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Failure of Preventive Detention

By SAM J. ERVIN Jr.

WASHINGTON — "Law and order" was a major political issue during the Presidential campaign of 1968 and the Congressional campaign of 1970. As one of his campaign promises, President Nixon vowed to make Washington, D. C., a model of safety for the rest of the nation.

In an effort to satisfy this promise, the Administration in late 1969 presented to the Congress its long-awaited plan to combat crime in the District of Columbia. The D. C. Crime Bill contained many valuable proposals for organizational reform of the District's criminal justice system. The bill's court reform proposals enjoyed bipartisan support and were not controversial because they were the product of the combined efforts of both the Johnson and Nixon Administrations and represented the best thinking on criminal-justice reform. They have proved to be a significant help in Washington's effort to improve criminal justice.

However, the Nixon Administration's major contribution to the D. C. Crime Bill was a grab bag of some of the most bizarre and repressive crime-control measures ever proposed to the Congress. These proposals included preventive detention, harsh changes in juvenile law, no-knock and overly broad wiretapping authority. Though loudly touted by the Administration at the time as the key to crime control, these repressive and unenlightened proposals have had little if any impact on crime in the District. In fact, the most notorious of these proposals—preventive detention—has now proved a complete failure. This failure is documented in a study recently conducted in Washington by the Georgetown Law School and the Vera Institute of Justice of New York City. The study contains a detailed analysis of what happened to each of the defendants for whom the Administration sought preventive detention during the first ten months of 1971.

The study discloses that despite extravagant claims by the Justice Department that preventive detention is indispensable to safety on the streets, the law was invoked against only twenty suspects out of a total of the more than 6,000 felony defendants who entered the District of Columbia courts during the first ten months of the law. Of the twenty, only ten were actually ordered detained and five of these detention orders were later reversed by the courts.

The study contains the best proof yet that preventive detention is unnecessary. For example, it shows that constitutional alternatives to the use of preventive detention, such as modification of bail conditions or revocation of parole or work release, or speedy trial, could have been used to far better advantage in all twenty cases and without any infringements of due process or other constitutional rights. This study reconfirms my conviction that pretrial crime could be virtually eliminated if the Constitution's speedy trial requirement were enforced. Of the twenty cases for which preventive detention was sought, fourteen had a prior charge pending for more than sixty days at the time of arrest. If trials had been held within sixty days of this prior charge, the subsequent criminal activity would have been prevented and preventive detention would have been unnecessary.

Rather than trying these defendants for the crimes with which they were charged, the Justice Department wasted time and energy in a fruitless effort at preventive detention. In one case the Justice Department tried for eight months to detain a defendant and after seven hearings had not only failed to detain the defendant under the statute but as of Dec. 31 had not even brought the defendant to trial. The "rights of society" would have been better protected if the Justice Department had expended some of this energy in trying the defendant for the crime of which he was accused.

This experience with preventive detention proves that we must be extremely skeptical of the other Administration "law and order" proposals which are also advertised as "indispensable" for crime control. We should not be surprised to find that many of the Administration's plans are no more practical or necessary than preventive detention, yet just as harmful to individual liberty.

The preventive detention fiasco may be a prelude to other disasters for both civil liberties and effective criminal justice. For example, the Administration proposes the expansion of preventive detention nationwide. It proposes that police be authorized to detain but not "arrest" citizens for the purpose of subjecting them to tests and experiments and other so-called "nontestimonial identification procedures."

Instead of clamoring after these bizarre and dangerous expedients which are offered in the name of law and order, the Administration should address itself to the admittedly slow, hard and expensive course of improvement and reform of our criminal justice system.

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