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November 12, 2001

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WRITTEN TESTIMONY OF PROFESSOR RALPH RUEBNER ON PROPOSED ANTI-TERRORISM LEGISLATION STYLED AS AMENDMENT TO HOUSE BILL 2299.

GENERAL COMMENTS

As one of the drafters of the original anti-terrorism legislation, Article 29C, 720 ILCS 5/29C (1997), I welcome some of the amendments of the Attorney General. The package as a whole, in response to the September 11th events, attempts to accommodate a fair balance between public safety concerns and individual rights and liberties. But I question the wisdom of legislating new crimes and penalties at a time when the Governor's Commission is now undertaking a full review of the entire Criminal Law and Procedure Code with a view to create a uniform, coherent, workable, and just set of laws. Piecemeal legislation is counter productive at this time. There is no immediate need to get the Anti-Terrorism package into law now. The President of the United States has signed into law a most comprehensive package on Anti-Terrorism. See USA Patriot Act. While Illinois has an independent interest to legislate in this area, there is no need to rush into a quick solution. More time is needed to contemplate the effects of the entire proposal on privacy rights of our law-abiding citizens and to suggest

greater judicial review of governmental conduct that will intrude on our cherished liberties. Certainly a veto session is not conducive for such a deliberative process.

SPECIFIC CONCERNS

1. The Death Penalty

I would suggest that the question of the death penalty should be reviewed in the larger and ongoing death penalty review, a process undertaken by the Governor. Specifically, it seems to me that current death penalty eligibility factors, twenty in number, more than adequately cover the situation described in proposed section (b)(21) to 720 ILCS 5/9-1 (aggravating factors - murder - death eligibility). Section (b)(21), page 10, lines 28-30 is redundant and unnecessary. But more importantly, another commission appointed by the Governor is about to conclude its review of the Illinois death penalty and how our criminal justice system ultimately impacts on the way we impose that penalty in Illinois. The State of Illinois would be better served if the question of the death penalty for murder in connection with terrorism be reserved for further consideration and that the proposal be examined in the context of the death penalty review process.

2. The Crime of Terrorism

I have concerns about the new crime of Terrorism, Section 29D-30 (720 ILCS 5/29D-30) on page 28. Section (b) (Sentence), lines 27-30, raises some thorny legal

questions. The amendment calls for a maximum penalty of natural life imprisonment "if the terrorist act caused the death of one or more persons..." The language, causing the death of one or more persons, suggests that this is nothing less than felony murder. Felony murder is already adequately provided for in our current murder statute, 720 ILCS 5/9-1(a)(3): "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (3) he is attempting or committing a forcible felony other than second degree murder." (See page 5, lines 23-24). What is a "forcible felony"? 720 ILCS 5/2-8 currently catalogues first degree murder, other enumerated violent crimes, "and any other felony which involves the use or threat of physical force or violence against any individual." Obviously, the suggested crime of "Terrorism" fits the definition of a "forcible felony". It follows logically that the maximum penalty for Terrorism where the terrorist act caused the death of one or more persons would be the death penalty. I am not advocating the imposition of the death penalty here, but I do want to illustrate that there is a serious problem of drafting and one of unforeseen consequences in the amending process. Under the current murder statute the accused would be eligible to get the death penalty for the same criminal conduct. Certainly, the accused would be eligible to receive the death penalty under the proposal of the Attorney General, section (b) (21) to 720 ILCS 5/9-1 *et seq.*, murder.

Therefore the proposed legislation suggests that there are inherent conflicts and inconsistencies between the crime of murder and the proposed crime of Terrorism. These in turn will thwart a prosecutor's effort to obtain the death penalty for multiple deaths that arise from a terrorist act. It will also raise troubling legal questions for our

judges who would have to consider whether the crime of Terrorism is a lesser included crime to murder in assessing the accused's request for an instruction to the jury on a lesser included crime on Terrorism in an effort to avoid the death penalty under the murder statute. When the judge so instructs the jury, there may be jury confusion and the possibility of verdict inconsistency, e.g., not guilty of first degree murder but guilty of Terrorism. That in turn will cast grave doubts about the validity of the verdict. This further suggests to me that there will be no finality to a guilty verdict and endless, costly, and needless litigation at all levels of our state courts. All of this can be avoided by the legislature by slowing down the amending process.

3. Eavesdropping

There are also serious constitutional problems in the amending of the crime of Eavesdropping, 720 ILCS 5/14-1, *et seq.*, especially 5/14-3 - exemptions. See proposed Section (g-5) on page 16, lines 6-23. Section 5/14-3 exempts certain conduct from criminal liability. Section 5/14-5 currently provides that any evidence which is obtained in violation of this Article is not admissible in any proceeding *against the injured person*. Under the proposed amendment, which fails to address Section 5/14-5, the statute insulates the eavesdropping by a law enforcement agent, acting without prior judicial authority, with an exemption from prosecution *and* rewards that conduct by allowing the prosecutor to use such evidence against the injured person who happens to be the person who is accused of an act of Terrorism under Article 29D.

No judicial review is provided in the proposed amendment to review the conduct of the agent or the acquiescence of the State's Attorney or the Attorney General in allowing it to occur. Judicial review is limited to determine the relevancy of the evidence and whether it is "otherwise admissible". See page 16, lines 20-23. What the proposal does is to sanction criminal conduct by law enforcement agents and rewards it by allowing the use of the fruit of that illegality as evidence in any trial against a person charged with an act of Terrorism. The proposal contradicts section 5/14-5. It also offends the state constitutional provision of separation of powers, Article II, Section 1, and the inherent authority of our state judiciary to independent judicial review and Article VI, Section 1. I would also suggest that there is a need for a comprehensive review of our laws of evidence. We have no evidence code at this time and piecemeal legislation as proposed here is not the answer to a growing and serious problem.

4. Issuance of Search Warrants

The amendment to 725 ILCS 5/108-4, section (b) - warrant upon oral testimony, is constitutionally flawed. The proposed Section 5/108-4(b)(7) unconstitutionally limits judicial review.

"Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit."

Given the expansion under the proposal for the use of non traditional warrant applications, dispensing in whole or in part with the traditional written affidavit, Illinois is about to change the well established and carefully circumscribed constitutional procedures for obtaining a search warrant. I agree that exigencies may lawfully excuse from time to time the traditional affidavit, as we know it, as a basis for the issuance of a search warrant. Although the advance of technology makes it easier for law enforcement to obtain a search warrant under this section, it should not dilute the constitutional right of privacy. To that end, we need to preserve and *add* complete and full judicial review of the application process. For that reason I am of the opinion that section 7, see page 40, lines 9-14, in restricting judicial review in a very substantial way, offends the constitutional principles of the independence of our judiciary, separation of powers, judicial review and the prohibition against unreasonable searches under the Article I, Section 6 of the State of Illinois Constitution. Our state constitution protects us not only against unreasonable searches and seizures but shields us from invasion of privacy and interceptions of communications by eavesdropping and other means. As Justice Scalia recently reminded us, expediency and technology advancements should not automatically justify the shrinking of our privacy rights under the Fourth Amendment. *Kyllo v. U.S.*, 121 S.Ct. 2038 (2001). This becomes prophetic in light of our state constitution that explicitly protects privacy rights.

Respectfully submitted,

Professor Ralph Ruebner