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THE DISTRICT OF COLUMBIA BAR

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Sections Manager

TO: Board of Governors
Section Chairpersons
(Designated to Receive Public Statements)

FROM: Carol Ann Cunningham CAC

DATE: February 5, 1992

SUBJECT: EMERGENCY PUBLIC STATEMENT regarding Comments on D.C. City Council Bill 9-360, The Bail Reform Amendment Act of 1991, by the Section on Courts, Lawyers and the Administration of Justice

48-hour expedited consideration requested on behalf of the Courts, Lawyers and the Administration of Justice Section

Enclosed please find for your immediate review a one-page public statement prepared by the Courts, Lawyers and the Administration of Justice Section. If you wish to have this matter placed on the next Board of Governors' agenda on February 11, please call me by 5:00 p.m. on Friday, February 7. I can be reached at (202) 331-4364.

Please note that according to the Guidelines regarding public statements (pp. 39-52) your telephone call "must be supplemented by a written objection lodged within seven days of the oral objection."

Enclosures

cc w/enclosures:
James Robertson, Esq.
Jamie S. Gorelick, Esq.
Frederick D. Cooke, Jr., Esq.
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COMMITTEE ON COURT RULES
OF THE COURTS, LAWYERS AND THE ADMINISTRATION
OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS ON D.C. CITY COUNCIL BILL 9-360, THE "BAIL REFORM AMENDMENT ACT OF 1991"

Carol Elder Bruce, Cochair
Randell Hunt Norton, Cochair
Deborah J. DeMille-Wagman
Hon. Eric H. Holder, Jr.**
Jeffrey F. Liss
Donna M. Murasky
David A. Reiser*

Steering Committee,
Courts, Lawyers, and the
Administration of
Justice Section, D.C. Bar

February 4, 1992

*/ Principal author

**/ Steering Committee member Hon. Eric H. Holder, Jr. did not participate in this comment.

STANDARD DISCLAIMER

The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors.

Summary

The Section on Courts, Lawyers and the Administration of Justice shares with other members of our community the concern over the tide of violence which is sweeping our city. The Section strongly endorses measures to intervene with at risk youths and their families, and to deter crime through community policing and other similar measures. The Section opposes amendments to the current bail law of the District of Columbia, such as the proposed "Bail Reform Amendment of 1991," which reduce the procedural safeguards against detaining innocent persons, because such measures jeopardize the liberty of citizens without adding to the safety of the community. The specific aspects of the Bail Reform Amendment Act which are of greatest concern to the Section are discussed below.

1. Although the measure has been justified to the public as a way of detaining "triggermen" with histories of violence, but no adult convictions, the scope of the detention provisions in the bill is much broader. For example, the bill authorizes detention on the basis of a single "dangerous" crime. The statutory definition of "dangerous" offenses includes all felony drug crimes. This tremendously expands the scope of preventive detention. Congress envisioned detaining a "small but identifiable group of particularly dangers defendants." S. Rep. 98-225 at 6, when it passed the federal detention statute in 1984, but the current rate of detention in the United States District Court is 70%, including defendants in many relatively small scale drug cases. This suggests that prosecutorial

discretion cannot be relied upon to narrow overbroad statutory detention authority. Instead of the "carefully limited exception," United States v. Salerno, 107 S. Ct. 2095, 2105 (1987), the proposed bill could make detention without bond the rule. An amendment to the current law tailored to persons accused of violent crimes whose "pattern of behavior" demonstrates that release would endanger the community would address the concerns raised in the news media without diluting constitutional safeguards. Such an amendment has been proposed by John A. Carver, Director of the D.C. Pretrial Service Agency.

2. The use of "rebuttable presumptions" to shift the burden to the defense to produce evidence why someone should not be detained has the practical effect of reducing the government's burden of proof from "clear and convincing evidence" to something less. When a detention request is based upon a single unproven charge instead of a pattern of conduct or a prior criminal record, the burden of producing clear and convincing evidence must rest with the government.

3. The proposed bill extends the length of detention authorized, at the same time that it reduces the evidentiary requirements for detention. Moreover, instead of the absolute time limit under the current statute, the proposed bill permits continued detention for an indefinite period if the trial is delayed at the request of the defense, presumably even if the reason for the continuance is the government's failure to disclose information in discovery. The result is that more

people will be detained on less evidence for a longer period before a jury has the opportunity to determine guilt or innocence. The proponents of this bill have not explained why an extension of time is justified.

4. The bill contains many provisions wholly unrelated to the rationale communicated to the public. For example, the bill would make detention pending a hearing mandatory if the government requests it, even if the judge is convinced that release would not endanger the public. The bill also would permit the government to delay detention hearings without giving any reason for up to three days, and to delay them for an indeterminate period on a showing of "good cause." This means that people who should and will be released after a hearing may imprisoned for extended periods before the hearing is held.