

II. Procedural Background

On January 27, 2016, Santilli made his first appearance in court and was detained pending a detention hearing on January 29. At the conclusion of the hearing on January 29, 2016, Judge Beckerman stated that it was a “close case” and that she needed to take the matter under advisement. On Monday February 1, 2016, Judge Beckerman issued an order detaining Santilli as both a flight risk and a danger to the community.

On February 2 and 4, 2016, Judge Mosman held hearings on defendant’s motion to review the detention order. He found that “the history and characteristics of this defendant, at least so far as the sort of paper record of his life goes, don’t favor detention. He has been fairly stable in his living arrangements and work arrangements” [Transcript, 2/4/16 at 28] Judge Mosman further found that while defendant did not have significant ties to Oregon, he made nothing of that fact, because he has a stable enough residence in Ohio to make that factor not cut in the government’s favor. [Transcript, 2/4/16 at 28-29] Judge Mosman further found that the nature and circumstances of the offense did not cut strongly in anyone’s favor either for or against on the questions of flight risk and danger to the community. [Transcript, 2/4/16 at 29] Judge Mosman stated that he was troubled by the weight of the evidence. He had expressed “more than once why ... that’s a troubling factor for the United States, and he found that the weight of the evidence was a “factor that cuts in defendant’s favor” [Transcript, 2/4/16 at 29]. Judge Mosman further stated that the risk of flight was not the traditional risk of flight, “but rather that if the day comes that he has to be forcibly brought to court for something or brought to account for performance, that he won’t come peacefully.” [Transcript 2/4/16 at 29-30] .

Judge Mosman ended up concluding that defendant was both a flight risk and a danger based on video clips that the government showed in court in which defendant made various statements on his Internet talk shows that “troubled” him. These included statements Santilli made that “he’ll die a free man,” [Transcript, 2/4/16 at 31-32], statements about burying guns in violation of a restraining order, [Transcript, 2/4/16 at 32-33], and statements about shooting anyone who busts through his door in the middle of the night announced and uninvited. [Transcript, 2/4/16 at 34].

III. New Information and Release Plan

Since Judge Mosman’s detention order, defendant and his partner have had all their firearms removed from their apartment. One of defendant’s guns is in the custody of the Newtown, Ohio police department and the other is in the custody of his partner Deb Jordan’s son. Ms. Jordan owns two firearms also, and they are both in the custody of her son. Should the court find it necessary, defendant and Ms. Jordan are willing to place custody of all their firearms in the custody of the local police department or sheriff’s office.

There is also new information showing that defendant was truthful when he said that he was not in possession of any firearms while out in Oregon. The FBI wanted to search through defendant’s rental car to see if he had any firearms or other contraband. Rather than getting a search warrant, on about February 8, 2016, the FBI caused Enterprise rental car company to file a deceitful police report by having Enterprise falsely report the rental car as stolen, when they knew it had not been stolen. Gresham police responded to the stolen vehicle report, seized the car and searched it. There were no firearms or any other contraband found in the car, showing defendant truthfully reported that neither he nor Ms. Jordan brought any firearms with them to Oregon.

Defendant also offers a new release plan with added protections for law enforcement officers assigned to contacting Mr. Santilli. Defendant previously offered a home detention release plan. Given the concerns raised by Judge Mosman, defendant is willing to offer additional assurances that he will pose neither a danger nor a flight risk. First, defendant offers to allow law enforcement officers to search through his apartment for any firearms or ammunition, and to allow law enforcement to conduct random searches as they feel may be necessary. Second, defendant further offers to allow a video camera to be mounted in his apartment so that law enforcement could monitor the interior of his apartment from an outside vantage point, thus for all practical purposes eliminating the concern Judge Mosman raised about defendant not coming peacefully if ordered in to court.

Defendant further offers additional evidence by way of declarations from himself and his partner Deborah Jordan. Defendant's declaration addresses the concerns Judge Mosman made in his order from the bench and he explains the context of his statements.¹ Defendant denies any prior knowledge of the takeover of the buildings on the Malheur National Wildlife Refuge (MNWR); he came out to Oregon solely for the purpose of covering the rally in support of the Hammonds on January 2, 2016; once the small group of militants splintered off to take over the buildings Santilli expressed his opposition to these tactics and he maintained that opposition throughout the takeover; and, he was never warned by law enforcement that his speech and communications were considered unlawful in any way.

¹ The government played several video clips of statements defendant made while hosting his Internet talk show, but defendant did not have the opportunity to review most of these video clips and statements with counsel prior to the detention hearing.

Defendant further offers evidence of his good conduct to reassure the court and law enforcement officers that he does not in fact pose a danger or a flight risk. In his declaration, defendant states that to the best of his knowledge, he has obeyed and complied with every order given to him by law enforcement officers. He prides himself on being lawful and he offers several examples of his compliance with law enforcement officers.

When defendant was in Nevada to cover the protest at Bundy Ranch in April 2014, he calmed down a protester who was screaming at law enforcement officers. Exhibit 103A. At that same protest, Santilli was a leader in keeping protesters in compliance with orders by law enforcement. In Exhibit 103B, Santilli can be heard saying, “Comply, comply, comply. Comply with the order. Comply with the orders. Comply with their orders. ... We have to.”

At a protest in Baltimore, MD in February 2015, Santilli stated that while the protesters had a constitutional right to stay put, he warned protesters they would be arrested for failing to comply with the orders, and “that’s why we’re backing up.” See Exhibit 103C.

At a protest in Cleveland, OH in May 2015, Santilli can be heard complying with the officer’s request to backup, to stay in the area designated for press by law enforcement, and moving out of the alley as requested. Exhibits 103D, E and F.

During a December 18, 2015 traffic stop, Santilli discloses to the police officer that he has a registered firearm in the car, and he places his hands up as ordered. The officer subsequently seizes the gun without incident. Exhibit 103G. The officer informs Santilli during the course of this stop that his name was somehow mistakenly put on the terror

watch list. Two days after this incident, Santilli praised the officer for his professionalism and courtesy during the stop and arrest. Exhibit 103H.

At a town hall meeting in Burns on January 19, 2016, a Harney County Sheriff's officer told Santilli that there was a zero tolerance policy and that he would be removed immediately for any incidents. Santilli thanked the officer for the warning, and he heeded it by not making any incidents. Exhibit 103I.

Prior to his arrest on January 26, 2016, Santilli is heard telling another person he had to "be really complaint with law enforcement." Exhibit 103J.

A little while later, that same evening, after learning that Ammon Bundy had been arrested, Santilli expresses his desire to help end the occupation without anyone getting hurt. "We'll get them out. ... No one needs to get hurt. ... Enough of this. Nobody needs to get hurt." Exhibit 103K.

IV. Due Process Implications of Continued Pretrial Detention

The Supreme Court has long recognized constitutional limits on pretrial detention. The Court has prohibited excessive bail, *see Stack v. Boyle*, 342 U.S. 1, 4-5 (1951), required a judicial determination of probable cause within 48 hours of arrest, *see Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), barred punitive conditions of pretrial confinement, *see Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979), prohibited pretrial detention as punishment, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9th Cir. 2014), citing *see United States v. Salerno*, 481 U.S. 739, 746-48 (1987); *Schall v. Martin*, 467 U.S. 253, 269-74 (1984), and held that restrictions on pretrial release of adult arrestees must be carefully limited to serve a compelling governmental interest, *see Salerno*, 481 U.S. at 748-51.

Although liberty is the norm in our society, and "detention prior to trial or without trial is the carefully limited exception," an individual charged with serious felonies may be detained before trial when, after an adversary hearing, the individual is found "to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *Salerno* at 755.

When assessing the validity of a pretrial detention, the central issue is the detainee's right, in accordance with due process, to be free from punishment before the adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Permissible pretrial detention serves a regulatory, as opposed to a punitive, purpose, but even "valid pretrial detention assumes a punitive character when it is prolonged significantly." *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986). Nevertheless, while the length of detention is an important factor in a court's due process analysis, "no case has established an absolute outside limit" on what comprises a constitutional period. *United States v. Bernhardt*, No. 97-1391, 1997 U.S. App. LEXIS 35295, at *5 (10th Cir. Dec. 16, 1997).

Courts that have considered the due process implications of a pretrial detention, have typically focused on three factors: (i) the length of confinement and any non-speculative expected confinement; (ii) the government's responsibility for delays in the proceedings; and (iii) the strength of evidence supporting detention. *See United States v. Millan*, 4 F.3d at 1043. In addition, some courts have added, as an additional factor, a comparison between the length of the likely sentence the defendant faces and the length of pretrial detention. *See United States v. Cos*, 198 Fed. Appx. 727, 2006 U.S. App. LEXIS 25136, at **12-13; *United States v. Shareef*, 907 F. Supp. 1481, 1484 (D. Kan. 1995)("The court believes that it is also appropriate to consider the potential terms of imprisonment to

which the defendants may be sentenced if ultimately found guilty of the charges as compared to the prospective length of pretrial detention in determining whether the due process rights of a person may be violated.").

As the Tenth Circuit recognized in its order and judgment remanding this case, because of these due process concerns, to justify an extended detention, the government must prove more than what 18 U.S.C. § 3142 requires to justify an initial detention. See *United States v. Cos*, 198 Fed. Appx. 727, 2006 U.S. App. LEXIS 25136, at **13-14 (quoting *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986), and citing *United States v. Shareef*, 907 F.Supp. at 1483-84). The government's burden is even heavier where the district court has issued an order suppressing all the government's evidence. *United States v. Shareef*, 907 F.Supp. at 1485 ("[W]hen the admissibility of all evidence against defendants is questionable, . . . prolonged pretrial detention must be subjected to more careful scrutiny than might otherwise be required."). *United States v. Cos*, No. CR 05-1619 JB, 2006 U.S. Dist. LEXIS 95275, at *7 (D.N.M. Nov. 15, 2006).

In this case, there are serious questions about the weight of the evidence against defendant. Judge Mosman expressed his concerns about the weight of the evidence multiple times because most, if not all, of the evidence the government has proffered against defendant is protected under the first amendment.

Second, even if defendant were convicted, the Base Offense Level under the Sentencing Guidelines is 10 under Section 2A2.4. Defendant never possessed a dangerous weapon or a firearm, but even if that is attributed to him, the total offense level is 13. Defendant has no prior criminal history, so before any adjustments his Guideline range is 12-18 months. Given his would be status as a first time offender, one whom was never

warned that his communications were unlawful, the defendant would be seeking a probationary sentence.

In the Joint Status Report, the Government indicates that it wants to take a year preparing for the trial in this case. This is time that defendant should not have to spend in custody. He stands today an innocent man who did nothing more than exercise his first amendment rights, and he received no warning that his exercise of those rights was considered unlawful by law enforcement. The Court should find that due process requires Santilli's pretrial release.

V. Conclusion

Shortly after Judge Mosman ordered Santilli's detention, the ACLU of Oregon released a statement in support of his release because Santilli has a life-long record of being free from violent conduct and his detention was based on his speech alone. A copy of the ACLU's statement is attached and marked as Exhibit B. A short section the statement states the following:

Situations like this - where words alone are used to label a speaker so dangerous or somehow threatening as to warrant the deprivation of his liberty - demand the highest caution. Where there is any question, we should err on the side of the speaker.

It is especially troubling that the prosecution and the court relied on statements made months and even years prior to the incident at issue in order to "prove" Santilli's risk. If all of our statements can be cherry-picked and strung together over a number of years to label us a "danger," we risk silencing our civil discourse. Recognizing and respecting the line between protected beliefs, even radical beliefs, and violent or criminal activity does not undermine our security, but rather strengthens it.

Defendant is 50 years old, he has served his country as a United States Marine, he has no prior criminal history, he has exhibited compliance and cooperation with law

enforcement orders at all times in his life, and he is now offering a plan that severely curtails his own freedom while providing concrete measures and assurances that he will comply with the court's orders and not be a danger to anyone including but not limited to law enforcement officers. Given all this, particularly considering that the length of a potential sentence if convicted is likely to be less than what defendant will have served on a pretrial basis, the Court should order Santilli's pretrial release.

DATED this 22nd day of February 2014.

Thomas K. Coan

Thomas K. Coan, OSB 89173
Attorney for Defendant

**ACLU****OREGON****TAKE ACTION**AMERICAN CIVIL LIBERTIES UNION
of OREGON

Because Freedom Can't Protect Itself.

ISSUES

LITIGATION

LEGISLATION

GET INVOLVED

RESOURCES

ABOUT US

BLOG

DONATE NOW

JOIN THE ACLU

THE FIRST AMENDMENT RIGHTS OF “SHOCK-JOCK” PETE SANTILLI

The ACLU of Oregon stands in solidarity with the thousands of Oregonians, particularly in rural communities, who are peacefully protesting the unwanted militia occupation in Harney County. There are reports that some of these occupiers have been intimidating and threatening community members. These are not social change strategies we support. Likewise, it is not lost on us that what was framed as a protest about land rights has ignored the historic territory of the Burns Paiute Tribe and desecrated sacred cultural properties.

Although it may be easy to form a negative opinion about the tactics used by the people involved in the occupation, it is much harder to assess the government's response. We have been watching how one of the people arrested, Pete Santilli, has been treated in court and we have real concerns. It is in this context that the ACLU of Oregon is compelled to speak out, not because we endorse the messages of the speaker or condone the tactics of the protesters.

by Mat dos Santos, Legal Director, ACLU of Oregon

There is no doubt that when Pete Santilli gets in front of the camera he is politically polarizing and, to many, downright offensive. He challenges government authority through brazen, political statements. But does he pose a real threat? That's the question asked of a federal judge last week: Should Pete Santilli remain in custody while awaiting his criminal trial for charges related to the Malheur Refuge takeover? While many people might disagree with statements made by those involved in the Malheur takeover, Americans have a fundamental right to freedom of speech. Law enforcement can and should differentiate between controversial statements and real threats. What's at stake here could indeed be larger than a radio personality's career, Malheur and Oregon.

Santilli, who hosts an internet radio show and YouTube channel with over 60,000 viewers, had dedicated his show to covering the occupation of the Malheur National Wildlife Refuge as an embedded journalist. This coverage was the basis for his arrest warrant as well as a threadbare indictment on a charge of conspiracy to impede federal officers by use of force, intimidation and threats. If convicted of this federal felony, Santilli could face up to six years in prison.

In deciding whether to release Santilli prior to trial, the judge needed to determine whether Santilli was a flight risk or a danger to the community. Santilli's court-appointed attorney highlighted his nonviolent record and presented videos of his compliance with law enforcement during the occupation, including at the time of his arrest. Also in the defense's evidence was a note from the Harney County Sheriff thanking him for going on-air to request that his media followers *cease all threats*. There was evidence that as a member of the public interacting with law enforcement, Santilli has been calm and compliant and that he has no known history of violence. The government's own testimony showed that unlike many of the protesters, Santilli did not carry a firearm. And when he urged others to join the protest he regularly told them to come unarmed. The government, however, pointed to a number of Santilli's "shock-jock" style statements to support keeping him in jail—including one from two years before the arrest occurred to urge his continued detention. In the end, the judge sided with the prosecution and ruled to keep Santilli in custody.

Situations like this - where words alone are used to label a speaker so dangerous or somehow threatening as to warrant the deprivation of his liberty - demand the highest caution. Where there is any question, we should err on the side of the speaker.

It is especially troubling that the prosecution and the court relied on statements made months and even years prior to the incident at issue in order to "prove" Santilli's risk. If all of our statements can be cherry-picked and strung together over a number of years to label us a "danger," we risk silencing our civil discourse. Recognizing and respecting the line between protected beliefs, even radical

SEARCH

Join our growing list of friends on Facebook & Twitter!



Recent Posts

The First Amendment Rights of "Shock-Jock" Pete Santilli

Portland Activist Secures First Amendment Win

I Was Shot Six Times With Pepper Bullets and Beaten With Batons – and I'm Here to Say Thank You

Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms

Portland Public Schools Made the Right Decision When It Withdrew From Christmas Festival

Indigenous Peoples' Day Must Be More Than Symbolic

Why I Signed the Letter

Clatskanie Police Chief Engaged in Racist Mockery

Democracy, Prosecutors and Criminal Justice Reform

Criminalization of Marijuana Comes to an End in Oregon

Blog Archive

- February 2016
- January 2016
- December 2015
- October 2015
- September 2015
- July 2015
- June 2015
- February 2015
- December 2014
- November 2014
- October 2014
- September 2014
- August 2014
- July 2014
- June 2014
- May 2014
- April 2014
- March 2014
- February 2014
- January 2014

Exhibit B

beliefs, and violent or criminal activity does not undermine our security, but rather strengthens it.

Did the decision to continue to hold Santilli in jail sufficiently protect his First Amendment rights?

There are less restrictive means of controlling an individual who is awaiting trial, such as a house arrest. We can all agree that we should not hold members of the media or protesters in jail without bail simply because they have shocking or abhorrent views. These are principles that we must stand by, even when we disagree with the message of the speaker.

The occupation of Malheur National Wildlife Refuge has been a divisive issue in Oregon. Many Oregonians see the protesters as outsiders, and the residents of Harney County were united in asking for a swift and peaceful end to the standoff. Even so, regardless of our political beliefs, Santilli's case may have far reaching implications on our American values that we must consider. Although the ACLU of Oregon is not representing Santilli, or any of the other people accused of conspiracy, we will continue to watch the situation closely to ensure that our basic constitutional principles are the basis of any government action.

- December 2013
- October 2013
- September 2013
- July 2013
- June 2013
- April 2013
- March 2013
- January 2013
- June 2012
- April 2012
- March 2012
- February 2012
- January 2012
- December 2011
- September 2011
- August 2011

Tags

Criminal Justice
Death Penalty
Free Speech
Immigrants' Rights
LGBT Rights
National Security
Police Practices
Prisoners' Rights
Privacy & Technology
Racial Justice
Religious Liberty
Reproductive Freedom
Voting Rights
Women's Rights
Youth & Student Rights

[Privacy](#) [Site Use Information](#)