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## **Obama's lawyers challenge the money bail system: Can people be kept in jail just because they are poor?**

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President Obama's civil rights lawyers are seeking a potentially far-reaching ruling to hold that the Constitution forbids the common practice of keeping people in jail prior to a trial, even for minor offenses, just because they are too poor to pay for bail.

Every day, about 450,000 people are held under arrest in city and county jails because they cannot afford bail, according to the Southern Center for Human Rights and Equal Justice Under Law, a small Washington-based civil rights group.

Last week, the Justice Department intervened on their side in a Georgia case which challenges the use of fixed bail schedules for people who are arrested.

It began when Maurice Walker, a poor and disabled man, was arrested last year as a "pedestrian under the influence" and was held in jail for six days in Calhoun, Ga., because he could not afford the standard \$160 bail.

The Constitution forbids "punishing people for their poverty," the government's civil rights lawyers argued in a brief to the 11th Circuit Court in Atlanta. The 8th Amendment says "excessive bail shall not be required." And the 14th Amendment, which protects the rights to liberty and equal protection of the laws, should be read to prohibit "bail practices that incarcerate indigent individuals before trial solely because of their inability to pay," they said.

They agreed, however, that arrested people can be held if a judge believes they pose a danger if released or are likely to flee.

The Justice Department's intervention is the latest step in a growing legal and political attack on the money bail system. It arose in part from investigations that revealed how poor people in Ferguson, Mo., had become trapped by escalating fees and fines for relatively minor offenses.

Civil rights lawyers describe the traditional bail system as a "wealth-based detention scheme" that has largely escaped the scrutiny of the nation's highest courts.

“This is a huge scandal, and it’s been almost ignored over the last 30 years,” said Alec Karakatsanis, co-founder of the Equal Justice project. “If you are dangerous but rich, you can walk free. Whether you stay in jail or not shouldn’t depend how much you can pay.”

He said this system takes its harshest toll on the poorest people for whom a few days in jail can mean the loss of a job or, for a single parent, a loss of children. The prospect of being held in jail also prompts arrested people to plead guilty to crimes, even if they are innocent, he said.

Some people die in jail too, he added. “Sandra Bland couldn’t pay and died in a Texas jail,” he said.

He was referring to the case of the black woman from the Chicago area who was stopped last year by a white police officer on a Texas highway who said she made an improper lane change. When the two quarreled, she was arrested and taken to jail. She was unable to post a \$500 bond and committed suicide three days later.

The Equal Justice group has filed lawsuits challenging the money bail system in cities across the South, including Houston, and has pending suits in San Francisco and Sacramento. Several cities have agreed to stop required money bail for new arrestees.

When the city of Calhoun was sued, it adopted a new policy to give people who are arrested a hearing within 48 hours. But a federal judge ruled it was unconstitutional to arrest people for misdemeanors and keep them in jail over the weekend because they could not afford to pay bail. The city appealed to the 11th Circuit, the first of the suits to reach a U.S. appeals court.

The lawyers expect the case of Walker vs. Calhoun will be set for argument in the fall.

In December, the White House convened a meeting to take aim at the “criminalization of poverty,” and Atty. Gen. Loretta Lynch cited the money bail system as part of the problem. “In a country where we have ruled debtors prisons are unconstitutional, too many of our citizens are simply in jail because they don’t have the money to get out,” she said.

The American Bar Assn. and the libertarian Cato Institute joined the administration’s side this month in the Georgia case. The ABA’s lawyers said they have been skeptical of the money bail system for decades and have now concluded fixed bail schedules “should be abolished.”

They said there are other ways to assure that defendants appear for their trials.

But the lawyers challenging the money bail system do not have a clear Supreme Court precedent on their side.

In 1983, the justices ruled poor people cannot be imprisoned simply because they cannot pay a criminal fine, but they have not questioned the long-standing American practice of requiring people to post bail to get out of jail before trial.

“This is an open question. This is first time I’ve seen appellate litigation on it,” said University of Pennsylvania law professor Stephanos Bibas.

“The argument here is that a crude bail schedule discriminates against poor people. It sure feels wrong to punish people who are not dangerous and who are on the margins of society,” he said. But he also noted that the justices have not previously ruled that the "equal protection" clause generally forbids policies that discriminate against poor people.

The American Bail Coalition and the Georgia Assn. of Professional Bondsmen hired former U.S. Solicitor Gen. Paul Clement to argue in the defense of the bail bond system.

The challengers would “effectively abolish monetary bail” and entitle poor defendants to “immediate release,” Clement wrote. “Nothing in the Constitution supports that extreme position....By enabling defendants to post bail with only a fraction of the required amount, the commercial bail industry allows individuals of all financial means to leverage their social networks and community ties to obtain pretrial release....The modern system of bail is fundamentally not about poverty or wealth but instead about preserving liberty while ensuring community safety and appearance in court.”

Would happen if money bail were abolished?

The ABA’s lawyer says cities and counties would save the “immense cost” of locking up people needlessly. “The total annual cost of pretrial detention is estimated be \$9 billion,” they said.

Clement’s brief on behalf of the commercial bail industry said far more people would not show up for their trial, and the police would have to spend more time and money rearresting these fugitives.

Jeff Clayton, policy director for the American Bail Coalition, said doing away with bail bonds would lead to more people, not fewer, being held in jail. Judges would decide it was too risky to release an arrested person. “It would mean an expansion of preventive detention,” he said.

But reform advocates say the money-based system locks up the wrong people.

About 12 million people are put into jails every year, and more than three-fourths of them are accused of misdemeanors, said Cherise Fanno Burdeen, chief executive of the Pretrial Justice Institute, a group that opposes the bail system. And in some areas, she said, as many as nine out of 10 cannot afford bail.

“We need replace the existing system and focus instead on who is a risk and not on their money,” she said.