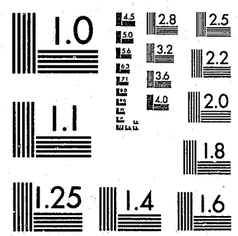

PRETRIAL RELEASE AND DETENTION

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA
OF THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
SECOND SESSION
ON

H.R. 7747

AN ACT TO AMEND TITLE 23 OF THE DISTRICT OF COLUMBIA CODE WITH RESPECT TO THE RELEASE OR DETENTION PRIOR TO TRIAL OF PERSONS CHARGED WITH CERTAIN VIOLENT OR DANGEROUS CRIMES, AND FOR OTHER PURPOSES.

JANUARY 31 AND FEBRUARY 6, 1978

...he use of the Committee on Governmental Affairs

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66656

Statement of

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University of California
Berkeley, California

before the

Subcommittee on Governmental Efficiency
and the District of Columbia
Committee on Governmental Affairs
United States Senate

Proposed Revisions of D.C. Code Sec. 23-1322
Pretrial Detention, H.R. 7747

February 6, 1978

I appreciate this opportunity to testify on the pretrial detention provisions of the District Columbia Code. It is a problem in which I have long been interested. During the nineteen-fifties I carried out, in Philadelphia and New York, the first empirical studies of the impact of the bail system on criminal justice administration and on the rights of defendants. I have also published studies on the scope of the constitutional liberty pending trial, with particular emphasis on the history and judicial interpretations of the Eighth Amendment.

The provisions of D.C. bail law which deny pretrial bail or any other form of conditional pretrial freedom to persons accused of less than capital offenses raise the most serious constitutional problems, problems which the proposed amendments of H.R. 7747 will only aggravate. Two constitutional provisions are relevant, the first being the due process clause of the Fifth Amendment. It is self-evident that pretrial imprisonment inflicts punishment before conviction, punishment that in many cases is suffered even though there never is any conviction. My own research has given empirical support for the common-sense propositions that pretrial imprisonment prejudices the right to a fair trial and, in the event of conviction, to a fair disposition of the imprisoned defendant's case. Compared with defendants who obtain pretrial release, the jailed defendant is hampered in the preparation of a defense, is more likely to be convicted and, if convicted, likely to receive a comparatively more severe sentence. To justify such invasions of basic rights would, under the balancing tests enunciated by the Supreme Court in due process cases, require a showing of compelling necessity and the absence of any alternative and less prejudicial remedies. This test cannot be met, for the obvious alternative--to provide

a speedy trial for allegedly dangerous defendants--would provide an effective and sufficient remedy for the abuses with which this legislation allegedly deals. Absent the most compelling public necessity, the cumulative effect of these discriminations is to deprive the jailed defendant of his rights to due process under the Fifth Amendment. These issues and the effectiveness of speedy trials, have been well documented and I will not elaborate further on them now, although I think they have received very inadequate attention in the Congress and in the Courts. Clearly one matter on which this committee should press forward is effective speedy trial legislation.

The second relevant constitutional provision, and the one I wish to emphasize is the clause of the
Eighth Amendment which specifically refers to bail. The language of this clause is puzzling, for on its face it only deals with protection against excessive bail. But both history and logic dictate that the only tenable interpretation of the Amendment is to read it as guaranteeing a constitutional right to pretrial bail in non-capital cases. Such an interpretation is compelled because, if the clause is given a literal reading, its words are ambiguous and its significance is trivial. If it means only that judges must not set excessive bail in those cases in which they set bail, but that they are free to deny bail altogether, the clause is a nullity, for as Mr. Just Butler wrote more than 50 years ago in United States v. Motlow, 10 F.2d 657, 659 (7th Cir., Butler, Cir. Justice, 1926), "The provision forbidding excessive bail would be futile if magistrates were left free to deny bail." If it is read to leave Congress free to legislate the denial of bail in any or all cases, then there is no need for the clause

at all, for excessiveness of bail would be guarded against by ordinary concepts of due process and legislative interpretation. When the members of the first Congress enacted the Bill of Rights and sent it out to the states for ratification, they thought they were adopting a charter of fundamental liberties. Madison laid stress on the intent that protection against abuse of these liberties

> must be levelled against the legislative (branch), for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. (1 Annals of Congress 437, 1789-91)

Ten years later, in writing about freedom of the press and the Sedition Act, Madison reiterated that whereas the English Bill of Rights was "not reared against the Parliament, but against the royal perogative, . . . in the United States the case is altogether different" in that protection against legislative abuse is also secured. 6 Writings of James Madison 386-87 (Hunt ed, 1906).

Thus the purpose of the Bill of Rights, including the Eighth Amendment, was to secure protection against legislative as well as executive and judicial abuse. To interpret the excessive bail clause as offering no protection against Congressional denial of the right to bail flies in the face of this undisputed history.

The Supreme Court has had few occasions to deal with the bail clause and there is no authoritative judicial resolution of the question of whether or not the Eighth Amendment necessarily imports a constitutional right to bail. I want to elaborate that point in a moment, for it is widely misunderstood.

The most obvious reason for this failure to resolve an important constitutional question, as the Court itself emphasized in 1951, is that

> from the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivally provided that a person arrested for a non-capital offense shall be admitted to bail. Stack v. Boyle, 342 U.S. 1 (1951).

Thus until very recently there has been no reason for the Court to determine the scope of the bail clause. The Court has, however, made it very clear that it views the right to bail as a fundamental component of our system of law. In Stack v. Boyle, which concerned only the issue of excessiveness and not the denial of bail, the Court nonetheless went on to say:

> this traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Id. at 3.

Twenty years later, in Schilb v. Keubel, 404 U.S. 357, 365 (1971), the Court reasserted the importance it attached to the matter, saying that "Bail, of course, is basic to our system of law," and in that case the Court expressly left open the question of a constitutional right to bail with the observation that ". . . we are not . . . concerned here with any fundamental right to bail."

The only Supreme Court authority which is asserted as being contrary to the position I am advancing here--that the Eighth Amendment incorporates a constitutional right to bail--is a dictum in Carlson v. Landon, 342 U.S. 524, 545-46(1952), a case decided in the same term as Stack v. Boyle, supra. Carlson v. Landon has frequently been miscited as a dispositive holding that the Amendment imports no right to bail. In fact, however, it concerned only the rights of aliens in deportation proceedings, and a 5-4 majority

held that alien alleged communists facing deportation charges were not entitled to bail under the Eighth Amendment. The Court concentrated almost exclusively on the legal status of aliens and on an interpretation of the Internal Security Act of 1950. The government's brief and argument before the Court stressed the non-criminal nature of deportation, Congress' absolute power over entry and deportation of aliens and the assertion that the Eighth Amendment applied only to criminal cases. 96 L.Ed. 551-52. Below, the Court of Appeals had likewise placed almost exclusive stress on the alien and communist issues, its opinion characterizing a communist as "an enemy of the state and of every person in it." Carlson v. Landon, 187 F.2d 991, 997 (9th Cir. 1951).

It was in this context that the Supreme Court's majority opinion, almost as an after thought, included near the end a short paragraph stating that the Eighth Amendment does not require that all arrests be bailable, but means "merely to provide that bail shall not be excessive in those cases where it is proper to grant bail." 342 U.S. at 545. As will be further elaborated below, the paragraph, raising a question which had not been argued or briefed, ignored the Amendment's American roots, misunderstood an English treatise, and distorted the Congressional debate on the Bill of Rights by a misleading citation to the Annals of Congress. Moreover, the dictum immediately followed a passage which stressed that aliens do not have the same rights as citizens charged with criminal offenses, and the opinion concluded with the observation that "the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." 342 U.S. at 546 (emphasis added).

This dictum must also be read in conjunction with Stack v. Boyle, supra,

which, as I have noted, was decided in the same term. Stack v. Boyle's assertion of the fundamental nature of the right to bail cannot be reconciled with the cavalier, slipshod dictum in Carlson v. Landon. Stack dealt only with the question of excessiveness of bail and, being decided under federal statutory law, the Court had no occasion to reach the question of constitutional rights against denial of bail. But the Court characterized bail as the "traditional right to freedom before conviction" which "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of stuggle, would lose its meaning." Id. at 4.

Carlson was decided by a 5-4 split Court in 1952; whatever significance may once have attached to its bail dictum has been eroded by the steady development of defendants' constitutional rights in the ensuing quarter century. In a succession of landmark cases, the protection of state criminal defendants has been extended by the incorporation in the Fourteenth Amendment of various provisions of the Bill of Rights. See Benton v. Maryland, 395 U.S. 784 (1954)(guarantee against double jeopardy); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to assistance of counsel); Malloy v. Hogan 378 U.S. 1 (1964)(privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400 (1965)(confrontation guarantee). In Klopfer v. North Carolina, 386 U.S. 213 (1967)(right to speedy trial), the Court was motivated in part by its concern to mitigate the potential evils of pretrial imprisonment. In re Winship, 397 U.S. 358 (1970), dealing with the requirement of proof beyond a reasonable doubt, characterized the presumption of innocence as as "bedrock . . . principle" of our criminal law administration. Id. at 363. Robinson v. California, 370 U.S. 660 (1967), expressly incorporated in the

Fourteenth Amendment the cruel and unusual punishment clause of the Eighth Amendment. And, as I have already noted, in Schilb v. Kuebel, 404 U.S. 357, 365 (1971), the Court said that "Bail, of course, is basic to our system of law." In view of this development it is clear that, so far as the Supreme Court is concerned, the question of whether or not the Eighth Amendment implies a constitutional right to bail is open and undecided.

In the lower federal courts a number of cases in the last twelve years have asserted the literalist position that the Eighth Amendment does not guarantee the right to bail. Most are dicta and they all derive from a brief, unsupported dictum in the so-called leading case of Mastrian v. Hedman, 326 F.2d 708, 710 (8th Cir. 1964), cert. denied, 376 U.S. 965 (1964). The Mastrian case involved allegedly excessive bail in a state prosecution; denial of bail was not an issue. Nonetheless the court said (at 710):

> While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail. (We are not here concerned with what these offenses may be.)

Several things are noteworthy in this extraordinary paragraph.

First, although the opening statement asserts that it is "inherent"

that "a right to bail shall generally exist," the rest of the passage leaves this declaration hanging in mid-air. There is a vague suggestion which no later cases have elaborated that there are implied federal constitutional limits to the power of the states to declare offenses nonbailable. If this is what the court meant the case has been repeatedly miscited for the proposition that there is no federal constitutional right to bail. The ambiguity remains unresolved. Second, the only federal constitutional bail remedy which the court finds to be available to state pretrial prisoners is that they are to be protected against arbitrary or discriminatory deprivation of whatever rights they may have under state bail law. As applied to state cases, the effect of limiting relief to arbitrariness effectively renders the Eighth Amendment a total nullity. As the court itself notes, the right not to be treated "arbitrarily or discriminatorily" is generally applicable to all "substantive or procedural benefits under [a state's] criminal law system . . ." It derives directly from the due process clause of the Fourteenth Amendment and would exist whether or not there was any Eighth Amendment.

It is significant that a much more recent 8th Circuit bail case does not cite Mastrian at all in discussing the constitutional issue. DeChamplain v. Lovelace, 510 F2d. 419 (8th Cir. 1975),

vacated as moot, 421 U.S. 996 (1975), involved the right to release from confinement pending court-martial under the Uniform Code of Military Justice; the court held that the accused serviceman must be afforded the right to a hearing before a neutral officer or judge at which the government must bear the burden of proving the necessity for confinement pending trial. The court cited In re Winship, supra, on the presumption of innocence as a "fundamental component of due process" and then said that "Pretrial release has long been recognized as a vital concomitant of that presumption." Id. at 424. The opinion then states (ibid):

> Whether the right to pretrial release is based on the Fifth Amendment guarantee of no deprivation of liberty with due process of law, or on the Eighth Amendment's prohibition of excessive bail, it clearly is not absolute in either the civil or military spheres. The government's legitimate interest that those arrested on probable cause give reasonable assurance that they will appear for trial and submit to sentence if convicted must be weighed in the balance. [citing, e.g., Stack v. Boyle, supra]

Of course this is self-evident; no court has held that the right to bail requires the release of every accused regardless of his or her ability to provide reasonable assurance against flight. If this is all that is meant by the statement that rights under the Eighth Amendment are not "absolute," it is entirely consistent with a

constitutional right to bail. Note also that the court, in contrast to its opinion in Mastrian, appears to leave open the question of whether or not there is a constitutional right to pretrial release based on the Eighth Amendment.

Most of the cases which build on the shaky foundation of the Mastrian theory that there is no Eighth Amendment right to bail have not involved denial of pretrial bail and are therefore no authority one way or the other on the constitutionality of such a denial. These cases fall into four categories.

(1) Many, like Mastrian itself, involve the alleged excessiveness of bail set by the state courts. This was the situation in Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963), which preceeded Mastrian and is frequently cited with it for the same proposition; and there are many other cases of this type.

(2) In another large group of cases, the issue was the right to bail on appeal after conviction. Different considerations apply after conviction, different constitutional standards are appropriate, and cases of this type are not relevant to the pretrial situation.

(3) A third category is composed of cases in which bail was denied to defendants charged with capital offenses. As with appeal, historical factors and policy reasons have required special constitutional consideration of this problem and such cases have no weight as authority against a general constitutional right to pretrial bail.

(4) Some of the cases which declare that there is no constitutional right to bail involve miscellaneous other situations other than pretrial detention, as to which they are irrelevant. E.g., In re Whitney, 421 F.2d 337 (1st Cir. 1970) (bail pending probation revocation hearing); Roberson v. Connecticut, 501 F.2d 305 (2d. Cir. 1974) (ibid); Hemphill v. United States, 392 F.2d (8th Cir. 1968), cert. denied, 393 U.S. 877 (1968) (pretrial bail claim mooted if raised on federal habeas corpus after conviction); Plumley v. Coiner, 361 F. Supp. 1117 (S.D. W.V.A. 1973) (ibid).

When all the above dicta have been weeded out, it is apparent that the assertion that the Eighth Amendment does not imply protection against denial of pretrial bail is without substantial foundation. In addition to the limitation of the scope of the right in capital cases, the only square holdings unholding denial of bail against, during or before constitutional attack have arisen from very exceptional circumstances involving protection for orderly trial processes. See United States v. Gilbert, 425 F.2d 490, 491-92 (D.C. Cir. 1969):

> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial. Yet this power should be exercised with great care and only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might

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threaten or cause to be threatened a potential witness or otherwise unlawfully interfere with the criminal prosecution. The court in Gilbert reversed the denial of pretrial bail and remanded the case for further proceedings at which the government would be required to produce stronger evidence of danger to witnesses. United States v. Wind, 527 F.2d 672 (6th Cir. 1975) vacated a similar denial of pretrial bail because of inadequacies in the hearing below. Both cases relied on Carbo v. United States, 288 F.2d 282, 686 (9th Cir. 1961) (bail revoked during trial to insure orderly trial process). It is clear, however, that this exception to the federal right to bail is to be extended to the pretrial phase only in an "extreme or unusual case." Carbo v. United States, 82 S.Ct. 662, 7 L.Ed.2d 769 (1962) Douglas, Circuit J.). The extremely narrow scope of this limitation on the right to bail is stressed in the most recent Sixth Circuit Case, United States v. Bigelow, 544 F.2d 904 (1976), which vacated an order denying bail and limited the Carbo-Gilbert doctrine to cases in which the operation of the court was directly threatened. The court said that "To insure the orderly progress of a criminal prosecution preventative detention should be used only in an extreme or unusual case when the court's own processes are jeopardized as by threats against a witness."

I conclude from this legal analysis that the bail clause of the Eighth Amendment necessarily imports a constitutional right to bail

in non-capital cases, that there is no substantial authority to the contrary, and that when the question is squarely presented to the Supreme Court the Court will so hold. With the one possible exception of the provision in Sec. 23-1322(a)(3) for preventive detention to prevent the obstruction of justice, I think that the present preventive detention provisions of the District of Columbia Code are unconstitutional. To further expand the scope of legislation that is presently probably unconstitutional is unjustifiable.

This historical analysis is supported by historical evidence. The circumstances surrounding the adoption by the first Congress of the excessive bail clause and that clause's antecedents in both colonial and English history are consistent only with the interpretation that I have advanced above. The antecedents of bail lie in English history and two things stand out in this pre-revolutionary background. The first is that relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law. Second, English protection against pretrial detention comprised three separate but essential elements. The first was the determination of whether a given defendant had the right to release on bail, answered by the Petition of Right of 1628, by a long line of statutes which spelled out which cases must and which must not be bailed by justices of the peace, and by the discretionary power of the judges of the King's bench to bail any case not bailable by the

lower judiciary. Second was the simple, effective habeas corpus procedure, enacted by the Habeas Corpus Act of 1679, 31 Charles 2, c. 2, which was developed to convert into reality rights derived from legislation which could otherwise be thwarted. Third was the protection against judicial abuse provided by the excessive bail clause of the Bill of Rights of 1689, which, because "excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects," provided "That excessive bail ought not to be required . . . ."

The protective structure thus stands like a three-legged stool, but when the Americans strengthened and converted their English statutory legacy into constitutional dogma one of the legs was omitted. This is the heart of the federal constitutional problem which has been analyzed above. The principle of habeas corpus found its way into Article 1, section 9 of the constitution, while the excessive bail language of the 1689 Bill of Rights was included in our Eighth Amendment. But the underlying right to the remedy of bail itself, which these enactments supplemented and guaranteed, was omitted. I am convinced that this omission was an inadvertent mistake, the error of George Mason, the draftsman of the Virginia Declaration of Rights of 1776, from which the language of the bail clause of the Eighth Amendment was drawn. Mason's purpose was the creation of a "new government upon a broad foundation" and the provision of "the most effectual securities for the essential rights of human nature, both

in civil and religious liberty." 1 Rowland, Life of George Mason, 239 (1892). Mason was a student of and thoroughly familiar with English constitutional history, but he was not a lawyer. He was certainly familiar with the ringing language of the English Bill of Rights, but the underlying fundamental bail law of both England and the colonies was buried in technical jargon.

Mason's mistake was thereafter carried forward with so little discussion that the latent ambiguity of the clause was never noticed. There was almost no discussion of the clause when it was adopted by Congress and that little only concerned the vagueness of the phrase "excessive bail." 1 Annals of Congress 754 (1789-91). The prevailing view of the times is illustrated by the Northwest Ordinance enacted by the Continental Congress in 1787, which provided that "all persons shall be bailable, unless for capital offences, where the proof shall be evident or the presumption great . . . ." This language was taken from Massachusetts and Pennsylvania laws first developed in the Seventeenth century, and was repeated in most of the early state constitutions of the revolutionary era.

Both Mason and the first congress were concerned to effectuate protection for "essential rights", and the only reading of the Eighth Amendment consistent with that purpose is to import into it a right to bail secure against both legislative and judicial abridgement. While such an interpretation leaves unresolved the precise scope of the right and its possible limitation in extreme situations, the

alternative is to reduce the Amendment to surplusage and to disregard (1) the important role of bail as a fundamental right in the development of English liberty; (2) the nondiscretionary character of contemporary English and colonial bail law; (3) significant trends in early colonial legislation which went far beyond English law in their liberality; and (4) the principal objective of the Bill of Rights to protect against congressional abuse.

If my constitutional analysis is accepted, there is a right to bail in all non-capital cases subject to only very limited exceptions such as the protection of the trial process, see the Carbo case, supra.

> In high risk cases alternatives available to the government should suffice to provide for essential public interests. These alternatives include speedy trial at the discretion of the government, with the possibility of detention as a sanction for unjustifiable delaying tactics by the defendant; probation control over the accused, daily reporting to the police or restrictions on travel; and discretion to detain an accused who has absconded in the instant or in a prior recent case (perhaps within five years). Only where the government can establish that release would create a high risk of violent injury to a specific victim, complainant, or witness should detention be permitted as a preventive measure. Even then detention should be contingent upon a speedy trial, and conditions of confinement should permit defendants to communicate freely with counsel, family and friends, and provide them with a standard of living substantially better than that of sentenced prisoners. Default by the government in meeting these conditions in any case should abrogate its privilege to detain.

Even if preventive detention is held not to be constitutionally proscribed, it should be rejected on policy grounds. The vices of pretrial detention are its imposition of punishment before conviction,

thus impairing the presumption of innocence, and its impairment of the right to fair trial. But the overwhelming practical objection to pretrial detention is that the kinds of precise prediction of future conduct which it requires cannot be made at any reasonable level of reliability even under the best of fact finding and diagnostic circumstances. See Diamond, The Psychiatric Prediction of Dangerousness, 123 U.Pa.L.Rev. 439 (1974); Monahan, The Prevention of Violence, in J. Monahan (ed.), Community Mental Health and the Criminal Justice System 13 (1975); Monahan, Social Policy Implications of the Inability to Predict Violence, 31 J. Social Issues 153 (1975); Von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 Buffalo L.Rev. 717 (1972); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970). Even if this necessary predictions could be made under ideal conditions, its application to the criminal justice system would have to be carried out on a mass scale before the lowest level judiciary without the time or facilities for the development of the factual background of each case. Under such conditions it would inevitably deteriorate into the worst kind of uncontrolled discretion.

There is a simpler, more practicable alternative to preventive detention in order to reduce the risks of pretrial liberty. If the period of time spent on pretrial release were drastically reduced

through effective implementation of the speedy trial concept, there would be a corresponding reduction in the risk of flight or the danger of criminal conduct by those released. Common sense alone would indicate this, and it is supported by one careful recent study. See Clarke, Freeman & Koch, Bail Risk: A Multivariate Analysis, 5 J. Legal Studies 341 (1976). The authors' analysis of their empirical data concluded that:

> Court disposition time, defined here as the amount of time elapsing from the defendant's release until the disposition of his case by the court (or until he fails to appear or is rearrested for a new crime, if either of those events occurs before disposition) must be considered the variable of greatest importance. Among the defendants studied, the likelihood of "survival"--avoidance of non-appearance and rearrest--dropped an average of five percentage points for each two weeks their cases remained open. This suggests that reducing court delay should be high on the agenda of those who could reform the bail system . . . (Id. at 341)

If this committee really wants to affect a reduction of crimes committed by those on pretrial release, it should direct its attention to such practical proposals for reform.

END

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