

THE REALITY OF POLITICAL PRISONERS IN THE UNITED STATES: WHAT SEPTEMBER 11 TAUGHT US ABOUT DEFENDING THEM

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INTRODUCTION

Prior to September 11, 2001, there were nearly 100 political prisoners and prisoners of war incarcerated in the United States.¹ Political prisoners are men and women who have been incarcerated for their political views and actions. They have consciously fought against social injustice, colonialism, and/or imperialism and have been incarcerated as a result of their political commitments. Even while in prison, these men and women continue to adhere to their principles. This definition of the term “political prisoner” is accepted throughout the international community.

Political prisoners have always been an especially vulnerable and abused subset of the American prison population.² Now, in the wake of September 11, these prisoners and their lawyers have been targeted for renewed abuse.

A. Political Prisoners in the United States: A Brief History

Many of today’s political prisoners were victims of an FBI counter-intelligence program called COINTELPRO.³ COINTELPRO consisted of a

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1. After September 11 hundreds of immigrants, mostly of Middle Eastern descent, were rounded up and interned in a manner reminiscent of American treatment of Japanese people during World War II. (For a description of this treatment, see *Korematsu v. United States of America*, 323 U.S. 214 (1944)). Just weeks after September 11, the Department of Justice admitted it had detained over 1,000 immigrants, none of whom had it charged with participation in any terrorist activity. Many of the detainees were held for extraordinary periods of time. Amy Goldstein, et al., *A Deliberate Strategy of Disruption*, WASH. POST, Nov. 4, 2001, at A1.
2. Despite their prevalence in United States society, U.S. Government officials have long denied the very existence of political prisoners. When Andrew Young, the former U.S. ambassador to the United Nations, publicly acknowledged the existence of over 100 political prisoners in his country, he was swiftly removed from office.
3. COINTELPRO was created in 1956 by J. Edgar Hoover, then the director of the Federal Bureau of Investigation as a result of Hoover’s increasing frustration about ris-

series of covert actions directed against domestic dissident groups, targeting five perceived threats to “domestic tranquility.” These included the Communist Party USA (1956–71), the Socialist Workers Party (1961–69), White Hate Groups (1964–71), Black Nationalist Hate Groups (1967–71) and the New Left (1968–71).⁴ People viewed as dissidents, Communists, or anti-establishment were at risk of prosecution, persecution or both:

In these programs, the Bureau went beyond the collection of intelligence to secret action designed to “disrupt” and “neutralize” target groups and individuals. The techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial (mailing reprints of Reader’s Digest articles to college administrators) to the degrading (sending anonymous poison-pen letters intended to break up marriages) and the dangerous (encouraging gang warfare and falsely labeling members of a violent group as police informers).⁵

In response to pressure from a broad spectrum of the American public, a congressional subcommittee, popularly known as the Church Committee, was formed to investigate and study the FBI’s covert action programs. In its report, The Church Committee concluded that the FBI had “conducted a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence.”⁶ It went on to report that “Many of the techniques used would be intolerable in a democratic society even if all of the targets had been involved in violent activity”⁷

In fact, before COINTELPRO was laid to rest, it was responsible for maiming, murdering, false prosecutions and frame-ups, destruction, and mayhem throughout the country. It had infiltrated every organization and association that aspired to bring about social change in America whether through peaceful or violent means. Hundreds of members of the Puerto Rican independence movement,⁸ the Black Panther Party (BPP), the Young Lords,⁹ the Weather Underground, Students for a Democratic Society (SDS), the Republic of New Africa (RNA), the Student Non-Violent

ing political dissent in the country and the response of the Supreme Court that limited the government’s power to proceed overtly against dissident groups. Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities (Apr. 23, 1976) [hereinafter Church Committee Report]. The Committee was chaired by Senator Frank Church of Idaho.

4. The COINTELPRO initiative formed part of the long history of domestic surveillance of U.S. citizens, a history dating at least as far back as the beginning of the twentieth century.
5. The Church Committee Report, *supra* note 3.
6. *Id.*
7. *Id.*
8. Between 1960 and 1971 there were at least thirty-seven actions authorized and “aimed at militant groups which sought Puerto Rican independence.” Church Committee Report, *supra* note 3, at 14 n.59.
9. The Young Lords were primarily a Puerto Rican liberation organization headquartered in New York City.

Coordinating Committee (SNCC), members of the American Indian Movement (AIM), the Chicano movement, the Black Liberation Army (BLA), environmentalists, the Revolutionary Action Movement (RAM), peace activists, and everyone in between were targeted by COINTELPRO for “neutralization.”

In 1969 the FBI and local Chicago police agents were responsible for the pre-dawn assassination of Fred Hampton and Mark Clark as they lay asleep in their beds. Hampton and Clark were the leaders of the Chicago office of the Black Panther Party.¹⁰ Among Hoover’s other targets were Leonard Peltier of AIM; the Rev. Dr. Martin Luther King of the Southern Christian Leadership Conference (SCLC); El-Hajj Malik Shabazz (Malcolm X); Kwame Ture (Stokely Carmichael) of SNCC; Huey Newton (leader of the BPP); and Rev. Phillip Berrigan and his brother Rev. Daniel Berrigan, peace activists who challenged the Vietnam War and the U.S. military industrial complex.¹¹

Prosecutor’s offices and the courts were complicit in the destruction meted out by the FBI. Prosecutors routinely withheld exculpatory evidence as was evidenced in the cases of Geronimo jiJaga Pratt, Dhoruba Bin-Wahad, and Mumia Abu-Jamal.¹² Although Pratt and Bin-Wahad were eventually exonerated after serving twenty-seven and nineteen years respectively for crimes they did not commit, requests by Peltier and Abu-Jamal for new trials have been frustrated at every turn by law enforcement and the prosecution.¹³

Many of today’s political prisoners were incarcerated as a direct result of COINTELPRO’s activities. They were targeted because of their political beliefs and/or actions. Unlike those convicted and sentenced for similar crimes, they were given much harsher sentences and routinely denied parole. Former BLA member, Sundiata Acoli (f.k.a. Clark Squire), the co-

10. The FBI created a plan of attack on the Chicago BPP headquarters where Hampton resided. They planted an informant, William O’Neal, in the Chicago BPP who was to become the local chief of security. O’Neal became Hampton’s bodyguard and quickly secured measures in the house to follow through with the FBI plan. He provided the FBI with detailed floor plans of the BPP apartment complex including the location of Hampton’s bed and closet areas and on what side Hampton’s wife slept. A wiretap was placed on the phones in the BPP apartment as well as on the phone of Hampton’s mother in February of 1968. In May of 1968, Hampton’s name was placed on the FBI’s “Agitator Index.” The FBI and local law enforcement set the date for the raid on the BPP apartment for December 4, 1969 at 4 a.m. Hampton v. Hanrahan, 600 F 2d 600 (7th Cir. Ct. App. 1979).

11. In March 1971, the FBI resident agency in Media, Pennsylvania was burglarized. The documents seized from the office were widely distributed and published by the press. The resultant concern led to the termination of COINTELPRO for “security reasons” the following month. Many believe that its operations were continued under another name. The Church Committee was able to determine the continued existence of at least three COINTELPRO-type operations after 1971. Four months after the official termination of COINTELPRO “information on an attorney’s political background was furnished to friendly newspaper sources under the so-called “Mass Media Program,” intended to discredit both the attorney and his client.” Church Committee Report, *supra* note 3, at 13.

12. Personal communication with counsel.

13. Personal communication with counsel.

defendant of Assata Shakur,¹⁴ was sentenced to life plus thirty years for the death of a New Jersey State Trooper. He was eligible for parole after twenty years. After serving twenty-two years, however, the New Jersey parole board denied him parole and gave him an unprecedented twenty-year set off. Susan Rosenberg was sentenced to fifty-eight years for possession of explosives and denied parole despite her exemplary prison record.¹⁵ Geronimo jiJaga Pratt was denied parole at least seven times although he was innocent of the charges for which he was serving time.¹⁶

B. Facing Renewed Abuse: The Post-September 11 Treatment of Political Prisoners

In concluding its review of COINTELPRO, the Church Committee wrote: "The American people need to be assured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order."¹⁷ Just over twenty-five years later, the American people are again in need of such assurance. In the wake of the attacks on the World Trade Center and the Pentagon on September 11, 2001 the use of the nation's jails and prisons for political repression was renewed. Within hours of the attacks, several of the political prisoners were rounded up and put in administrative segregation, generically known as the hole.¹⁸ No charges or allegations were levied against them. Some of them were told that they were being placed in the hole for their own safety. They were held in solitary confinement and restricted to their cells twenty-three or twenty-four hours a day.

Some, like Marilyn Buck, Sundiata Acoli¹⁹ (both represented by the author), and Richard Williams²⁰ were held incommunicado for weeks without access to legal counsel.²¹ Other prisoners were told that they were

14. Shakur, formerly known as Joanne Chesimard, escaped from a New Jersey state prison in 1979. Years later she was granted political asylum in Cuba, where she continues to reside. The state of New Jersey has offered a reward of \$100,000 for her capture. The United States Congress passed a resolution in 2000 demanding the return of Shakur and several other exiles living in Cuba. H. Con. Res. 254.

15. She was released in January 2001 pursuant to a commutation granted by President Clinton at the end of his term of office.

16. For a detailed discussion of Mr. Pratt's ordeal, see generally JACK OLSEN, *LAST MAN STANDING: THE TRAGEDY AND TRIUMPH OF GERONIMO PRATT* (2000).

17. Church Committee Report, *supra* note 3, at 77.

18. The political prisoners that were rounded up were Sundiata Acoli, Carlos Alberto Torres, Phil Berrigan, Marilyn Buck, Antonio Camacho Negron (released from prison in May, 2002 after serving thirteen years), Yu Kikumura, Ray Levasseur, Tommy Manning, and Richard Williams. There is no discernable connection between these political prisoners. During the time that some of them were held incommunicado, their lawyers had no way of verifying if they were still in the facilities to which they had previously been designated. There was a total Bureau of Prisons black out of information concerning them. Conversations with anonymous BOP representatives during the period between September 13 and November 17, 2001.

19. Sundiata Acoli was not returned to general population until January 3, 2002.

20. Richard Williams was not returned to general population until February 11, 2002. The next day he suffered a minor heart attack. On April 30, 2002, he was sent back to the hole. Again, the isolation was not the result of any disciplinary infraction.

21. All information concerning Buck and Acoli comes from the author's personal representation of Buck and Acoli. All information concerning Williams comes from the author's personal communications with counsel for Williams.

to have no contact of any kind with Marilyn Buck once she was thrown in administrative segregation “for her own safety.” Numerous requests to arrange for legal visits and phone calls with these prisoners were flatly refused by administrators of the Bureau of Prisons (BOP). All legal mail was suspended; no letters were allowed out of the prison and legal mail that was mailed in was neither given to the prisoners nor returned to the attorneys. From September 11 to October 24, 2001 Sundiata Acoli was not allowed any access to his lawyers. Social visiting, mail, and phone calls were suspended for many of these prisoners. The actions of the Bureau of Prisons were so unusual that initially the BOP General Counsel denied that any prisoners were being refused access to their lawyers. The Bureau continued to put forward this position as late as February of this year.²² Yet on September 26, 2001, the Warden of USP Allenwood, where Mr. Acoli was being held, wrote to the author to inform her that he was “denying her request to allow Inmate Squire (Acoli’s former name) a legal telephone call.”²³

Between September 11 and 17, 2001, the restrictions placed on the prisoners were in flux, and it seemed clear that the individual prison authorities were trying to determine exactly what the directions from Washington contemplated. But on or about September 17, Attorney General John Ashcroft issued a memorandum to the Bureau of Prisons directing them to terminate all communications, both social and legal, for certain prisoners.²⁴ Some have posited that the memo left the discretion to the prison wardens. Others believe that Ashcroft determined who should be held incommunicado.²⁵ No matter who had the final discretion, the result was the same for the prisoners; they were in the hole and some had no access to the outside world.

C. *The War on Terrorism: Targeting Attorneys*

Political prisoners have not suffered alone; their attorneys have proven equally vulnerable to political abuse. Defending the “unpopular client,” the client who has been targeted by the government as a terrorist, a cop killer, a bank robber, a revolutionary, or “the sole white member of the Black Liberation Army” does not get you nominated to the list of America’s 100 Most Influential Lawyers. Such professional endeavors usually find the lawyer on the receiving end of constant harassment from prison and jail officials, federal marshals, court personnel and prosecutors.²⁶ Nonetheless, the Constitution and accepted ethical and criminal procedure norms guarantee that every defendant is entitled to legal counsel and zealous advocacy.

22. Anne Marie Cusac, *You’re in the Hole: A Crackdown on Dissident Prisoners*, PROGRESSIVE, Dec. 2001, at 34.

23. See letter dated September 26, 2001 from Warden Jake Mendez to Jill Elijah regarding Sundiata Acoli, f.k.a. Clark Squire (on file with author).

24. Anonymous communications from various Bureau of Prisons officials (2001–02).

25. The lawyers for the prisoners thrown in the hole formed an ad hoc committee to try to gather information about what was happening to our clients and to share the information with each other. It is in this context of discussing the information that we all speculated about the reasons that these things were being done to our clients.

26. See Deborah L. Rhode, *Terrorists and Their Lawyers*, N.Y. TIMES, Apr. 16, 2002, at A27.

That's what is taught in law school, but is that what is meant? Recent legislation has raised serious doubts as to whether we can continue to take these principles for granted. How else can we explain the recent unprecedented arrest and indictment of New York lawyer, Lynn Stewart, a zealous advocate well respected amongst members of the bar and the bench?²⁷ Ms. Stewart has represented numerous "unpopular" clients, some of whom have clear political ideologies, such as David Gilbert, who was charged as a former member of the Weather Underground with the 1981 Brinks armored car robbery in Nyack, New York, Bilal Sunni-Ali a member of the Republic of New Africa also charged in the 1981 Brinks case in a federal prosecution, and Richard Williams who was alleged to have conspired with members of the Ohio 7 to blow up several military buildings and offices of major corporations.²⁸

Ms. Stewart has been a thorn in the side of prosecutors for over two decades. It seems that the time for revenge has arrived. The U.S. Attorney General boldly announced at a press conference following her arraignment that the federal government had been monitoring conversations between Stewart and her client, Sheikh Omar Abdel-Rahman, from at least as far back as May of 2000. Even the most conservative observer would concede that the USA Patriot Act was not signed into law until October 26, 2001. Even had it been operational at the time Ms. Stewart's communications were monitored, a scrupulous review of its provisions will reveal no specific reference to monitoring of attorney-client communications. Upon what authority did the government rely in determining that it could monitor undisputed attorney-client communications in May of 2000?²⁹

Prior to October 30, 2001 the Bureau of Prisons regulations on institutional management authorized the Bureau to impose special administrative measures, including the monitoring of certain inmate communications, with respect to specified inmates. The imposition of these administrative measures had to be based on information provided by senior intelligence or law enforcement officials, where it was determined to be necessary to prevent the dissemination of either classified information

27. Sadly this is not the first time that Ms. Stewart has been used as a test case by the government in unprecedented interference in the attorney-client relationship. Back in 1989, the Manhattan District Attorney's office led by Robert Morgenthau, attempted to undermine Ms. Stewart's representation of her client, Dominick Maldonado, by having unauthorized communications with him and convincing him to cooperate. This lead him to participate in a scheme concocted by the D.A.'s office that ultimately led to felony charges being lodged against Ms. Stewart for contempt of court. She refused to testify before a grand jury investigating the source and amount of funds paid to her and other lawyers in the case. Mr. Maldonado was charged with participation in a heroin ring. The charges against Ms. Stewart were ultimately reduced. Her client committed suicide after being sentenced to 100 years and realizing that he had been misled and used as a pawn to destroy her career.

28. Gilbert and Williams were convicted in 1983 and 1986 respectively and remain incarcerated today as political prisoners. Sunni-Ali was acquitted in an emotional and political upset for the U.S. Attorney's office for the Southern District of New York. At that time, the office director was none other than Rudolph Giuliani.

29. Attorney General Ashcroft shamelessly admitted that Ms. Stewart's conversations with her client were surreptitiously wiretapped during a prison visit that took place two years ago.

that could endanger the national security or other information that could lead to acts of violence and terrorism.³⁰ It was not contemplated by these regulations, however, that the privileged communications between an inmate and his or her attorney were to be subject to such monitoring.

On October 30 the Department of Justice instituted new regulations amending certain key provisions. In addition to extending the time during which a prisoner could be subjected to special administrative measures from 120 days to up to one year, the new regulations provide,

In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section, provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.³¹

30. 28 CFR pts. 500–501.

31. 28 CFR 501.3 (d).

(1) The certification by the Attorney General under this paragraph (d) shall be in addition to any findings or determinations relating to the need for the imposition of other special administrative measures as provided in paragraph (a) of this section, but may be incorporated into the same document.

(2) Except in the case of prior court authorization, the Director, Bureau of Prisons, shall provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review under this paragraph (d). The notice shall explain:

(i) That, notwithstanding the provisions of part 540 of this chapter or other rules, all communications between the inmate and attorneys may be monitored, to the extent determined to be reasonably necessary for the purpose of deterring future acts of violence or terrorism;

(ii) That communications between the inmate and attorneys or their agents are not protected by the attorney-client privilege if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

(3) The Director, Bureau of Prisons, with the approval of the Assistant Attorney General for the Criminal Division, shall employ appropriate procedures to ensure that all attorney-client communications are reviewed for privilege claims and that any properly privileged materials (including, but not limited to, recordings of privileged communications) are not retained during the course of the monitoring. To protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a privilege team shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the

It is alleged *inter alia* in Ms. Stewart's federal indictment that she violated the Special Administrative Measures that have been in place since 1997 with respect to Sheikh Omar Abdel-Rahman by facilitating communications between him and members of the so-called Islamic Group.³² The Islamic Group is described in the indictment as an "international terrorist group dedicated to opposing nations, governments, institutions and individuals that did not share its radical interpretation of Islamic law." The government's indictment of Ms. Stewart is based on the monitoring of communications between lawyer and client. This monitoring appears to have been illegal at the time it took place. Although the October 2001 amendments to the Bureau of Prisons regulations may permit the government's conduct under limited conditions now, there appears to have been no authority for their actions prior to that date.

As the nation begins to accept greater infringements on civil liberties, it seems that lawyers are amongst the first to feel the effects on their profession. Indeed, Ms. Stewart believes that she is being used as an example to deter others from representing controversial figures and causes.³³ If she is right, hers is a case of over-deterrence if ever there were one. How do we explain the fact that the Arabic speaking court-certified interpreter was also indicted along with Ms. Stewart? What was his crime? Interpreting documents into English for Ms. Stewart and her client? Is it the responsibility of an interpreter hired to aid the attorney and client in their communications to screen the words he is asked to interpret? If the interpreter's prosecution is allowed to go forward, it will be nearly impossible for attorneys representing "unpopular" clients to hire someone to translate for them during prison visits and phone calls. There seem to be no limits to the possible abuses. The net has been cast far too wide. Many would argue that the net should not have been cast at all.

So the message is clear. Attorneys who believe that they are obligated to follow the Code of Professional Responsibility and "not decline representation because a client or a cause is unpopular or community reaction

intrusion into privileged material or conversations. Except in cases where the person in charge of the privilege team determines that acts of violence or terrorism are imminent, the privilege team shall not disclose any information unless and until such disclosure has been approved by a federal judge.

32. 02 Crim. 395 SDNY Paragraph 16.

33. But history is instructive here. In 1991, around the same time that Lynne Stewart was having her difficulties with the Manhattan D.A.'s office, attorney Linda Backiel was being targeted by the U.S. Attorney's office in Philadelphia for her refusal to testify before a federal grand jury about communications she had with Elizabeth Ann Duke, a client who was believed to have jumped bail. Ms. Duke was an admitted revolutionary who had been indicted on weapons and explosives charges. Ms. Backiel, like Ms. Stewart, had represented a number of "politically unpopular" clients such as Kathy Boudin, who was charged as a member of the Weather Underground with the 1981 Brinks armored car robbery in Nyack, New York and Antonio Camacho Negrón who was charged with conspiracy in the 1983 Wells Fargo \$7.1 million robbery in West Hartford, Conn. Mr. Camacho was a Puerto Rican *independista* and alleged to be a member of Los Macheteros. Ms. Backiel spent six months in jail for civil contempt before the grand jury disbanded.

is adverse”³⁴ are at risk of being targeted for character assassination and prosecuted to the full extent of, and in some instances, beyond the law.

CONCLUSION

The full ramifications of the political climate that followed September 11 remain to be seen. It is clear that the post-September 11 rollback on civil liberties did not stop at the restrictions placed upon political prisoners and their attorneys. On October 12 Attorney General Ashcroft issued another memorandum, this time urging all federal agencies to resist requests filed pursuant to the Freedom of Information Act seeking information and documents.³⁵ There was very little media attention given to this maneuver, but the ramifications for the American public were substantial. Daniel J. Metcalfe, co-director of the Justice Department’s Office of Information and Privacy, explained that, “[t]he Ashcroft memorandum places more emphasis on an agency being careful, on giving full and careful consideration of the interests that are being protected under the FOIA exemptions. That’s its primary focus.”³⁶

This is small consolation to most Americans. Because of the Freedom of Information Act, we eventually learned the truth behind the Bay of Pigs invasion, Watergate, Contragate and so many other questionable government operations. In the years to come, we must rely upon the Freedom of Information Act to ascertain the truth about the government’s targeting and persecution of politically unpopular prisoners and their lawyers.

The increasing numbers of FIA-related lawsuits regarding the withholding of previously available government information testify to the fact that our civil liberties are under attack. In New York and around the country, defense lawyers watch apprehensively as the wheels of “justice” turn slowly over Lynn Stewart and her co-defendants. And from California to Massachusetts, from behind prison bars, prisoners are watching to see if the days of confidential communications with their counsel are gone forever.

34. The ABA Model Code states that regardless of personal feelings, “a lawyer should not decline representation because a client or cause is unpopular or community reaction is adverse.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1980)

35. According to the Department of Justice Office of Information and Privacy, “In replacing the predecessor FOIA memorandum, the Ashcroft FOIA Memorandum establishes a new “sound legal basis” standard governing the Department of Justice’s decisions on whether to defend agency actions under the FOIA when they are challenged in court. This differs from the “foreseeable harm” standard that was employed under the predecessor memorandum. Under the new standard, agencies should reach the judgment that their use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information.” FOIA Post at www.usdoj.gov/oio/foiapost/2001foiapost19. In Attorney General Ashcroft’s words, “[w]hen you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.” Memorandum for Heads of all Federal Departments and Agencies (Oct. 12, 2001).

36. See Ellen Nakashima, *Bush View of Secrecy Is Stirring Frustration; Disclosure Battle Unites Right and Left*, WASH. POST, Mar. 3, 2002, at A04.