



Department of Justice

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TESTIMONY BY ATTORNEY GENERAL ROBERT F. KENNEDY ON BAIL LEGISLATION
BEFORE THE SUBCOMMITTEES ON CONSTITUTIONAL
RIGHTS AND IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE
SENATE JUDICIARY COMMITTEE
11:15 a.m., August 4, 1964

The legislation you consider today is new evidence of the deep concern of Congress that all Americans receive equal treatment in our courts, whatever their wealth. This subject has been one of great interest to us at the Department of Justice and I am very happy to come here to testify about the three measures before you, S. 2838, S. 2839, and S. 2840. They are, in general, excellent solutions to aspects of an increasingly disturbing problem.

That problem, simply stated is: the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail.

Bail has only one purpose -- to insure that a person who is accused of a crime will appear in court for his trial. We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. It is not harassment. It is not to keep people in jail. It is simply to guarantee appearance in court.

This is a legitimate purpose for a system of justice. In practice, however, bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom.

I am talking about a very large number of Americans. In fiscal 1963, the number of federal prisoners alone held in jail pending trial exceeded 22,000. The average length of their detention was nearly 29 days.

Like figures can be compiled from state and local jurisdictions. On a single day last year, for example, there were 1,300 persons being held prior to trial in the Los Angeles County jail. In St. Louis, 79 percent of all defendants are detained because they cannot raise bail. In Baltimore the figure is 75 percent.

A 1962 American Bar Association survey of felony cases showed high percentages of pre-trial detention in New Orleans, Detroit, Boston, San Francisco and Miami. And similar conditions exist in smaller communities.

In Montgomery County, Maryland, nearly 30 percent of jail inmates are persons awaiting grand jury action or trial. The heart of the problem is that their guilt has not been established. Yet they must wait in jail for three to six months.

The main reason for these statistics is that our bail setting process is unrealistic and often arbitrary. Various studies demonstrate that bail is set without regard to a defendant's character, family ties, community roots or financial condition. Rather, what is often the sole consideration in fixing bail is the nature of the crime.

In the federal court system, Rule 46 of the Federal Rules of Criminal Procedure directs the courts to consider "financial ability of the defendant to give bail" and the "character of the defendant," as well as the "nature and circumstances of the offense charged" and the "weight of evidence against him."

Bail is often set, however, by judges who do not know or consider these facts or measure the likelihood of flight. What is the result? Bail is set in an amount which may seem small to the judge or the prosecutor, but which to the defendant might well mean prison.

For example, according to one survey, 17 percent of those whose bail was set at \$500 in the District of Columbia had to stay in jail. In New York City, the figure was 25 percent. Among those whose bail was set at \$2,500, the figures rose to 78 percent in the District of Columbia and to 63 percent in New York City.

A survey of federal districts by our distinguished Committee on Poverty and the Administration of Federal Criminal Justice showed that with bail set at \$500 or under, it was still an impossible amount for 11 percent of defendants in Connecticut, 36 percent in the Northern District of Illinois, 78 percent in Sacramento and 29 percent in San Francisco.

Such figures are even more disturbing when we recognize that these defendants not only could not raise \$500, but were unable even to raise the fifty or seventy-five premium for securing bond from professional bail bondsmen.

The system distorts justice even for the defendant who can afford the bail bond. Having money is not enough. He must pass muster with the bondsmen. This procedure has been aptly described by Judge Skelly Wright:

...The professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety -- who in their judgment is a good risk. The bad risks, in the bondsmen's judgment, and the ones who are unable to pay the bondsmen's fees remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail. (Pannell v. U.S., 320 F. 2d 698 (D.C. Cir. 1963)).

What is the justice in a system which, when the stakes are jail or freedom, can leave the decision up to a private businessman? Plainly, our bail system has changed what is a constitutional right into an expensive privilege.

It is expensive not only to the individual, but also to society. Federal, state and local governments must spend millions each year on food, care, clothing, and constantly growing detention facilities. In 1963, for example, the cost of maintaining only those prisoners held in local jails awaiting federal trial totaled \$2,000,000. Local governments are faced with similar expenses. In the District of Columbia, the cost of pre-trial detention in 1962 was \$500,000. In New York, it was more than \$10,000,000.

Such costs alone should be a matter of widespread attention. What should impart even greater urgency to our attention is the human cost, and that is incalculable.

The man who must wait in jail before trial often will lose his job. He will lose his freedom to help prepare his own defense. And he will lose his self-respect. He is treated, in almost every jurisdiction, just like the convicted criminal. Even though he may finally be found innocent and released, he is tagged, nonetheless, as a jailbird.

This impact was described in a recent New York Assembly report:

We doubt whether any innocent person (as all before trial are presumed to be) can remain unscarred by detention under such a degree of security as New York's detention houses impose. The indignities of repeated physical search, regimented living, crowded cells, utter isolation from the outside world, unsympathetic surveillance, outrageous visitor's facilities, Fort Knox-like security measures, are surely so searing that one unwarranted day in jail in itself can be a major social injustice. (Bail, Report of Judiciary Committee of the N.Y. State Assembly, ch. 3, Legis.Doc. No. 37 (1963)).

The cruelty of the bail system is documented by case after case of persons so confined and then acquitted. Recently, in Los Angeles, a man was forced to stay in jail awaiting trial for a minor crime because he could not afford bail. His case came to trial after 207 days. He was acquitted.

A Pennsylvania man who could not raise \$300 spent 54 days in jail awaiting trial on a traffic offense -- the maximum penalty for which was five days in jail.

In Glen Cove, New York, Daniel Walker was arrested on suspicion of robbery and spent 55 days in jail for want of bail. Meanwhile, he lost his job, his car was repossessed, his credit destroyed, and his wife had to move in with her parents. Later, he was found to be the victim of mistaken identity and released. But it took him four months simply to find another job.

There are other injustices in the present bail system. The Committee on Poverty and the Administration of Federal Criminal Justice concluded that a man forced to stay in jail before a trial is more likely to be convicted. If convicted, he is more likely to get a jail term. And, if sentenced to a jail term, he is likely to get a longer sentence.

These conclusions are supported by controlled experiment. We are waiting now for the detailed results of such a study made in New York, to be published shortly. This study indicates that even among parallel defendants, charged with identical crimes, the defendant who must stay in jail will not fare as well as his counterpart who was released on bail.

In summary then our present bail system inflicts hardship on defendants and it inflicts considerable financial cost on society. Such cruelty and cost should not be tolerated in any event. But when they are needless, then we must ask ourselves why we have not developed a remedy long ago. For it is clear that the cruelty and the cost of the bail system are needless.

Today, bail reform projects are underway in a number of communities throughout the country. These projects demonstrate that if a court is provided and considers fundamental facts about each defendant, it can make a reasonable estimate of his likelihood of flight--and that many persons jailed for want of bail could be released safely without it.

The pioneering example of such a system--and of its effectiveness--is the Manhattan Bail Project, conducted under the auspices of the Vera Foundation. I understand that the very able Director of that Project, Mr. Herbert Sturz, will appear before you tomorrow to discuss the project in some detail. Thus, let me only note now that so far, 3,200 persons have been released without bail on the recommendation of Project workers. Less than 1 percent have failed to appear for trial. This compares with a default rate of about 3 percent for those freed on bail.

The District of Columbia has begun a bail project, modeled on the New York project. In its first 100 days, all 54 defendants who were released on project recommendation have appeared for trial.

A similar project is underway in Des Moines, where only 3 of the first 121 defendants released failed to appear. Two of these were traffic offenders, who showed up voluntarily, one day late.

Other projects are underway in St. Louis, Chicago, San Francisco, Los Angeles, and Tulsa. Others are planned in Seattle, Syracuse, Reading, Akron, Cleveland, Atlanta, Boston, Milwaukee, Newark, Iowa City, New Haven and Philadelphia.

Meanwhile, since 1961, the Department of Justice has worked to improve the present system in federal courts -- and to provide assistance to interested state and local authorities. Our starting point was to appoint the committee on poverty and the administration of federal criminal justice.

Among the problems it considered was bail and pre-trial release.

Following one of the committee's recommendations, we instructed all United States Attorneys to recommend that the greatest possible number of persons possible be released on their own recognizance. In the year since that instruction was issued, 6,000 defendants in federal criminal cases have been released on recognizance. The default rate has been 2.5 percent -- about the same as that for defendants released on bail bonds.

The Eastern District of Michigan deserves special mention. There, for 20 years, the judges have been making bail determinations after receiving information from the United States Attorney about the defendants. In 1963, 773 defendants were released on their word. Of these only 9 -- 1.1 percent -- failed to appear. This is a district, it should be noted, where the courthouse is only five minutes away from the Canadian border.

Our most recent step at the federal level came last May, when, in conjunction with the Vera Foundation, we convened the National Conference on Bail and Criminal Justice. Over 400 delegates from every state, judges, prosecutors, defense lawyers, professors -- even bail bondsmen -- came to Washington to study the bail system. The consensus of the Conference was clear: the system was in drastic need of overhauling.

This three-day conference set in motion a widespread awakening to the need for bail reform at local and state levels. Requests for information and assistance have poured in, and we have rendered advice, assistance, and information to many communities working on the problem. In this climate of increasing awareness of the need for reform, the bills being considered by this committee introduced by Senator Ervin and others sensitive to the problem, are particularly timely. You have already received our detailed recommendations on these bills, but I would like to offer several observations about them today.

S. 2838 would spell out more clearly and fully the authority of a court or commissioner to release defendants on their own recognizance. It would state that the courts, as a matter of policy, should favor pre-trial release whenever possible. As you know, this bill is similar to the proposed amendment to Criminal Rule 46 of the Federal Rules of Criminal Procedure. Both of these proposals seek to put into positive law what we have learned is the only rational approach to bail setting procedure. S. 2838 also would amend Section 3146 of Title 18, the bail-jumping statute, expressly to include persons who fail to appear after release on their own recognizance.

S. 2839 would provide that all defendants sentenced to terms of imprisonment shall be credited with time spent in jail -- whether awaiting trial or awaiting sentence after trial. At present, the law limits this credit to those defendants convicted of crimes for which a minimum mandatory sentence must be imposed. This, too, is a most meritorious change.

S. 2840 offers an alternative to the traditional bail procedure. It provides that in lieu of a surety bond, a defendant may deposit with the court 10 percent of the bail set by the court. This, as you know, is the

refundable deposit system, with which Illinois is now experimenting. Reports submitted to the Bail Conference indicated that the system is working successfully, and I heartily recommend enactment of legislation along these lines.

Montesquieu once wrote that:

"In the state of nature...all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the laws."

These three bills can help provide such protection for all our citizens, whatever the size of their purse. These bills can help to improve the administration of justice in the federal system. They can establish a philosophy for state jurisdictions to emulate.

I am confident that Congress will follow the excellent lead of your two subcommittees and enact this legislation promptly. This is a cause in which there is great work to be done.