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REPORT
110–208

BAIL BOND FAIRNESS ACT OF 2007

JUNE 22, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 2286]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2286) to amend title 18, United States Code, and the Federal Rules of Criminal Procedure with respect to bail bond forfeitures, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

H.R. 2286, the "Bail Bond Fairness Act of 2007," amends the Federal Criminal Code to prohibit a Federal court from declaring forfeited a bail bond for violation of a specified collateral condition of release. In so doing, the legislation seeks to restore the use of

bail bonds to their historical origin, which traditionally focused exclusively on guaranteeing a defendant's physical presence in court.

BACKGROUND AND NEED FOR THE LEGISLATION

Historically, the sole purpose of affording bail to a defendant has been to ensure his or her appearance in court. Currently, however, Federal judges have merged the purposes of bail and with other conditions of release. As a result, the bonds are ordered forfeited in cases in which the defendant appears as required, but fails to comply with some collateral condition of release. For example, if the defendant uses illegal drugs, fails to maintain a job, or travels beyond a certain area, the court may order that: (1) the defendant's bail be revoked; (2) the defendant be returned to jail; and (3) the bond be forfeited.

Section 3142(e) of title 18 of the United States Code provides that a judicial officer may order a defendant to be detained before trial if there are no reasonable conditions to ensure the defendant's appearance in court and the defendant is a threat to a witness or the community.[1] Thus, risk of flight and whether the defendant presents certain threats are the sole statutory criteria for detaining a defendant.

Nevertheless, the Federal courts, as authority for their expanded use of bail bonds, rely on Federal Rule of Criminal Procedure 46(f), which has withstood repeated court challenges. For example, the Ninth Circuit held that a court, pursuant to this Rule, may order a bond to be forfeited for a defendant's violation of collateral conditions of release and not simply for his or her failure to appear.[2]

The adverse consequences of forfeiting a bond as a method of monitoring a defendant's performance—rather than for its historically narrowly-tailored purpose—are significant. First, bond writers, which include commercial underwriters as well as the families and friends of the defendant, risk forfeiting their assets when a defendant fails to meet all pretrial release conditions, including the defendant's performance. To protect their assets, these bond writers must monitor the defendant's performance and behavior while on pretrial release, a virtually impossible task. As the risk to bond agents has increased dramatically, they are refusing to provide bonds and, as a result, the availability of these bonds is virtually nonexistent in the Federal system.

Second, the effect of restricting the availability of bail bonds has a disparate impact on wealthy and poor defendants. Irrespective of their risk of flight or danger to the community, the elimination of third-party bonds renders poor and disadvantaged defendants less able to obtain pretrial release. Conversely, wealthier defendants who can use their own assets for collateral can then post their own bond without resorting to third parties. Consequently, defendants with significant assets are afforded pretrial release, while poor defendants are incarcerated before trial regardless of their risk of flight and threat to the public, which would appear to conflict with section 3142(e).

Third, family members of the defendant or anyone willing to raise collateral to help procure a bail bond are also put at undue

[1] 18 U.S.C.A. § 3142(e) (2006).
[2] *United States v. Vaccaro,* 51 F.3d 189 (9th Cir. 1995).

financial risk. Like the increased risk to bond writers, persons putting their homes and at risk may lose their assets, even if the defendant attends court appearances and is not a threat to the community. Thus, fewer family members and friends are willing to assist in procuring a bond and those who do may unjustly lose their assets. Remanding a defendant into pretrial detention when he or she is not a flight risk nor a danger to witnesses or the community also creates an undue financial burden on our Nation's prison system.

Fourth, should a defendant's bond be revoked for a performance issue such as unemployment, the defendant's incentive to make court appearances is diminished. Consequently, the bond revocation for a performance matter has created a flight risk defendant who may not have been.

HEARINGS

The Committee's Subcommittee on Crime, Terrorism and Homeland Security held 1 day of hearings on H.R. 2286 on June 7, 2007. Testimony was received and heard from Representatives Robert Wexler (D-FL) and Ric Keller (R-FL); Linda Braswell, MCBA, Professional Bail Agents of the United States; and United States Magistrate Judge Tommy E. Miller, Eastern District of Virginia. Additional statements were also submitted for the record by Edward Gallagher, General Counsel, The Surety and Fidelity Association of America; and Richard A. Hertling, Principle Deputy Assistant Attorney General, United States Department of Justice.

COMMITTEE CONSIDERATION

On June 7, 2007, the Subcommittee on Crime, Terrorism and Homeland Security met in open session and ordered the bill, H.R. 2286, favorably reported, by voice vote, a quorum being present. On June 12, 2007, the Committee met in open session and ordered the bill H.R. 2286 favorably reported without amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2286

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2286, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 22, 2007.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2286, the Bail Bond Fairness Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 2286—Bail Bond Fairness Act of 2007.

H.R. 2286 would prohibit the forfeiture of a bail bond in Federal court based on a defendant's failure to abide by certain conditions of their temporary release. Under current law, a Federal judge may grant a criminal defendant temporary release pending trial. Such a release may include conditions such as travel restrictions, abiding by a curfew, maintaining employment or attendance in an educational program, and part-time incarceration. Because such conditions often include a pledge of assets, defendants may obtain a bail bond to act as a surety for their future appearance in court. Upon failure to appear in court, or upon violation of another condition of release, a judge may declare the bond forfeit. H.R. 2286 would amend current law to allow forfeiture only in cases where a defendant fails to appear in court.

Enacting this bill could reduce the number of bail bonds declared forfeit by the Federal courts. Proceeds from forfeited bail bonds are recorded as revenues, then deposited in the Crime Victims Fund of the Department of Justice, and later spent. Thus, CBO expects that the net effect on the Federal budget from any reduction in revenues and direct spending resulting from this bill would not be significant.

H.R. 2286 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on State, local, or tribal governments.

The CBO staff contact for this estimate is Daniel Hoople, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2286, will restore the use of bail bonds to their historic use, namely solely to ensure the appearance of a defendant before a court as ordered.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8 of the Constitution.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2286 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Bail Bond Fairness Act of 2007."

Sec. 2. Findings and Purposes. Section 2(a) sets forth certain findings. First, it notes that the sole purpose of bail in the United States has historically been to ensure the defendant's physical presence before a court and that the bail bond would be declared forfeited only when the defendant failed to appear as ordered. Second, it notes that Federal judges have merged the purposes of bail with other conditions of release and that they rely on Federal Rule of Criminal Procedure 46(f) as authority to do so. Third, it notes that the courts' reliance on Rule 46(f) has withstood repeated court challenges. Fourth, it notes that, as a result, the underwriting of bonds for Federal defendants has become virtually impossible.

Section 2(b) sets forth the purposes of this Act. First, the Act is intended to restore bail bonds to their historical origin, that is subjecting bonds to forfeiture only when a defendant fails to appear before a court as ordered. Reducing the risk of forfeiture will enable third-party bond writers to help defendants attain pretrial release, which will give them a fairer opportunity to assist in their defense. Second, the Act is intended to preserve the judge's the authority to revoke bail should the defendant fail to abide by non-appearance conditions of pretrial release. By revoking bail but not ordering bond forfeiture, the court retains authority to enforce all conditions of pretrial release without undue risk to the third-party.

Sec. 3. Fairness in bail bond forfeiture. Section 3(a)(1) amends sections 3146(d) and 3148(a) of title 18 of the United States Code and Federal Rule of Criminal Procedure 46(f)(1) to prohibit a judicial officer from using bond forfeiture as a sanction for certain specified conditions related to pretrial release that are not related to the defendant's appearance in court.

AGENCY VIEWS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 6, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2286, the "Bail Bond Fairness Act of 2007." The Justice Department opposes this bill.

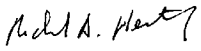
Under the current federal pretrial services system and the bail options available under current law, courts have the means to allow defendants to remain in the community, to manage them, and to compel them to remain law abiding. Pretrial services officers enforce court-ordered conditions of release and monitor defendants in the community; they ensure public safety and manage the risk posed by released defendants. This bill would undermine these efforts and pose new risks to the community. More specifically, H.R. 2286 would eliminate the power of Federal courts to forfeit bail, including a bail bond, when a defendant failed to satisfy a condition of release, other than by failing to appear before the court. This change would seriously limit the ability of Federal courts to enforce important conditions of pretrial release. As a result, the bill would either unnecessarily endanger public safety or increase unnecessarily the use of pretrial detention of defendants and thereby costs to the Federal government, or both.

Section 3142 of title 18 of the United State Code addresses the conditional pretrial release of defendants in the federal criminal justice system. If a court determines that unsecured release will not reasonably assure a defendant's appearance or will endanger the safety of anyone in the community, the court is authorized to set conditions for release. These conditions can include: the posting of bail or a bail bond; restrictions on possession of weapons; use of alcohol or drugs; contact with victims or witnesses to the crime; or the keeping of a curfew. If these conditions are not met, the court can order the defendant detained and also can revoke and forfeit any bail or bail bond executed in the case. Rule 46 of the Federal Rules of Criminal Procedure sets out the procedures relating to the forfeiture of bail or bail bonds and to the setting aside or remission of any forfeiture.

We believe that putting the assets of the defendant or those of a friend or relative of the defendant at risk should the defendant violate a condition of release significantly increases the probability that the defendant will comply with such conditions. By eliminating that risk, enactment of H.R. 2286 would have two possible consequences. Either it would increase the risk of harm to the community - by increasing the risk that a released defendant would violate one or more conditions of release tied to public safety - or it would cause courts to refuse to release defendants who might otherwise be candidates for release (out of a reluctance to expose the court and innocent members of the public to the greater risk that the defendant would violate a significant condition of release). For example, good public policy dictates that a defendant charged with a crime of violence, if not detained, be released pending trial with every possible incentive not to possess a weapon and to stay away from the victim and witnesses of the charged crime. Under current law, a court can order the defendant's bail summarily forfeited if the defendant breaches either of these critical conditions of release. Imposing such conditions is appropriate, because it fosters both public safety and appropriate use of pretrial detention. If H.R. 2286 were enacted, the court would be powerless to forfeit any bail, regardless of the seriousness of the defendant's breach of a non-appearance condition of release.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's views, there is no objection to submission of this report.

Sincerely,



Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith.
Ranking Minority Member

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART II—CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS

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§ 3146. Penalty for failure to appear

(a) * * *

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(d) DECLARATION OF FORFEITURE.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) of this title or is subject to the release condition set forth in clause (xi) or (xii) of section 3142(c)(1)(B) of this title, the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States. *The judicial officer may not declare forfeited a bail bond for violation of a release condition set forth in clauses (i)–(xi), (xiii), or (xiv) of section 3142(c)(1)(B).*

* * * * * * *

§ 3148. Sanctions for violation of a release condition

(a) AVAILABLE SANCTIONS.—A person who has been released under section 3142 of this title, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court. *Forfeiture of a bail bond executed under clause (xii) of section 3142(c)(1)(B) is not an available sanction under this section and such forfeiture may be declared only pursuant to section 3146.*

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RULE 46 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 46. Release from Custody; Supervising Detention

(a) * * *

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(f) Bail Forfeiture.

(1) Declaration. The court must declare the bail forfeited if **[**a condition of the bond is breached**]** *the defendant fails to appear physically before the court*.

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