Testimony on behalf of the

American Civil Liberties Union Of the National Capital Area

By

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Before the
Committee on Public Works and the Environment

Of the

Council of the District of Columbia

On

Bill 17-88
"Taleshia Ford Memorial Amendment Act of 2007"

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The ACLU of the National Capital Area opposes the provision of Bill 17-88 that would subject young adults to custodial arrest, overnight detention, and an arrest record to age 21 for the possession of or drinking an alcoholic beverage in a licensed establishment. The Council rejected this idea in 2004 (Bill 15-823) and should do so now. The ACLU also opposes the new proposal to authorize private persons to confiscate patrons' identification cards.

History

From the repeal of Prohibition and the ratification of the 21st Amendment in 1933 until 1993, the drinking age in the District of Columbia was 18, the same as the age of majority. *See* D.C. Code § 25-130(b) (1991); *District of Columbia v. Morrissey*, 668 A.2d 792, 798 (D.C. 1995). In 1993 the drinking age was raised to 21, not

because the citizens of the District of Columbia desired that change, and not because the members of the D.C. Council were convinced that that change was needed, but because Congress had mandated that states would lose large sums of federal financial assistance if they failed to do so. *See* 28 U.S.C. § 158 (the "National Minimum Drinking Age Act"). Under the 1993 Act, underage possession was punishable by a $100 to $300 fine and suspension of driving privileges in the District for up to a year. *See Morrissey*, 668 A.2d at 798. In 1994, the law was again amended by (among other things) adding a cross-reference to the "residual penalties" provision of D.C. Code § 25-132. Although the preamble to the 1994 legislation said nothing about criminalizing mere possession, *see* 41 D.C.Reg. 1658 (1994), *Morrissey*, 668 A.2d at 795, the D.C. Court of Appeals, while finding the statutory language "no[t] … so plain, and the applicable penalty … not immediately clear," *id.* at 797, ultimately concluded that this cross-reference incorporated the "residual penalties" provision of D.C. Code § 25-132 and thus made mere possession a criminal offense. Nevertheless, Judge Schwelb, who wrote the court's opinion, observed that "[t]he notion that the ABC Act makes possession of a can of beer by a young man of nineteen a crime punishable, inter alia, by imprisonment for one year" may "strike a fair- minded person as counter-intuitive, disproportionate, and unjust." *Morrissey*, 668 A.2d at 800.

In response, the Council again amended the law to decriminalize the mere possession of alcohol by persons under 21 years of age. D.C. Law 11-187 (1997). Further amendments in 2001 (D.C. Law 13-298 and D.C. Law 14-42) did not alter that situation. The Court of Appeals confirmed that "the language and structure of the ABC

Act, as well as its legislative history, lead us to conclude that the possession of alcohol by a person under twenty-one … is not a criminal offense." *Cass v. District of Columbia,* 829 A.2d 480, 488 (D.C. 2003).[1]

A concerted effort was made to re-criminalize underage possession in 2004. After full consideration, including a lengthy hearing at which all stakeholders testified, the Council rejected that proposal. The Council should not change its carefully considered conclusion of just two sessions ago.

Policy

At the age of 18, a person becomes a legal adult. He or she can vote, can enlist in the military, can make legally binding contracts, can sue and be sued, can make his or her own medical decisions, can marry without parental consent, and will be prosecuted and punished as an adult for criminal offenses. Yet he or she cannot lawfully possess a glass of wine or a bottle of beer. This is senseless.

The Council may be powerless, as a practical matter, to correct this inequity, for Congress has used its power to coerce compliance with the 21-year-old drinking age. But the National Minimum Drinking Age Act requires only that the District make underage possession unlawful, not criminal.[2] Thus, the current state of District law does not place federal funds at risk.

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[1] The D.C. Superior Court confirmed that the 2001 amendments did not affect the applicability of the *Cass* decision to the current law. *District of Columbia v. Agin,* No. D-739-04 (D.C. Super. Ct. May 19, 2004) (Noel Kramer, J.)

[2] "The Secretary [of Transportation] shall withhold [specified funds from] any State … in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." 23 U.S.C. § 158 (a)(1).

District law now provides civil penalties for underage drinking in licensed establishments. D.C. Code § 25-1002(e). These are not ineffective penalties. Indeed, the fine of $300 and the drivers' license suspension for 90 days for the first offense (up to $1,000 fine and drivers' license suspensions up to one year for the third violation) are serious penalties. These sanctions are considerably more severe than the penalties for conduct that is *far more dangerous,* such as running a red light ($75 fine) or speeding more than 25 miles per hour faster than the posted speed limit ($200 fine), or driving with a open container of alcohol ($100 fine). Those are acts that may threaten the lives and limbs of D.C. residents. Drinking a beer in a club does not rise to that level.

By invoking the criminal law, Bill 17-88 subjects an 18-year-old to custodial arrest, which means handcuffing and a physical search on the street, fingerprinting and photographing at the stationhouse, likely overnight detention (if arrested after lunchtime), and most important the creation of an arrest record (and if convicted a record of criminal conviction) that cannot be expunged, absent participation in a diversion program, until age 21. When applying for a job, for admission to college, or for a security clearance, the arrest or conviction may have to be disclosed and explained. And if the young person is a non-citizen, the consequences of a criminal conviction may be even greater, including possible deportation regardless of the person's length of residence or ties to the United States. The Council should not be amending the law to create consequences of such extreme seriousness affecting

personal freedom, job opportunity, immigrant status, and education for the possession of a glass of wine.

Bill 17-88 would also enact an irrational form of discrimination. Juveniles who engage in the same conduct do not become saddled with arrest records or convictions. In this kind of case, the juvenile is issued a "delinquency report" and usually released to a parent or guardian. Only young adults ages 18, 19 and 20 will face criminal consequences for this conduct. There is no justification for imposing criminal penalties on this group of people because they are not quite young enough and not quite old enough.

Proponents of this provision argue that "something needs to be done" because police officers do not issue citations for underage drinking. But if police officers do not think underage possession is serious enough to issue a citation, why would anyone believe they will think it's serious enough to make an arrest? Indeed, the contrary is true. The more serious the penalty, the less likely it is that the police will want to be participants in such unjustified harshness. If the problem is that the police do not give sufficient priority to this problem, the Council can exercise its considerable leverage on the MPD to make underage drinking a higher priority. Changing it from a civil to a criminal offense will not automatically have that effect – but it will, as explained above, automatically have a draconian effect on young adults who are arrested.

The ACLU also finds the provision of the bill that authorizes establishment employees to confiscate identification documents highly problematic and probably unconstitutional, and urges that it be deleted.

Confiscating a person's identification document is not a petty matter. The cost of a mistake by a club employee who confiscates a valid identification document can be considerable. If the seized document is a driver's license, how is the person going to be able to drive home without it? What if the person is scheduled to board an airplane the next day, and won't be able to do so without the ID? What if the ID is an employee ID card, and the person will not be able to enter his or her workplace the next day without it?

In effect the bill would authorize untrained private persons to use the police powers of the state, similar to the provisions for citizens arrest in D.C. Code § 23-582(b). When the state seizes private property, the Fourth Amendment requires that it have probable cause to believe that a crime has been committed. Similarly, District law requires that a private person may arrest another only if "he has probable cause to believe [that the person] is committing [a felony or an enumerated serious offense] in his presence. [Emphasis added.] The provision of Bill 17-88 allowing a club employee to confiscate an ID merely because she "has reason to believe" it to be fraudulent is constitutionally inadequate.

Furthermore, the District's citizen arrest statute requires the person making the arrest to "deliver the person arrested to a law enforcement officer without unreasonable delay." D.C. Code § 23-582(c). The bill would allow the club to retain the confiscated ID for two days before delivering it to the police, which is an unreasonable delay, particularly in view of the serious consequences that may flow from a person's loss of his or her identification.

And while the bill would require the police department to provide the club a receipt for the document, it fails to require the club to provide a receipt to the person from whom it seized the document. The bill also establishes no expeditious process through which a person can retrieve his or her wrongfully seized identification document. We think this section fails to meet the standards of due process.

And while the bill grants immunity to clubs that confiscate IDs (unless they act "in bad faith or maliciously") – an invitation to abuse – the District of Columbia, under whose authority the confiscations would be conducted, may itself be liable for the harm caused to innocent patrons whose valid IDs are seized by club employees who are not trained to distinguish a real Wyoming driver's license from a fake one.

Licensed establishments have the duty not to serve alcohol to persons under the lawful drinking age. They are entitled to deny admission to anyone whom they believe is attempting to violate the law. There is no need to give club employees police powers deputizing them to seize private property, but there is considerable likelihood of harm and liability if such authority is given.

In sum, the ACLU urges the Council not to revisit the question of making drinking by persons between the ages of 18 and 21 a criminal offense. The present law with its severe civil sanctions should not be altered. And we further oppose the provision authorizing club employees to confiscate identification documents.