

PREVENTIVE DETENTION: PREVENTION OF HUMAN RIGHTS?

By Laura Whitehorn with Alan Berkman*

Justice Rehnquist: "In our society liberty is the norm

* Laura Whitehorn and Alan Berkman are two of the six political prisoners who are co-defendants in the Resistance Conspiracy Case (*U.S. v. Whitehorn et al.*, 710 F.Supp. 803, D.D.C. 1989). The others are Susan Rosenberg, Marilyn Buck, Linda Evans, and Timothy Blunk. The six were indicted in May, 1988, for conspiracy to "influence change, and protest policies and practices of the U.S. government concerning various international and domestic matters through the use of violent and illegal means," and with carrying out a series of bombings against U.S. government and military targets, including the Capitol building following the invasion of Grenada and the shelling of Lebanon in 1983. According to Whitehorn and Berkman, these actions constituted one part of the broader movements resisting racism, colonialism, and intervention in Central America, the Middle East, Africa, and Puerto Rico. The message of the bombings was that the U.S. government's denial of the right of oppressed nations to self-determination must be exposed and fought.

The Resistance Conspiracy case was settled recently when Whitehorn, Buck, and Evans each entered a plea of guilty to the conspiracy count and to the count charging the Capitol bombing; in exchange, all charges were dismissed against Berkman, Blunk, and Rosenberg, and the three remaining charges against Whitehorn, Buck, and Evans were also dismissed. As part of the agreement, Whitehorn also pled guilty to one count of manufacturing false identification from her 1985 Baltimore indictment. All except Whitehorn are already serving long sentences.

One motivation for the plea agreement, according to the defendants, was the fact that Alan Berkman is suffering a recurrence of Hodgkin's Disease (lymphatic cancer). Due to a combination of the inadequate health care afforded all prisoners, and the particular attacks on political prisoners, the normal dangers of chemotherapy have been exacerbated in Berkman's case. He has been near death several times since the start of treatment in May, 1990. A campaign for immediate release on parole is underway—Berkman has been eligible for parole since 1987—and individuals and organizations are urged to participate. For information, please contact the Emergency Committee for Political Prisoners' Rights, Box 28191, Washington, DC 20038, (202) 328-7818.

All but one of the Resistance Conspiracy Six were held in preventive detention following their arrests in 1984-85. Alan Berkman was held in preventive detention in Philadelphia for two years (1985-87) and denied bail even when he developed

and detention without trial is the carefully limited exception . . ."¹

Justice Rehnquist's words describe an ideal that many of us would like to believe is an integral part of the U.S. system of laws. Ironically, his pronouncement is from a 1987 Supreme Court decision that upheld the constitutionality of preventive detention and thereby guaranteed that the gap between the ideal and the reality of the criminal justice system would widen.

His words have given me little comfort during the five and a half years that I've spent in jail. Only one year was a result of a conviction; the rest of the time, I've been held in preventive detention awaiting trial.

Being a "carefully limited exception" hasn't made it easier to be awakened at 4:30 every morning by clanging metal gates, sometimes accompanied by a hostile correctional officer (guard) yelling, "Hurry up, no talking; you're not at McDonald's, you're in jail."

I know I'm in jail. I've known it since May, 1985, when I was arrested in a Baltimore apartment by the FBI. They were searching for a group of revolutionaries, some of whom had been fugitives for a number of years. Although I was not a fugitive and had no outstanding charges, I was immediately placed under arrest.

My initial charge was assault on an FBI agent — a charge so blatantly false that even the magistrate who arraigned me questioned its veracity. That didn't stop the U.S. Attorney from asking that I be held in preventive detention, and it didn't deter the magistrate from granting her request.² In theory, the government has the burden of showing that bail should be denied; in practice, magistrates and judges routinely grant such requests — and defendants have the new burden of proving why they *should* be granted bail.

Hodgkin's Disease for the first time.

1. *U.S. v. Salerno*, 481 U.S. 739 (1987).

2. Hearing, (D.Md. May 14, 1985), Magistrate Paul M. Rosenberg.

Over the next few months, the prosecutor added charges of possession of two guns and false identification which had been found in the apartment in which I'd been arrested, and preventive detention was re-affirmed.

Under the Bail Reform Act of 1984³ (the act that approved the use of preventive detention in Federal cases), the prosecutor can request preventive detention only if a crime of violence is involved. In my case, the unproven and contrived assault charge served as the requisite violent act.

The prosecutor also had to prove to the judge's satisfaction that I was either a "threat to the community" or could not be prevented from fleeing by "any conditions or set of conditions." To establish my "dangerousness," the U.S. Attorney cited my record of three prior arrests.

It was true. I had been arrested before. Since the 1960's when I became involved as a college student with the Civil Rights and anti-Vietnam War movements, I've been active in a broad range of human rights and social justice issues. I've picketed, protested, demonstrated, and defended myself and others when we've been attacked by the police. In 1969, I was arrested three times in anti-war demonstrations. None of the arrests was serious enough to result in a prison sentence. I was released on bail in each case and appeared for all court dates. I violated none of the conditions of release. I successfully completed two years of unsupervised probation.

Nevertheless, the magistrate decided that I should be held in preventive detention. The fact that my father was willing to offer his home for bail and to supervise my release did not seem to matter.

At a later hearing, the judge articulated his own carefully sculpted exception to the right to bail: I should be denied bail, he said, because I had stated in court that "I live by revolutionary and human principles."⁴ Apparently, it did not occur to him that when you make exceptions — no matter how "carefully limited" — to a fundamental right, the exceptions end up destroying the right and replacing it with a privilege. The initial decision to hold me without bail has twice been upheld by the Fourth Circuit Court of Appeals.

In May, 1988, three years after my arrest in Baltimore, I was indicted along with five other political activists in Washington, D.C. on charges of conspiring "to influence, change, and protest politics and practices that of the United States government in various international and domestic matters through violent and illegal means."⁵ The policies and practices that we're accused of protesting include the contra war against Nicaragua and the 1983 invasion of Grenada. The violent and illegal means that we're accused of employing were four bombings of government and military buildings, including the bombing of the Capitol following the attack on Grenada. No one was hurt in any of these bombings.

My co-defendants had been arrested at various times

in 1984-85, and they are now serving outrageously long sentences on charges that, in any other case, would have resulted in significantly less time. Alan Berkman is serving 12 years; Tim Blunk, 58 years; Marilyn Buck, 70 years; Linda Evans, 35 years; and Susan Rosenberg, 58 years. It seems that "carefully limited exceptions" both to normal sentencing procedures, and to bail, have been carved out for political prisoners.

Because of this new charge, I had a new bail hearing in D.C., even though I was still being held in preventive detention in Baltimore. Here, too, I was ordered to be held in preventive detention⁶, and the Baltimore charges were held in abeyance by the Justice Department, which was presumably waiting to see the outcome of the D.C. trial.

In April, 1989, the D.C. trial judge dismissed the charges against three of my co-defendants for double jeopardy, and the government appealed. Because the appeal could take up to a year to be resolved, I again requested bail. This time, the judge ruled that detention for more than a year would violate due process and ordered my release on the same bail conditions that the Baltimore courts had rejected.⁷

Again, the Baltimore courts rejected those conditions, continuing the preventive detention. Same defendant, essentially the same potential prison time in both cases, same bail conditions—yet there are two diametrically opposed decisions.

I remain in jail serving an inordinately long sentence, having been neither tried nor convicted. Ironically, I've now served more time in preventive detention than I could have received as the maximum sentence on the initial assault charge. That charge carries a maximum penalty of three years; I have now spent five and a half years in jail.

I've been detained far longer than KKK leader Don Black who was imprisoned for two years after he was convicted for stockpiling massive quantities of automatic weapons and explosives for an invasion of the Caribbean nation of Dominica in an attempt to overthrow its government.

I've been locked up longer than Michael Donald Bray who served 46 months in prison for his conviction for bombing ten abortion clinics.⁸

When Congress passed the 1984 Bail Reform Act, some senators and representatives expressed concern that preventive detention could be open-ended.⁹ They were reassured by the Justice Department that the Speedy Trial Act would limit detention to ninety days. But Justice disingenuously neglected to mention that the same prosecutor and judge who respectively ask for and grant preventive detention can obtain exemptions from the speedy trial rule.

"Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of

3. 18 U.S.C. 3142.

4. Hearing (D. Md. June 24, 1985), Judge Alexander Harvey III.

5. *U.S. v. Whitehorn*, Cr. No. 88-0145 (HHG). Indictment, May 11, 1988.

6. Hearing (D.D.C. July 1, 1988) Judge Harold H. Greene.

7. *U.S. v. Whitehorn*, Cr.No. 88-0145 (D.D.C. June 8, 1989).

8. *U.S. v. Bray*, Cr. No. 85-082 (D. Md. 1985).

9. See, 130 Cong. Rec. 9 3 8, 939-940 (Feb. 3, 1984).

struggle, would lose its meaning," stated Justice Marshall, in an impassioned dissent in the *Salerno* case.¹⁰ He warned that the erosion of one of the hard-won rights of the individual faced with criminal charges would necessarily weaken the others. His prediction has come true.

With the development of preventive detention, the presumption of guilt has replaced the presumption of innocence. Now, a detainee's guilt or innocence is decided not by a jury of one's peers, but by a judge. The determination is made based on information presented by the prosecutor, and it is the defendant's burden to rebut the accusations. The decision to refuse bail is made within three days of the arrest — a time when the defendant is lucky to have a lawyer, let alone have had time to prepare for a hearing. In fact, beginning a case by defending a client against the threat of preventive detention leaves an attorney at a significant disadvantage, because fighting for bail — including appeals in many cases — takes up much time and energy that should be spent on the case itself.

The destruction of the presumption of innocence is most glaring in cases where the detainee is later acquitted. Even if only ten to twenty percent of those held in preventive detention each year are acquitted (the Justice Department will not release the actual figure), that still means hundreds, if not thousands, of people are being arbitrarily imprisoned and punished.

When the Bail Reform Act was passed in 1984, the government projected that preventive detention would apply to only "a small group of detainees." In 1985, the first full year that it was in effect in the federal system, and the last year for which I could find Justice Department statistics, *preventive detention was imposed in 29% of all Federal criminal cases.*

Every lawyer I've spoken with believes that percentage is considerably higher now.

The impact of preventive detention is even more far reaching given that, all other conditions being equal, a defendant who is imprisoned prior to trial is more likely to be found guilty than one who is free on bail. That is partly a result of the deplorable conditions and escalating overcrowding in the country's jails.

I can speak directly from my experience in Baltimore City Jail and the D.C. Detention Center.

Facilities that were always inadequate are now totally overwhelmed.

Picking an attorney becomes an almost impossible task. Most pre-trial facilities only permit detainees to make collect phone calls, and most lawyers won't accept them — certainly not from people who aren't already clients. There are, theoretically, provisions for making individual, supervised, direct legal calls, but the demand is so great that often correctional officers throw up their hands and refuse everyone rather than be forced to choose among angry and desperate prisoners.

The same conditions make it equally hard to talk with a lawyer. The collect phone calls are monitored by the prison, and so there is no attorney-client confidentiality. Also, as must be apparent to anyone who has dealt

with lawyers in any context, you're much more likely to get a lawyer's time and attention if you can go to his or her office than if the lawyer has to come to you. This is particularly true when prison procedures mean that a lawyer will typically have to wait an hour or more for the client to be brought down from the housing unit; if the visit occurs during one of the day's many "counts," the wait can extend to several hours. I have long since lost count of the number of women who have told me they met their lawyers for the first time in the courtroom.

Being in prison before trial means that you can't contact, interview, or select witnesses. You can neither review the evidence against you nor accumulate evidence in your defense.

And, if you want to become familiar with the law governing your case, you will find it practically impossible to go to the prison law library. In Baltimore, there wasn't one for women; in the D.C. Jail, the women may go to the law library for only fifteen minutes a week — and even that is frequently cancelled for one reason or another.

When I was arrested in 1985, most of the prisoners who were held without bail were either awaiting trial on first degree murder charges or had a history of bail jumping or escape. Today, under the impact of the D.C. and federal preventive detention statutes, the jail is filled well beyond capacity, largely with African-American defendants awaiting trial for minor drug charges — without bail. It seems that many prosecutors and judges believe that being poor and Black automatically makes a person either a danger to the community or a risk of flight. Because it is an established fact that prosecutors are more likely to ask for the death penalty in a capital case where the defendant is Black, I think it would be fair to assume that prosecutors are more likely to ask for preventive detention when the defendant is poor, Black or Latino. Rights that were once guaranteed to all are first denied to the poor and powerless who most need those protections.

Justice Rehnquist, in the *Salerno* decision, tried to distinguish preventive detention from imprisonment without trial by claiming that pre-trial detainees are held under better conditions than sentenced prisoners. This, he asserted, made pre-trial detention "regulatory" rather than "punitive." This judicial sleight-of-the-hand might be funny if it weren't so painfully false.

Like everyone else in the D.C. Jail, I am locked in a tiny cell at least fourteen hours a day, and often much longer. Almost all cells are double-bunked, although they were constructed to house only one adult. There's no real window. The din of too many people in too small of a place is maddening, and the noise, coupled with a schedule that begins at 4:30 a.m., makes sleep nearly impossible. Several times a month, our cells are turned upside down, papers strewn about, underwear dumped out on the floor, in a "shake-down" search for prison "contraband." Visits are limited to two hours a week and take place over phones and through a thick glass wall. Outside recreation — the only time we can breathe fresh air or see a little bit of the sky — is scheduled for three hours a week but is most often limited to one or two. I ask myself how anyone living in these conditions is supposed to

10. *Supra* at 2111, quoting *Stack v. Boyle*, 342 U.S. 1, 3.

be able to stand the stress of trial and to be alert enough to help in her own defense — especially when the trial stretches on for several months.

After a few months of these conditions, many pre-trial detainees are willing to cop a plea instead of fighting their case, just to get out of the jail and go to a prison where they can have a more nearly-sane existence.

The Supreme Court got it all backwards: preventive detention is not less punitive, and it has contributed to massive overcrowding and made pre-trial facilities more punitive.

So it should come as no surprise that preventive detention in the United States has been disproportionately applied to the poor, to the oppressed, and to political opponents of the government.

Justice Marshall, arguing in opposition to federal preventive detention in the Salerno case, wrote, "such statutes, consistent with the usages of tyranny and what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by the Constitution."¹¹

One of the hallmarks of a police state is the conscious manipulation of the legal system to ensure social and political control. Which acts get labelled as crimes and how seriously they're dealt with are a function of the political agenda of those in power. So it should come as no surprise that preventive detention in the United States has been disproportionately applied to the poor, to the oppressed, and to political opponents of the government. For example, I'm in prison, charged with trying to stop the illegal and immoral Contra war; Oliver North is getting rich while doing his little bit of "community service." Increasingly, it's not what you did, but who you are that determines your legal status.

The preventive detention statute was used for the first time in the case of eight African-American activists arrested by the FBI in 1984 and charged with planning a range of revolutionary actions (none of which actually took place).¹² As is always true in political cases, the FBI orchestrated a hysterical media campaign labeling them the most dangerous "terrorists" ever arrested. And, in a tactic that was to become the Justice Department's standard operating procedure in left-wing political cases, the eight were labelled "perfect candidates" for the new preventive detention law. The fact that most of them had no arrest record and had deep roots in the community carried no weight. Those "objective" criteria so carefully written into the law disappeared the first time that the FBI yelled "terrorist" and the defendants proudly acknowledged that they were revolutionaries and fighters for Black liberation.

The eight were held in preventive detention, some for many months. A massive outcry and show of support from the African-American community in New York and from human rights groups secured their release on bail. They all appeared for court and, after a lengthy trial, were acquitted of all but the most minor charges for which they received short terms of community service. But the many months that they had spent in preventive detention could not be returned to them and their families.

The person who has spent the longest uninterrupted period in preventive detention, Filiberto Ojeda-Rios, is also a political prisoner. He is one of twelve Puerto Rican independentistas arrested in a massive FBI sweep in August, 1985, and charged with being part of a revolutionary group called Los Macheteros.¹³ The criminal charge is that the group took \$7 million from a Wells Fargo office in Hartford in an action in which no one was hurt. Again, FBI charges of "terrorism" and "most dangerous ever" abounded. This was particularly marked in Filiberto Ojeda's case, because he had defended himself when his house was attacked by an FBI SWAT team armed with machine guns and a bazooka, and an agent had been wounded in the cross-fire.

The shoot-out figured prominently in Ojeda's bail hearing, and he and all the other activists arrested were held in preventive detention. Because massive FBI illegalities were exposed during the pre-trial phase of the case, the trial was postponed for a year. One by one the defendants were granted bail. Finally, after almost three years in detention and following emergency heart surgery, Filiberto Ojeda was released on bail in May, 1988. At that point, trial in the Hartford case was projected to be at least another year off because of continued government appeals.

Three months later, on the third anniversary of his original arrest, Ojeda-Rios was rearrested by the FBI and charged with assault stemming from the 1985 shoot-out. Although the courts were fully aware of the facts surrounding the initial arrest when they granted him bail, a new judge in a different circuit ordered him again held in preventive detention. He spent another year in pre-trial detention until, on August 26, 1989, a jury in Puerto Rico acquitted him of all charges stemming from the shoot-out. Ojeda-Rios, who has spent forty-five of the last fifty-four months in prison, has never been convicted of anything, and is still awaiting trial — this time, on bail — in Hartford.

While political prisoners constitute only a small percentage of those held in preventive detention, it is striking that the U.S. Attorney's office asks for (and usually gets) preventive detention in almost all cases involving radical political activists. Preventive detention is a bad law that has been easily molded to politically repressive ends. Preventive detention, gag orders,¹⁴ militarized courtrooms (the case I'm involved with in D.C., the Resistance Conspiracy case, was the first case held in the high security

13. *U.S. v. Gerena*, Cr.No.H-85-50 (TEC).

14. For example, Filiberto Ojeda-Rios was under gag order in his assault case in Puerto Rico; Laura Whitehorn was under gag order in Baltimore.

11. *Id.* at 2106.

12. *U.S. v. Chimurenga*, 609 F.Supp. 1070 (S.D.N.Y. 1984).

courtroom later used in the Rayful Edmonds case),¹⁵ anonymous juries,¹⁶ disproportionate sentences, and arbitrary denial of parole are routinely applied in cases involving leftist political defendants. When we see these practices occurring in other countries, many of us correctly denounce them as police state tactics and a danger to everyone's rights. When we see them here, too many of us are willing to be lulled by FBI statements about "terrorism" and "most dangerous."

The U.S. "war on terrorism" continues to conceal a political agenda of overseas aggression and domestic repression. The "war on international terrorism" was used to justify the invasion of Grenada, the contra war, and continued support for the death squad regime in El Salvador. The "war on domestic terrorism" has justified the resurgence of the FBI's role as a political police force and the passage of repressive legislation such as the Bail Reform Act of 1984. Now, Bush's "war on narco-terrorism" will not only be used to justify direct U.S. military involvement in Latin America but also the militarization of our society. Given the realities of racism and poverty, it is the African-American and Latino communities that will be patrolled by the National Guard and monitored by helicopters overhead. Already we have heard officials hail indiscriminate sweeps of the streets in Los Angeles as an important weapon in the war on drugs. In Chicago and in D.C., residents of public housing projects have to carry official identification to get into their own homes. In South Africa, this is the crux of the pass laws.

The prospect that more and more people who should be "innocent until proven guilty" will serve long pre-trial sentences is a frightening one. But more frightening still is the prospect that our society is moving one more step toward bartering its most important liberties for a "law and order" non-solution to its problems and injustices.

There are no easy answers to the problems that the U.S. faces. But, having spent more than four years in prison as one of the Supreme Court's "carefully limited exceptions," I know that the problems can't be "locked up." That path leads only to the police state that Justice Marshall envisioned.



Desvelo

Credit—Elizam Escobar

Photo Credit—Tony Kelly

15. See, *U.S. v. Whitehorn* Cr. No. 88-0145-05 (HHG), defendant's motion to take down the wall and shut off the cameras.

16. See, e.g., *U.S. v. Ferguson*, 758 F.2d. 843 (2nd Cir. 1985); *U.S. v. Odinga et al.*, 576 F.Supp. 1043 (S.D.N.Y. 1983).

