

BEFORE THE
SUBCOMMITTEE ON
GENERAL SERVICES, FEDERALISM, AND
THE DISTRICT OF COLUMBIA
OF THE
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

STATEMENT OF
THE SECTION ON COURTS, LAWYERS AND
THE ADMINISTRATION OF JUSTICE
OF THE DISTRICT OF COLUMBIA BAR
ON
H.R. 2136
THE "DISTRICT OF COLUMBIA CIVIL CONTEMPT
IMPRISONMENT LIMITATION ACT OF 1989"

* Robert N. Weiner, Co-Chair
Randell Hunt Norton, Co-Chair
Carol Elder Bruce
Richard B. Hoffman
Jeffrey F. Liss
David A. Reiser
Arthur B. Spitzer

Steering Committee of the Section
on Courts, Lawyers, and the
Administration of Justice

July 1989

STANDARD DISCLAIMER

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

* Dissents in a separate statement.

SUMMARY

The House of Representatives has passed, and the Senate is considering, H.R. 2136, The "District of Columbia Civil Contempt Imprisonment Limitation Act of 1989," which would amend the D.C. Code to impose a 12-month limit on the time for which a person could be imprisoned for civil contempt by the D.C. courts. The Section on Courts, Lawyers, and the Administration of Justice of the D.C. Bar opposes this legislation. The Section believes that the Bill would weaken the ability of Courts to secure compliance with their orders, but would not prevent unjust year-long incarcerations. A more effective course, in the Section's view, would be to adopt procedural safeguards such as a guarantee of legal counsel in civil contempt cases, provide for expedited appellate review, and specify that such review should be plenary rather than deferential.

A dissenting statement by one of the members of the Section's Steering Committee takes the position that an individual should not be confined for more than 18 months without a trial by jury.

Statement of the Section on Courts, Lawyers,
and the Administration of Justice
of the District of Columbia Bar
on H.R. 2136
the "District of Columbia Civil Contempt
Imprisonment Limitation Act of 1989"

The Section on Courts, Lawyers, and the Administration of Justice of the District of Columbia Bar opposes the enactment of H.R. 2136, which would amend the D.C. Code to impose a 12-month limit on the time for which a person could be incarcerated for civil contempt by the District of Columbia courts.

This bill has been prompted by a concern -- arising out of a particular case now before the District of Columbia courts -- that under existing law, individuals may be unjustly incarcerated for very lengthy periods of time based on the incorrect (and perhaps improperly motivated) decision of a single trial judge. The Section expresses no view on that particular case.¹ We are also unaware of any evidence that there is a general problem of abuse by courts of the civil contempt power, requiring legislative intervention. As

¹ Because that case involves the custody of a juvenile, most of the records of the case are sealed, and most of the proceedings have been closed to the public. It is, accordingly, impossible for those not directly involved in the case to form an educated opinion about its merits.

Interestingly, another case involving the lengthy incarceration of a mother for civil contempt of court amidst allegations of child abuse is now before the courts. However, in that case, the mother is the person accused of the child abuse. See "High Court to Weigh Rights of Md. Mother, Missing Child," The Washington Post, July 10, 1989, at A-1 (reporting the case of Ms. Jacqueline Bouknight, who has been in the Baltimore City Jail since April, 1988, for refusing to obey a court order to disclose the whereabouts of her son, whom she is suspected of having abused or killed). The Maryland Court of Appeals ordered Ms. Bouknight to be released on the grounds that the order compelling her to disclose the whereabouts of her son violated her right against self-incrimination under the Fifth Amendment, see In re: Maurice, 314 Md. 391, 550 A.2d 1135 (1988), but the United States Supreme Court stayed her release pending review of that decision. See Baltimore City Dep't of Social Services v. Bouknight, 109 S. Ct. 571 (1988) (Rehnquist, Circuit Justice, granting stay); 109 S. Ct. 1636 (1989) (granting certiorari). Had H.R. 2136 been applicable to Ms. Bouknight's case, she would have been released from jail three months ago, with the whereabouts and condition of her son still unknown.

Justice Black, joined by Chief Justice Warren and Justice Douglas, have noted, "[s]uch coercion, where the defendant carries the keys to freedom in his willingness to comply with the court's directive . . . has quite properly been exercised for centuries to secure compliance with judicial decrees." Green v. United States, 356 U.S. 165, 197 (1958) (opinion dissenting as to other issues). However, even if the concern underlying this bill is valid, we believe H.R. 2136 addresses it in a manner that is counterproductive.

All that H.R. 2136 would accomplish, if it were enacted into law, would be to limit an unjust incarceration to 12 months. It is not much solace to a person wrongly held in jail to know that his or her confinement will only last a year.

On the other hand, it is not at all clear to us that a person who is properly being held in jail for civil contempt ought to go free after twelve months, or any other pre-ordained period of time, in all cases. The purpose of incarceration as a sanction for civil contempt is to coerce compliance with a court order; there is not necessarily a one-year time limit on the importance of obtaining such compliance. Moreover, the existence of a pre-established limit on incarceration will assure that this sanction will be less and less effective with each passing day, as the contemnor knows that he or she faces a shorter and shorter period of imprisonment.

Thus, H.R. 2136 would do nothing to prevent unjust year-long incarcerations, and simultaneously would reduce the effectiveness of this essential tool for obtaining compliance with court orders. In our view, this is exactly backwards. The proper goal of any legislation in this area, it seems to us, should be to prevent any unjust incarceration, to the extent possible, without detracting from the courts' ability to enforce their lawful orders.

This can be accomplished through legislation providing for appropriate procedural safeguards in civil contempt cases. First, at the trial level, there should be a guarantee of legal counsel to anyone facing incarceration for civil contempt. Defendants in criminal cases -- including cases of criminal contempt -- are already provided with court-appointed attorneys if they cannot afford to retain private counsel. We think the same rule should apply here. A person should not be deprived of liberty as the result of complex legal proceedings without having the assistance of counsel if he or she wants it.

Second, and most relevant to the concerns that prompted the introduction of H.R. 2136, Congress should provide for the prompt and effective appellate review of a trial judge's decision to incarcerate a person in order to compel compliance with a court order. Such review should be very expedited (perhaps to the same degree as a

petition for a writ of habeas corpus), and the standard of review should be plenary rather than deferential. Additionally, there should be a specific provision for periodic review, by both the trial and appellate courts, of the continued appropriateness of incarceration. These measures will assure that any unjustified imprisonment is promptly terminated.² At the same time, if the trial court's order is found to be valid and the incarceration is upheld on appeal, the sanction will retain its effectiveness as a means of coercing compliance, since the contemnor will know that he or she faces indefinite incarceration.

Of course, even without any change in the law, a person cannot be imprisoned forever for civil contempt. The law already recognizes that "once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." Catena v. Seidl, 65 N.J. 257, 321 A.2d 225, 228 (1974); see also Morgan v. Foertich, No. 88-1599 (D.C. App. May 26, 1989) (remanding case to trial court for renewed factual determination on this issue). In some cases, that point may be reached in less than a year, in other cases, it may not yet have been reached after a year. "No hard and fast rule can be formulated and no fixed period of time can be set," Catena v. Seidl, supra, 321 A.2d at 228; rather, "each case must be decided on an independent evaluation of all of the particular facts. Age, state of health and length of confinement are all factors to be weighed, but the critical question is whether or not further confinement will serve any coercive purpose." Catena v. Seidl, 68 N.J. 224, 343 A.2d 744, 747 (1975).³ In our view, this is the correct approach to these questions.

² This is not the existing situation. For example, Dr. Morgan was incarcerated at the D.C. Jail for 11½ months before the D.C. Court of Appeals issued its ruling on her appeal of the civil contempt order. See Morgan v. Foertich, 546 A.2d 407 (D.C. 1988).

³ As the New Jersey Supreme Court has also pointed out, a person's refusal to comply with a court order during an initial period of incarceration may result from "the hope or advice that it would not be necessary for him to break his silence, because he had good legal grounds for securing his release." Catena v. Seidl, supra, 321 A.2d at 229. This may well have been the situation during the first 11½ months of Dr. Morgan's confinement, while her initial appeal was pending. See note 2, supra. The existence such situations highlights the reason why providing for an expedited appeal is the most constructive manner of addressing the problem of incarceration for civil contempt.

The alternative approach reflected in H.R. 2136 -- which would permit a person who is incarcerated for civil contempt to be also prosecuted for criminal contempt, and, if convicted by a jury, to be sentenced to imprisonment for an additional term -- is not a satisfactory one, because criminal contempt sanctions do not serve the same purposes as civil contempt sanctions, and criminal contempt procedures do not make sense in the civil contempt context.

In the first place, a criminal sentence will not terminate upon compliance with the underlying court order; accordingly, the contemnor will no longer have any incentive to obey it. Secondly, many contemnors may feel confident that they will not be convicted by a unanimous jury because their behavior, no matter how blatantly contemptuous, is popular with some segment of the community. Imagine, for example, prosecuting a right-to-life demonstrator who refuses to obey a court order to stop blocking the entry to an abortion clinic, or a labor leader who refuses to obey a court order to call off an illegal strike. In many communities, conviction would be impossible. It is the proper role of a jury to determine whether a person has been proved guilty beyond a reasonable doubt. It is not the proper role of a jury to determine whether a court order is valid and should be obeyed.⁴ That is the job of the appellate courts, which is why we believe H.R. 2136 is off the mark.

In sum, if Congress is concerned that individuals may be subject to unnecessary or improper incarceration in civil contempt cases, we believe the proper response is to provide additional procedural protections, along the lines we have suggested, that will guard against such results. Simply imposing a twelve-month limit on incarcerations serves neither the best interests of those who may be unnecessarily or improperly imprisoned, nor the interests of a society that has a right to expect obedience to lawful court orders.

⁴ As Justices Black and Douglas observed in United States v. United Mine Workers of America, 330 U.S. 258 (1947) (opinion concurring in relevant part): "In the case of [civil] contempt . . . [i]f the court limits itself to its proper action in such cases, namely, process of imprisonment merely to prevent the violation of the decree, and if the imprisonment is to cease as soon as the danger of disobedience has ceased, the jury, which is thought necessary to pass upon the desert of a defendant to suffer punishment[,] is not required. . . . So far, therefore, as popular clamor demands a jury trial in such cases, it seems to go beyond the requirements of justice." *Id.* at 332 (quoting Beale, *Contempt of Court*, 21 *Harv. L. Rev.* 161, 173-74 (1908)).

DISSENTING STATEMENT

H.R. 2136 properly limits the time that a judge may confine an individual for civil contempt. It does not eviscerate the contempt sanction. It merely acknowledges the right of trial by jury for persons who are incarcerated for more than a year.

Plainly, a court does and should have the prerogative to coerce compliance with its orders without invoking the full panoply of rights guaranteed to a criminal defendant. But that authority must be limited. To allow a judge to imprison an individual indefinitely with no trial by jury places too much power in the hands of a single person. As the Supreme Court stated in Duncan v. Louisiana, 391 U.S. 145, 156 (1968),

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against . . . the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of the jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Under H.R. 2136, a court cannot confine a person for more than 12 months without initiating criminal contempt proceedings and allowing a trial by jury. In my view, this is by and large a reasonable check on the courts' power, although I think that setting the boundary at 18 months strikes a better balance between the needs of the judicial

system and the rights of the individual. Indeed, the federal recalcitrant witness statute, 28 U.S.C. § 1826(a), has long limited to 18 months the time a witness may be incarcerated for defying an order to testify before a grand jury. Enforcement of the criminal law apparently has not suffered.

That civil contempt is coercive -- that an individual can theoretically terminate the sanction by complying with the court's order -- does not vitiate the need for such a limit. The court's order may not be reasonable or proper, or it may be impossible to comply. Moreover, the determination when a sanction ceases being coercive and becomes punitive is a subjective and fact-bound issue, to be decided by the very judge whose authority is being resisted. Under these circumstances, a prophylactic rule drawing the line between coercion and punishment at 18 months is appropriate. It would eradicate potentially the most serious abuses of civil contempt for punitive ends without appreciably diminishing the court's power to secure compliance with its orders. The prospect of incarceration for a year and a half on a civil contempt citation, followed by possible indictment, conviction, and imprisonment for criminal contempt should deter defiance of court orders.¹

¹ While criminal contempt is a punitive sanction, one avowed purpose of such sanctions is to deter violation of criminal laws. Congress could compensate for any feared diminution in the potency of civil contempt by increasing the penalties for criminal contempt.

The contention in the majority statement that any abuses by trial judges can be remedied by appellate courts proves too much. On the same logic, jury trials in criminal cases would serve no function -- the appellate courts could simply correct any erroneous decisions by the trial courts. Although the appellate process does afford substantial protections, it is no substitute for trial by jury.

Finally, the majority suggests that a court should be entitled to confine an individual indefinitely without a jury trial because juries might otherwise nullify court orders. However, as noted above, an essential function of the jury is to "safeguard against . . . the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. at 156. The majority turns that safeguard on its head. I have great faith in the wisdom of our judiciary, but not so much that I would insulate from review by a jury of one's peers a decision to jail an individual for more than a year and a half.

With the modification noted, I would endorse H.R. 2136.

Robert N. Weiner