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Resolving a "Substantial Question": Just Who is Entitled to Bail Pending Appeal under the Bail Reform Act of 1984?

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RESOLVING A "SUBSTANTIAL QUESTION": JUST WHO IS ENTITLED TO BAIL PENDING APPEAL UNDER THE BAIL REFORM ACT OF 1984?

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Abstract

Under the Bail Reform Act of 1984, federal criminal defendants who wish to remain free on bail after conviction must prove that their appeal will have enough merit to raise at least one "substantial question." Federal appellate courts, however, have been deeply divided over how much merit is required to show that an appeal will raise a "substantial question." Ten circuits define the phrase as a "close question," based on an implausible reading of the 1984 Bail Act's legislative history. But the Ninth Circuit has interpreted the requirement to mean that a defendant must prove that his appeal will raise a "fairly debatable" issue—the historical definition of what constitutes a substantial question. It is therefore much easier to obtain bail pending appeal in the Ninth Circuit than in circuits using the close-question test. This Article argues that the Ninth Circuit has it right, and thus, countless defendants in other circuits have been wrongfully denied bail pending appeal. At least some of those defendants have had their convictions overturned on appeal, resulting in the gross injustice of a wrongful incarceration.

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I. INTRODUCTION

A federal criminal defendant sentenced to prison must typically begin serving time quickly unless he is allowed to remain free on bail until the completion of his direct appeal.[1] But the question of when a defendant is entitled to bail pending appeal has divided the circuits ever since Congress changed the bail standard more than two decades ago. This Article explores that controversy and concludes that most courts have made it harder for defendants to obtain bail pending appeal than Congress intended—an injustice that should be promptly corrected.

1. *See, e.g.*, Lepesh v. United States, No. 99-CR-516-BR, 2006 WL 2381857, at *1 (D. Or. Aug. 11, 2006) (discussing a defendant who was required to surrender two weeks after he was sentenced); United States v. Zgleszewski, No. CRIM.A. 02-774, 2004 WL 350187, at *1 (E.D. Pa. Feb. 10, 2004) (same).

There are high stakes involved in deciding who is entitled to bail pending appeal. A defendant not released on bail is incarcerated before an appellate court has confirmed that his conviction is legal. An erroneously convicted defendant who is denied bail loses his liberty to pay a debt to society that he never owed.[2] On the other hand, society has a compelling interest in protecting itself by swiftly incarcerating individuals who are found guilty beyond any reasonable doubt of a crime serious enough to warrant prison time. Under what circumstances a defendant can obtain bail pending appeal, then, is a delicate balance between the interests of society and the defendant.

Congress has struck the current balance in the Bail Reform Act of 1984.[3] The Act provides that a defendant is entitled to bail pending appeal when, among other things, he can prove (1) that he will not be a flight risk or a danger to the community while out on bail and (2) that his appeal will be meritorious enough to raise at least one "substantial question."[4] The circuits unanimously agree that Congress intended to make it more difficult to obtain bail pending appeal when it passed the 1984 Bail Act.[5] But the circuits disagree on how much harder Congress made obtaining bail when it replaced the previous requirement that the defendant's appeal raise a non-frivolous issue with the current requirement that the appeal raise a substantial question.[6]

Most courts define a substantial question as a "close question."[7] The Ninth Circuit, on the other hand, defines substantial question more broadly by using the same definition that the phrase was given in a prior incarnation of the standard for bail pending appeal—i.e., as an issue that is "fairly debatable."[8] Courts that have embraced the close question standard have held that, in light of legislative history, the fairly debatable standard does not go as far as Congress intended in restricting bail.[9] On the

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2. As one judge put it: "[T]he unjust deprivation, for a single hour of one man's liberty, creates a debt that can never be repaid." Johnson v. United States, 218 F.2d 578, 580 (9th Cir. 1954) (Stephens, J., concurring). There are other policy reasons to favor granting bail pending appeal, including allowing defendants time post-conviction to continue earning a paycheck, so that they may start paying off any restitution obligation. Another important (yet overlooked) point in favor of a liberal bail-pending-appeal policy is that it will give defendants and their families a longer time to adjust to the idea that the defendant will be serving prison time. For example, during this extra time, the convicted can make sure any dependents will be provided for during his incarceration.

3. 18 U.S.C. § 3143(b) (2000).

4. *Id.*

5. *See infra* Part III.

6. *Id.*

7. *See* cases cited *infra* note 82 (listing the nine courts of appeals that have defined a substantial question as a close question).

8. United States v. Handy, 761 F.2d 1279, 1281–82 (9th Cir. 1985).

9. *See* cases cited *infra* note 82.

other hand, the Ninth Circuit resurrected the fairly debatable standard by arguing that Congress intended to use the historical meaning of substantial question.[10] This Article sides with the Ninth Circuit and argues that the fairly debatable standard is the correct standard—an interpretation supported by common sense and a close look at the 1984 Bail Act's legislative history.

The difference between the standards is not merely an academic concern. Many legal questions that are "fairly debatable" are not "close." Defendants can and do fall in that gap.[11] But should we be concerned about such defendants? It might not seem troublesome when a court denies bail to a defendant whose direct appeal will not raise a close question. After all, if we are primarily concerned with defendants who serve prison time only to have their conviction overturned on appeal, why should we care about defendants whose appeal will not raise a single close question? Seemingly by definition those cases will not result in a reversal. The problem lies in the fact that, in practice, motions for bail must be filed soon after sentencing to prevent defendants from having to report to prison at all. That time frame means that defense counsel must quickly research the arguments that will likely be made on appeal and hurriedly draft a motion. And all this work must often be done without the benefit of transcripts—the lifeblood of a defendant's appeal[12]—which can take court reporters several months to complete.[13] As a result, even defendants with highly meritorious appeals might not be able to meet their burden to prove that their appeal will raise a close question.

This Article establishes that Congress was sensitive to this problem and intended that courts use the fairly debatable standard—not the close question standard. The analysis commences in Part II with an examination of the three incarnations of the bail-pending-appeal standard that led up to 1984. Examining those three periods provides the necessary context for understanding what Congress did when it passed the Bail Reform Act of 1984. Part III provides a brief overview of the current standard for bail

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10. *Handy*, 761 F.2d at 1281–82.

11. For a discussion of one such defendant, see *infra* notes 110–18 and accompanying text.

12. Transcripts are often the most important part of the appellate record. *See* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 604–05 & n.175 (2002) (discussing a case in which the Supreme Court reversed a trial court's decision after reviewing the trial transcript).

13. While court reporters must "promptly" translate the shorthand they took during the relevant proceeding into a transcript after a party requests it, *see* 28 U.S.C. § 753(b) (2000), that ideal is often not achieved, *see* United States v. Austin, 768 F.2d 302, 303 (10th Cir. 1985) (McKay, J., dissenting) (noting the reality that court reporters often take months to complete trial transcripts). In one notorious case, a court reporter took *four years* to complete a partial trial transcript in a criminal case. *See* Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 431, 436–37 (1993) (denying the court reporter absolute immunity in a suit for damages).

pending appeal. The Part focuses on the incipiency of the circuit split that developed regarding the meaning of substantial question. Part IV then takes advantage of the historical lessons learned in Part II to establish that Congress intended for courts to use the historical definition of substantial question.

II. BAIL PENDING APPEAL FROM 1879 UNTIL 1984

"Bail," Justice Douglas famously wrote, "is basic to our system of law."[14] Bail symbolizes the country's bedrock concern for personal freedom and the idea incorporated from English common law that "only those incarcerations which arise from absolute necessity are just."[15] Indeed, ever since Congress granted federal appellate courts jurisdiction over criminal cases in 1879, defendants have had the ability to obtain bail pending appeal under at least some circumstances.[16]

This Part will examine those circumstances and how they changed from 1879 to 1984.[17] Those 105 years can be neatly divided into three distinct periods: 1879 to 1934, 1934 to 1956, and 1956 to 1984. The most fruitful way to examine those periods is to view the way in which the three primary components of the standard for bail pending appeal changed. Those components are:

- *The merit requirement*. This requirement deals with whether the defendant's appeal must raise a non-frivolous issue, a substantial question, or something else to entitle the defendant to bail pending appeal.
- *The burden-of-proof requirement*. This requirement deals with whether the defendant has the burden to prove he has met the merit requirement or whether the government has the burden to prove that the defendant has not met the merit requirement.
- *The character requirement.* This requirement encompasses whether the defendant can be denied bail based on character issues, such as danger to the community or flight risk.

As will become clear, the legislature and judiciary have, over time, adjusted these requirements to find the right blend to balance the individual's liberty interest against the community's interest in safety.

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14. Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955).

15. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 33–34 (1978).

16. *See infra* Part II.A.

17. For an incredibly thorough look at the history of the right to bail in the United States up until 1977, see generally Duker, *supra* note 15.

A. *1879–1934*

Starting in 1879, when federal appellate courts were first granted jurisdiction over writs of error in all federal criminal cases, Congress provided that when such a writ was taken, "'bail may . . . be taken.'"[18] Twelve years later, the U.S. Supreme Court re-crafted the standard. The new, equally nebulous test provided that:

> Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which [the writ] will lie . . . the circuit court or district court, or any justice or judge thereof, shall have power, . . . to admit the accused to bail in such amount as may be fixed.[19]

The Supreme Court explained an oft-repeated rationale for the rule: "[A] person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment . . . ."[20]

Over time, the concept of a merit requirement implicit in the standard took hold. Most courts, in practice, asked whether the appeal would present any non-frivolous issues.[21] If the defendant's appeal would raise a non-frivolous issue for the appellate court to decide, he would be entitled to bail.[22] But since the statute was silent on a merit requirement, no uniform standard emerged. The Second Circuit, for example, required the defendant to have a "reasonable chance of success" in his appeal.[23] The Sixth Circuit, on the other hand, seemed to believe that *no* merit requirement existed and that as long as the defendant did not pose a flight risk, bail pending appeal was mandatory.[24] Courts also disagreed on the precise scope of the character requirement.[25]

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18. *Id.* at 112 (emphasis omitted) (quoting Act of Mar. 3, 1879, ch. 176, § 2, 20 Stat. 354, 354 (repealed 1891)). The first federal statute to explicitly note the possibility of bail pending appeal was enacted in 1866. *Id.* It provided that when a defendant appealed his state criminal case to the U.S. Supreme Court, the decision whether to grant bail pending appeal rested with the state court. *Id.*

19. SUP. CT. R. 36(2), 139 U.S. 706 (1891), *cited in* Duker, *supra* note 15, at 113.

20. Hudson v. Parker, 156 U.S. 277, 285 (1895).

21. United States v. Austin, 614 F. Supp. 1208, 1212–13 (D.N.M. 1985) ("From 1891 to 1934 . . . . [t]he general rule was that bail pending appeal would be granted in most non-capital cases unless there was a clear showing that the appeal was frivolous or taken for delay.").

22. *Id.*

23. Garvey v. United States, 292 F. 591, 593 (2d Cir. 1923).

24. McKnight v. United States, 113 F. 451, 453 (6th Cir. 1902).

25. *See* Duker, *supra* note 15, at 114–15 (listing factors various circuits took into consideration in determining whether bail pending appeal was proper).

All courts agreed, however, that the government bore the burden to prove that the defendant was not entitled to bail.[26] This position reversed the common law standard that placed the burden on the defendant.[27] Flipping the burden back and forth between the government and the defendant is a notable (but often unnoticed) theme in the history of bail pending appeal and a common technique to either restrict or expand access to bail pending appeal—during times when bail was disfavored, the defendant shouldered the burden, whereas during times when bail was favored, the government bore it.

The period from 1879–1934 was no exception, as many courts recognized that in most cases defendants ought to be granted bail pending appeal; as one court explained it: "[A]ccused and convicted persons under ordinary circumstances and in the vast majority of cases should be admitted to bail, both before their conviction and during the pendency of their writs of error until the appellate court has affirmed the judgments against them."[28] The court further explained that this rule reflected the idea that a defendant who is denied bail pending appeal and has his conviction reversed suffers the "same injustice" as a defendant who is imprisoned before trial and is subsequently acquitted; Congress had enacted a lenient standard to "prevent just such imprisonment."[29]

B. *1934–1956*

In 1934, the mishmash of rules that had evolved under the prior standard gave way to a clearer, more restrictive rule. Apparently unhappy with the lenient attitude reflected in the old standard, the Supreme Court (pursuant to its rule-making authority) limited bail to defendants who could prove that their appeal would raise "'a substantial question which should be determined by the appellate court.'"[30]

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26. Debra L. Leibowitz, *Release Pending Appeal: A Narrow Definition of 'Substantial Question' Under the Bail Reform Act of 1984*, 54 FORDHAM L. REV 1081, 1084–85 (1986) (noting that the 1891 statute placed the "burden of demonstrating frivolousness on the government" and that it marked the "first step toward making a merit[o]rious appeal a prerequisite for release").

27. Duker, *supra* note 15, at 115 (citing United States v. Delaney, 8 F. Supp. 224, 227 (D.N.J. 1934)).

28. Rossi v. United States, 11 F.2d 264, 265 (8th Cir. 1926); *see also* Jones v. United States, 12 F.2d 708, 709 (4th Cir. 1926) ("There may be unusual cases . . . that would warrant the court to hesitate in granting bail; but these are exceptional cases . . . .").

29. *Rossi*, 11 F.2d at 265–66.

30. Duker, *supra* note 15, at 115 (quoting SUP. CT. R. 6, 292 U.S. 663, 664 (1933)) (noting that the Supreme Court used its rule-making authority to draft and codify this requirement as Rule IV of the Criminal Appeal Rules). The rule was re-codified in 1946 as Rule 46(a)(2) of the Federal Rules of Criminal Procedure. *Id.* at 115 & n.536.

Courts interpreted the standard as placing a threshold requirement on the defendant to prove that his appeal would raise a substantial question.[31] Once the defendant jumped that hurdle, the court had discretion to determine whether bail was appropriate.[32] Whether the defendant was a flight risk or a danger to the community could then be considered.[33] But "the legal merit of the question presented to the appellate court [was] the primary consideration in determining whether bail should be granted," and many reported bail decisions discussed only whether the defendant's appeal had sufficient merit to warrant bail.[34]

Justice Douglas, in his capacity as a Circuit Justice,[35] was one of the first judges to discuss the definition of "substantial question." He equated

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31. *See* United States v. Glazer, 14 F.R.D. 86, 88 (E.D. Mo. 1952) ("'[T]wo requisites must be met in order to justify the enlargement of a defendant on bail pending appeal. First, it must appear that the case involves a substantial question of law. Second, it must appear that the case is one in which, in the discretion of the Court, it is proper to grant bail.'" (quoting United States v. Burgman, 89 F. Supp. 288, 289 (D.C. Cir. 1950))).

32. *See* cases cited *supra* note 31.

33. *See Rossi*, 11 F.2d at 265 (listing ways in which a court might use its discretion to deny bail).

34. Rhodes v. United States, 275 F.2d 78, 80 & n.2 (4th Cir. 1960) (listing numerous cases as support that, under both current law and pre-1956 law, the prime consideration in determining whether a defendant was entitled to bail pending appeal was whether the defendant's appeal had sufficient merit).

35. The Supreme Court assigns one or more of its members to each of the appellate circuits to act as that circuit's Circuit Justice. *See* 28 U.S.C. § 42 (2000). As Justice Marshall explained, when Supreme Court Justices act as a Circuit Justice, they act not for themselves alone, "but as a surrogate for the entire Court, from whence [their] ultimate authority in these matters derives. A Circuit Justice therefore bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them . . . ." Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (Marshall, Circuit Justice 1973). Historically, Justices often times in their capacity as a Circuit Justice, played a large role in the development of the jurisprudence relating to bail pending appeal, as they chose to actively participate in the bail-pending-appeal process. *See* Frank Felleman & John C. Wright, Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 991–98 (1964) (discussing the role Supreme Court Justices then played in determining whether a defendant was entitled to bail pending appeal). For example, between 1956 and 1961, the Justices received 113 bail motions, granting twenty-three of them. *Id.* at 1020. But the Justices' attitudes have apparently changed regarding whether they should be actively participating in the bail-pending-appeal process; it appears that the last time a Justice granted a bail-pending-appeal motion was in 1978, when Justice Brennan, sitting as a Circuit Justice, allowed a defendant to remain out on bail while he appealed his espionage conviction to the Fourth Circuit. *See* Truong Dinh Hung v. United States, 439 U.S. 1326, 1328–30 (Brennan, Circuit Justice 1978). Nevertheless, defendants still do occasionally seek to obtain bail pending appeal from a Supreme Court Justice—who then promptly denies the request. *See*, *e.g.*, Chilingirian v. United States, 538 U.S. 958 (2003) ("Application for bail pending appeal addressed to Justice SOUTER and referred to the Court denied."); Koon v. United States, 510 U.S. 909, 909 (1993) (stating "The application for release on bail pending appeal presented to Justice O'CONNOR and by her referred to the Court is denied.").

the phrase with an issue that is "fairly debatable."[36] Later, he provided additional guidance to district courts trying to determine whether a defendant's appeal would raise a fairly debatable issue:

> [T]he first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail.[37]

Justice Douglas's formulation quickly became the leading understanding of what constituted a "substantial question" as courts often cited his definition as the proper understanding of the phrase.[38]

Changing the merit requirement to "substantial question" was a welcome relief for some who saw the prior non-frivolous issue standard as too lax. U.S. District Court Judge Holtzoff, for example, concluded that the purpose of the change was to "restrict" the number of convicted defendants eligible for bail and that the prior law's broad presumption in favor of bail was a "serious defect in the administration of criminal justice."[39] Unfortunately for Judge Holtzoff, this period of "tough on bail" would last only 22 years.

C. *1956–1984*

In 1956, Congress once again approved a change to the standard for bail pending appeal, dramatically expanding the pool of defendants eligible for bail. The new standard provided that "[b]ail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay."[40] The standard was re-codified in the Bail Reform Act of 1966 with one minor difference—the new standard explicitly recognized what had always been implicit: the court could deny bail if the

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36. D'Aquino v. United States, 180 F.2d 271, 272 (Douglas, Circuit Justice, 9th Cir. 1950).

37. Herzog v. United States, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955); *see also* cases cited *infra* note 38 (illustrating some of the many courts that cited Justice Douglas's formulation of "substantial question").

38. *See, e.g.*, United States v. Warring, 16 F.R.D. 524, 526 (D. Md. 1954) (applying Justice Douglas's standard in considering a bail pending appeal motion and citing *D'Aquino*); United States v. Stephenson, 110 F. Supp. 623, 627 (D. Alaska 1953) (same); United States v. Glazer, 14 F.R.D. 86, 88 (E.D. Mo. 1952) (same); United States v. Barker, 11 F.R.D. 421, 422 (N.D. Cal. 1951) (same); United States v. Barbeau, 92 F. Supp. 196, 202 (D. Alaska 1950) (same).

39. United States v. Burgman, 89 F. Supp. 288, 289 (D.D.C. 1950).

40. Duker, *supra* note 15, at 117 (quoting FED. R. CRIM. P. 46(a)(2) (as amended in 1956)).

defendant was a flight risk or a danger to the community.[41]

Courts observed that once again the burden had flipped: the government now bore the burden to prove that the defendant was not entitled to bail.[42] And the merit requirement once again required the government to prove that any appeal would be frivolous.[43]

As with prior law, the frivolity of the appeal was only a threshold condition. The government could also rely on a character requirement to prevent defendants from obtaining bail.[44] But, at least initially, the government carried a heavy burden. In arguing flight risk, for example, it was "incumbent upon the government to display a *strong probability* that the defendant [would] become a fugitive."[45] In arguing danger to the community, the government had to prove that the defendant presented what Chief Justice Warren described as a "clear" threat.[46] Midway through this period, in 1972, Congress became more concerned about crime problems and altered the character requirement, placing the burden on the defendant to prove, by a preponderance of the evidence, that he was not a flight risk or a danger to the community.[47] Even after the change, however,

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41. 18 U.S.C. § 3148 (1970) (repealed 1984) ("A person . . . who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained."); *see also* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 767 (3d ed. 2004) ("Even before 1966, at a time when the rule was silent on the subject, courts had considered that they could deny bail pending appeal to a defendant who was likely to flee or who posed a danger to the community . . . ."). For a discussion of the 1966 Bail Act, see Note, *The Bail Reform Act of 1966*, 53 IOWA L. REV. 170, 177–88 (1967).

42. *See* Duker, *supra* note 15, at 117 n.544 (listing cases).

43. Fiano v. United States, 259 F.2d 135, 136 (9th Cir. 1958) (noting the change from the substantial question standard to the non-frivolous standard).

44. Rhodes v. United States, 275 F.2d 78, 81 (4th Cir. 1960) ("Although the most important factor to consider is whether the appeal is frivolous, there are other considerations which may justify the denial of bail pending appeal both under the old and new rules. The one most often mentioned is the likelihood of the defendant absconding." (footnote omitted)); *see also* Duker, *supra* note 15, at 117–18 (listing the various factors courts took into consideration).

45. *See* Duker, *supra* note 15, at 118 (emphasis added) (citing *Rhodes*, 275 F.2d at 81).

46. Leigh v. United States, 82 S. Ct. 994, 996 (Warren, Circuit Justice 1962) (noting that if the government cannot prove the defendant's direct appeal will raise only frivolous issues, bail should only be denied "in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release"); *see also* Sellers v. United States, 89 S. Ct. 36, 38 (Black, Circuit Justice 1968) (concluding that bail pending appeal should be denied only when the defendant posed the "kind of danger that so jeopardizes the public" that detaining him is the only option).

47. *See* FED. R. APP. P. 9(c) (1972) ("The decision as to release pending appeal shall be made in accordance with [The Bail Reform Act of 1966]. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.").

some courts resisted implementing a tough character requirement. The Third Circuit, for instance, warned that defendants were to be denied bail pending appeal because of concerns about safety only when the "danger to the community posed by the defendant . . . [is] of such dimension that only his incarceration can protect against it."[48]

Courts quickly realized the revolution brought about by switching from the fairly debatable standard to the non-frivolous issue standard. For example, Justice Frankfurter, acting in his capacity as a Circuit Justice, concluded that the new non-frivolous issue standard "greatly liberalized" the bail standard. Granting bail would occur "more readily under the new standard than it [had] under the old concept of 'substantial question,'" Justice Frankfurter commented—a conclusion, he added, that even the government agreed with.[49] Justice Frankfurter later continued:

> The Government commendably acknowledges that the new Rule has made an important change. The Rule expresses a general attitude, the significance of which is that inasmuch as an appeal from a conviction is a matter of right, the risk of incarceration for a conviction that may be upset is normally to be guarded against by allowing bail unless the appeal is so baseless as to deserve to be condemned as "frivolous" or is sought as a device for mere delay.[50]

Many saw the shifting of the burden on the issue of danger to the community and flight risk as being in tension with the general liberal attitude toward release provided by the 1966 Bail Act. *See generally* Paul D. Inman, *Bail Pending Appeal in Federal Court: The Need for a Two-Tiered Approach*, 57 TEX. L. REV. 275, 284–85 (1979) (noting the tension and resolving it by arguing that the "principles of the [1966] Bail Reform Act should govern" if the direct appeal is "substantial," but that the principles inherent in placing the burden on the defendant to prove he is not a danger to the community or a flight risk should apply if the defendant's appeal is "insubstantial").

48. United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979).

49. Ward v. United States, 76 S. Ct. 1063, 1065 (Frankfurter, Circuit Justice 1956). The Fifth Circuit likewise noted that the change from substantial question to non-frivolous issue "was intended to liberalize the granting of bail pending appeal." Leary v. United States, 431 F.2d 85, 88–89 & n.3 (5th Cir. 1970) (noting this liberalized approach "was reflected in a series of decisions by individual Justices designed to insure [sic] that bail pending appeal would be fairly considered so that even the most unsavory defendants would not be incarcerated before their convictions were ultimately upheld or be denied bail as a form of punishment"); *see also* Fiano v. United States, 259 F.2d 135, 136 (9th Cir. 1958) (concluding that the court "[did] not doubt" that in changing the standard from substantial question to non-frivolous issue, there was an intent to establish a "much lighter standard"); United States v. Esters, 161 F. Supp. 203, 205 (W.D. Ark. 1958) (concluding that the change in standards was intended to "effect[] a liberalization in the matter of bail pending appeal").

50. *Ward*, 76 S. Ct. at 1065.

As a result, bail pending appeal was once again favored.[51] This greatly liberalized standard set the stage for the 1984 Bail Act, to which the analysis now turns.

III. COURTS DIVIDE OVER THE MEANING OF "SUBSTANTIAL QUESTION" IN THE 1984 BAIL ACT

In 1984, President Reagan signed the Comprehensive Crime Control Act[52] into law, reshaping large swaths of the criminal code and affecting everything from the contours of the insanity defense to sentencing.[53] A small piece of that legislation is the Bail Reform Act of 1984,[54] which made a number of changes to bail practice.[55] The impetus for bail reform was public concern about crimes committed by those out on bail, and most of the legislation changed bail practice with respect to defendants likely to re-offend.[56]

For present purposes, the most pertinent portion of the 1984 Bail Act altered the standard for bail pending appeal. Congress wanted to change the standard not only to address general public fears about crime, but also to address a concern specific to appeals. As the Act's legislative history

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51. *See, e.g.*, Bandy v. United States, 81 S. Ct. 197, 198 (Douglas, Circuit Justice 1960) (noting that bail pending appeal was "heavily favored"); United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979) (noting that bail pending appeal should be denied only as a matter of "last resort"); Rhodes v. United States, 275 F.2d 78, 82 (4th Cir. 1960) ("[N]ormally bail should be allowed pending appeal, and it is only in an unusual case that denial is justified."); United States v. Hearst, 424 F. Supp. 318, 320–21 (N.D. Cal. 1976) ("Nonetheless, the [1966 Bail Reform] Act establishes a policy strongly favoring post-trial as well as pretrial release."); United States v. Ursini, 276 F. Supp. 993, 997 (D. Conn. 1967) (recognizing that bail pending appeal should be denied only in "extraordinary" cases).

52. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18, 21, 28, 29, 31, and 42 U.S.C.).

53. *See* S. REP. NO. 98-225, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3184 (noting that the Comprehensive Control Act made "major comprehensive improvements to the federal criminal laws," including "sentencing reform, bail reform, insanity defense amendments, drug penalty amendments, [and] criminal forfeiture improvements").

54. *See* 18 U.S.C. §§ 3141–3150, 3062 (2000).

55. *See generally* Richard A. Powers III, *Detention Under the Federal Bail Reform Act of 1984*, 21 CRIM. L. BULL. 413 (1985) (discussing some of the changes brought about by the Bail Reform Act of 1984).

56. Powers, *supra* note 55, at 414 (explaining the need for reform to allow judges discretion to gauge the risk of a defendant's "danger to the community"); *see also* Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 930 (1985) (noting the need for detention if defendants were "community safety hazards"); S. REP. NO. 98-225, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3185 ("Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal Bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.").

explains, prior law had "a presumption in favor of bail even after conviction" and Congress wanted to "eliminate" that presumption.[57] With those concerns in mind, the new legislation provided that defendants sentenced to prison would be denied bail unless the defendant had met his burden to prove:

> (1) by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community . . . and
>
> (2) that [his] appeal . . . [will] raise[] a substantial question of law or fact likely to result in reversal or an order for a new trial.[58]

While the new character requirement was clear—defendants now had to offer *clear and convincing proof* that they would not flee or be a danger while on bail—the new merit requirement was not. What was a "substantial question of law or fact likely to result in reversal or an order for a new trial"?

The first appellate court to work through its meaning was the Third Circuit in *United States v. Miller*[59]—an opinion that quickly became the departure point for interpreting the 1984 Bail Act. Despite the controversy that would later surround the meaning of "substantial question," the Third Circuit, without discussion or even a citation, stated that a substantial question is an issue that is either "novel, which has not been decided by controlling precedent, or which is fairly doubtful."[60] The standard resembled the historical fairly debatable standard announced by Justice Douglas.[61] It is likely that the *Miller* court did intend to simply quote the prior fairly debatable verbiage, but instead settled on fairly doubtful. This reading would explain why the court offered up little defense of its definition—the court thought it uncontroversial that Congress did not accidentally use the exact phrase from a prior version of the same standard.

In any event, the Third Circuit next addressed what it thought was the controversial portion of the standard: what Congress meant when it

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57. S. REP. NO. 98-225, at 26, *reprinted in* 1984 U.S.C.C.A.N. at 3209.

58. Pub. L. No. 98-473, § 203(a), 98 Stat. 1976, 1981–82 (codified as amended at 18 U.S.C. § 3143(b) (2000)); *see also* S. REP. NO. 98-225, at 27, *reprinted in* 1984 U.S.C.C.A.N. at 3210 (noting the Committee's intent that under § 3143 the burden of showing the merit of the appeal should now rest with the defendant).

59. 753 F.2d 19 (3d Cir. 1985).

60. *Id.* at 23.

61. Later, the Third Circuit essentially merged this standard with the Ninth Circuit's fairly debatable standard. *See infra* note 78.

required that the substantial question was "'likely to result in reversal or an order for a new trial.'"[62] The court rejected the meaning the district court assigned to it: that a district court must conclude that its own rulings were likely to be reversed.[63] The court was "unwilling to attribute to Congress the cynicism" that a district court judge could grant bail pending appeal only if it believed it were likely to be reversed—something that would presumably never happen.[64] The *Miller* court also found that defining the phrase in that way would render the "substantial question" portion of the statute superfluous: any question likely to result in reversal would necessarily be a substantial question.[65] Thus, the court sensibly interpreted the phrase to require the district court to determine whether, if the substantial question were decided in the defendant's favor, it would likely result in a reversal or an order for a new trial.[66] For example, even if the substantial question were decided in the defendant's favor, it might be harmless error, in which case the defendant would not be entitled to bail because the conviction would not be overturned.[67]

Following *Miller*, the other circuits unanimously agreed that the 1984 Bail Act required them to go through the two-step process:[68] they were to determine whether the defendant's direct appeal would raise a substantial question and then determine whether that question, if decided in the defendant's favor, would likely result in a new trial or a reversal.[69] The controversy focused on what constituted a "substantial question."

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62. *Miller*, 753 F.2d at 23 (quoting the new standard).

63. *Id.*

64. *Id.* Many district courts imputed this cynical appraisal to Congress—this interpretation was quite common among district courts in the immediate aftermath of the 1984 Bail Act's passage. *See* Lay & De La Hunt, *supra* note 56, at 947 ("District courts confronted with ['likely to result'] language have interpreted it subjectively, believing the provision to require them to state a belief that they will be reversed on appeal."). Eventually, even the government abandoned this view of the statute. *See* United States v. Powell, 761 F.2d 1227, 1233 (8th Cir. 1985) (en banc) (noting the government's change in position).

65. *Miller*, 753 F.2d at 23.

66. *Id.* At least one district court—in a thorough opinion—independently came to the same conclusion as the Third Circuit. *See* United States v. Lamp, 606 F. Supp. 193, 194–98 (W.D. Tex. 1985) (examining the statutory construction and legislative history of the Comprehensive Crime Control Act).

67. *See* United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985) ("We also agree with the other circuits that the language in the statute which reads 'likely to result in reversal or an order for a new trial' is a requirement that the claimed error not be harmless or unprejudicial.").

68. *See* cases cited *infra* note 82.

69. In 1990, Congress amended the 1984 Bail Reform Act to clarify that bail pending appeal was also appropriate not only when the substantial question would likely result in a reversal or an order for a new trial, but also in cases where it would likely result in a "sentence that does not include a term of imprisonment" or a "reduced sentence . . . less than the total of the time already served plus the expected duration of the appeal process." *See* United States v. Chang, No. 90-0533-01, 1992 WL 2417, at *2 (E.D. Pa. Jan. 6, 1992) (noting that the change occurred in 1990).

Other appellate courts quickly criticized the Third Circuit's definition of substantial question. The first to do so was the Eleventh Circuit in *United States v. Giancola*,[70] where the court noted that the Third Circuit allowed for questions not covered by "controlling precedent" to be labeled a substantial question.[71] But some issues are not covered by controlling precedent because they are "so patently without merit that it has not been found necessary for [them] to have been resolved."[72] The Eleventh Circuit then refused to adopt the Third Circuit's definition wholesale, finding that it failed to go far enough in effectuating congressional intent to reverse the presumption in favor of bail as reflected in the 1984 Bail Act's legislative history.[73] The court, without acknowledging the historical definition of substantial question, then invented its own definition: a substantial question was a "close question."[74]

Next, the Ninth Circuit weighed in. In *United States v. Handy*,[75] in an opinion authored by Judge Reinhardt (over Judge Farris's dissent),[76] the court adopted the historical definition of substantial question: a question that is "fairly debatable."[77] According to Judge Reinhardt, the standard is the functional equivalent of the Third Circuit's test.[78]

Judge Reinhardt pointed to two strands of cases to support his view that the phrase "substantial question" had historically been understood to mean a fairly debatable issue. First, he observed that, as discussed above, when the prior bail-pending-appeal standard had included the substantial question requirement, courts had adopted Justice Douglas's fairly debatable standard.[79] Second, just a year before Congress passed the 1984 Bail Act, the Supreme Court had determined that in the habeas context an

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70. 754 F.2d 898 (11th Cir. 1985).

71. *Id.* at 901.

72. *Id.*

73. *Id.* at 900–01.

74. *Id.* at 901.

75. 761 F.2d 1279 (9th Cir. 1985).

76. *Id.* at 1284 (Farris, J., dissenting); *see infra* Part IV.C.1 (discussing Judge Farris's dissent).

77. *Handy*, 761 F.2d at 1281–82.

78. *Id.* at 1282. Later, the Third Circuit modified its standard and essentially adopted the Ninth Circuit's fairly debatable standard. *See* United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986). In *Smith*, the Third Circuit recognized "that a number of courts of appeals view our *Miller* definition as incomplete." *Id.* It responded to these objections "by refer[ring] to the requirement that a question which is not governed by controlling precedent nonetheless must be significant. Clearly, an issue that is 'patently without merit' cannot qualify as significant." *Id.* The court concluded by seemingly abandoning the approach laid out in *Miller* and siding with the Ninth Circuit: "Where there is any doubt as to significance, we believe it is preferable to resort to the historical approach outlined in . . . *Handy*, rather than to the 'close' question concept advocated by the *Giancola* court." *Id.* (citation omitted); *see also* United States v. Kale, 661 F. Supp. 724, 725 (E.D. Pa. 1987) (interpreting *Smith* as defining "substantial question" as a "'fairly debatable' question").

79. *See Handy*, 761 F.2d at 1281.

issue involving a "'substantial showing of the denial of [a] federal right'" (i.e., a substantial question) was an issue that is "'debatable among jurists of reason'" (i.e., a fairly debatable issue).[80] Given this history, Judge Reinhardt presumed that Congress intended to use the historically settled definition of "substantial question."[81]

Nevertheless, in short order, *every* other circuit sided with the Eleventh Circuit and essentially parroted its reasoning: the fairly debatable standard failed to go far enough to effectuate Congress's intent in restricting bail pending appeal.[82] As an en banc Eighth Circuit succinctly put it: "We believe [the close question standard] is more responsive to the announced purpose of Congress, which was, bluntly, that fewer convicted persons remain at large while pursuing their appeals."[83] The court's terse reasoning typifies the analysis of the other circuits, whose support in selecting the close question standard rarely stretched beyond a single sentence.[84]

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80. *Id.* at 1281–82 (alteration in original) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983), *superseded by statute*, 18 U.S.C. § 2253 (2000), *as recognized in* Slack v. McDaniel, 529 U.S. 473 (2000)). In the habeas context, a petitioner can appeal the district court's denial of his habeas petition only if the district court issued a "certificate of probable cause," which courts equate with requiring the petitioner to demonstrate a "substantial showing of the denial of [a] federal right." *See, e.g.*, *Barefoot*, 463 U.S. at 892–93 (alteration in original). In other words, the petitioner has to show that his appeal of the denial of his petition will raise a "substantial question." *See* Foster v. Field, 413 F.2d 1050, 1051 (9th Cir. 1969); *see also* Ramsey v. Hand, 309 F.2d 947, 948 (10th Cir. 1962). The Supreme Court noted that this standard placed the burden on the petitioner to prove his appeal would raise issues that "are debatable among jurists of reason." *Barefoot*, 463 U.S. at 893 n.4. In 1996, the standard was slightly changed by statute, and a habeas petitioner must now show a substantial showing of the denial of a *constitutional* right—not just a federal right. *See* Slack v. McDaniel, 529 U.S. 473, 483 (2000). A "certificate of probable cause" is also now called a "certificate of appealability." *See id.* at 480. Courts in the Ninth Circuit have recognized that the substantial-showing requirement in the certificate of appealability context is essentially the same as the substantial question test in the bail-pending-appeal context. *See, e.g.*, United States v. Grogg, No. 2:06-cr-0008-JKS, 2007 WL 2904292, at *2 (E.D. Cal. Oct. 4, 2007) ("The test as defined in *Handy* [*i.e.*, the Fairly Debatable standard] is very similar to the test for a certificate of appealability . . . ."). This Article contends that this view is exactly right.

81. *Handy*, 761 F.2d at 1282–83.

82. *See* United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the close question standard); United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985); United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991); United States v. Valera-Elizondo, 761 F.2d 1020, 1023–24 (5th Cir. 1985); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298–99 (7th Cir. 1985); United States v. Powell, 761 F.2d 1227, 1232–34 (8th Cir. 1985) (en banc); United States v. Affleck, 765 F.2d 944, 952 (10th Cir.1985) (en banc); United States v. Perholtz, 836 F.2d 554, 555-56 (D.C. Cir. 1988). The one (brief) exception to this deluge was the Fifth Circuit, which in an unpublished order adopted the "*Handy/Miller*" standard, *see Valera-Elizondo*, 761 F.2d at 1022 n.5 (citing *In re* Canale, No. 85-3052 (5th Cir. Mar. 28, 1985)), but in *Valera-Elizondo*, however, it backed off and adopted the close question standard, *see id.* at 1024.

83. *Powell*, 761 F.2d at 1232.

84. The First Circuit was typical in this respect: "We think that the *Giancola* test more accurately reflects the intent of Congress to restrict access to bail pending appeal and adopt its

The state of the law on the meaning of "substantial question" has not changed since. On one side of the road sits the Ninth Circuit. On the other side sits every other circuit except for the Third Circuit, which sits in the road near the Ninth Circuit's curb.

IV. CONGRESS INTENDED THAT COURTS INTERPRET A "SUBSTANTIAL QUESTION" AS A "FAIRLY DEBATABLE" ISSUE

This Article now turns to why the Ninth Circuit is correct. This Part first discusses the concerns that led to bail reform—concerns that had nothing to do with the merit requirement. This Part next explores the legal consequences of Congress's decision to fashion a merit requirement by using a phrase—a "substantial question"—that has a well-settled meaning and history. The most salient consequence is that courts must presume that Congress intended to use the settled definition unless there is clear evidence to the contrary. Finally, this Part addresses the arguments that Congress did not intend courts to interpret a substantial question as a fairly debatable issue. Those arguments face two obstacles: first, the improbability that Congress intended to dramatically alter the merit requirement given that its expressed concerns addressed only the character and burden-of-proof requirements; and second, the strong legal presumption that Congress intends to import a phrase's well-settled meaning. This Part then concludes that those contrary arguments marshal insufficient evidence to rebut the presumption in favor of the historical definition of a "substantial question" as being fairly debatable.

A. *The Motivation Driving Bail Reform Had Nothing to Do with the Merit Requirement*

In passing the 1984 Bail Act, Congress wanted to reduce the public's anxiety about rising crimes rates by ensuring that those free on bail were not prone to committing more crimes. Because convictions are presumed correct on appeal, Congress also wanted to reverse the presumption in favor of bail pending appeal.[85] And in responding to these concerns, as the Eight Circuit "bluntly" explained it, "Congress [intended] that fewer convicted persons remain at large while pursuing their appeals."[86] History demonstrates how Congress responded both to the concern about rising crime rates—by placing an unprecedented burden on the defendant to prove he will not be a danger to the community—and the concern about

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'substantial question' definition." *Bayko*, 774 F.2d at 523. The court offered no further analysis. *See id.*

85. *See supra* notes 56–58 and accompanying text.

86. *Powell*, 761 F.2d at 1232.

reversing the presumption in favor of bail—by placing the burden on the defendant to prove that his appeal will raise a meritorious issue. Neither of these concerns had anything to do with restricting the level of merit that the defendant would have to prove his appeal will raise.

1. Congress's Prime Motivation in Restricting Bail Pending Appeal Related to the Character Requirement

In altering the standard for bail pending appeal, Congress was reacting to public concerns about "the alarming problem of crimes committed by persons on release."[87] Recall that only a small portion of the 1984 Bail Reform Act was aimed at altering the standard for bail pending appeal—most of the Act thoroughly overhauled general bail practice to give judges the tools to keep defendants who were likely to re-offend off the streets. As one judge summarized it: "The whole tenor of the 1984 [Bail Act] addresses the problems of safety of the community or of other persons . . . ."[88] Congress saw the shift in focus to public safety concerns as a "significant departure" from prior bail law, which centered solely on concerns about assuring the "appearance of the defendant at judicial proceedings."[89]

Given this backdrop, Congress unsurprisingly was dissatisfied with the character requirement in the standard for bail pending appeal. A mere 12 years before Congress passed the 1984 Bail Act, criminals who were threats to public safety would not necessarily be denied bail pending appeal—the government had to prove that they were clear threats.[90] Even when Congress changed this standard in 1972, a defendant could still be

87. S. REP. NO. 98-225, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185.

88. Powers, *supra* note 55, at 414; *see also* Lay & De La Hunt, *supra* note 56, at 930 ("The principal features of the 1984 [Bail Act] allow the detention of certain defendants pending trial or appeal if they are found to be, among other things, community safety hazards.").

89. S. REP. NO. 98-225, at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3185–86. Later, in 1990, Congress further underscored the concern for public safety by passing the Mandatory Detention Act, which prevented defendants convicted of certain categories of dangerous crimes from being eligible for bail pending appeal without "exceptional reasons" being present. 18 U.S.C. §§ 3143(b)(2), 3145(c) (2000). The Act provides that violent offenders, in addition to those convicted of drug offenses with a maximum sentence of at least ten years and those convicted of any offense with a maximum sentence of life imprisonment or death, are not eligible for release unless "it is clearly shown that there are exceptional reasons why [their] detention would not be appropriate." *Id.* §§ 3145(c), 3145(f). The exceptional-reasons requirement must be met in addition to the requirements defendants must normally meet to be entitled to bail pending appeal. United States v. DiSomma, 951 F.2d 494, 496 (2d Cir. 1991). For a look at how courts have interpreted the "exceptional reasons" requirement, see Jonathan S. Rosen, *An Examination of the "Exceptional Reasons" Jurisprudence of the Mandatory Detention Act: Title 18 U.S.C. §§ 3143, 3145(c)*, 19 VT. L. REV. 19, 25–45 (1994).

90. *See* cases cited *supra* note 46.

released on bail if he could prove that he was likely not a threat to the community.[91] Because of Congress's dissatisfaction, the 1984 Bail Act swept aside the prior character requirement to make way for an unprecedented standard—that defendants would have to prove by clear and convincing evidence that they were not a threat to the community.[92] In the previous one-hundress-plus years of bail-pending-appeal standards, defendants had *never* had to meet such an onerous burden.

But courts, in deciding how to interpret the 1984 Bail Act, seem completely unaware of these facts. The Eighth Circuit, for example, noted that Congress would not have gone through "the trouble" of passing bail reform if it knew courts would use the fairly debatable standard as opposed to the close question standard.[93] This line of reasoning makes no sense in light of the evidence that Congress's primary concern was public safety—not a concern that defendants with meritless appeals were being let out on bail. Moreover, in light of these facts, a prime argument used to justify the close question standard falters: namely, that the fairly debatable standard does not adequately limit, to the extent Congress intended, the number of defendants out on bail pending appeal. The hidden assumption is that Congress altered only the merit requirement to reach its desired reduction in those out on bail. But that assumption is not correct. Congress intended to place an important limit on defendants seeking bail by altering the character requirement, which placed a new and unprecedented burden on defendants.[94]

2. Congress's Concern about Reversing the "Presumption" in Favor of Bail Refers to the Burden-of-Proof Requirement

The second concern that Congress wanted to address in passing the 1984 Bail Act was the "presumption in favor of bail."[95] The Act's legislative history explains that "the basic distinction" between the current and prior standards for bail pending appeal "is one of presumption."[96] The legislative history continues:

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91. *See supra* text accompanying note 47 (noting that a defendant only had to show by a preponderance of the evidence that he was not a flight risk or a danger to the community); *see also* United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979) (noting the need for a great threat to the community to warrant denial of bail).

92. 18 U.S.C. § 3143(b).

93. United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985).

94. *See* S. REP. NO. 98-225, at 26–27, *reprinted in* 1984 U.S.C.C.A.N. at 3209–10.

95. *Id.* at 26, *reprinted in* 1984 U.S.C.C.A.N. at 3209.

96. *Id.*

> It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail even after conviction. It is the presumption that the Committee wishes to eliminate . . . . Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumptively correct in law.[97]

Courts have, at times, cited the fact that Congress wanted to reverse the presumption in favor of bail pending appeal in its discussion of how to define a "substantial question," thus signaling their belief that the two are related.[98] The D.C. Circuit, for example, inferred such a connection: "We adopt [the close question standard, the] more demanding standard, because it appears better to accord with the expressed congressional intent to increase the required showing on the part of the defendant. The law has shifted from a presumption of release to a presumption of valid conviction."[99] The court offered no other reason to select one standard over the other.

On its face, however, the legislative history cited above plainly addresses the issue of who carries the *burden* on the bail motion—nothing more.[100] Under the standard used before 1984, the government had the burden to prove that the defendant was not entitled to bail pending appeal.[101] The legislative history takes issue with that burden allocation,

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97. *Id.* (footnotes omitted).

98. In fact, in selecting the close question standard, the *only* legislative history courts often cited was the fact that Congress wanted to reverse the presumption in favor of bail, thus seeming to indicate that this piece of legislative history supported use of the close question standard. The Eleventh Circuit, for example—the originator of the close question standard—endorsed this flawed reasoning. *See* United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985) (noting that Congress wanted to reverse the presumption in favor of bail that existed under prior law). Likewise, the Fifth Circuit, in choosing the close question standard over the fairly debatable standard, quotes from the Eleventh Circuit's discussion of the fact that Congress wished to "reverse the presumption in favor of bail," but offers no indication of why it would chose one standard over another. *See* United States v. Valera-Elizondo, 761 F.2d 1020, 1023 (5th Cir. 1985); *see also* United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc) (noting that the 1984 Bail Act "was intended to reverse the presumption in favor of bail pending appeal under the former law and to make the standards for granting bail pending appeal more stringent").

99. United States v. Perholtz, 836 F.2d 554, 555–56 (D.C. Cir. 1988) (citing S. REP. NO. 98-225, at 27, *reprinted in* 1984 U.S.C.C.A.N. at 3210).

100. *See* Lay & De La Hunt, *supra* note 56, at 947 (summarizing the 1984 Bail Act's legislative history as making clear "Congress's intent to eliminate the presumption favoring release pending appeal and to place the burden of establishing the four requirements under subsection (b) on the defendant").

101. *See supra* Part II.C.

pointing out that the newly revised standard now places the burden on the defendant.[102] Congress determined that in the context of bail pending appeal, it makes little sense to require the government to prove that the defendant will not raise meritorious issues when, as the legislative history notes, there is already a built-in legal presumption on appeal that the defendant's conviction is "correct."[103]

If there were any doubt as to what Congress meant by reversing the presumption in favor of bail, an examination of the legislative history makes it clear. Immediately after the legislative history discusses a "presumption in favor of bail," it footnotes a case that discusses who has the *burden* on a bail motion.[104] Moreover, the Judiciary Committee Report perhaps puts the matter to rest by stating: "The Committee intends that in overcoming the presumption in favor of detention the burden of proof rests with the defendant."[105]

A discussion of how a defendant would rebut the "presumption"—that is, how much of a showing a defendant would need to make to demonstrate that his appeal will raise a substantial question—is conspicuously missing from the cited legislative history. From this omission we can conclude that Congress's desire to reverse the presumption in favor of bail had *nothing* to do with how it wanted to define " substantial question". It is therefore puzzling that courts would link the definition of substantial questions to Congress's decision to reverse the presumption in favor of bail.[106]

Indeed, the fact that Congress notes that "the basic distinction" between the prior and current standards for bail pending appeal is its decision to reverse the presumption in favor of bail seems to be a fatal blow to defenders of the close question standard.[107] If Congress wanted a radically different and much stricter definition of substantial question, it would be hard to claim that reversing the burden of proof was *the* basic distinction between current and prior law.

The history of bail pending appeal demonstrates that simply reversing the burden of proof on the merit requirement was a common response to

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102. S. REP. NO. 98-225, at 26, *reprinted in* 1984 U.S.C.C.A.N. at 3209.

103. *Id.*

104. *Id.* at 26 n.91, *reprinted in* 1984 U.S.C.C.A.N. at 3209 n.91 (citing United States v. Bynum, 344 F. Supp. 647 (S.D.N.Y. 1972)). The court in *Bynum* dealt with defendants who wanted to be released after they were convicted, but before they were sentenced. 344 F. Supp. at 648. The court noted that the defendants "suggest that it is the Government's burden after conviction to show that bail release should be denied. Section 3148 does not explicitly contain any such requirements." *Id.*

105. S. REP. NO. 98-225, at 27, *reprinted in* 1984 U.S.C.C.A.N. at 3210, *quoted in* United States v. Vance, 851 F.2d 166, 169 (6th Cir. 1988).

106. *See supra* note 98 (providing examples of courts believing there is some link between reversing the presumption in favor of bail and defining the substantial question).

107. S. REP. NO. 98-225, at 26, *reprinted in* 1984 U.S.C.C.A.N. at 3209.

the desire to restrict or expand the availability of bail pending appeal. Through each of the three reform periods discussed above, the burden on the bail motion ricocheted back and forth. In 1984, Congress simply reversed the arrangement one more time.

This point should not be surprising because placing the burden on the defendant can dramatically alter the chances of successfully obtaining bail. Motions for bail pending appeal are filed soon after the conviction—much sooner than the opening direct appeal brief would be filed. Thus, a defendant might not be able to meet his burden simply because of the compressed time frame.[108] For example, if the defendant intended to raise on appeal the question of whether his right to cross-examine a key government witness was unreasonably limited, he might not be able to meet his burden because the trial transcripts might not yet be available and so he could not provide the court with specific examples of where his cross-examination was denied.[109] As a result, when defendants shoulder the burden on the bail motion, even defendants who will eventually prevail on their appeals could be denied bail.

One extraordinary, real-life example of this problem occurred shortly after the passage of the 1984 Bail Act. In *United States v. Austin*,[110] Austin argued in the district court that he should be granted bail because his appeal would raise the substantial question of whether the government had provided sufficient evidence to prove he had committed a crime.[111] The district court denied bail, noting that it could only do a "preliminary review" without the benefit of trial transcripts, which the court reporters had not yet completed.[112] On appeal of that denial, the Tenth Circuit remanded the case in light of its recently issued decision construing the 1984 Bail Act.[113] One judge dissented and questioned whether the 1984 Bail Act met the minimum requirements of due process; the judge noted

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108. *Cf.* Toussaint v. Klem, 131 F. App'x 383, 383–84 (3d Cir. 2005) (affirming district court's denial of bail pending appeal after a pro se defendant "fail[ed] to present any argument even remotely relating to bail"); United States v. Marshall, 78 F.3d 365, 366 (8th Cir. 1996) (noting that the defendant was not entitled to bail because he had not even identified the issues he would raise on appeal); United States v. Montoya, 908 F.2d 450, 451 (9th Cir. 1990) (criticizing the defendant's presentation of his appeal issues as "vague" and "cursory" and noting that "[w]e simply cannot evaluate the merits of arguments that have not been set forth" and therefore denying the motion since he could not meet his burden).

109. *See, e.g.*, United States v. Crabtree, 754 F.2d 1200, 1201 (5th Cir. 1985) (upholding the district court's denial of a defendant's bail motion on the grounds that he had not met his burden to prove that any of his various evidentiary challenges were substantial questions since he had not provided a trial transcript).

110. United States v. Austin (*Austin I*), 768 F.2d 302 (10th Cir. 1985).

111. *Id.* at 303 (McKay, J., dissenting).

112. *Id.*

113. *Id.* at 302 (majority opinion) (citing United States v. Affleck, 765 F.2d 944 (10th Cir. 1985)).

that the defendant carried the heavy burden to prove that his appeal would raise a close question, but was given neither the time nor the necessary resources (i.e., trial transcripts) to meet that burden:

> The government . . . makes a big issue of the absence of a transcript to support the [defendant's] claims. When one considers the time constraints involved in this and in future cases, that is of course the necessary result. This court will be considering [motions for bail] in the absence of adequate information. If not so serious, it would be laughable to excuse this on the ground that the burden of supplying these necessities lies on the person seeking bail pending appeal. We ourselves have had to discipline some court reporters in cases because of months of delay in preparing transcripts. Even if court reporters were prompt, the time constraints obvious in this and future cases make the task of appellants' seeking bail pending appeal one which I cannot conclude meets the minimum standards of due process.[114]

On remand, the district court denied Austin bail, holding that even though he was not a flight risk or a danger to the community, he could not show that his sufficiency challenge was a "close question."[115] Austin was then sent to prison, where he toiled for eight months, waiting for the Tenth Circuit to rule on his appeal.[116] When a ruling came down, the court held that the government had not provided sufficient evidence to support Austin's conviction.[117] Austin was promptly released from prison.[118] This story, which is not unique,[119] provides a dramatic example of the

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114. *Id.* at 303 (McKay, J., dissenting).

115. United States v. Austin (*Austin II*), 614 F. Supp. 1208, 1220, 1222 (D.N.M. 1985).

116. *See* United States v. Austin (*Austin III*), 786 F.2d 986, 990 (10th Cir. 1986).

117. *Id.* at 989.

118. *Id.*

119. Most bail motions are decided in "simple orders or in short, unpublished dispositions." United States v. Garcia, 340 F.3d 1013, 1016 n.3 (9th Cir. 2003). Thus, it is difficult to know how many defendants are denied bail on the basis that their appeal will not raise a close question, only to have their convictions reversed on appeal. But what is possible to know is that Austin is not the only defendant to meet that description. For example, in *United States v. Thompson*, the Seventh Circuit reversed the conviction of Georgia Thompson, finding that the alleged crime she had committed (essentially, she departed from state administrative rules for politically motivated reasons) was not a federal crime at all. 484 F.3d 877, 878 (7th Cir. 2007). But even though the Seventh Circuit took the unusual step at oral argument of ordering Thompson to be immediately released from prison, she had already spent approximately six months (of her eighteen-month sentence) in jail, as she had been denied bail pending appeal. *See id.* (noting that the court ordered the defendant released at oral argument); *see also* United States v. Thompson, No. 06-CR-20, slip op. (E.D. Wis. Oct. 26, 2006) (order denying bail pending appeal). Likewise, in *United States v. Santos*, the district court denied bail to Miriam Santos (Chicago's city treasurer), holding that the

importance of the placement of the burden on a bail motion and on the pitfalls of requiring the defendant to prove that his appeal will raise a close question instead of a fairly debatable one.[120]

With the key motivators that led to bail reform in 1984 in mind, the analysis now turns to Congress's decision to require defendants seeking bail to prove that their direct appeal will raise a "substantial question."

B. *Courts Should Presume That Congress Intended to Revive the Historical Definition of Substantial Question*

As a matter of common sense, it would be odd if Congress were to resurrect a phrase with a settled legal meaning but silently expect courts to assign an entirely new meaning to that phrase. This observation is particularly true when the phrase's prior meaning arose in an earlier version of the same standard in which it now appears. If Congress wanted to give the phrase a new meaning, why would it use a phrase with a long pedigree? At the very least, we should expect Congress to clearly express its desire to courts that it wanted to depart from a well-established meaning of a phrase.

Unsurprisingly, courts do indeed recognize these principles of interpretation. Courts assume that "our elected representatives, like other citizens, know the law."[121] If Congress crafts a statute using words with a "well-known meaning," courts presume Congress intended to use that meaning "unless the context compels to the contrary."[122] This is true even

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errors she claimed in her corruption trial were not "close questions." 65 F. Supp. 2d 802, 806, 850 (N.D. Ill. 1999). Later, the Seventh Circuit reversed the conviction, holding that the district court judge made a "litany of errors," including rulings involving important evidentiary matters. United States v. Santos, 201 F.3d 953, 965 (7th Cir. 2000). Santos spent four months in jail. *See* Steve Warmbir, *The Santos Standard*, ILL. ISSUES, Feb. 2001, at 22, 23, *available at* http://www.lib.niu.edu/ipo/2001/ii010222.html. On remand, she pled guilty to one count of mail fraud and received no prison time. *Id.*

120. *Cf.* United States v. Seegers, 433 F.2d 493, 494–95 (D.C. Cir. 1970) (granting a defendant bail pending appeal, when then-current law dictated a presumption in favor of bail, even though the defendant had not yet received a copy of the trial transcripts, and defense counsel could only tentatively list three questions that might result in reversal).

121. Cannon v. Univ. of Chi., 441 U.S. 677, 696–97 (1979).

122. Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary."); *see also* Chiarella v. United States, 445 U.S. 222, 233 (1980) (refusing to extend insider trading sanctions to non-traders because doing so would be a radical departure from prior law and the Court would not assume Congress intended such a massive change "absent some explicit evidence" of such an intent); Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

when the prior meaning is judicially—rather than legislatively—crafted.[123] This presumption may be strongest, and makes the most sense, where the phrase at issue was used in prior versions of the same standard.[124]

Courts faced with interpreting the phrase "substantial question" in the 1984 Bail Act should have applied this common sense and presumed that Congress intended to use the phrase's historical definition. But they did not. Instead, courts hardly mentioned that the phrase had a long pedigree, and not a single court that rejected the historical definition noted the canon in favor of assigning a phrase its historical meaning. For example, the Tenth Circuit, in adopting the close question standard, mentions the fairly debatable standard only in a footnote and never identifies it as the historical definition.[125] The Fourth Circuit failed even to *mention* the fairly debatable standard, let alone grapple with the issue of whether Congress intended to revive it.[126] The Second Circuit, for its part, stated that it believed that there was not much difference between the fairly debatable and close question standards—yet still selected the historical close question standard![127] Even courts that did recognize the fairly debatable standard's pedigree gave it little weight, reflexively deciding that the close question standard better reflected Congress's intent to restrict bail pending appeal.[128]

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123. Bragdon v. Abbott, 524 U.S. 624, 645 (1998) ("When . . . judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."); *see also Lorillard*, 434 U.S. at 580 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

124. *Cf.* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 22:33 (6th ed. 2002) ("[T]he legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision.").

125. United States v. Affleck, 765 F.2d 944, 952 n.12 (10th Cir.1985) (en banc).

126. United States v. Steinhorn, 927 F.2d 195 (4th Cir. 1991); *see also* United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985) (adopting the Eighth Circuit's conclusion to use the close question standard); United States v. Bilanzich, 771 F.2d 292, 298–99 (7th Cir. 1985) (adopting the close question standard without even discussing the fairly debatable standard).

127. United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985) ("We do not believe [the *Miller*, *Giancola*, and *Handy*] definitions of 'substantial' differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*."); *see also* United States v. Jackson, 876 F. Supp. 1221, 1223 (D. Kan. 1994) (equating a close question and a fairly debatable issue by stating that a "substantial question . . . is a close question that is either fairly debatable or fairly doubtful").

128. *See, e.g.*, United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985) (brushing aside the historical definition of substantial question because the court doubted Congress would have bothered to alter the standard for bail pending appeal if it wanted that definition resurrected).

C. *Arguments in Favor of the Close Question Standard are Unconvincing*

Although no court that adopted the close questions standard mentioned any sort of presumption in favor of using the historical definition, some courts did offer a substantive reason for not adopting the fairly debatable standard: use of the standard would not restrict bail pending appeal as much as Congress would have wanted.[129] Thus, we can charitably reinterpret their argument as follows: that while it makes sense to presume that Congress intended to use the settled meaning of substantial question, Congress made it clear that it intended to supplant the prior definition with something more strict. This argument, however, still must be tempered by the fact that there are strong reasons to believe that Congress did not intend to significantly deviate from the settled definition of substantial question, given that its primary concerns with the prior standard related solely to the character and burden-of-proof requirements—not the merit requirement. Given all of this, was Congress's intent to abandon the fairly debatable standard clear?

The answer is a resounding no. As a threshold issue, the sentences typically plucked from the 1984 Bail Act's legislative history to support use of the close question standard—sentences that note Congress wanted to reverse the presumption in favor of bail—have nothing to do with how courts are to interpret "substantial question."[130] As explained above, they reflect Congress's decision to place the bail motion burden of proof on the defendant.[131] Thus, those statements offer no support for the close questions standard or the idea that congress did not intend to revive the fairly debatable standard. Courts have offered other pieces of evidence to support their defense of the close question standard. But when analyzed, that evidence fails to rebut the heavy presumption in favor of the fairly debatable standard.

1. The D.C. Bail Act's Legislative History Does Not Support Use of the Close Question Standard

One argument occasionally invoked to support the idea that Congress did not intend to revive the historical definition of substantial question is

129. *See, e.g.*, United States v. Bayko, 774 F2d 516, 523 (1st Cir. 1985) (brushing aside the historical definition of substantial question because the court doubted Congress would have bothered to alter the standard for bail pending appeal if it wanted that definition resurrected).

130. *See supra* note 99 (listing cases implying a connection between Congress's decision to reverse the presumption in favor of bail and its alleged intent not to revive the fairly debatable standard).

131. *See supra* note Part IV.A.2.

made most forcefully by Judge Farris in his dissent in *Handy*—the Ninth Circuit case that adopted the Fairly Debatable standard.[132] Judge Farris first explained that Congress noted in the 1984 Bail Act's legislative history that it modeled the Act on certain provisions found in the District of Columbia Code addressing the circumstances entitling a defendant to bail pending appeal;[133] Congress passed those provisions in 1971 and included the same "substantial question" requirement.[134] In the legislative history of the D.C. Bail Act, Congress elucidated the purpose for the change in bail standards: "'[O]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances.'"[135] Requiring a defendant to prove his direct appeal would raise only fairly debatable issues, which were not "exceptional circumstances," or so Judge Farris surmised.

While defenders of the close question standard trot out quotes from the D.C. Bail Act's legislative history from time to time, the history has dubious value in interpreting the 1984 Bail Act. The 1984 Bail Act's legislative history does not contain the "exceptional circumstance" language of the 1971 D.C. Bail Act, undercutting its relevance in interpreting what Congress did in 1984.[136] Moreover, the Supreme Court has said that when deciding whether Congress intended to use the settled meaning of a phrase, courts should look *only* to "the text or structure" of the statute at issue—trying to find such an intent from examining other statues is forbidden.[137]

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132. United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985) (Farris, J., dissenting).

133. *Id.* at 1284.

134. *See* S. REP. NO. 98-225, at 26 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3209 ("[T]he Committee has largely based section 3143 on a similar provision enacted in 1971 in the District of Columbia Code."). For a discussion by one of the members of the drafting team of the District of Columbia Court Reform and Criminal Procedure Act of 1970 ("D.C. Bail Act"), Pub. L. No. 91-358, 84 Stat. 473 (codified as amended in scattered sections of 18, 28, 40, and 42 U.S.C.), regarding the concerns about crime that led to D.C. bail reform and its effect on pre-trial detention of defendants, see generally Frederick D. Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOK. L. REV. 277 (1971). The 1966 Bail Act governed bail pending appeal determinations in the District of Columbia before the passage of the D.C. Bail Act. United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1972), *abrogated by* Calloway v. District of Columbia, 216 F.3d 1 (D.C. Cir. 2000).

135. *See* United States v. Miller, 753 F.2d 19, 22 (3d Cir. 1985) (alteration in original) (quoting the D.C. Bail Act's legislative history, H.R. REP. NO. 91-907, at 186–87 (1970)).

136. *Cf.* Russello v. United States, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

137. Neder v. United States, 527 U.S. 1, 23 n.7 (1999) ("The Government argues that because Congress has provided express materiality requirements in other statutes prohibiting fraudulent

But even if the D.C. Bail Act's legislative history were valuable in determining congressional intent, it is not clear what "exceptional circumstances" means in this context. Judge Farris treats as self-evidently true the premise that it is not an "exceptional circumstance" when a defendant can prove by clear and convincing evidence that he is not a danger to the community, then prove that his direct appeal will raise a fairly debatable issue, and finally prove that the fairly debatable issue, if decided in his favor, would likely entitle him to a reversal or a new trial.[138] Given that no standard in the history of bail pending appeal has required so much of the defendant, it would be easy to interpret the current criteria as requiring the defendant to prove he is entitled to bail because of exceptional circumstances. But that historical perspective is entirely absent from Judge Farris's dissent.

Moreover, no court has interpreted the D.C. Bail Act to require the defendant to prove that his direct appeal will raise a close question. Indeed, no court has ever defined "substantial question" in the D.C. Bail Act,[139] and D.C. superior court judges did not view the change from the old non-frivolous issue standard to the new substantial question standard as "effecting great change in the D.C. bail system."[140] Given this context, citation to the ambiguous legislative history of the D.C. Bail Act concerning "exceptional circumstances" cannot rebut the presumption that Congress intended to use the settled definition of substantial question in the 1984 Bail Act.

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conduct, [Congress did not intend to incorporate the common-law definition of fraud]. . . . [T]hese [other] statutes cannot rebut the presumption that Congress intended to incorporate the common-law meaning of the term 'fraud' in the mail fraud, wire fraud, and bank fraud statutes. That rebuttal can only come from the text or structure of the fraud statutes themselves.").

138. *See supra* notes 130–31 and accompanying text.

139. The few reported decisions applying the substantial question requirement never define the term and instead just note that the appeal should be substantial. *See, e.g.*, United States v. Jones, 476 F.2d 885, 886–87 (D.C. Cir. 1973) (discussing the "substantiality of the appeal" and noting that judges should be "more receptive" to motions that raise a "substantial doubt" about the validity of the conviction, but never providing a definition for what constitutes a substantial question). Soon after the D.C. Bail Act was passed, the D.C. Circuit concluded that it did not apply to defendants convicted in federal court of either a federal or local offense; instead, the 1966 Bail Act would apply. United States v. Brown, 483 F.2d 1314, 1317–19 (D.C. Cir. 1973) (concluding that the D.C. Bail Act did not apply to defendants convicted of local offenses—that is, D.C. Code offenses—in federal court); United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971) (concluding that the D.C. Bail Act did not apply to defendants convicted of federal offenses). In 1970, all D.C. local felonies were tried in federal court, meaning the only class of defendants affected by the D.C. Bail Act were those convicted of local misdemeanors. *Brown*, 483 F.2d at 1320 (MacKinnon, J., dissenting). This fact might explain why there are so few cases discussing the D.C. Bail Act and why "substantial question" has never been defined.

140. Lay & De La Hunt, *supra* note 56, at 935.

2. The Prior Context in Which Substantial Question Was Defined Is Irrelevant

Judge Farris also relied on another creative argument to support the close question standard. He observed that when courts had previously interpreted a substantial question to require the defendant to prove that his appeal would raise a fairly debatable issue, courts were also supposed to resolve all doubts in favor of granting bail.[141] But according to Judge Farris, the new presumption against bail meant that courts were no longer supposed to resolve all doubts in favor of the defendant.[142] Thus, it was inappropriate to rely on the previous definition of substantial question because it was formed under different and outdated assumptions.[143]

Judge Farris's premises, however, do not support his conclusion. First, the fact that Congress wanted to reverse the presumption in favor of bail does not mean Congress wanted to reverse all parts of the law that favored bail. During the era in which courts first started using the fairly debatable standard, not only were all other doubts to be resolved in favor of bail, but the defendant also carried the burden.[144] Thus, it is not clear why Judge Farris believes that when Congress placed the burden of the bail motion on the defendant, it necessarily no longer wanted courts to resolve all doubts in favor of bail. More fundamentally, even if the definition of substantial question were created in a different bail environment, it does not necessarily follow that Congress intended to change the historic definition in the 1984 Bail Act.

3. Obtaining Bail Only When the Chance for Reversal Is "Substantial" Is Consistent with the Fairly Debatable Standard

The only portion of the 1984 Bail Act's legislative history that even arguably discusses how to define substantial question notes that the new standard for bail pending appeal "requires an affirmative finding that the

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141. United States v. Handy, 761 F.2d 1279, 1284–85 (9th Cir. 1985) (Farris, J., dissenting). The case commonly cited for this proposition is *Herzog v. United States*, 75 S. Ct. 349, 351 (Douglas, Circuit Justice 1955). *See, e.g.*, United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979) (citing *Herzog* for the proposition that all doubts should be resolved in favor of granting bail); United States v. Iacullo, 225 F.2d 458, 459 (7th Cir. 1955) (same).

142. *Handy*, 761 F.2d at 1284–85 (Farris, J., dissenting).

143. *Id.*; *see also* United States v. Smith, 793 F.2d 85, 91–92 (3d Cir. 1986) (Hunter, J., concurring) (same).

144. *See, e.g.*, *Herzog*, 75 S. Ct. at 351 (requiring the defendant to prove his appeal would raise a substantial question within the meaning of FED. R. CRIM. P. 46(a)(2), but also resolving all doubts in favor of bail).

chance for reversal is substantial."[145] Some courts have quoted this phrase in defense of the close question standard as self-evident support of that standard.[146]

The statement, however, appears to be an unhelpful tautology—a substantial question raised on appeal is an issue that gives the defendant a substantial chance of obtaining a reversal. This phrase is hardly the type of guidance courts can use to define substantial.[147]

This phrase is also hard to reconcile with the close question standard. In the context of the Fourth Amendment, the Supreme Court has said that "'probable cause requires only a probability or *substantial chance* of criminal activity.'"[148] To say a police officer has probable cause for a search warrant is not to say the police officer believes it is a "close question" whether he will find evidence of a crime; the Supreme Court has never required such a strong showing.[149]

4. Looking at the Arguments in Favor of the Close Question Standard in the Aggregate Does Not Support Use of the Standard

One could argue that even if none of these arguments individually is convincing, taken together, the arguments evince Congress's desire to greatly restrict bail. And because the fairly debatable standard does not

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145. S. REP. NO. 98-225, at 27 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3210.

146. *See, e.g.*, United States v. Powell, 761 F.2d 1227, 1232 (8th Cir. 1985) (en banc) ("Congress passed the new law because it was unhappy with the old one. 'The change . . . requires an affirmative finding that the chance for reversal is substantial. This gives recognition to the basic principle that a conviction is presumed to be correct.'" (alteration in original) (quoting S. REP. NO. 98-225, at 27, *reprinted in* 1984 U.S.C.C.A.N. at 3210)).

147. This likely partially explains the fact that this piece of legislative history is typically not mentioned when courts attempt to define substantial question. *See, e.g.*, United States v. Bayko, 774 F.2d 516, 518 (1st Cir. 1985) (not mentioning the "substantial chance for reversal" portion of the 1984 Bail Act's legislative history in adopting the close question standard); United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991); United States v. Valera-Elizondo, 761 F.2d 1020, 1022–24 (5th Cir. 1985); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir. 1985); United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc); United States v. Giancola, 754 F.2d 898, 899 (11th Cir. 1985).

148. New York v. P.J. Video, Inc., 475 U.S. 868, 877–78 (1986) (emphasis added) (quoting Illinois v. Gates, 462 U.S. 213, 243–44 n.13 (1983)).

149. *See* Maryland v. Pringle, 540 U.S. 366, 371 (2003) (noting that an officer has probable cause that someone has committed a crime when the officer has a "reasonable ground for belief of guilt"). On the other hand, the Supreme Court, when it interpreted a substantial question to require a defendant to raise an issue that is "debatable among jurists of reason" (i.e., a fairly debatable issue) in the habeas context, the Court was defining what constituted "probable cause" that the defendant had a meritorious claim. Barefoot v. Estelle, 463 U.S. 880, 892–93 n.4 (1983), *superseded by statute*, 18 U.S.C. § 2253 (2000), *as recognized in* Slack v. McDaniel, 529 U.S. 473 (2000). By process of substitution then, the Court equated a fairly debatable issue with raising an issue that has a substantial chance to succeed. Thus, it is entirely reasonable to equate having a substantial chance of reversal to mean presenting a fairly debatable issue.

greatly restrict bail, it is proper to resort to the close question standard.

This argument ignores, however, the gulf between the fairly debatable standard and the earlier non-frivolous standard. When the law oscillated between those two standards, courts hardly saw the difference as minor. Indeed, Judge Holtzoff in 1950 praised the change from the non-frivolous issue standard to the fairly debatable standard as fixing a "serious defect in the administration of criminal justice."[150] When the standard was later changed back to the non-frivolous issue standard, courts—and the government—both agreed that the switch "greatly liberalized" the bail pending appeal standard.[151] The government even conceded that changing the standard back from fairly debatable to non-frivolous would significantly increase the number of defendants out on bail.[152] Thus, it would necessarily follow that simply replacing the non-frivolous issue standard with the fairly debatable standard would greatly restrict bail pending appeal and the number of defendants out on bail would significantly decrease.

The perceived gap between the two standards, no doubt, was partly due to the burden requirement flip-flopping—the government carried the burden when the merit requirement was frivolous, and the defendant carried the burden when it was a substantial question. As explained above, placing the burden on the defendant to prove that he has a sufficiently meritorious appeal to warrant bail can drastically decrease his chances of obtaining bail.

The perceived gap also likely reflected an understanding that, in practice, a significant divergence existed between the levels of merit required to meet the two standards. While courts, at times, have erroneously equated the merit required for a non-frivolous issue and a substantial question,[153] there is a distinction between the two. As the Ninth Circuit stated in *Handy*: "'The difference between the terms "not frivolous" and "substantial" is perhaps one of art. Certainly it is subject to subtle analysis. Nevertheless, the very fact that different words are used to describe the standards . . . indicates that distinctions do exist.'"[154]

This argument also ignores the fact that Congress also placed other important restrictions on bail pending appeal. One important restriction is the demanding character requirement.[155] Another important restriction is the requirement that the defendant show not only that his appeal will raise

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150. United States v. Burgman, 89 F. Supp. 288, 289 (D.D.C. 1950).

151. *See supra* text accompanying notes 49–51.

152. *Id.*

153. *See* Leibowitz, *supra* note 26, at 1096 ("Throughout the history of bail pending appeal, courts have often confused the definition of 'fairly debatable' with 'not frivolous.'").

154. United States v. Handy, 761 F.2d 1279, 1282 n.1 (9th Cir. 1985) (alteration in original) (quoting Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977)).

155. *See supra* Part IV.A.1.

a substantial question, but that the substantial question, if decided in his favor, would "likely" result in a reversal or a new trial.[156] This no-harmless-error requirement is likewise unprecedented.

Finally, this argument cannot overcome the conclusion that Congress expected courts to apply the settled definition of substantial question in interpreting the 1984 Bail Act. Why would Congress expect courts to interpret "substantial question" differently when the phrase had appeared previously in the same exact standard? And if Congress did have such an intention, why didn't it say so somewhere—either in the statute itself by providing another definition, or in the legislative history?

Courts should take Congress at its word. It was concerned about crime, so it placed an unprecedented burden on defendants to prove that they are not a danger to the community. And it wanted to reverse the presumption in favor of bail that existed under prior law, so it placed the burden on the defendant to prove he was entitled to bail and took the burden from the government. But Congress did not intend to apply a radically stricter merit requirement.

V. CONCLUSION

A powerful case supports the Ninth Circuit's position that when Congress in 1984 required defendants to prove that their direct appeal would raise a "substantial question," it intended defendants to establish that their direct appeal would raise a fairly debatable issue. Nevertheless, every other circuit except the Ninth Circuit (and arguably the Third Circuit) has come to a different conclusion, creating a circuit split that has lasted more than twenty years. Typically a split pitting the Ninth Circuit—in a Judge Reinhardt decision—against the other circuits would scream "cert worthy!" But even though the split has existed for some time, and affects so many cases, the issue has evaded high court review.[157] It is time for the Supreme Court to step in and resolve the dispute. In the meantime, some defendants will serve prison time only to have their convictions overturned on appeal. The defendant will suffer unjustified prison time—at taxpayer expense—to pay a debt to society that he did not owe.

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156. *See supra* Part III.

157. It is beyond the scope of this Article, but there is also a circuit split regarding the proper standard of review for bail-pending-appeal motions. *See* United States v. O'Brien, 895 F.2d 810, 814 (1st Cir. 1990) (noting that the court would "independently review" the defendant's bail motion, although it would defer to the findings of the lower court); United States v. Londono-Villa, 898 F.2d 328, 329 (2d Cir. 1990) (applying a "clearly erroneous" standard of review); United States v. Peden, 891 F.2d 514, 520 (5th Cir. 1989) (applying a "clearly erroneous" standard); United States v. Garcia, 340 F.3d 1013, 1015 (9th Cir. 2003) (stating that factual findings would be reviewed for clear error and legal conclusions would be reviewed de novo); United States v. Smegal, 772 F.2d 659, 661 (10th Cir. 1985) (applying a "clearly erroneous" standard).