communications that are involved with political action.

By expanding the scope of the substantive criminal law, the government expands the allegedly permissible scope of searches to uncover evidence of the crimes that they have now created. It is important to grasp this point. For example, if the legislature makes it a crime to dance in public, then the police acquire the power to seize dancers, search the homes of possible dancers, and confiscate dancing paraphernalia. When formerly protected forms of political activity and association are criminalized, the power of search and seize to capture people suspected of these new "crimes" and to rummage through their possessions and papers is correspondingly increased.

But for those in charge, it is not enough to expand criminal liability and take advantage of what Congress has authorized. Since 1978, there has been a Foreign Intelligence Surveillance Court to issue wiretap warrants for so-called foreign intelligence investigations, even when the investigation will predictably net United States persons. This secret court has never rejected an application for a wiretap warrant, and even judicial review of its actions when there is a criminal prosecution is sharply limited. It is, in truth, a form called "judicial review of searches" that is most usually without practical effect in protecting privacy.

The Bush administration has declared that even this chimerical form of review is too much, and therefore has induced telephone and Internet providers to open their files and turn over the communications records of millions of people. There are court challenges to this arrogation of power, and some timid legislators have raised questions about it. The administration is so arrogant that its response has been to threaten prosecution of newspapers that print the truth about its activities, and to refuse to disclose details even to the Congress.

Nobody who reads constitutional history can plausibly argue that the U.S. state was constructed on neutral principles. Even if you were not a slave, a Native American, a woman, or a poor person—all of whom were expressly excluded in one way or another from full participation—the intent to create a system that would defend private ownership of means of production is clear. However, the rights proclaimed by that Constitution and by many other documents dating to the same era were expressly designed to preserve attributes of neutrality. Respect for these rights was thought to be a condition of regarding the exercise of state power as legitimate. Therefore, Paye's central insight ought to concern us greatly. The present U.S. government is willing to say that the forms do not matter. It is not alone in this endeavor, having been joined by the Blair government in breaking down the barriers to arbitrary power. As I write these words, a London taxi driver was acquitted by a jury of aiding terrorism by videotaping tourist sites while saying rude things about Tony Blair. The official British response was to say that tougher legislation was being sought so that this sort of triumph of innocence would not happen again. While these horrors are going on, the Bush administration is busy declaring it and all its agents immune from any civil or criminal responsibility for torture, war crimes, genocide, and crimes against humanity. The administration does this by refusing assent to an international criminal court, denying the applicability of criminal laws prohibiting such conduct, blocking judicial review of wrongdoing, and hiding illegality behind the wall of secrecy.

A new statute passed in September 2006 expressly denies habeas corpus to detainees and strips them of well-recognized protections under the laws of war in the event that they are tried before military commissions. Constitutional challenges to these provisions have begun.

When Paye uses the term "permanent," he means to raise the issue whether this train of events is merely a shift in the political winds or a powerful storm that will likely blow away all the fragile structures that protect human rights in the context of bourgeois state power. The dan-

ger signs are many. Paye has discussed some of them in this and an earlier essay. The July–August 2001 issue of *MR* contains valuable information. The "immigration debate" is taking place in overtly racist terms and with a deepening cycle of violence, exploitation, and repression against immigrant workers. The struggle within the domestic and transnational forums ostensibly devoted to protection of human rights must continue. After all, those whose rights are invaded, and who are hauled before criminal courts, courts martial, and makeshift military tribunals, need their defense. The importance of defense is underscored by the government's recent attacks on courageous lawyers. Those held without any prospect of trial must have their cases brought to public attention. The struggle beyond the walls of courtrooms has, however, become more important than ever.

The Liberation of Iraq

71% Percentage of total Iraqi population that believe U.S. troops should be withdrawn from Iraq within a year.

91% Percentage of Iraqi Sunni Population that believes U.S. troops should be withdrawn within a year.

78% Percentage of total Iraqi population that believes U.S. troops are provoking more conflict than they prevent.

97% Percentage of Iraqi Sunni population that that believes U.S. troops are provoking more conflict than they prevent.

92% Percentage of Iraqi Sunni population that approves of attacks on U.S. forces.

—Poll Conducted by Program on International Policy Attitudes, University of Maryland, September 1–4, 2006 (1,150 people polled; margin of error plus or minus 3 percentage points), http://www.pipa.org.