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

Printed for the use of the Committee on Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1978

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PREPARED STATEMENT OF PAUL R. RICE, PROFESSOR OF LAW, THE AMERICAN UNIVERSITY SCHOOL OF LAW

The Supreme Court has not ruled on the constitutionality of preventive detention. Indeed, aside from favorable language in two Circuit Court opinions, Carbo v. U.S., 82 S. Ct. 622 (1962) (Douglas, Circuit Justice) and Fernandez v. U.S., 81 S. Ct. 642 (1961) (Harlan, Circuit Justice), in which Supreme Court Justices were sitting as Circuit Judges on applications for bail pending appeal, the members of the Court have given little indication of how they would rule.[1] In Carbo and Fernandez, the Justices were addressing only the possibility of preventively detaining defendants on the ground of witness intimidation. Certainly, with regard to the constitutionality of preventive detention on the the ground of community danger, the language in those opinions offers little guidance. Incarceration of defendants who have attempted to intimidate witnesses has been found to be within the inherent common law power of the judiciary since the conduct giving rise to the detention directly relates to the fairness and integrity of the proceedings over which the judge has jurisdiction and is presiding. See, U.S. v. Gilbert, 138 U.S. App. D.C. 59, 425 F. 2d 490 (1969); Blunt v. U.S., 322 A. 2d 579, 584 (D.C. Ct. App. 1974). The decision of the Supreme Court necessarily will turn on the Court's interpretation and acceptance of historical precedent. See generally, Meyer, Constitutiality of Pretrial Detention, 60 Geo. L.J. 1139 (1972); Boreman, The Selling of Preventive Detention, 1970 NW. L. Rev. 879 (1971); and Hruska, Preventive Detention: The Constitution and the Congress, 3 Creighton L. Rev. 36 (1970).

In this paper I offer no insight into the constitutionality of the concept of preventive detnetion, as it has been codified in sections 23-1322, 1323, and 1324 of the D.C. Code. Assuming

1 In Carlson v. Landon, 342 U.S. 524 (1952) the Court upheld the refusal of bail to an alien pending deportation hearings. These proceedings, however, were civil and not within the guarantees of the eighth amendment. Due process rights controlled.

that it is constitutional, I address only the fairness and constitutionality of several of the revisions which have been propcsed in H.R. 7747 to section 23-1322.

The proposed expansion of the permissible period of preventive detention from sixty to ninety days:

One of the major revisions proposed in H.R. 7747 is the expansion of the permissible detention period under section 1322(d)(2)(A) from sixty (60) to ninety (90) days. I express no opinion on the need for or wisdom of this extension of time. However, if the detention period is so increased, I do not believe that it will affect the constitutionality of the preventive detention concept to which it relates. If the basic concept of preventive detention is found to be constitutional, the amount of time one can be detained pending trial would logically seem to be controlled by the speedy trial guarantee of the sixth amendment.

In recent years the most noted decision by the Supreme Court on the issue of speedy trial was Barker v. Wingo, 407 U.S. 514 (1972). Acknowledging in that opinion that pretrial incarceration is a very serious matter, because of the possibility that the person may not be found guilty, the Court delineated four factors which must be balanced in determining when the right to a speedy disposition is violated. Those factors are: 1) the length of the delay; 2) the reason for the delay; 3) whether the defendant asserted his right: and 4) the prejudice to the defendant. With regard to the last factor, prejudice, the Court noted one important type - "oppressive pretrial incarceration". Implicitly, it would seem that the length of permissible delay is inversly proportional to the degree of prejudice suffered by the defendant. Incarceration substantially should diminish the permissible period of pretrial delay. Whether incarceration due to preventive detention would necessitate more speedy dispositions than incarceration due to a defendant's inability to meet monetary conditions that

have been set, is not clear. Although the prejudice to both individuals would seem to be the same, the stigma of preventive detention resulting from the determination of "dangerousness" that must be made, may be sufficiently greater to require more expeditious action.

The proposed revisions to subsection (e): The temporary detention of those on probation and parole.

H.R. 7747 proposes significant revision in section 1323 (e). First, it would double (increase from five to ten) the number of days an arrestee for any offense, who is on probation or parole from any jurisdiction, can be detained without a hearing and without the government meeting the burdens of persuasion established in section 1322 (b) for preventively detaining the criminally violent or dangerous. Second, it extends this right to detain to any arrestee who is on bail, or other pretrial conditional release, for a felony offense. If the detention of arrestees released on bail is adopted by this committee, I propose that you incorporate this class of offender into subsection (a) and limit detention to cases where the rearrest is for violent crime, rather than expanding subsection (e) as proposed in H.R. 7747.

The inclusion of defendants on bail in subsection (e) is ill advised. That provision is intended to allow the temporary detention of persons whose liberty may be denied on a more permanent basis by the revocation of their conditional release (probation or parole). During this period of detention this jurisdiction does not proceed on the charge giving rise to the rearrest. This inaction on the new charge is possibly justified by the expectation of action on the prior conditional release, but the inactivity necessitates that the detention be only as long as expeditious action makes necessary. With regard to arrestees on pretrial release in pending cases from other jurisdictions, revocation of bail and preventive detention may not be authorized. In fact, most state jurisdiction do not recognize

preventive detention. Consequently, the justification for temporary detention does not exist. The only reason for holding the person in such cases is to protect the community from the danger which he may pose. Consequently, fairness dictates that authorization to detain immediately proceed under the general preventive detention provisions.

Regardless of whether the scope of subsection (e) is expanded to include defendants on bail, existing problems within subsection (e) must be addressed. Under the present language an arrestee who is on probation or parole may be detained if it "appear(s)" that the person "may" pose a "danger" to any person or "the community." There is no explicit requirement of a formal hearing. I believe that the failure of the provision to provide for this right, even though an informal inquiry may, in fact, be held, raises the possibility that the due process rights of individuals could be denied. Clearly, to expand this subsection with this existing inadequacy to allow the denial of liberty to persons who merely have been charged with a previous offense endangers the constitutionality of the provision.

Basic to our system of justice is the principle that one's liberty will not be deprived without a hearing and formality. This is true regardless of whether the proceedings giving rise to this deprivation are civil or criminal. See Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); and Argersinger v. Hamlin, 407 U.S. 25 (1972).

In Gagnon and Morrissey the issue was revocation of probation and parole respectively. In both opinions, the Court held that due process requires that a "reasonably prompt" informal inquiry be afforded if one is to be detained pending the more formal adjudication which is required for final revocation. At this initial inquiry, verified facts must be presented upon which a determination can be made regarding the violation of the conditions of release.

Throughout the opinions, the Court delineated what the minimum requirements for due process are in such preliminary hearings. These included: 1) written notice of the claimed violations;

(2) disclosure to the accused of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body which need not consist of judicial officers or lawyers; (6) evidence, including letters, affidavits, and other material not admissible in an adversary criminal trial; and (7) a written statement by the factfinders relating the evidence relied on and the reasons for revocation. Morrissey, Id. at 489. Less cannot be afforded a defendant who is being detained in this jurisdiction in contemplation of a revocation elsewhere.

No hearing is presently provided for in subsection (e). Under the proposed revisions in H.R. 7747, section 3 (b)(1), there is an explicit hearing requirement, but only after the five (or proposed ten) day period has elapsed. In section 3 (b)(1) of H.R. 7747 it is proposed that subsection (e) incorporate the hearing guidelines of subsection (b) only after the "appropriate State or Federal officials have failed or declined to take [the person] into custody . . ." and further detention under section 1322 is being considered. This, of course, is inadequate. The deprivation will already have been suffered. If subsection (b) were incorporated into subsection (e) prior to detention, the due process requirements of Morrissey, (with the exception of subsection (b) permitting the use of a proffer by the government, which will be discussed below), would appear to be met. This incorporation could be accomplished by deleting the words "appropriate State or Federal officials have failed or declined to take into custody during the ten-day period provided in such subsection" from the proposed revisions in section 3 (b)(1) of H.R. 7747.

In its Report, the House Committee seems to indicate that it intends to make subsection (b) applicable to the initial detention determination. On page 7 of that Report the Committee states that the "substantial probability" standard for showing guilt of the most recent charge (the standard established in subsection (b)(2)(C) must be met before detention is permissible under subsection (e). As previously discussed, however, the

language employed in H.R. 7747 does not appear to accomplish this.

Adding to the problems within subsection (e) and its proposed expansion is the fact that H.R. 7747 would expand the subsection to include persons who have been released on a "felony" charge who may pose a "danger" to the "community", and the fact that the type of "danger" which must be found to justify detention is not specified. I believe that the selection of individuals for detention on the basis of the type of charge which has been made against them in a pending action is unfair for a number of reasons. First, the label is imprecise because the definition of what constitutes a felony may vary from one jurisdiction to another. Second, the same conduct may be a felony in one jurisdiction but not in another, due solely to the possible penalties which have been assigned by the legislative bodies (generally, a crime with a possible punishment of more than one year is classified as a felony). Third, since possible punishment is generally the sole factor upon which legislatures distinguish felonies from misdemeanors, the label has no necessary relationship to the "dangerousness" of the person - the basic justification for preventive detention. Finally, the fact that a felony charge has been made, does not mean that a felony has been committed or that the prosecuting officials even anticipate obtaining a felony conviction. The person may not be guilty of any offense, or he may be overcharged as a result of the erroneous selection of charges by the arresting officer or as a result of an intentional ploy by the prosecution to encourage plea negotiations. This problem is compounded by the undefined "danger" which subsection (e) requires that the accused be found to pose to the community.

Within the subsection the concept of "danger" is wholly undefined. It is limited by neither the nature of the offenses and offenders covered by the subsection since the immediate offense giving rise to the arrest is not limited ("any offense"), nor by the pending felony charge, since not all involve "danger." In contrast, the offenses to which the general preventive detention provisions apply, as defined in subsection 1322(a)(1) & (2), (dangerous crimes as defined in section 23-1331 (3) and crimes of violence as defined in section 23-1331(4)), in turn

define the dangers to which the section is addressed. Contrary to the assertion in the Report of the House Committee, p. 5, that this subsection is limited to persons "rearrested and charged with any of the enumerated dangerous or violent crimes," the subsection has no delineation - it is open-ended and this would be true even if subsection (b) were incorporated prior to the detention decision. As a consequence, the dangerousness standard may be constitutionally vague. As presently worded, the arrestee can be charged with any crime and detained if it appears that he may endanger the health, safety, morals or general welfare of the community in ways that are unrelated to either the present or past charge, or if related to either charge, in no way involving violence or potential violence. As proposed, this provision would have potential application to a very large number of people who should not be detained in a free society without the benefit of the formalities of trial and the full protections of the Bill of Rights.

Even with the proposed changes, subsection (e) would allow the judicial officer to detain a selected class of persons (arrestees on bail for a "felony" charge) who pose a community danger (which is not necessarily related to the selected class of offenders) which he finds justifies detention, when the existence of that same danger will not justify the incarceration of others. That is to say, if an individual is rearrested on a nondangerous or nonviolent offense, (therefore not within the scope of section 1322 (a)) and has been released on bail on a pending assault charge, the judicial officer is prohibited from detaining the individual, regardless of any present "danger" which he may pose to the community, if a misdemeanor, rather than a felony charge were previously filed against him. Since there is no apparent basis for the discrimination against the class of alleged felony offenders on bail, it is irrational. Being irrational, it would clearly violate the right to equal protection of the law of that class of offender. In fact, a very strong argument can be made that a much more stringent standard of review (compelling state interest) applied by the Court due to the involvement of a fundamental constitutional right - liberty. This provision could not withstand such strict scrutiny.

The expansion of subsection (e) to include bailed defendants would create unanticipated results when the defendant has been released on a felony charge from this jurisdiction. Once rearrested, on any charge, he could be held five days (or ten days, as proposed) without an evidentiary hearing pending a determination of what will be done on revocation of bail in the pending felony charge. Since that charge is within this jurisdiction, however, revocation of the bail must be controlled by section 1322. However, even if the person could not be preventively detained under those provisions (because he does not fall within the class of offenders defined in section 1322 (a)) his detention for five (or ten) days is still allowed. If the person falls within section 1322 (a) and action is taken to revoke his bail, an identical hearing to that which would be held to determine whether to preventively detain the person on the latest charge would have to be held. Exactly the same evidence would be presented. Consequently, the practical effect of the proposed expansion could be to delay the preventive detention hearing and increase the maximum detention allowed from sixty to sixty five days (or ninety to one hundred days under the proposed expansions).

If the procedural inadequacies of subsection (e) are cured, through the incorporation of subsection (b) prior to the detention decision, and if persons released on bail or other conditional pretrial release are not included within it, I do not support the expansion of the temporary detention period from five to ten days. Such a drastic expansion would be appropriate only if a compelling governmental need can be shown. The fairness of the temporary detention period must be judged by balancing the government's reasonable needs against the right of the defendant to have the government act expeditiously, a right which is defined by the inherent injury of his incarceration coupled with the facts that the other jurisdiction has not requested that he be held and the charge giving rise to the rearrest is not being pursued in this jurisdiction during the detention period (as it otherwise would be under the general preventive detention provisions). I do not believe that a sufficiently compelling need has been demonstrated to justify the increased detention period.

Proposed Revisions: Subsection 1322 (a)(2) and 1322 (e)

The problems which I have raised with regard to subsection (e) and to its expansion to include bailed defendants could be minimized, if not avoided, by incorporating that class of offender into the definition of those who are subject to preventive detention under section 1322 (a). Under subsection (a)(2) I would propose that the language be amended to read as follows:

> (2) a person charged with a crime of violence, as defined in section 23-1331.(4), if (i) the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged crime of violence for which he is presently charged; or (ii) the crime of violence was allegedly committed while the person was, ~~with respect to another crime of violence~~, on bail or other release [for any offense] or on probation, parole, or mandatory release pending completion of a sentence; or

There is substantial public concern over the amount of crime which is being committed by defendants who have been released on bail in pending cases, or who have been shown leniency in prior cases as reflected in their probation or parole status. This was the moving force behind the proposed revisions in H.R. 7747. See, Report of House Committee on the District of Columbia, pp. 1-4. I do not believe, however, that the problem can or should be totally resolved through preventive detention. I believe that there is some responsibility for the system to function more expeditiously in disposing of the cases. All of the responsibility should not be placed on the defendants, some of whom may be erroneously or unfairly detained. Preventive detention should be reserved for those who, while released on bail, can be shown to have committed acts of violence and therefore pose a significant threat to the community. These are the types of offenses and offenders who outrage the public and who the public may have the right to demand protection from through preventive detention prior to conviction. My proposal would achieve this result and afford each individual the procedural due process to which he is entitled. It would ignore the type of pending charge upon which an individual has been released on probation, parole or bail (subsection (a)(2) presently requires

the new charge also to be one involving violence) thereby expanding the types of offenders presently subject to preventive detention, but it would be more restrictive than the proposal in H.R. 7747 (arrest for "any offense" and on bail for a "felony" charge) in that it would apply only to persons who can be shown by "clear and convincing evidence" to have committed a crime of violence.

Subsection (e) should be retained so that persons on probation or parole can be temporarily detained without proceeding on the charge giving rise to the rearrest. The due process problem within the present language must, however, be corrected. I would propose that the procedures, which are required for detention under section 1322 (b) & (c) be incorporated by reference into subsection (e). Although this has been proposed in section 3 (b)(1) of H.R. 7747, the language is inadequate since it restricts the incorporation (as discussed above).

On page 5 of the Bill, I would propose that you delete, from the words "who appropriate State . . ." in line 18, the remainder of the proposed revision, through line 21. As amended, by my proposal and H.R. 7747, section 23-1322 (b) would read in part, as follows:

> (b) No person described in subsection (a) of this section, [and no person described in subsection (e) of this section] shall be ordered detained unless the judicial officer --

The deletion of the last clause of the proposed revision in H.R. 7747 would incorporate subsection (b) into subsection (e) prior to the initial stage of detention, rather than at the end of the five day (or proposed ten day) period when the appropriate State or Federal officials have failed or declined to take the person into custody.

Subsection 1322 (b)(2)(c)

Regardless of the action taken on the proposed revisions in

H.R. 7747, an existing problem within the section 1322 (b) must be addressed. This is the method by which the government is permitted to satisy its burden of persuasion - a proffer - a mere offer that certain facts are true and can be proven.

In Blunt v. U.S., 322 A. 2d 579 (1974), the D.C. Court of Appeals held that a defendant is not entitled to confront the witnesses against him in the hearings under section 1322 of the D.C. Code. Noting that due process is a flexible conept, Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that a mere proffer of evidence was sufficient. The Court relied upon the authority of two Supreme Court decisions in reaching this conclusion. Richardson v. Perales, 402 U.S. 389 (1971); Williams v. Zuckert, 371 U.S. 531 (1963). I would submit that these decisions do not support the conclusion of the Court of Appeals and that the constitutionality of the practice is highly questionable.

In both Perales and Zuckert, the interests which were at stake were property interests. In Perales the issue was the denial of social security benefits, and in Zuckert the issue was the dismissal of a government employee. The preventive detention hearings must be distinguished by the fact that a liberty interest is at stake - an interest which historically has called for greater procedural protection due to the greater injury resulting from an unfair result. Cf. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25 (1972).

Bail hearings might be cited as authority for the use of a proffer at hearings under section 1322. Historically, conditions of pretrial release have been established in hearings where this informal procedure has been employed. That practice, however, cannot be construed as historical precedent, and therefore authority, for the appropriate procedures in preventive detention hearings. The two proceedings are qualitatively different. The bail hearing particularly under the liberal release provisions of section 1321, is based on the assumption of release - the primary issue being the appropriate condition. In contrast, the preventive detention hearing is litigating the very right to freedom that was before assumed. Consequently, the preventive detention hearing is more

analogous to a criminal proceeding where culpability and liberty are the principle issues. The most similar situation addressed by the Supreme Court was the parole revocation involved in Morrissey v. Brewer, 408, U.S. 471 (1972). For the temporary deprivation of liberty involved in the initial informal decision to revoke (which would later be followed by formal adjudication) "verified facts" were required. This has been interpreted to require the presentation of witnesses since the Court specifically held that the right of confrontation must be afforded unless the hearing officer finds good cause for not affording it. No less should reasonably be afforded defendants who are adjudicated a danger to society under the preventive detention provision.

I propose that the words "information presented by proffer or otherwise," in subsection 1322 (b)(2)(C) be deleted and the words, "verified facts presented" be inserted. That subsection would read, in part, as follows:

> (C) that, except with respect to a person described in paragraph (3) of subsection (a) of this section, on the basis of ~~information presented by proffer or otherwise~~ [verified facts presented] to the judicial officer there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and . . . .

Although this revision would not insure the constitutionality of the procedure, it would bring the process closer to the most analogous situation addressed by the Supreme Court.

END