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November 14, 2001

Honorable Kathy Patterson
Chairman, Judiciary Committee
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 109
Washington, D.C., 20004

RE: Statement Concerning Bill 14-373, The "Anti-Terrorism Act of 2001"

Dear Chairman Patterson,

I am writing you in my capacity as the president of the District of Columbia Association of Criminal Defense Lawyers, (DCACDL), a local affiliate of the National Association of Criminal Defense Lawyers to oppose, in its current form, Bill 14-373, The "Anti-Terrorism Act of 2001." The attached written comments¹ are intended to supplement the oral comments to be made on behalf of our organization by our Treasurer, Andrew J.J. Delehanty, at your public hearing on Friday, November 16, 2001.

We hope you find these comments helpful. Thank you for your consideration.

Respectfully,

Richard K. Gilbert

¹ We have provided the Committee with 20 copies of the statement, plus, for the convenience of Councilmember Ambrose, a special copy printed in 24 point Arial Black.

STATEMENT OF THE DISTRICT OF COLUMBIA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN OPPOSITION TO
BILL 14-373, THE “ANTI-TERRORISM ACT OF 2001”

On behalf of the District of Columbia Association of Criminal Defense Lawyers (DCACDL), we are pleased to have this opportunity to comment on Bill 14-373, The “Anti-Terrorism Act of 2001.” Like all Americans, our members were appalled and outraged by the events of September 11, 2001, as well as the subsequent efforts by persons as yet unknown to spread anthrax. While reasonable persons can differ as to particular details, we support all appropriate and constitutional efforts to prevent future terroristic attacks and to punish those responsible for acts of terrorism. Even in that light however, we cannot bring ourselves to support Bill 14-373, The “Anti-Terrorism Act of 2001” in its current form.

It is important to recognize that, in practical terms, Bill 14-373 is largely symbolic. International terrorism is a federal, not a state or local, issue and the federal criminal code already includes tough anti-terrorism provisions with penalties up to and including the death penalty. In addition to punishing terrorism on United States soil, some other federal crimes relating to terrorism include: terrorist murder of a U.S. national in another country; use of weapons of mass destruction; acts of terrorism transcending national boundaries; providing material support to terrorists; and providing material support or resources to designated foreign terrorist organizations. Congress has repeatedly enacted new anti-terrorism laws in the aftermath of terrorist attacks in the United States. Each new piece of legislation amends current federal law, usually strengthening penalties and expanding the federal police power. In the wake of the recent terrorist attacks in New York and at the Pentagon, Public Law 107-56, named the USA PATRIOT Act², was enacted, which among many other provisions, provides that anyone convicted of involvement in planning a terrorist act would be subject to the maximum penalty allowed for the commission of the terror act itself, which includes the death penalty.³ Regardless of the merits of these particular proposals, in combination with existing laws they provide ample legal tools to combat terrorism.

Consequently, it is virtually certain that, in today’s political climate, any person accused of committing the kind of acts the Council obviously has in mind with this legislation will be prosecuted in federal court under federal

² The title of the legislation is a clever acronym. The letters “USA PATRIOT” stand for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.”

³ Another provision would subject those convicted of terrorist crimes to post-imprisonment supervision. That means law enforcement officials could track them and maintain oversight over them after they have served any prison term, potentially for their lifetimes.

law, not in Superior Court under District of Columbia law. However, we do not oppose Bill 14-373 for that reason; there is a place for even symbolic legislation. We are, however, greatly concerned that any such legislation be constitutional, have appropriate penalties, and not be subject to interpretation which reaches beyond the conduct the Council appears to wish to punish in the legislation. Unfortunately, Bill 14-373, as currently written, contains such flaws.

Constitutional Concerns

We have two related constitutional concerns about Bill 14-373, both concerning the provisions surrounding the definition of an “act of terrorism.” In the first place, while we agree with three of the four portions of the definition of an “act of terrorism” set forth in section 2 of the bill, we violently disagree with defining an act intended to “retaliate against government conduct”, as an “act of terrorism,” because the term “government conduct” is so broad as to render the proposed legislation constitutionally vague. For example, a frustrated car owner who brandishes a tire iron at the parking enforcement officer as his car is being towed away for parking tickets, has, by virtue of committing an assault with a dangerous weapon in retaliation for the government action committed an “act of terrorism,” even if he quickly thought better of it and did not actually strike anybody or anything with the tire iron. Likewise, an estranged husband who assaults his wife because she was granted a civil protection order by the court could be said to have acted in retaliation for government action. Indeed, virtually every assault on a police officer or correctional officer with a weapon would suddenly become an “act of terrorism.” Of course, we do not condone such acts and support the existing penalties for them, but surely, the Council does not intend that such common occurrences be defined as “acts of terrorism.”

Our position finds support in the recently enacted federal legislation. We note that P.L. 107-56 defines “domestic terrorism” as illegal activity that is dangerous to human life and appears intended to (1) intimidate or coerce a civilian population, (2) influence government policy by intimidation or coercion, or (3) affect government conduct by mass destruction, assassination or kidnapping. These categories correspond to sections 2(1) (A), (B), and (D) of Bill 14-373, and DCACDL believes them to be accurate descriptions of terroristic activity. However, importantly, the federal law does not include retaliation for past government conduct, and we urge the Council to delete section 2(1) (C).

Our second constitutional concern involves the double jeopardy implications of making an act of terrorism a separate criminal offense. To constitute an “act of terrorism” the act must be an act already “in violation of the criminal laws of the District of Columbia” with the additional element of the required intent. The implication of Bill 14-373 is that one could be charged, convicted and punished twice for a single kidnapping if the jury found the kidnapping was done to affect the conduct of a unit of government. We believe this to be unconstitutional because all of the elements of the simple kidnapping count would be contained within the elements of kidnapping as an “act of terrorism.” See, *Blockberger v. United States*, 284 U.S. 299 (1932); *Nixon v. United States*, 730 A.2d 145 (D.C. 1999).⁴ DCACDL believes the appropriate approach is to make the intent required for an “act of terrorism” an element which enhances the sentence for the underlying crime, much the way the status of a victim as a senior citizen currently enhances the sentence for certain violent acts, See, District of Columbia Code § 22-3601 (formerly §22-3901). With these prospective amendments, we have no objection to giving a judge the option of sentencing a defendant convicted of an “act of terrorism” to a maximum sentence of life, and would therefor amend section 3 (a) to read “A person who commits an act of terrorism may, upon conviction, be punished by imprisonment for life.”

Other Concerns

With the changes suggested above, we agree with several portions of Bill 14-373. We agree with amending the first degree murder statute to include a murder committed

⁴ The United States Supreme Court in *Blockberger v. United States*, *supra* at 304, held that “(w)here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”

while committing an “act of terrorism” and with permitting the government to seek a sentence of life without parole for a first degree murder committed during the commission of an “act of terrorism.” With these exceptions, we oppose the creation of any new mandatory minimum sentences. The conduct covered by Bill 14-373, even with our suggested amendments, still runs the gamut from incredibly dangerous to relatively benign. We fully trust the judiciary to be able to distinguish between the individual caught trying to smuggle a vial of smallpox into the MCI Center and the distraught ex-husband who temporarily kidnaps his wife and children, but quickly releases them unharmed, in a misguided attempt to coerce a Superior Court judge to reduce his child support payments, (which would, even under our modified definition, still constitute an “act of terrorism.”)

We are particularly concerned by the creation of the apparently new offense of assault with intent to commit an act of terrorism, with a mandatory sentence of not less than ten years. Since an assault with a dangerous weapon, with the requisite terroristic intent is under the proposed bill an act of terrorism which we agree could be punished by up to life, presumably this new offense would also cover unarmed assaults, to include cases where no one is harmed. Given that an “act of terrorism” could cover our distraught ex-husband in the example above, who might have grabbed his ex-wife’s arm to pull her into a car, it is hard to see what societal interests would be served by requiring a judge to send him to prison for ten years, even if there is no criminal record and other mitigating circumstances exist. Simply put, mandatory minimum sentences are both an insult to the judiciary and an invitation to injustice. We urge the Council to reject them.

As a matter of semantics, we would suggest the Council adopt the term “weapons of terror” instead of “weapons of mass destruction.” The latter term has a specific meaning in the discussion of world affairs and would not normally cover a hand grenade or land mine. As to the specific definitions of such weapons in Section 2 of the bill, we have several specific recommendations for changes to the language of the bill. We recommend that (2)(A)(1) be amended to read “A bomb, grenade, rocket, missile, mine, or similar device capable of an explosive or incendiary effect that is designed or intended to cause death or serious bodily injury.” We note that “poison” weapons are adequately covered in (2)(B) and even lawful fireworks have some explosive or incendiary effect.

We recommend that section (2)(A)(2) include the language “except shotguns.” We discussed the current language with Mr. William Welch of Firearms Services Ltd., a consultant on firearms, who has informed

us that the vast majority of lawful shotguns have barrels with bores more than one half inch in diameter.⁵ We also recommend that section (2)(C) be amended to read “Any weapon involving a disease organism, designed or intended to cause death or serious bodily injury,” as there are “diseases,” such as the common cold, which carry little or no risk of serious injury.

While we support the possibility of a life sentence for possession of these types of weapons, for the reasons stated above, we oppose any mandatory minimum sentence. An ex-service member who foolishly keeps an hand grenade as a souvenir of his military experience without any intent to harm or injure anyone is simply not on the same footing as someone who enters the subway system with a canister of nerve gas.

In closing we would like to make one additional observation. We anticipate that some other witnesses, notably the Office of the United States Attorney will suggest we are over-reacting. They will likely say “trust us;” we will only use the statute against “true” terrorists, and may point out that title of the legislation would arguably mean it was not intended to cover such examples as our disgruntled ex-husband or ex-service member with a grenade as a souvenir. However, we have learned through experience, that it is the language of the statute which will govern future prosecutions. There is one very pertinent example. Many years ago the crime of “felony threats” was created (District of Columbia Code §22-1810, formerly District of Columbia Code §22-2307). There was then already in existence a misdemeanor offense of threats (formerly District of Columbia Code §22-507, now codified as §22-407). At that time the caption of the new felony threats statute was labeled “Extortion,” and the legislative history indicated that Congress intended to create a severe penalty for those persons who used threats to extort money or other value from persons. However in *United States v. Young*, 376 A.2d 809 (D.C. 1977), a divided District of Columbia Court of Appeals held the language was not limited to threats intended to have an economic effect.⁶ Now, the Office of the United States Attorney routinely charges defendants with this crime, carrying a potential sentence of 20 years in prison, in a wide variety of situations. (Because misdemeanor threats carries a sentence of six months, it is almost never charged; if the government wants to charge or permit a plea to a

⁵ Mr. Welch has also informed us of a phenomenon known as “spud guns,” which are apparently made of pieces of PVC pipe into which a potato or portion of one is inserted and propelled by a combination of oil and aerosols. Mr. Welch claims such “weapons” are relatively harmless and that informal competitions have grown up where contestants vie to see which “spud gun” can shoot the potato the furthest. We are not certain whether such items exist in the District of Columbia. It would seem that arguably they would qualify as “weapons of mass destruction” according to the definition. If they are so included, that would seem a powerful argument against imposing any form of mandatory minimum sentence.

misdemeanor, it usually charges “attempted threats” to avoid a jury trial.) Consequently, one could get more time in prison for threatening to punch someone than

⁶ Under the new codification, felony threats is listed under “General Offenses,” while misdemeanor threats is still listed under the caption “Threats.”

by actually hitting them with a bat, for example. This is precisely the type of unintended consequences DCACDL is concerned may arise with the poorly drafted sections of the current bill.

Thank you for your consideration.

Richard K. Gilbert
President, DCACDL