

MAY 15 2023

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**IN THE UTAH SUPREME COURT**

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STATE OF UTAH,  
  
Plaintiff / Appellant,

vs.

KOLBY RYAN BARNETT,  
  
Defendant / Appellee.

**NOTICE OF SUPPLEMENTAL  
AUTHORITIES UNDER RULE  
24(J)**

App No. 20220636-SC

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Kolby Barnett files this notice of supplemental authority under Utah R.  
App. P. 24(j).

At oral argument, the Court asked about the 1988 Voter Information Pamphlet. That is attached to this notice. The language in the pamphlet supports Mr. Barnett's interpretation that the Bail Provision was not understood to be prohibitory. The discussion speaks in terms of the district court and Legislature's discretion to deny bail to those who are excepted from the right to bail.

At oral argument, the Court asked about whether district courts have considered bail for felony-on-felony defendants. Co-counsel Todd Utzinger, who has been with the Legal Defender Coordinator for the Davis County Legal Defenders since the early 2000s, said that in his experience, Davis County judges routinely considered (and still do consider) bail for felony-on-felony defendants. Doug Thompson, who has worked at the Utah County Public Defenders for a decade, has never heard a judge in Fourth District say that they are prohibited from granting bail from felony-on-felony defendants. *See Appellee’s Principal Brief at 12, fn. 4.*

Mr. Barnett also referred to several cases during oral argument where the courts reasoned that a bail provision similar to ours was not prohibitory:

- *Ex Parte Bridewell*, 57 Miss. 39 (1879): “This provision makes the granting of bail mandatory in all cases not excluded by the exception, but does not prohibit it in cases falling within the exception.” *See also Ex Parte Hamilton*, 3 So. 241 (Miss. 1887).
- *People v. Tinder*, 19 Cal. 539 (1862): “The admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases. . . And independently of any consideration of the merits of the prosecution, circumstances frequently arise which will justify the

allowance of bail after indictment found. Thus bail may be allowed if the trial of the prisoner has been unreasonably delayed.”

- *Ex Parte Croom*, 19 Ala. 561 (1851): “It would be somewhat paradoxical to hold, that in a *bill of rights*, the convention should have put the negative of a common law right beyond the power of legislative control, however much necessity might exist for legislative action.”
- *Rigdon v. State*, 26 So. 711 (Fla. 1899): “There may be exceptional cases recognized by the courts, such as extreme sickness caused or increased by imprisonment, and the like.”
- *State v. Crocker*, 40 P.681 (Wy. 1895).
- *In re Losasso*, 24 P. 1080 (1890): “[C]ertain exceptions to the common-law rule in relation to bail in capital cases are recognized, even where this rule prevails most rigorously. Among these exceptions may be mentioned serious illness of the prisoner; delay by the prosecution in bringing him to trial; consent of the prosecuting attorney to the taking of bail; the existence of public excitement at the time of the finding of the indictment, likely to prejudice the grand jury; the confession of another that he did the killing, and the like. . . Courts sometimes exercise a sound judicial discretion, and admit to bail in such cases, even when the proof appears to be evident or presumption great.”
- *State v. Herndon*, 12 SE 268 (N.C. 1890): “There are other cases, as where the prisoner is so sick as to be in danger of his life, or the

prosecution is unreasonably delayed, and the like, in which the prisoner has been let to bail after indictment found.”

DATED this 15th day of May, 2023.

THE APPELLATE GROUP

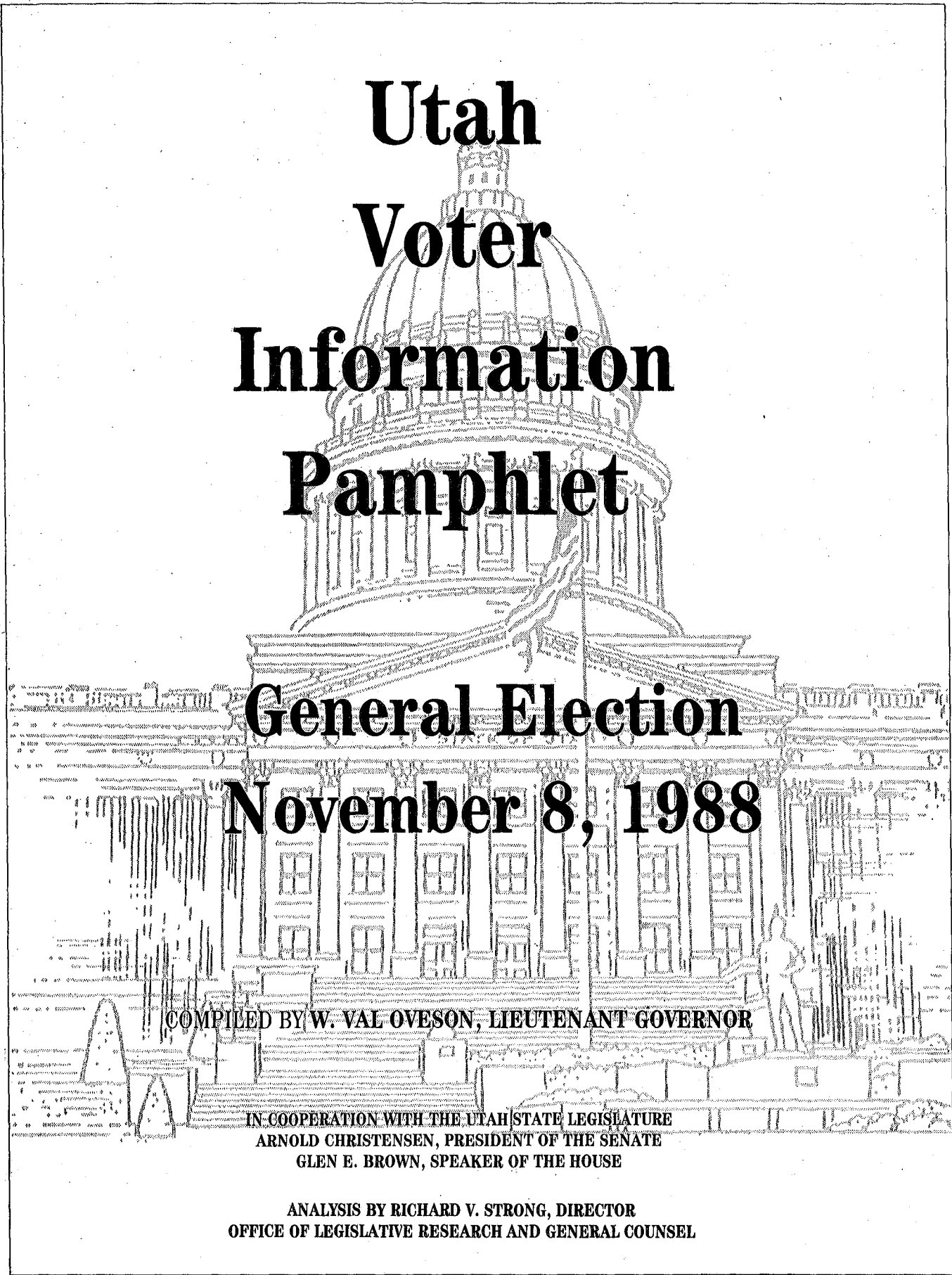
/s/ Emily Adams  
EMILY ADAMS  
*Attorney for Appellee*

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2023, I emailed a true and correct copy of the foregoing postage prepaid to the following:

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/s/ Emily Adams



# Utah Voter Information Pamphlet

## General Election November 8, 1988

COMPILED BY W. VAL OVESON, LIEUTENANT GOVERNOR

IN COOPERATION WITH THE UTAH STATE LEGISLATURE  
ARNOLD CHRISTENSEN, PRESIDENT OF THE SENATE  
GLEN E. BROWN, SPEAKER OF THE HOUSE

ANALYSIS BY RICHARD V. STRONG, DIRECTOR  
OFFICE OF LEGISLATIVE RESEARCH AND GENERAL COUNSEL





STATE OF UTAH  
**Lieutenant Governor**

**W. Val Oveson**  
LIEUTENANT GOVERNOR

203 STATE CAPITOL BUILDING  
SALT LAKE CITY, UTAH 84114

September 26, 1988

Dear Fellow Utahn:

On November 8, Utah voters will have the opportunity to vote on three initiatives as well as two proposed amendments to the Utah State Constitution. This Voter Information Pamphlet has been prepared to help you better understand these very important changes in our state's laws. The pamphlet contains arguments for and against each proposal, along with explanations and other information, which I believe will be of assistance to you in making your decisions how to vote.

The pamphlet also contains information on ballot-marking procedures, as well as registering to vote.

I urge you to study this pamphlet, along with other sources of information, so that when you go to the polls you will be able to make sound, intelligent and informed choices on these proposed changes.

Best wishes.

Sincerely,

W. VAL OVESON  
Lieutenant Governor

# TABLE OF CONTENTS

	TITLE	PAGE
INSTRUCTIONS FOR READING THE TEXT OF THE PROPOSITIONS .....		5
PROPOSITION NO. 1 — BAIL AMENDMENT		
Ballot Title .....		7
Final Legislative Vote .....		7
Impartial Analysis .....		7
Arguments .....		8-9
Text .....		10
PROPOSITION NO. 2 — MISCELLANEOUS AMENDMENT		
Ballot Title .....		11
Final Legislative Vote .....		11
Impartial Analysis .....		11
Arguments .....		12-13
Text .....		14-15
INITIATIVE A — TAX AND SPENDING LIMITATIONS		
Ballot Title .....		16
Impartial Analysis .....		16-17
Arguments .....		18-19
Text .....		20-21
INITIATIVE B — TAX REDUCTIONS		
Ballot Title .....		22
Impartial Analysis .....		22-23
Arguments .....		24-25
Text .....		26-27
INITIATIVE C — INCOME TAX CREDIT FOR PRIVATE EDUCATION		
Ballot Title .....		28
Impartial Analysis .....		28-29
Arguments .....		30-31
Text .....		32
INSTRUCTIONS TO VOTERS		
(Beaver, Cache, Carbon, Davis, Salt Lake, Sanpete, Sevier, Summit, Uintah, Utah, Washington, and Weber counties) .....		34-35
INSTRUCTIONS TO VOTERS		
(All other counties) .....		36-38
LIEUTENANT GOVERNOR'S CERTIFICATION OF BALLOT ITEMS .....		inside back cover
HOW TO REGISTER TO VOTE .....		back cover



## INSTRUCTIONS FOR READING THE TEXT OF THE PROPOSITIONS

NOTE: In reading the text of the propositions the following rules apply:

- (1) Underlined words and numbers represent new language being added to the constitution, or current language that is being moved from another section in the constitution.
- (2) Bracketed and lined-through words or numbers represent current language being deleted from the constitution, or current language that is being moved to another section in the constitution.
- (3) All other language is the current language in the constitution, which is retained without change.

**Example:** Sec. 8.(1) All ~~prisoners~~ persons charged with a crime shall be bailable ~~by sufficient sureties;~~ except ~~for~~:

(a) persons charged with a capital offense when ~~the proof is evident or the presumption strong or where a person is accused of the commission of~~ there is substantial evidence to support the charge; or

**Present Constitution:** Sec. 8. All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong or where a person is accused of the commission of . . .

**Proposed Revision:** Sec. 8. (1) All persons charged with a crime shall be bailable except:  
(a) persons charged with a capital offense when there is substantial evidence to support the charge; or



For



Against



# Proposition No. 1

## BAIL AMENDMENT

Vote cast by the members of the 1988 Legislature on final passage:  
HOUSE (75 members): Yeas, 63; Nays, 4; Absent or not voting, 8.  
SENATE (29 members): Yeas, 26; Nays, 0; Absent or not voting, 3.

### IMPARTIAL ANALYSIS

The state constitution presently allows judges to deny bail to persons who have been charged with:

(1) a capital offense; or

(2) a felony while on probation or parole or while free on bail awaiting trial.

Proposition 1 adds one more circumstance under which bail may be denied:

(3) persons who have been charged with a crime when there is clear and convincing evidence that the person would constitute a substantial danger to others or the community, or is likely to flee the court's jurisdiction if released on bail.

Proposition 1 also requires the Legislature to designate the specific crimes for which bail may be denied under this third condition. The Legislature has already passed legislation designating felonies as the only crimes for which bail may be denied. This legislation is not effective unless the voters approve Proposition 1.

Proposition 1 clarifies the constitutional bail language in two additional ways:

(1) It changes the phrase "accused of the commission" of a crime to "charged with" a crime. The second phrase is more commonly used.

### Official Ballot Title:

Shall the Utah Constitution be amended to allow bail to be denied to persons charged with a serious crime if the person may be a danger to another person or to the community, or is likely to flee the court's jurisdiction if released; and to clarify language regarding necessary evidence to deny bail?

(2) It changes the phrase "when the proof is evident or the presumption strong" to "when there is substantial evidence." The second phrase is more commonly used and understood by the courts and attorneys.

Proposition 1 also adds to the state constitution the Legislature's current power to statutorily provide or deny bail for convicted persons. The current state constitution does not address the issue of bail for convicted persons awaiting an appeal. Current statute, however, allows judges to detain convicted persons if the person would constitute a danger to others or the community, or is likely to flee the court's jurisdiction if released.

### Effective Date

Proposition 1 takes effect January 1, 1989. The implementing legislation takes effect on that same date if Proposition 1 is approved by the voters.

### Fiscal Impact

There is no impact on state revenues but there may be some additional county jail costs of up to \$13,000 statewide.

## Arguments For

The right to bail of criminally accused persons granted by the Utah Constitution goes far beyond the bail rights guaranteed by the U.S. Constitution. The current bail provision of the Utah Constitution guarantees bail to ALL prisoners except those charged with capital murder, parolees, and probationers. As a result, almost any prisoner charged with a crime has the constitutional right to bail in Utah regardless of the seriousness of the crime charged and without regard for the fact that the person may be a danger to the community if allowed to roam free. These provisions of the Utah Constitution are far more liberal than the bail rights guaranteed in the U.S. Constitution.

The Utah Constitution does not give judges the ability to deny bail when warranted. The present bail provisions of the Utah Constitution do not give Utah judges the discretion to deny bail for charges involving serious offenses such as second degree murder, criminal sexual abuse, rape, and other felonies. As a result, many dangerous persons charged with serious violent crimes are allowed to roam the streets of our cities.

Judges should be allowed to deny bail to persons who present a clear and present danger to the community. While the rights of criminal defendants are important and should continue to be considered, the general public and victims also have rights that must be protected. Persons who have been charged with serious crimes should not be allowed to continue to commit crimes against innocent victims while awaiting trial.

Judges should be allowed to deny bail to persons who are likely to flee the jurisdiction of the court. The Utah Constitution currently guarantees the right to bail for nearly all persons charged with a crime, even if those persons have shown in the past that they are likely to flee the jurisdiction of the court at the first opportunity. Judges should be given the discretion to deny bail in these cases in order to prevent circumvention of the criminal justice process.

In addition to the arguments stated, Proposition 1 would also:

1. Give judges the right to deny bail only if certain factors and criteria are present. Bail for most offenses would still be allowed.
2. Remove unreasonable restrictions on the discretion of judges by allowing bail to be set in Utah in a manner similar to that used by federal judges.

A vote for Proposition 1 is a vote for the victims of crime and for judicial restraint and efficiency in the criminal bail process.

Vote **FOR** Proposition 1!

Senator Winn L. Richards  
5301 Old Post Road  
Ogden, Utah 84403

Senator Darrell G. Renstrom  
1145 East 1675 North  
North Ogden, Utah 84404

## Rebuttal to

### Arguments For Proposition No. 1

Proponents of Proposition 1 beg the fundamental issues, and err in argument.

Right to bail in Utah does not go "far beyond the bail rights guaranteed by the U.S. Constitution." The Eighth Amendment simply states that "Excessive bail shall not be required, nor excessive fines imposed..." The Fourteenth Amendment applies this guarantee to the states, so that Utah, as well as Alabama, South Carolina, and Texas, must meet this minimum standard. States are free to give the accused **more** protection than the federal minimum. What is of concern here is the new language, not addressed in proponents' argument, as to how a "substantial evidence" standard affects our fundamental right to be free from incarceration while still presumed innocent.

Proponents appear to support a "police state" mentality where anyone the "authorities" deem "dangerous" can be locked up indefinitely in crowded, unwholesome, and often violent jails, away from their families. Often the decision to incarcerate lies more with the accused's non-conformity, poverty, appearance, or other arbitrary reason.

Let's not let our fundamental freedoms get diluted any more. Utah has too many problems with a backward image already, even though its existing constitution and appellate courts are probably of national envy. Let's not regress to the level of the pre-sixties American South.

A vote **AGAINST** Proposition 1 is a vote for liberty; for constitutional law; for our great republic; and most of all for the best Utah has to offer.

R. Clayton Huntsman, Attorney  
2 West St. George Boulevard  
Ancestor Square, Suite 31  
St. George, Utah 84770

## Arguments Against

The right to reasonable bail goes back to our revolution. The cavalier manner in which the British arrested and confined our people aroused such resentment that when we finally got free we said, "never again"—and confirmed the right to bail in the Eighth Amendment to our new constitution.

*State v. Boyle* defines bail's purpose: "to assure the presence of the **accused** at trial." Not "criminal," "guilty party," or "prisoner"—but "**accused**." Our courts still try to maintain what is often forgotten: the **presumption of innocence**.

Louisiana recently tried to abridge the right to reasonable bail. The U.S. Supreme Court, in the landmark case of *Duncan v. Louisiana*, held that Louisiana's refusal to accept certain property pledged as bail was unlawful, "in bad faith and for purposes of harassment."

Every year someone tries to erode our fundamental freedoms. Police want to abridge our right to bear arms. The giant insurance companies would deny us access to the courts through "tort reform."

And now, in a topsy-turvy Alice-in-Wonderland scenario, some would have the punishment first and then trial for accused citizens, by denying bail.

Read the proposed bill carefully.

Consider Sec. 8(1)(a), where "substantial evidence" replaces "proof is evident or where the presumption strong."

What is "substantial evidence?" Words can be manipulated to mean whatever anyone — judge, dictator, general — wants them to mean. As another odd character from *Alice* said before his celebrated fall, "When I use a word, it means exactly what I want it to mean — no more and no less."

Humpty-Dumpty articulates a court's power to invent meaning capriciously: guilty is innocent, jail **before** trial — even while the accused is still **presumed innocent**. Why? This standard is not only vague, but is also less rigorous than "beyond a reasonable doubt."

What is "substantial evidence?" Possession of a hunting weapon? Being a passenger in a vehicle carrying improperly tagged deer or untaxed jewelry?

Also alarming is the prospect that one can be denied bail for **any** crime if the court also finds by "clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction if released on bail."

Adequately high bail already deters flight from the jurisdiction for most crimes. But should we all be at risk just to make it slightly more difficult for a suspect to flee? Should the possibility that the accused, when arrested, may have been in possession of a fishing knife, deer rifle, prescription pills, or other "evidence" of "destructive tendencies" toward others, be used as pretext to incarcerate in an overcrowded jail until trial, which may be next year or in ten years?

And with Utah's financial resources dwindling along with our constitutional rights, can we really **afford** increased pre-trial detention?

Don't let the state further erode your fundamental rights, and increase your tax burden.

Vote **AGAINST** Proposition 1!

R. Clayton Huntsman, Attorney  
2 West St. George Boulevard  
Ancestor Square, Suite 31  
St. George, Utah 84770

## Rebuttal to

### Arguments Against Proposition No. 1

**Proposition 1 protects the rights of victims!** While we should all be concerned with preserving the right to bail of accused persons, we must also protect the rights of victims. Certainly a victim of violent crime, who is scheduled to be a witness in an upcoming trial, deserves the right to be free from fear and intimidation. Mandatory bail for the accused often results in the infringement of this right. Also, what is "reasonable" bail for one person may not be "reasonable" for another. To prevent an accused from fleeing the court's jurisdiction, one **thousand** dollars may be unreasonably high for someone whose total resources are the clothes on his back. But one **million** dollars may not be high enough for a person involved in drugs or organized crime.

**Proposition 1 revises the Utah Constitution to bring it in line with bail practices allowed under federal law.** Under federal law, judges can deny bail for accused persons who are dangerous. Proposition 1 simply gives Utah judges the same power.

**Proposition 1 provides clear standards of evidence that do not infringe upon the presumption of innocence.** Under Proposition 1, in order to deny bail a judge must find "substantial evidence" to support the charge and "clear and convincing evidence" that the accused is dangerous. These are much more clear standards than the present "proof is evident or presumption strong" standard. Also, by requiring both standards to be present, the presumption of innocence is protected.

Vote **FOR** Proposition 1!

Senator Winn L. Richards  
5301 Old Post Road  
Ogden, Utah 84403

Senator Darrell G. Renstrom  
1145 East 1675 North  
North Ogden, Utah 84404

**COMPLETE TEXT OF PROPOSITION NO. 1  
BAIL AMENDMENT**

A JOINT RESOLUTION OF THE LEGISLATURE PROPOSING TO AMEND THE UTAH CONSTITUTION; RELATING TO BAIL; SUBSTITUTING THIS RESOLUTION FOR A RESOLUTION PASSED AT THE 1988 GENERAL SESSION OF THE 47TH LEGISLATURE; AND PROVIDING AN EFFECTIVE DATE.

THIS RESOLUTION REPEALS AND WITHDRAWS ENROLLED COPY S.J.R. NO. 3 PASSED AT THE 1988 GENERAL SESSION OF THE 47TH LEGISLATURE AND REPLACES IT WITH THIS RESOLUTION, AND PROPOSES TO CHANGE THE UTAH CONSTITUTION AS FOLLOWS:

AMENDS: ARTICLE I, SEC. 8

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

Section 1. It is proposed to amend Article I, Sec. 8, Utah Constitution, to read:

Sec. 8. (1) All ~~[prisoners]~~ persons charged with a crime shall be bailable ~~[by sufficient sureties;]~~ except ~~[for]~~:

(a) persons charged with a capital [offenses] offense when [the proof is evident or the presumption strong or where a person is accused of the commission of] there is substantial evidence to support the charge; or

(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, [and where the proof is evident or the presumption strong] when there is substantial evidence to support the new felony charge; or

(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

(2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.

Section 2. Enrolled copy S.J.R. No. 3 passed at the 1988 General Session of the 47th Legislature is repealed and withdrawn in its entirety from the next general election.

Section 3. The lieutenant governor is directed to submit in lieu thereof this proposed amendment to the electors of the state of Utah at the next general election in the manner provided by law.

Section 4. If approved by the electors of the state the amendment proposed by this joint resolution shall take effect on January 1, 1989.