
INDIANA SENATE JOINT RESOLUTION No. 1 : OPPOSE

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Written Testimony of:

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Dear Chair Senator Freeman and Members of the Senate Judiciary Committee:

On behalf of the American Bail Coalition, we must respectfully oppose Senate Joint Resolution No. 1. This legislation represents a costly, likely unconstitutional solution that is unfortunately the wrong solution to the problem of courts in Indiana giving criminal defendants a 90% bail discount (by acting as surety imposing 10% cash to the court and then failing to collect the other 90%) and by over-use of zero bails (get-out-of-jail-free). This proposed constitutional amendment also represents such a fundamental change in bail in Indiana that would over-write a beautiful history of common law and the right to bail that pre-dates statehood, and which is a quite simple system that has yet to cost the taxpayer a cent.

This proposed constitutional amendment is a massive expansion of preventative detention, a system of denying bail altogether, which would be the most expansive in the nation by allowing prosecutors to deny bail in any criminal case where they could show a “substantial risk” to public safety, a very low bar. This will over-write nearly 250 years of the right to bail by sufficient sureties in Indiana. I will address why that is an evil system that is not a better alternative from any perspective, but particularly from a civil rights and fiscal perspective.¹

Because of the expansive constitutional due process requirements (which either render the law unconstitutional or will have to be later implemented) court funding, prosecutor funding, public defender funding, and local jail costs are going to balloon, as I detail below. This could cost the state hundreds of millions of dollars based the experiences of the few other states, federal district, and federal models of preventative detention.

This change is a direct assault on the constitutional right to bail (that of the defendant and the people to request bail by “sufficient sureties”) that promises hope, but when the fundamentals of the new system are fully understood, this is nothing more than a pivot away from the failed solutions proposed by many of the same proponent groups, including Arnold Ventures (formally the Arnold Foundation), who pitched for the better part of nearly a decade that their “money-balling” criminal justice methodology of pretrial risk assessment computer algorithms could replace bail and would be the new panacea.

¹ See *Detention, Release From Jail, and Computerized Bail Justice in California: Is it 1984 All Over Again? What Can California Learn From the Last 30 Years of Bail Reform?* (<https://escholarship.org/uc/item/6p31t6hv>)

Here we are eleven years later, and the risk assessment has done nothing to reduce pretrial incarceration, incarceration in general, reduce racial disparities, save jail bed dollars, or make the system “safer” or “fairer.” Nothing. In fact, some argue it has made the system worse.

It is the same hollow hope promised today in Senate Joint Resolution No. 1, this “new” system of release and preventative detention will cure all ills, fix all civil rights issues, reduce racial disparities, and save us money. We have thus seen this movie before.

Instead, this system of preventative detention to the contrary is a lesson in recent American history that we have already learned is more costly to civil rights than a system of so-called “wealth-based detention,” and as Justice Thurgood Marshall wrote such system of preventative detention, like that proposed here, is “consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state.”²

If Indiana is going to make such monumental changes, it seems to me that if we are for “data-driven” solutions, we must start with the fact that the proponents of this legislation just concede there is no data to back any of it up. It may be worth a study to identify the particular problems we are looking to solve. For example, **Professor Alex Tabarrok found that in New York State the average defendant who did not post bail was twice as dangerous to the public as those who posted bail having twice as many arrests, twice as many convictions, and had on average 6 previous felony arrests and 4 previous failures to appear than those who posted bail.**³ Thus, the idea that the jails are full of innocent people is not quite the case, especially since the presumption of innocence in the present case does not wipe away prior bad conduct, which judges are specifically required to take into account in terms of the constitutional mandate to set a bail that is of sufficient sureties and otherwise not excessive.

Instead, **this legislation takes a sledgehammer to Indiana’s bail tradition** under the rubric of it does not protect public safety and it trammels the liberty of the poor who are there solely because they are poor and not because they are a danger to the community or a risk of failing to appear in court or say *because they already have ten prior strikes against them and are twice as dangerous as those who post bail*. Further, **no one can present evidence that a system of conditions and preventative detention delivers up better results at a better cost to taxpayers, reduces racial disparities in the justice system, and results in actual savings, not a nickel of which materialized in New Jersey and was therefore never “reinvested.”** That is pie in the sky thinking, with all due respect.

This legislation is a direct assault on Indiana’s right to bail by sufficient sureties and would all but end that tradition in Indiana. Ending the system of bail by sufficient sureties that was in fact codified in the Northwest Ordinance of 1787 which governed Indiana pre-statehood and allowed for settlement in Indiana, and of course that language that has been maintained in the Indiana Constitution since statehood. That language also appeared in the Judiciary Act of 1789, until it was deleted in 1984 as part of the Federal Bail Reform Act of 1984, which the Supreme Court upheld in *U.S. v. Salerno* in 1987.

² *United States v. Salerno*, 481 U.S. 739, 755 (1987)(Marshall, J., dissenting)

³ <https://www.youtube.com/watch?v=QbfGxvphI5A&t=4s>

The sufficient sureties clause of course was removed in favor of the system of preventative detention as part of the federal Bail Reform Act of 1984, a system that has **tripled pretrial detention** (24% detained in 1983, to 75% detained today) with no evidence that doing so has made us “safer.” The legislation was passed despite objections of the learned Professor Daniel Freed, one of the original architects of preventative detention in the D.C. system, who feared it would go too far and had in fact already gone too far.⁴

Joining the opposition to the Bail Reform Act of 1984 were the Professional Bail Agents of the United States, and the American Civil Liberties Union,⁵ a group who apparently today is now for a massive expansion of preventative detention. The ACLU explained to Congress why it opposed the bail reform act, some five years later:

The Bail Reform Act of 1984 (“the Act”) was designed to remedy a number of problems with its predecessor, the Bail Reform Act of 1966. In particular, the 1966 Act did not allow judges to order pretrial detention to protect the safety of the community. Nonetheless, judges imposed de facto preventative detention by setting excessively high bail. A central goal of the 1984 Act was to eliminate this practice; to this end, §3142(c) specifies that a judge “may not impose a financial condition that results in pretrial detention.” For the first time, Congress authorized pretrial detention of those defendants found to pose a danger to the community.

...

The ACLU opposed the passage of the Act in 1984 for a number of reasons:

1. it stood the presumption of innocence on its head;
2. there was no evidence that adequate techniques existed to accurately predict who was dangerous;
3. there was no evidence that pretrial incarceration actually curbed crime;
4. the definition of dangerous crimes was overbroad;
5. detention hearings did not provide adequate safeguards to protect the rights of the accused; and,
6. the “rebuttable presumption” penalized conduct that had already been punished or punished without the benefit of trial.

⁴ In addition, this author sat on a panel at the Heritage Foundation a few years ago when the former Attorney General all but conceded this federal model of pretrial detention had gone far beyond what was ever intended.

⁵ See Testimony of John A. Powell before congress, July 15, 1989, (https://books.google.com/books?id=e2q45VqAwlQC&pg=PA252&lpg=PA252&dq=ACLU+statement+bail+reform+act+of+1984&source=bl&ots=t3_16r9Ya9&sig=ACfU3U1BexaSa9x286ZH1666YOCMeeGW3g&hl=en&sa=X&ved=2ahUKewjEhp7K7_X3AhW4lJQIHZL4BCc4FBD0AXoECBEQAw#v=onepage&q=ACLU%20statement%20bail%20reform%20act%20of%201984&f=false)

Unfortunately, our subsequent experience with the Act has only increased our earlier concerns. It is not clear that the Act has remedied the problems of excessively high bail, one of its primary purposes. What is clear, however, is that the Act as eroded the presumption of innocence, one of the most basic principles of our criminal justice system.⁶

Yet, today, many ACLUs are for the very policies that a generation ago were so abhorrent to our system of justice as to be outrageous. Today, ACLUs have turned this previous outrage at “cash bail” into a new policy solution. They preferred the system of “cash bail” in 1984 to the evils of preventative detention, and today, with the political winds blowing in a different direction, they are able to convince themselves that preventative detention will now work, despite the fact that the only tool to predict riskiness itself failed. How they are able to do so is beyond this author.

Professor Daniel Freed asked in testimony before congress in the years that lead to the passage of the Bail Reform Act of 1984 a simple question that I now pose to you: **what did you know now that the drafters** of the Northwest Ordinance, the federal constitution and Bill of Rights, the Judiciary Act of 1789, and the various state constitutional provisions of bail by sufficient sureties, including Indiana, **didn’t know then?**

The personal surety system is what the bail system in Indiana is called, we should be clear about that. Falsely labeling it the “cash bail system” is a political tactic. Bail is a core associational right as well, the right of third-party sureties to put up for someone, and the right to release *not on an electronic ball and chain*, but free to get one’s affair in order to defend oneself against the charges and prepare for the possibility of a term of incarceration.

Bail agents are an extension of the right to bail by sufficient sureties, serving as the personal surety, a right that is one of both the People who file the charges, who seek sufficient sureties in order for a release to occur, and the defendants who seek to be released without state interference or by being supervised by the very state or local government that seeks to prosecute and incarcerate them.

As it turns out, the ACLU, Judge Amalia Kearse,⁷ and Justice Thurgood Marshall, in my favorite dissent of all time, a dissent I first read in 1989, **much preferred a system of “cash bail” and “wealth-based incarceration” despite all of the alleged evils of which they were very well informed**, over a system of preventative detention and release on conditions. In other words, they sought not to further legitimize expanded pretrial detention by creating a front door for what is supposedly an illegal and unconstitutional

⁶ *Id.*

⁷ Judge Amalia Kearse was the first African-American female jurist elevated to a federal court of appeals, and declared the Federal Bail Reform Act of 1984 unconstitutional in a majority opinion in 1986, later overturned by the U.S. Supreme Court in 1987. See *United States v. Salerno*, 794 F.2d 64, 72 (2d Cir. 1986)(“ The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes*”).

backdoor, if one is to believe the concept of *sub rosa* detention (what happens when bail is set by sufficient sureties but is not posted). If we truly seek to protect the presumption of innocence, we will not fall victim to such thinking, shelf this legislation, work within the existing framework of bail to protect the indigent and follow the Fourth Generation of Bail Reform,⁸ and take the words of Justice Marshall to heart:

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz*, 339 U. S. 56, 339 U. S. 69 (1950) (Frankfurter, J., dissenting). Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. **But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.**

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. **Theirs is truly a decision which will go forth without authority, and come back without respect.**⁹

And indeed, *it did*.

Please, have the self-restraint to know that these are monumental decisions. We would argue, this should not be done at all, and if it is to be done, it should be very limited and based on substantial study and evidence of the problem. Indiana is a right to bail state—and we think it should stay that way. There are plenty of ways to deal with the indigent parties in the bail system—an issue the state and their judiciary has had to deal with since the eighteenth century.

At the end of the day, there is no evidence that the alternative system being proposed will better protect public safety, reduce racial disparities, save money, or achieve any of the goals it purports to achieve. Since 1787 Indiana has operated under a personal surety system that requires all persons by bailable by sufficient sureties. To answer Professor Freed's question, there is *nothing we have learned since 1787 that would counsel toward departing from such a system, despite all of the criticisms*. The alternative is simply worse, and the evidence is quite clear on that point.

There are other, better solutions to this problem rather than a constitutional amendment. Other states have proven this. Not only **has the Texas legislature rejected constitutional amendments to expand preventative detention several times, like Senate Joint Resolution No. 1.**, Texas passed SB 6¹⁰ in the

⁸ <https://ambailcoalition.org/download/17/4th-generation-of-bail-reform/801/the-4th-generation-of-bail-reform.pdf>

⁹ *Salerno*, 481 U.S. 739, 767 (1987)(Marshall, J., dissenting)(emphasis added).

¹⁰ <https://legiscan.com/TX/bill/SB6/2021/X2>

summer of 2021 during a special session, which not only rejected bail reform, but instead made a long list of crimes and circumstances that prohibited own recognizance release and required a secured monetary bond, in addition to regulating charitable bail organizations. The Delaware legislature also passed similar legislation, requiring monetary bonds in a long laundry list of cases and circumstances¹¹. This is similar to other such provisions in Georgia and Colorado. So, let there be no doubt, that not only are other state legislatures not falling for the snake oil that is preventative detention, they are going further by requiring more defendants to have to post sufficient sureties in order to be released.

Judges in Indiana, however, are giving criminals a 90% bail discount by acting as bail sureties and only requiring defendants to post 10% of the bond, but then not collecting upon or requiring defendants to make good on the full bond should the defendant fail to appear. This is driven largely by the court's wanting to collect defendants' money for court operations, rather than fully securing the entire bond that was imposed pursuant to the Indiana and federal constitutions. Indeed, this is a nefarious and ineffective bail discount program that is done by people simply not paying attention. Further, zero bail policies are also letting people out of jail free and with no accountability of third-party incentives or bail agent arrest powers. If the system of sufficient sureties in Indiana may be argued is broken, it is specifically because the courts in Indiana are not applying it correctly and the legislature and other branches of the government are allowing them to do that. To eliminate 90% discount, back-door cash bail bonding by the court and restricting when get-out-of-jail free cards, is not only common sense—it is precisely what other states are using to combat pretrial crime and failing to appear in court without the need for changing state constitutions.

There are also numerous procedural defects with Senate Joint Resolution No. 1 that render it unconstitutional or that will have to be addressed that add on extreme costs that the legislature and local governments will have to fund since it is a constitutional amendment. In *Salerno*, the Chief Justice pointed out that the act passed constitutional muster in part because it limited preventative detention only to the most severe of charges, maintaining the rule that "liberty is the norm." In addition to that, Congress had at least done some work to suggest that these particular charges were those where we could expect a high level of pretrial crime.

Here, absolutely nothing has been presented to justify the expansion of preventative detention to these particular charges or circumstances. No evidence whatsoever has been presented that even attempts to justify the line drawing that is being done here, largely because *all crimes and defendants are eligible for detention*. We think this is contrary to *Salerno*, and that if detention were to be sought there would be a more artful, data-driven way to limit that to the worst-of-the-worst.

Salerno also requires a more strict speedy trial system as part of its reforms in order to meet the procedural requirements of *Salerno* and not risk a facial challenge. The legislature is rolling the dice that speedy trial deadlines will be met in Indiana, and Senate Joint Resolution No. 1 does not specifically require one. Such typically are in the 90-day range, putting a further burden on the courts, prosecutors, and public defenders.

¹¹ See <https://www.usnews.com/news/best-states/delaware/articles/2021-06-24/lawmakers-pass-bill-requiring-cash-bail-for-more-crimes>

In *Salerno*, the Chief Justice wrote that one of the key procedural safeguards that allowed preventative detention to survive was the fact that the judge would have to “support his conclusion with ‘clear and convincing evidence.’”¹² No such requirement is included in the proposed constitutional amendment, another procedural deficiency.

In addition, the standard for detention is unconstitutionally too low. *Salerno* upheld the federal system because of the requirement to prove the need for detention and that “no condition of release would assure the safety of the community or any person.” No such requirement is contained in Senate Joint Resolution No. 1. This puts further burdens on the courts, prosecutors, and public defenders were this requirement to be imposed, and would have to be dealt with at a hearing days after arrest.

Further, those preventatively detained, pursuant to *Salerno*, must be segregated from the convicted population when awaiting trial, thus imposing another financial and administrative burden upon local jails.

All defendants must be provided attorneys at all such preventative detention hearings. The hearings all must be held quickly after arrest, and there must be expedited rights of appeal.

Judges will have to hear the detention mini-trials, and there will also be need for more court staff, prosecutor time, and law enforcement time as participants in the hearings. New Jersey for example has spent over \$500 million to implement a system of preventative detention.

Local jails will feel the impact because all defendants for whom detention is sought will remain in jail until the hearings occur in open court.

To conclude, when the settlers first came to Indiana, they brought with them a document that they still operate under that uttered a simple statement of rights: that all persons are bailable by sufficient sureties. We do not, with all due respect, think the proponents have made a sufficient case to change nearly 250 years of bail law and constitutional tradition in Indiana. Until they might, we ask for a no vote on this legislation.

Respectfully submitted,

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¹² *Salerno*, 481 U.S. at 742.