REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

S. 1722 and S. 1723

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BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1722 and S. 1723

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CONTENTS

NCJ# 73371
Postiton Paper and Testimony of the Federal Public andCommunity Defenders on the Proposed Federal Criminal Code (pp. 10366-10450) (1979)

NCJ# 73372
Position Paper and Testimony of the Federal Public and Community Defenders on The Proposed FederalCriminal Code (pp. 10451-10582) (March 1978)

NCJ# 73373
~~Study of~~ The Possible Impact on Sentence Length and Time Served In Prison of Sentencing Provisions of Major Criminal Code Reform Legislation of the 95 th Congress-Study (pp. 10642-10652)

NCJ# 73374
Sentencing Provisions of Major Criminal Code Reform Legislation of the 95th Congress: Possible Impact on Sentence Length and Time Served in Prison (pp. 10653-10669)

NCJ# 73375
Motion Picture Association of America, Inc. and Recording Industry of America Inc. Concerning Film and Record Piracy and Counterfeiting

13370

STATEMENT OF ALAN M. DERSHOWITZ, PROFESSOR OF LAW, HARVARD UNIVERSITY, CAMBRIDGE, MASS.

I. INTRODUCTION

A. The problem posed

The problem surrounding the issue of bail is inherent in any system of criminal justice. When a person is charged with having committed a serious crime, he is generally arrested. Since a trial often will not ensue for a number of months, competing interests arise with regard to what should happen to the defendant during this inevitable hiatus between arrest and trial. On the one hand, society's interests include the prevention of the flight of the accused, the safety of the community, and the orderly process of the case. These interests are oftentimes in direct conflict with those of the accused, primarily his freedom before conviction based on the presumption of innocence, and his ability to aid in the preparation of his case for trial based on his constitutional right to counsel and an effective defense. Most other societies—including some of the most civilized—accord significantly less weight to the interests of the defendant in the pre-trial context. The general rule in most parts of the world today mandates pretrial confinement of persons awaiting trial for serious crimes. This obviously avoids the problem of bail altogether.

In this country, the setting of pretrial bail has been the norm in all but a small number of capital cases. While this norm forces our legal system to recognize the problem of the pre-trial status of the accused, the employment of monetary bail as the most common mechanism for confronting this problem has allowed our legal system to obscure the real issues at stake. Bail is often set in a manner which ignores the interests of the accused. The questions which surface have not been answered. Which of society's interests should be weighed against which of defendant's interests? What sort of weight should be given to the interests on either side? Can the interests and the weight accorded them be reconciled within a workable system that fully considers both society and the accused? These are some of the basic questions that a bail system should address, not merely cover up. Only by confronting these questions directly can the problem posed by bail be resolved.

B. The American experience

From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has provided that bail generally be available to persons arrested for noncapital offenses, (*Stack* v. *Boyle*, 342 U.S. 1, 4 (1951); Fed. R. Crim. P. 46(a); 18 U.S.C. § 3146). It has been held that bail may be denied only in exceptional cases. (*United States* v. *Abrahams*, 575 F. 2d 3, 8 (1st Cir. 1978); *United States* v. *Smith*, 444 F. 2d 61, 62 (8th Cir. 1971), *cert. denied sub nom. Haley* v. *United States*, 405 U.S. 977 (1972); *see Carlson* v. *Landon*, 342 U.S. 524, 537–46 (1952)). This right to be admitted to bail is based on the traditional right to freedom before conviction, a freedom which emanates from the fundamental tenet of the American criminal system that a person is presumed innocent until proven guilty. (*Stack* v. *Boyle*, *supra*, 342 U.S. at 4; Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J. 941. 951 & n. 67 (1970); *see* Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Uses of Pre-trial Parole*, 38 N.Y.U.L. Rev. 67, 69 (1963)). This freedom before conviction allows the accused to aid in the preparation of his defense—indeed to prepare and present his own defense if he so chooses—another recognized purpose of bail. (*Stack* v. *Boyle*, *supra*, 342 U.S. at 4; *see Faretta* v. *California*, 422 U.S. 806 (1975); 28 U.S.C. § 1654).

The function of requiring restrictive conditions, including money bail, in appropriate cases has historically been to assure the appearance of the accused

at trial. (*Stack* v. *Boyle*, *supra*, 342 U.S. at 4–5). It is not surprising, therefore, that the present federal bail statute, 18 U.S.C. § 3146, allows the setting of such conditions for the *sole* purpose of reasonably assuring the presence of the accused at trial. (*E.g.*, *United States* v. *Cramer*, 451 F. 2d 1198 (5th Cir. 1971); *United States* v. *Leathers*, 412 F. 2d 169, 171 (D.C. Cir. 1969) (per curiam)). Although the present statute has been held to be constitutional, (*e.g.*, *United States* v. *Smith*, *supra*, 444 F. 2d at 62), this does not mean that the legislation is fulfilling all of the purposes that it constitutionally can and should fulfill.

My belief is that the time has come for reform in the federal bail system in order that the system can be designed to best serve the needs of both the citizens and courts of this country. Senator Kennedy offered some ideas for such reform in his June 1 address to the National Governors Conference on Crime Control with which I find myself in basic agreement. My statements today will attempt to identify the central reasons why reform is needed and will present a constitutional framework for these reforms. This framework is not a radical departure from present practice, but is one aimed at providing practical results while, at the same time, avoiding divisive and unproductive theoretical warfare. It deals with very real problems that exist today, problems which any bail system must address.

II. THE NEED FOR BAIL REFORM

As Senator Kennedy pointed out in his June 1 address, the present bail system fails to deal effectively with the problem of crimes committed by defendants released on bail. He cited statistics from a recent study by the Institute of Law and Social Research which found that over 15% of all persons arrested in the District of Columbia were on bail at the time of their arrest. This arrest rate for persons out on bail is more than 10 times the rate of arrest for the general population. In short, current bail procedures pose a serious threat to the safety of individuals in our society. The present law, the sole overt aim of which is reasonably to assure the apeparance of the accused on trial, does not permit judges openly to consider a defendant's potential dangerousness to citizens when reaching bail decisions. (*United States* v. *Leathers*, *supra*, 412 F. 2d at 170–71; *United States* v. *Melville*, 306 F. Supp. 124, 126 n. 2 (S.D.N.Y. 1969); H. Rep. No. 1541, 89th Cong., 2d Sess. 5–6, *reprinted in* [1966] U.S. Code Cong. & Ad. News 2296). While preventing the flight of the accused is an important policy at which bail should be aimed, it should not stand alone. Prevention of flight is apparently encompassed within the constitutional policy underlying bail, but it is somewhat less than certain that the framers intended this policy to be the only permissible objective of bail.

My colleague at Harvard Law School, Professor Laurence H. Tribe, has concluded that capital crime exception to the Eighth Amendment clearly establishes that under that amendment a denial of bail may only be permised on the likelihood of flight and not on the danger of the accused. (Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1970)). I reject this conclusion. I also reject the categorical conclusion of former Attorney General John Mitchell, and others who argue that the framers clearly intended to permit the use of bail to prevent future crimes. (Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention*, 55 Va. L. Rev. 1223 (1969)). My research leads me to believe that the framers did not intend to prohibit denial or conditions of bail on grounds of dangerousness. My own view is that because virtually all dangerous crimes were also capital crimes in 1790, the framers simply never had to confront the issue of whether a dangerous offender not facing the death penalty, and therefore not likely to flee, could be detained solely because of alleged dangerousness. The issue was never debated during the time that the Constitution was drafted, and I suspect the framers simply never thought of the problem. It may not have occurred to them, and if it did, they did not purport to resolve it by the enactment of the Eight Amendment. The realities of the present day situation, however, makes it necessary for both the Congress and the courts to confront the problem of the dangerousness of the accused defendant before trial. (Dershowitz, *Imprisonment by Judicial Hunch*, 57 A.B.A.J. 560 (June, 1971)).

In practice, federal district courts often appear to recognize this concern for dangerousness. Federal prosecutors surely do. They often ask for money bail in amounts which defendants cannot afford, and the courts fall in line by admitting dangerous defendants to bail in these inflated amounts under the guise of preventing flight. (*See United States* v. *Leathers*, *supra*, 412 F. 2d at 170–71). This practice not only flies in the face of the current statute, but it effectively creates

a system of preventive detention—a concept fraught with grave theoretical and practical infirmities—for defendants believed to be dangerous.

As Senator Kennedy has said, the challenge is to develop a bail system that takes into account the legitimate concern of protecting citizens from crime, and does so explicitly. The bail system should not only deal with the recognized problem of dangerousness, but it should strive to do so in a candid, fair and constitutional manner.

III. A CONSTITUTIONAL FRAMEWORK FOR BAIL REFORM

There is an approach to bail reform which confronts the problems outlined above, and which falls somewhere in between the present system and preventive detention. In the reform framework that I would favor, monetary bail conditions are deemphasized and preventive detention is eliminated. A graded system of restricted release is proposed.

A. Monetary bail conditions

The value of monetary bail conditions is greatly overstated in present practice and money bail is often set in amounts designed to effectuate a *de facto* system of preventive detention of defendants. As early as 1963, a report of an Attorney General's committee which studied the bail system—a committee appointed by the late President John Kennedy which operated under the jurisdiction of the late Attorney General Robert Kennedy—recognized that a large proportion of accused persons lack means sufficient to supply even modest financial securities, with the result being that liberty pending trial is rendered unattainable for such persons. (*Attorney General's Committee on Poverty and the Administration of Criminal Justice, Report*, at 77 (1963) [hereinafter cited *as Attorney General's Report*]). The traditional administration of bail in this country, however, relies primarily on a system of financial inducements. (*Id.*). In many cases, therefore, monetary bail conditions are tantamount to setting no conditions at all, "a thinly veiled cloak for preventive detention." (*United States* v. *Leathers*, *supra*, 412 F. 2d at 171). This result is not only one which the present bail statute was designed to prevent, (*Allen* v. *United States*, 380 F. 2d 636, 637–39 (D.C. Cir. 1967) (Bazelon, J., dissenting)), but is one which essentially destroys the traditional right of freedom before conviction due to "the lack of means of the accused and a failure of ingenuity on the part of the government" to devise a non-pecuniary system of bail. (*Attorney General's Report* at 68).

Appellate review does little other than to perpetuate this injustice. When appellate courts scrutinize claims of excessive bail in violation of the Eighth Amendment, the standard applied is one which often skirts the real issue. The test for excessiveness asks only whether bail is set higher than an amount reasonably calculated to assure that the accused will appear when his presence is required. (*Stack* v. *Boyle*, *supra*, 342 U.S. at 4–5). In looking only to the lower tribunal's evaluation of what is needed to assure appearance, reviewing courts do not consider reasonableness vis a vis the particular accused's ability to pay. This allows, as noted above, the imposition of money bail to act "as a subterfuge for denial of release." (Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966, 975 (1970)). Thus, there must be a deemphasis on money bail in order to overcome present practices which result in arguably unconstitutional and clearly undesirable and inequitable results.

Of course, money bail may be the right medicine in certain cases, either to prevent flight or to ensure safety. When it can be determined that risk of financial loss will be sufficiently meaningful to the particular accused, then money bail might quite properly be used.

I note only in passing that monetary bail conditions are the least favored bail conditions as expressed by Congress in the present statutory scheme. (18 U.S.C. § 3146(a)). The imposition of a money bond is proper only after all other non-financial conditions have been found inadequate. (*United States* v. *Bobrow*, 468 F. 2d 124, 126–27 (D.C. Cir. 1972); *United States*, v. *Leathers*, *supra*, 412 F. 2d at 171). Monetary conditions of bail, however, continue to be widely used. Money bail should not be used in a cavalier manner, rather it should be employed only in the narrow group of cases where it will serve a meaningful purpose.

B. Preventive detention

Preventive detention is not the answer. As Senator Kennedy spoke on June 1 and a number of legal commentators, including myself, have written, preventive

detention is unsound both as a matter of public policy and constitutional law. (*E.g.*, Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371 (1979); Dershowitz, *Preventive Detention: Social Threat*, Trial, Dec.–Jan. 1969–70 at 22, 24). In the words of Mr. Justice Jackson, sitting as Circuit Justice:

"Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted." (*Williamson* v. *United States*, 184 F. 2d 280, 282–83 (2d Cir. 1950)).

The predictions of the kind relied on by the proponents of preventive detention tend to be unreliable and difficult to make. Predictions of any human conduct are problematic. Humans are complex entitites, and the world they inhabit is full of unexpected occurrences that cannot be accurately catalogued and predicted in an actuarial manner. Predictions of rare human events are even more difficult to make, and predictions of rare events occurring within a short period of time are the most difficult of all. Acts of violence by persons released while awaiting trial are statistically rare events, although they occur far too often, and the relevant time span is relatively short. Accordingly, the kind of predictions under consideration begin with heavy odds against their accuracy. A predictor is likely to spot a high number of persons who would actually commit crimes of violence only if he is willing to imprison a vastly larger number of defendants who would not in fact engage in such conduct. (Dershowitz, *Imprisonment by Judicial Hunch*, 57 A.B.A.J. 560, 562 (June, 1971)). I believe that this inherent unreliability presents an insurmountable barrier to the acceptance of pre-trial preventive detention under our current state of knowledge.

It should be mentioned that past proposals or suggestions to implement a system of preventive detention in this country have been met with great opposition, and have caused much divisiveness. In addition, as Senator Kennedy pointed out in his June 1 speech, the experience of the District of Columbia strongly suggests that preventive detention does not work. The District has a preventive detention statute (22 D.C. Code §§ 1322 & 1323)), but it is rarely invoked. Of some 1500 cases in the District of Columbia last year when preventive detention could have been used, it was only employed 36 times. The District also has one of the highest arrest rates in the country of persons on bail. The track record of the District of Columbia statute is not a strong recommendation for the enactment of similar statutes.

C. Restricted release

My proposal for bail reform is one which would release accused persons subject to conditions or restrictions imposed by a court on a case-by-case basis. These conditions would not only be aimed at reasonably assuring the appearance of the defendant when required, as under the present statute, but would also be intended to avoid other potential problems of pre-trial release. As already expressed, danger to individuals would be a highly relevant consideration, as would tampering with prospective witnesses, jurors and the like. This list is obviously not meant to be exhaustive.

In his June 1 speech, Senator Kennedy identified a number of suggested conditions or restrictions that might be imposed. These included requiring a defendant to: (1) report to appropriate law enforcement agencies on a regular basis; (2) avoid all contacts with potential witnesses; (3) avoid specific neighborhoods and personal associations; (4) not possess a weapon; (5) participate in a drug rehabilitation program; and (6) seek employment. Of course, as the Senator remarked, many other conditions can be suggested, depending on the facts of the particular case. Indeed, at least one federal district court judge has imposed similar restrictions on an accused under the present statute. (*United States* v. *Cowper*, 349 F. Supp. 560, 566 (N.D. Ohio 1972)).

In general, as under the present statute, the presumption would be favor of unconditional release on personel recognizance or upon the execution of an unsecured bond. (*E.g.*, *United States* v. *Leathers*, *supra*, 412 F. 2d at 171). The norm would be freedom. However, a wide variety of individualized case-by-case concerns would factor into the imposition of limits or conditions upon this norm for the particular defendant. These would be presented by both prosecution and defense counsel at a pre-trial bail hearing similar to that already afforded defendants. (*See United States* v. *Wind*, 527 F. 2d 672, 675 (6th Cir. 1975); *United States* v. *Gilbert*, 425 F. 2d 490, 491–92 (D.C. Cir. 1969)). Conditions of bail could be later modified, if found necessary, at hearings similar to those currently employed in parole or probation revocation hearings. (*See Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (parole revocation)). In addition, rules of appealability from original release orders and/or modifications of condition orders could readily be fashioned, not unlike the provision now found in 18 U.S.C. § 3147.

The problems of prediction noted above in the context of preventive detention pose a less serious hurdle to the idea of restricted release. Restricted release does not absolutely deprive any individual of liberty. In this sense, it does not depart from traditional concepts. For instance, it allows for unfettered consultation with counsel, and for the time and mobility that an accused may need to aid in the preparation of his case. The notion of restricted release limits liberty, but only with regard to all relevant individual factors and explicitly stated policy aims. In other words, although admittedly imperfect, predictions of human conduct can justify graded liberty. In cases where the predictions are wrong, the fact of unnecessarily applied restrictions would not approach the total denial of freedom imposed by a system of preventive detention.

In addition, I wish to make clear that this framework for bail reform does not detract meaning from the fundamental policy of the presumption of innocence. I do not ascribe to the views of Mr. Justice Rehnquist in the most recent Supreme Court case concerning the rights of pre-trial detainees. (*Bell* v. *Wolfish*, 47 U.S.L.W. 4507 (May 14, 1979)). In his majority opinion, Justice Rehnquist characterized the presumption of innocence as an evidentiary presumption, one that "is indulged only in the absence of contrary evidence." (*Id.* at 4510 *quoting Taylor* v. *Kentucky*, 436 U.S. 475–84 n.12 1978)). I respectfully disagree. The presumption of innocence is a weighty policy, (*Stack* v. *Boyle*, *supra*, 342 U.S. at 4), and some commentators have well argued that it is constitutionally based. (*See, e.g.*, Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Uses of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67, 69 (1963); Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 Yale L.J., 941, 951 & n.67 (1970)). In any case, it is readily recognized that this weighty policy of presuming one's innocence until guilt is proven can be overcome. At trial, the presumption of innocence is overcome by proof beyond a reasonable doubt. At the pre-trial release stage of the criminal process, my framework allows for the presumption to be modified in its application in a sliding scale fashion on a case-by-case basis. This stems from the irrefutable fact that a certain amount of liberty is necessarily relinquished when an individual is brought into the criminal process. For example, an accused may legally be required to submit to fingerprinting, photographing, or measurements in addition to standing or speaking for identification, appearing in court, assuming a stance, walking or making a particular gesture. (*See Schmerber* v. *California*, 384 U.S. 757, 764 (1966)). A suspected individual may be stopped and frisked. (*E.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968)). In extreme cases, he may even be made to submit by the application of force—even deadly force. These represent but a few of the invasions of liberty which, although admittedly not pleasant, are indeed part of our traditionally accepted criminal process. In the framework which I propose today, the extent of the pre-trial relinquishment of liberty would depend on the particular facts and circumstances surrounding the defendant and the situation. There would be a presumption of unrestricted liberty, but this presumption could be overcome to some degree by specific facts demonstrating a particular need.

I only wish to add with regard to the presumption of innocence that the Supreme Court's recent holding that the presumption has no application to the rights of pre-trial detainees, (*Bell* v. *Wolfish*, *supra*, 47 U.S.L.W. at 4510), makes it all the more necessary to avoid pre-trial detention in as many cases as reasonable. In other words, Justice Rehnquist's views add to the necessity for reforming the bail system along the lines of a restricted release framework.

D. Some additional thoughts

Under a restricted release system, restrictions on an accused could be modified or release revoked by using two types of proceedings with which courts are already familiar. As alluded to above, a procedure like that employed by courts in parole or probation revocation hearings would seem appropriate to deal with defendants who materially violated the conditions of release ordered by the court. In addition, where it could be shown that an accused deliberately violated release restrictions, contempt powers could be exercised. (*See* 18 U.S.C. §§ 401 & 402).

To aid the fuctioning of a system based on my proposals, parallel legislation should eliminate—except perhaps in extraordinary cases—the possibility of con-

current sentences for crimes committed by defendants on release. Senator Kennedy spoke to this issue on June 1 when he suggested that concurrent sentencing for crimes committed on bail actually encourages the accused to commit other crimes. His reasoning was that the likelihood of a concurrent sentence offers an opportunity for the commission of additional crimes without fear of corresponding additional sanctions. I would favor legislation that creates a presumption in favor of consecutive sentences for crimes committed while an accused is on pre-trial release. The theory behind this approach is that a crime committed while on pre-trial release represents a substantial aggravating factor to be considered in sentencing. To encourage concurrent sentences is to ignore this theory; to impose consecutive sentences is to put this theory into practice.

IV. CONCLUSION

As I stated at the outset, my proposed framework for bail reform is one which strives for practical results while avoiding theoretical warfare. These proposals do not represent a radical departure from present practice. As can be seen, many existing legislative aims and judicial practices in both the bail system and other analogous contexts are drawn upon in formulating these ideas for needed reform. No great debate over principle is intended. My proposals will hopefully be viewed in the light in which they are offered. They represent a down-to-earth attempt to deal with certain practical needs of our country that the bail system can and should satisfy, without compromising important constitutional protections and civil liberties.

SENATOR DOLE'S QUESTIONS FOR PROFESSOR ALAN DERSHOWITZ

1. In your statement, on pages 3–4, you say there is considerable confusion among scholars as to whether the Framers of the Constitution intended to authorize preventive detention, whereby a suspect can be denied bail on the basis of whether he poses a sufficient great danger to society.

Yet on page three you say the arrest rate for persons out on bail is more than than ten times the arrest rate for the general population.

This clearly indicates that suspects on bail pose a danger to society, which we need to curtail. Despite this obvious danger to society posed by bailees, you are opposed to preventive detention, and recommend a form of "restricted release," i.e., release based on restrictions determined on a case by case basis.

Is there a danger that such a restricted release system may be subject to arbitrariness by various judges and that it would result in a system as bad as, or worse than, the present bail system?

How would a judge predict the likelihood of a particular suspect's commission of more crimes while released on bail?

2. While "danger to society" would be a factor to be considered by the judge in your restricted release system, could this in fact become a meaningless criterion, subject to each judge's whim?

3. Would it be fairer to suspect and safer for society if we amend S. 1722 to mandate the denial of pre-trial release to any suspect accused of certain heinous crimes, by category?

4. On page seven, you cite the District of Columbia Preventive Detention Statute as proof that such statutes "don't work," because it is rarely invoked. Do you feel that if the Congress mandates preventive detention in this act, Federal judges will be more likely to invoke this statute?

5. You seem to show great concern for the rights of the accused. But what about the rights of the victims of crime?

Do you favor a provision in the bill to provide for restitution to victims of crime?

If so, how would you integrate such restitution with civil damage liability for the same act?

6. What is your opinion of determining sentencing and the sentencing commission, which S. 1722 provides?

ALAN DERSHOWITZ' ANSWERS TO SENATOR ROBERT DOLE'S QUESTIONS

1. I agree with you that there is a danger of judicial arbitrariness in a restricted release type of bail system. Part of the aim, however, is to structure a system in which arbitrariness is reduced and has the least effect on constitutional liberties. I believe that a restricted release system accomplishes this goal.

Under restricted release, judicial decisions—even if arbitrary—would not bring about the absolute deprivation of liberty that results from the surreptitious use of the present system or that would result under a system of preventive detention. Instead, it would lead to greater restrictions on a defendant. As set out in my written statement, these restrictions would be subject to modification and might well be reviewable. In any cases, conditions of bail would not seriously intrude on the right to freedom before trial and would not impede a defendant from at least aiding in the preparation of his own defense. On the other hand, arbitrariness in the present system or in a preventive detention system results in the complete abrogation of these basic rights and policies that are at the heart of any pretrial release system.

In addition, Justice Rehnquist's majority opinion in *Bell* v. *Wolfish* (47 U.S.L.W. 4507 (May 14, 1979)), holding that the presumption of innocence has no application to the rights of pretrial detainees, provides another argument for favoring a restricted release system over either the present system or a system of preventive detention. Quite simply, we especially do not want persons confined on a pretrial basis if the confinement is not subject to certain fundamental tenets of our criminal justice system.

In response to the second part of this question, I can only say that judges would make predictions on the basis of a wide variety of individualized case-by-case concerns—for example, the nature of the crime charged, the defendant's drug habit if any, the defendant's past record, and the defendant's current work and family situation would all seem relevant factors in a judge's prediction of the likelihood of a suspect's commission of more crimes while on bail. Studies of factors that are somewhat predictive of crime might be employed, although none that I know of permit a high degree of predictive accuracy. Although admittedly far from perfect, I feel that predictions of human conduct can justify a graded liberty. As I said in response to Senator Thurmond's question during my oral testimony, more information is needed by judges. However, restricted release based on the kind of information already available seems a better alternative to surreptitious use of the present system based on that same information.

2. I do not propose that "danger to society" be a factor considered in a restricted release system. Rather, it is "danger to individuals" that I consider to be the relevant factor. It is important to make this distinction. The use of danger to society, as distinguished from danger to the individuals who make up society, suggests that bail restrictions could be applied to prevent anticipated crimes of speech, advocacy and political organization. These are the traditional crimes against society. One need only look as far as Judge Julius Hoffman's denial of bail pending appeal to the defendants in the Chicago Seven trial to see the evils that a general "danger to society" standard could produce. (See Dershowitz, "Imprisonment by Judicial Hunch," 57 A.B.A.J. 560, 561 (June, 1971)). My proposed system, however, would generally exclude crimes of advocacy from a judge's consideration, and would focus on crimes of physical harm to individuals. By so limiting the dangerousness criterion, one substantially decreases—without entirely eliminating—the chance that it will become a meaningless criterion, subject to each judge's whims.

3. I do not believe that it would be fairer to suspects to mandate the denial of pretrial release to those accused of certain heinous crimes. Due to the aforementioned unreliability of predictions and the absolute deprivations imposed by preventive detention, a mandated denial of pretrial release does nothing positive in terms of fairness to any suspect.

Sufficient data does not exist to know whether mandated preventive detention in certain cases would be safer for individuals in our society. Again, the unreliability inherent in predicting rare human events argues against any form of absolute preventive detention. To mandate denial of pretrial release for the safety of individuals, at this point in time, would be to treat with surgery that which might be alleviated by aspirin.

4. In my written statement, at page 7, I cited the District of Columbia preventive detention statute as "not a strong recommendation for the enactment of similar statutes." The statute in the District is rarely invoked, largely because of its cumbersome mechanism to protect due process guarantees. These procedures cause prosecutors and judges to look to the easier surreptitious use of the present money bail system. If Congress should mandate preventive detention, similar safeguards would be necessary, and the mechanism would likely prove to be as unworkable as that in the District. If prosecutors and Judges have the present money bail system available as the alternative, there is no reason to believe that

the experience in the federal courts would not mirror that of the District of Columbia courts.

It is important to note that due process guarantees could be protected in a restricted release system by employing procedures analogous to those already in effect in other contexts in the criminal justice system. As a result, the mechanism need not be unruly.

5. This question is beyond the scope of my testimony. I will state, however, that I have always been in favor of a state mandated system of restitution for victims of crime. I also favor adopting procedures whereby persons erroneously convicted of crimes they did not commit could be given restitution for the harm done to them by a false conviction and imprisonment. (See Goldberg, "Equality and Governmental Action," 39 N.Y.U.L. Rev. 205, 224 (1964)).

6. My views on sentencing and a sentencing commission are contained in the record of my prior testimony that I offered to the Subcommittee on Criminal Laws and Procedure a few years back. ("Reform of Federal Criminal Laws: Hearings on S. 1437, S. 31, S. 45, S. 181, S. 260, S. 888, S. 979 and S. 1221 before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on the Judiicary," 95th Congress, 1st session 9042 (1977)).

END