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## The Bail Reform Act of 1984: A Discussion

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## THE BAIL REFORM ACT OF 1984: A DISCUSSION

JUDGE DONALD P. LAY†  
& JILL DE LA HUNT††

*The Bail Reform Act of 1984 was enacted in response to public concern over crime committed by defendants while released on bail. The Act significantly changes prior federal bail legislation to allow the judicial officer, in determining pretrial release, to consider the defendant's danger to the community, and eliminates the presumption in favor of bail pending appeal. In this Article, Judge Lay and Ms. De La Hunt discuss the significant policy and constitutional concerns raised by the Act, and conclude that while some aspects of the Act improve on prior legislation, others overzealously tip the scales in favor of community values at the expense of individual rights.*

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## INTRODUCTION

In the 1980's, public concern over rising crime rates has focused in part on crimes attributed to defendants on release pending trial or appeal. In 1981, in an attempt to alleviate this public concern, Attorney General William French Smith announced a new operation entitled "F.I.S.T." (Fugitive Investigative Strike Teams) aimed at apprehending fugitives, including federal bail jumpers and pretrial or postconviction release violators. According to the Department of Justice, the operation resulted in the arrest of almost 7,000 individuals in just over two and one half years.<sup>1</sup> Some of those arrested were sought for violating pretrial and postconviction release conditions.

Congress took a different approach to solving the perceived connection between crime and pretrial release with the passage of the Pretrial Services Act of 1982.<sup>2</sup> By increasing supervision over persons released pending trial, the Pretrial Services Act was intended to reduce both pretrial crime and the number of defendants detained unnecessarily while awaiting trial.<sup>3</sup>

Congress again voiced its concern in the Bail Reform Act of 1984.<sup>4</sup> The principal features of the 1984 Act allow the detention of certain defendants pending trial or appeal if they are found to be, among other things, community safety hazards.

Concern over increased crime is undoubtedly justified, and endeavors to lessen crime are laudable. We must be careful, however, not to favor overzealously society's perceived need to protect itself at the expense of individual freedoms. Former Attorney General Smith blamed "lenient judges" and "the weak court system" for the granting of bail to defendants apprehended during the latest F.I.S.T. operation.<sup>5</sup> Such statements undermine the legitimacy of the judiciary in the eyes of the public, and characterize incorrectly the position of an indi-

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1. Department of Justice, Release USMS 703-285-1131 at 3 (Nov. 20, 1984).

2. Pub. L. No. 97-267, 96 Stat. 1136 (codified at 18 U.S.C. §§ 3152-3155 (1982)).

3. See S. REP. NO. 77, 97th Cong., 1st Sess. 1, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2377.

4. Pub. L. No. 98-473, §§ 202-203 (to be codified at 18 U.S.C. §§ 3141-3150) *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 1837, 1976-87 [hereinafter cited to UNITED STATES CODE ANNOTATED (West Supp. 1985)]. The relevant sections of the 1984 Act are attached as an appendix to this Article.

5. St. Paul Dispatch, Nov. 21, 1984, at A2, col. 2.

vidual awaiting trial. Former Attorney General Smith's assumptions and accusations concerning fugitives and pretrial release demonstrate the common lack of understanding of the role of the courts and preventive detention in the federal judicial system. Under the 1984 Act, as in all previous bail legislation, preventive detention is appropriate in only a small number of cases.

## I. OVERVIEW OF MODERN FEDERAL BAIL LEGISLATION

Since the days of Anglo-Saxon law, bail has served as a means of preventing the accused from fleeing by requiring him or her to post some guarantee of appearance at trial.<sup>6</sup> Traditionally, money bonds provided that guarantee. In the last three decades, however, there has been growing criticism of the financially based bail system. Critics have noted that indigents are often detained in disproportionate numbers because of their inability to pay bond, even though indigents as a group present no higher risk of flight.<sup>7</sup> The powerful role of the professional bondsperson has also elicited virulent criticism.<sup>8</sup> Critics charge that because the bondsperson determines who is a good risk and thus an acceptable person for whom to act as surety, the bondsperson "hold[s] the keys to the jail in [his or her] pockets. . . . The court . . . [is] relegated to the relatively unimportant chore of fixing the amount of bail."<sup>9</sup>

In 1961, the Manhattan Bail Project by the Vera Institute in New York City paved the way for the reform of the federal bail

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6. See Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 *FORDHAM L. REV.* 423 (1980). The concept of bail traces back to early Anglo-Saxon legal precepts. For thorough discussions of the historical origins and evolution of bail, see E. DE HASS, *THE ANTIQUITIES OF BAIL* (1940); C. FOOTE, *STUDIES ON BAIL* 190 (1966); Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 *SYRACUSE L. REV.* 517, 519-33 (1983); Duker, *The Right to Bail: A Historical Inquiry*, 42 *ALB. L. REV.* 33, 34-66 (1977); Meyer, *The Constitutionality of Pretrial Detention*, 60 *GEO. L. J.* 1140 (1972); see also Hunt v. Roth, 648 F.2d 1148, 1156-59 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

7. See, e.g., D. FREED & P. WALD, *BAIL IN THE UNITED STATES, A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE* 9-21 (1964); HARTIS, *The Vested Interests of the Judge: Commentary On Flemming's Theory of Bail*, 1983 *AM. BAR FOUND. RESEARCH J.* 490, 493-94.

8. See Harris, *supra* note 7, at 494.

9. *Id.* (quoting Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring)).

system.<sup>10</sup> The Project discovered that when judges had access to verified information on an accused's background and community ties, the overwhelming majority of defendants could be released on their own recognizance (ROR) and would appear in court.<sup>11</sup> Objective criteria based on such considerations as employment history, family contacts, and residential stability led to the development of a prediction tool used to determine a defendant's propensity for flight.<sup>12</sup>

Congress incorporated the Vera Institute's findings in the Bail Reform Act of 1966<sup>13</sup> by creating a presumption in favor of ROR and by authorizing the use of release conditions for those defendants not eligible for ROR.<sup>14</sup> Money bonds were imposed only where a non-financial restriction could not ensure the accused's presence. Pretrial release standards published by the American Bar Association in 1968 also contributed to the release of many defendants who would otherwise have been detained.<sup>15</sup> The availability of non-financial release conditions dramatically affected the rate of release before trial: between 1962 and 1971, the proportion of felony defendants on pretrial release rose from forty-eight percent to sixty-seven percent.<sup>16</sup>

In conjunction with increased use of non-financial conditional release, pretrial release programs developed to provide information upon which to evaluate defendants' flight potential, and to supervise released defendants. By the early 1970's, however, a number of these programs were developing funding and administrative problems.<sup>17</sup> In many jurisdictions, for example, release programs were merged into probation departments, leading to more conservative release policies.<sup>18</sup>

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10. For a discussion of the Manhattan Bail Project, see Ares, Rankin & Struz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67 (1963).

11. *Id.* at 89-90.

12. *See id.*

13. Pub. L. No. 89-465, 80 Stat. 214 (codified at 18 U.S.C. §§ 3141-3151 (repealed 1984)).

14. *See* 18 U.S.C. § 1346 (repealed 1984); A. HALL, PRETRIAL RELEASE PROGRAM OPTIONS 5 (1984); *see also* Kennedy, *supra* note 6, at 426.

15. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: PRETRIAL RELEASE (1968).

16. A. HALL, *supra* note 14, at 6.

17. *Id.*

18. *Id.* Probation officers with responsibility for pretrial services programs often view their pretrial services function as secondary to their primary mission revolving

Detention rates also remained high in a large percentage of jurisdictions. As one commentator noted:

In retrospect, bail reform efforts in the sixties have probably had their greatest impact in releasing good defendants who might otherwise have had to pay a bondsman or go to jail. They did not, however, do much to solve the problems of the defendant who needs supportive help in the community to succeed on release. Nor have they reduced the staggering costs society and the individual still pay for detaining any person not yet convicted of any crime.<sup>19</sup>

Reports of increased crime caused public debate over the presumption favoring pretrial release. Some argued that consideration of factors other than propensity for flight would undermine constitutional rights, while others claimed that danger to the community had always been considered in setting bail, albeit *sub rosa*.<sup>20</sup>

Pretrial release programs responded to the growing discontent with pretrial release by decreasing the number of defendants released on their own recognizance and expanding the range of other, more restrictive alternatives. Pretrial programs became more actively involved with the defendants, engaging in such efforts as assisting them in obtaining social services, and providing the court with information concerning a defendant's conduct during pretrial release.<sup>21</sup>

National pretrial services efforts were also increased. In 1975, Congress passed legislation establishing pretrial services agencies in ten pilot federal judicial districts on an experimental basis.<sup>22</sup> Various organizations also developed pretrial re-

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around parole and probation duties. Further, probation officers performing pretrial services are required to wear "two hats," leading to confusion concerning the officers' responsibility in each area.

19. *Id.* at 7 (quoting Wald, *The Right to Bail Revisited: A Decade of Promise Without Fulfillment*, 1 SAGE CRIM. JUST. ANN. 188 (1972)).

20. See, e.g., Ervin, *Foreword: Preventive Detention—A Step Backward For Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 297-98 (1971) [hereinafter cited as *A Step Backward*]; Kennedy, *supra* note 6, at 426-29; see also Meyer, *supra* note 7; Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969); Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970).

21. See A. HALL, *supra* note 14, at 9.

22. See Pub. L. No. 96-619, § 201, 88 Stat. 2086 (1975). In 1982, the ten demonstration agencies were replaced with permanent agencies in all judicial districts. See Pub. L. No. 97-267, § 2, 96 Stat. 1136 (1982) (codified at 18 U.S.C. § 3152 (1982)). The ten demonstration pretrial services agencies were split into two groups. In the first group, the agencies were administered by the Division of Probation of the Ad-

lease standards, emphasizing the presumption favoring release and the need for monitoring a defendant's compliance with pretrial release restrictions.<sup>23</sup>

Congress attempted to respond to the general concern over increased crime as early as 1969. Although federal bills introduced to amend the Bail Reform Act of 1966 to include a preventive detention provision failed,<sup>24</sup> Congress did pass a bill containing both a pretrial and pending-appeal detention provision in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D.C. Act).<sup>25</sup> The D.C. Act includes a community safety consideration in the judicial officer's determination of whether to grant pretrial release. The Act permits preventive detention if the suspect falls into certain categories, and the judicial officer finds both that no release conditions will reasonably ensure the safety of the community and that there is a substantial probability that the suspect committed the offense for which he is charged.<sup>26</sup> The D.C. Act also provides that a convicted defendant seeking bail pending appeal must be detained unless the judicial officer finds by clear and convincing evidence that the defendant is neither a safety risk nor a flight risk, and that "the appeal . . . raises a substantial question of law or fact likely to result in a reversal or an order for new trial."<sup>27</sup> Many have voiced vehement criticism of the D.C. Act, including the late Senator Sam Ervin, who stated that the preventive detention provision is unconstitutional because:

It violates the eighth amendment right of reasonable bail in noncapital cases.

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ministrative Office of the United States Courts. The group included the districts of Central California (Los Angeles), Northern Georgia (Atlanta), Northern Illinois (Chicago), Southern New York (New York City), and Northern Texas (Dallas). The remaining five demonstration agencies were administered by a seven member board of trustees appointed by the chief judge of the district and supervised by a Board-appointed chief pretrial services officer. The five agencies were established in the districts of Western Missouri (Kansas City), Eastern New York (Brooklyn), Eastern Pennsylvania (Philadelphia), Maryland (Baltimore), and Eastern Michigan (Detroit). S. REP. NO. 77, *supra* note 3, at 3, 1982 U.S. CODE CONG. & AD. NEWS at 2379.

23. See A. HALL, *supra* note 14, at 9.

24. See Kennedy, *supra* note 6, at 429.

25. See Pub. L. No. 91-358, 84 Stat. 473, 642-49 (codified at D.C. CODE ANN. §§ 23-1321 to 21-1329 (1973)). See generally Hess, *Pretrial Detention and the 1970 District of Columbia Crime Act—The Next Step in Bail Reform*, 37 BROOKLYN L. REV. 277 (1971).

26. See D.C. CODE ANN. § 23-1322(b) (1973).

27. *Id.* § 23-1325(c).

It imprisons for unproved, anticipated crime, rather than actual criminal conduct.

The offense of 'dangerousness' is unconstitutionally vague.

It violates the presumption of innocence.

It convicts on the basis of 'substantial probability' rather than 'beyond reasonable doubt.'

Preventive detention severely prejudices the defendant in the trial of the actual offense.

The bill does not afford procedural due process in the detention hearing.

Detention prejudices the right to access to counsel.

The detention hearing forces the defendant to waive his privilege against self-incrimination.

The hearing forces the defendant to disclose his defense to the prosecution prior to trial.

It imprisons on the basis of hearsay and other forms of 'evidence' not admissible at trial under the rules of evidence.<sup>28</sup>

Despite the controversy surrounding the D.C. Act, judges of the District of Columbia Superior Court do not view it as effecting great change in the D.C. bail system. Indeed, a 1979 study conducted for the federal Law Enforcement Assistance Administration by the Institute for Law and Social Research found that only one preventive detention hearing was held during the year upon which the study was based.<sup>29</sup>

States have also responded to the growing concern over crime rates. As of 1981, at least thirty-two states had passed statutes authorizing the consideration of community safety and a defendant's propensity for flight in determining pretrial release.<sup>30</sup> American Bar Association and other organizational standards promulgated in the late 1970's authorized pretrial detention under certain circumstances for defendants who pose risks to the community.<sup>31</sup>

In 1982, Congress passed the Pretrial Services Act<sup>32</sup> in an

28. Ervin, *supra* note 20, at 298.

29. See Washington Post, Jan. 15, 1984, at C1. Unlike the 1984 Bail Reform Act, however, the D.C. Code does not eliminate the use of financial conditions to detain a defendant.

30. A. HALL, *supra* note 14, at 11.

31. See *id.*

32. Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1136 (codified at 18 U.S.C. §§ 3152-3155 (1982)).



attempt to decrease the potential for error in granting pretrial release. The legislative history cites statistics suggesting that the number of fugitives had increased dramatically, and states that the Act would, among other goals, "meet the objective of reducing the number of new crimes committed by persons released on bail . . . ." <sup>33</sup> The Act orders each federal judicial district to provide pretrial services, either through existing probation departments or through separate pretrial services offices. <sup>34</sup> The pretrial services agencies collect information pertaining to the release of each defendant charged (including information relating to his or her dangerousness), make recommendations to the judicial officer, and assist released defendants. <sup>35</sup> The departments also inform the court of apparent violations and any danger the defendant may "come to pose." <sup>36</sup>

By the early 1980's, Congress, state legislatures, and legal organizations had begun to respond to social concern over the perceived connection between pretrial and pending-appeal release and growing crime. The step to bail legislation which increased restrictions on release was but a short one.

#### A. *Comparison: The Bail Reform Acts of 1966 and 1984*

The 1984 Act changes substantially the Bail Reform Act of 1966. The legislative history explains that the changes:

reflect the . . . 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. The adoption of the changes marks a significant departure from the basic philosophy of the [1966 Act], which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings. <sup>37</sup>

There appear to be two major differences between the 1966 and the 1984 Acts. First, in determining pretrial release conditions or whether to detain an individual before trial, the judi-

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33. S. REP. NO. 77, *supra* note 3, at 1, 1982 U.S. CONG. CODE & AD. NEWS at 2377.

34. See 18 U.S.C. § 3152(a)-(b).

35. *Id.* § 3154(1), (7).

36. *Id.* § 3154(5).

37. S. REP. NO. 225, 98th Cong., 1st Sess. 3, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 9A at 5-6.

cial officer may now consider the danger the defendant poses to individuals or the community.<sup>38</sup> Second, the new Act eliminates the presumption in favor of bail pending appeal.<sup>39</sup> The 1984 Act also makes other changes in bail laws:<sup>40</sup> (1) the judicial officer is authorized to preventively detain certain categories of defendants awaiting trial, but prohibitively high bail cannot be used to detain a suspect;<sup>41</sup> (2) a release order must expressly contain a condition that a defendant will not commit any crimes while on pretrial release;<sup>42</sup> (3) a sentence received after conviction for an offense committed while on release must run consecutively to any other sentence of imprisonment;<sup>43</sup> (4) subject to certain conditions, temporary detention may be imposed on defendants who have been arrested for an offense committed while on probation or parole;<sup>44</sup> (5) the judicial officer can reject, after inquiry, money or property from "ill-gotten gains" offered to secure bail;<sup>45</sup> (6) penalties for bail jumping are greatly increased, reflecting the potential sentence for the offense charged;<sup>46</sup> and (7) the government is permitted to appeal release decisions.<sup>47</sup>

In essence, the 1984 Act assumes a connection between crime and release before trial or pending appeal that was not assumed under the 1966 Act. Based on that assumption, the 1984 Act raises legal presumptions against the defendant in both the pretrial and pending appeal release provisions.

*B. Statutory Analysis: The Pretrial Detention Provision: 18 U.S.C. Section 3142*

*1. The Statutory Language*

The statutory scheme of 18 U.S.C. section 3142 continues to favor release over pretrial detention. Section 3142(a) provides four alternatives from which the judicial officer must choose:

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38. See 18 U.S.C.A. § 3142 (West Supp. 1985).

39. See *id.* § 3143(b).

40. See generally J.J. Perlstein, Memorandum Concerning the Bail Reform Act of 1984 (November 8, 1984) (on file at the William Mitchell Law Review office).

41. 18 U.S.C.A. § 3142(c), (e) (West Supp. 1985).

42. *Id.* § 3142(b), (c)(1).

43. *Id.* § 3147.

44. *Id.* § 3142(d).

45. See *id.* § 3142(g)(4).

46. Compare *id.* § 3146(b) with 18 U.S.C. § 3150 (1982).

47. 18 U.S.C.A. § 3145(a)(1) (West Supp. 1985).

(1) release on personal recognizance or unsecured bond pursuant to subsection (b); (2) conditional release pursuant to subsection (c); (3) temporary detention to permit, among other things, revocation of conditional release pursuant to subsection (d); and (4) pretrial detention pursuant to subsection (e). The legislative history explains that "[t]he decision to provide for pretrial detention is in no way a derogation of the importance of the defendant's interest in remaining at liberty prior to trial. . . . It is anticipated that [pretrial release] will continue to be appropriate for the majority of Federal defendants."<sup>48</sup>

Although the legislative history describes subsections (e) and (f) as the "core pretrial detention provisions,"<sup>49</sup> subsections (b) and (c) will most often be of relevance. Subsection (b) provides for release on personal recognizance or unsecured bond subject to the express condition that the accused will commit no crime during his or her release period.<sup>50</sup> The statute requires the judicial officer to release the defendant pursuant to subsection (b) unless the judge or magistrate finds that the forms of release provided for under subsection (b) will not reasonably assure the defendant's appearance or will endanger another person in the community.<sup>51</sup> Thus, for example, even if the judicial officer is reasonably assured that the defendant will appear at his or her hearing if released on personal recognizance or unsecured bond, subsection (b) will not apply if the judge or magistrate believes that the defendant presents a safety risk to the community if released under the conditions in (b).

A finding that subsection (b) release is not appropriate for a particular defendant, however, does not automatically lead to a pretrial detention hearing. The judicial officer must first determine whether release under any condition or set of conditions under subsection (c) will reasonably assure the defendant's appearance and the safety of the community or specific individu-

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48. S. REP. NO. 225, *supra* note 37, at 7, 12, 1984 U.S. CODE CONG. & AD. NEWS 9A at 9, 15. Material witnesses may also be subject to section 3142 under certain circumstances. See 18 U.S.C.A. § 3144 (West Supp. 1985).

49. S. REP. NO. 225, *supra* note 37, at 11, 1984 U.S. CODE CONG. & AD. NEWS 9A at 14.

50. 18 U.S.C.A. § 3142(b) (West Supp. 1985).

51. *Id.* § 3142(c).

als.<sup>52</sup> Subsection (c) requires the judge or magistrate to impose the least restrictive set of conditions listed within the subsection that will meet the statutory appearance and safety concerns.<sup>53</sup> The possible conditions range from third party custody to the execution of an agreement to forfeit designated property upon failing to appear as ordered.<sup>54</sup> The statute allows the judicial officer to tailor conditions to the characteristics of the individual defendant, thus mandating the release of all but “a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”<sup>55</sup>

Subsections (e) and (f) are reserved for the small percentage of defendants who do not immediately meet the requirements of subsections (b) or (c).<sup>56</sup> Subsection (e) authorizes the judicial officer to detain a defendant if, after a hearing pursuant to subsection (f), he or she finds that no condition or combination of conditions set forth under subsection (c) will reasonably assure the appearance of the defendant and the safety of

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52. The difference between the legal standard set forth in subsection (b) and that found in subsections (c), (e), (f), and (g) reemphasizes congressional intent to preserve the statutory bias favoring pretrial release for most defendants. Subsection (b) directs release unless release will not reasonably assure the defendant's appearance, or will endanger the community's safety. 18 U.S.C.A. § 3142(b) (West Supp. 1985). Although the judicial officer may impose further restrictions upon a finding that the legal standard for either the flight or the danger concern is not met, a determination that a defendant's release *will* endanger the community will be rare. In contrast, subsections (c), (e), (f), and (g) change the legal standard to require release if any set of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. *Id.* § 3142 (c), (e), (f), (g). The change from the negative to the positive in the flight determination standard and from the will to will reasonably assure in the dangerousness evaluation criterion renders it more difficult to find the defendant a flight and safety risk. *United States v. Orta*, No. 84-2530, slip op. at 8 n.14 (8th Cir. Apr. 29, 1985).

53. 18 U.S.C.A. § 3142(c) (West Supp. 1985).

54. *Id.*

55. S. REP. NO. 225, *supra* note 37, at 6-7, 1984 U.S. CODE CONG. & AD. NEWS 9A at 9. The “reasonable assurance” legal standard prescribed under subsection (c), (e), (f), and (g) plays an important role in limiting the group of defendants to which pretrial detention applies. A judicial officer cannot detain a defendant merely on the possibility that he or she might flee or pose a danger to the community if there is an objectively reasonable assurance that the defendant will appear and not endanger the community. *See Orta*, No. 84-2530, slip op. at 10 (8th Cir. Apr. 29, 1985).

56. 18 U.S.C.A. § 3142(c)-(f) (West Supp. 1985).

any other person or the community.<sup>57</sup> Subsection (e) also raises presumptions favoring the government in certain circumstances.<sup>58</sup>

Subsection (f) enumerates when a hearing must be held, and when the government or the judicial officer may move for such hearing.<sup>59</sup> The hearing must take place immediately upon the person's first appearance before the officer unless a continuance is sought. The defendant has a right to counsel at the hearing, and may testify, present witnesses, cross-examine the government's witnesses, and present information by proffer.<sup>60</sup> The rules of evidence, however, do not apply. Subsection (f) requires the judicial officer's finding under subsection (e) that the defendant poses a danger to be supported by clear and convincing evidence.<sup>61</sup>

The mechanics of the hearing provided for in combined subsections (e) and (f) are not entirely clear. First, the hearing will operate somewhat differently depending on the characteristics of the defendant. If the defendant falls into one of the categories described in subsection (f)(1),<sup>62</sup> and the government moves for a detention hearing, a rebuttable presumption arises that the defendant presents a safety risk<sup>63</sup> if the judge finds the defendant was on bail when the described offense was committed, and within the past five years the defendant had been convicted, or released from prison after serving a sentence based on a conviction, of one of the types of offenses listed in subsection (f)(1).<sup>64</sup> This combination of characteristics is not likely to occur often.

A second presumption will arise more frequently. If a defendant is arrested for an offense listed in subsection (f)(1)(C)

57. *See id.*

58. *Id.* § 3142(e).

59. *Id.* § 3142(f).

60. *See id.*

61. The statute does not specify the evidentiary standard necessary to support a finding of propensity for flight. Courts thus far have agreed that the preponderance of evidence standard should apply. *See, e.g., Orta*, No. 84-2530, slip op. at 9 n.20 (8th Cir. Apr. 29, 1985); *United States v. Freitas*, 602 F. Supp. 1283 (N.D. Cal. 1985).

62. 18 U.S.C.A. § 3142(f)(1) (West Supp. 1985). The categories in subsection (f)(1) are: (1) a defendant arrested for a violent crime; (2) certain offenses under title 21 of the United States Code; (3) a crime for which the maximum sentence is death or life imprisonment; and (4) a felony, if the defendant has already been convicted of two or more of the above types of offenses. *Id.*

63. *See id.* § 3142(f)(2).

64. *Id.* § 3142(e).

or under 18 U.S.C. section 924(c), and the government moves for a hearing in a case involving a serious risk that the defendant will flee or obstruct justice, a rebuttable presumption may arise. If the judicial officer finds that there is probable cause that the defendant committed one of the offenses listed in subsection (f)(1), a rebuttable presumption arises that the defendant presents both a flight risk and a safety risk.<sup>65</sup>

The statute does not detail the effect of the presumptions after they have arisen. In discussing the first presumption, the legislative history states that "it is appropriate in such circumstances that the burden shift to the defendant to establish a basis for concluding that there are conditions of release sufficient to assure that he will not again engage in dangerous criminal activity pending his trial."<sup>66</sup> The majority of courts have stated that only the burden of production shifts to the defendant.<sup>67</sup> At least one court has claimed to disagree, stating instead that the entire burden shifts to the defendant. In practice, however, this court also appears to have shifted only the production burden.<sup>68</sup> The Department of Justice apparently believes that the government retains the burden of persuasion.<sup>69</sup>

Subsection (e) authorizes the judicial officer to detain a defendant if, after a subsection (f) hearing, "the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . ."<sup>70</sup> If a presumption has arisen that the defendant is a safety or flight risk, he or she must rebut the presumption.<sup>71</sup> Assuming the

65. *Id.* § 3142(e) (West Supp. 1985).

66. S. REP. NO. 225, *supra* note 37, at 19, 1984 U.S. CODE CONG. & AD. NEWS 9A at 22.

67. *See* United States v. Freitas, 602 F. Supp. 1283, 1290 (N.D. Cal. 1985); United States v. Payden, 598 F. Supp. 1388, 1397-98 (S.D.N.Y. 1984); United States v. Chimurenga, No. 84 Cr. 818 (RLC) slip op. at 13 (S.D.N.Y. Nov. 5, 1984).

68. *See* United States v. Aiello, 598 F. Supp. 740, 743-45 (S.D.N.Y. 1984).

69. *See* UNITED STATES DEPARTMENT OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER STATUTES ENACTED BY THE 98TH CONGRESS 18 (1984).

70. 18 U.S.C.A. § 3142(e) (West Supp. 1985).

71. Only one court thus far has discussed whether subsection (e) requires the judicial officer to find the defendant to be both a safety and a flight risk before detention can be imposed, or whether a finding of either statutory concern is sufficient. *See* United States v. Kouyoumdjian, 601 F. Supp. 1506 (C.D. Cal. 1985). In *Kouyoumdjian*, the court reasoned that the structure and intent of section 3142 required an

government retains the burden of persuasion, any evidence the defendant can produce will serve to rebut the presumption. If such evidence is produced, it will most likely address the concerns listed in subsection (g).<sup>72</sup> If the presumption is rebutted, the government must show, based on the factors considered in subsection (g), by clear and convincing evidence that the defendant is a safety risk, or by a preponderance of the evidence that the defendant is a flight risk. The presumptions alone are sufficient to procure a detention order only when the defendant offers no evidence in rebuttal.

The rebuttable presumptions do not arise in every case in which a hearing is held. For example, under subsection (f)(2) the government or the judicial officer can move for the hearing where there is a serious risk of flight or obstruction of justice.<sup>73</sup> Unless the defendant has been arrested for one of the specified title 21 violations, the presumptions will not become relevant unless the defendant has been arrested for a violation of 18 U.S.C. section 924(c).<sup>74</sup> When the presumptions do not apply, the government must carry the burdens of both production and persuasion.

The pretrial detention hearing is to determine whether *any* form of conditional release will ensure the accused's appear-

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interpretation allowing detention after a finding of either flight or safety risk. *Id.* at 1508-09. See generally 1A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 21.14 (4th ed. 1972). "There has been . . . so great laxity in the use of [the conjunctive and disjunctive] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent." *Id.* (footnote omitted).

Although the *Kouyoumdjian* construction is probably correct, an argument can be made that the conjunctive language in subsections (c), (e), (f), and (g) should be read literally. If a defendant can be detained under subsection (e) upon a finding supported by a preponderance of the evidence that the defendant's appearance cannot reasonably be assured, there will rarely be a need to resort to a finding of dangerousness by clear and convincing evidence. Both flight and danger potential are determined by considering the factors in subsection (g). A finding of flight risk becomes a new form of sub rosa detention for those defendants who cannot be proven dangerous by clear and convincing evidence, but who are deemed dangerous enough to warrant pretrial incarceration. Cf. S. REP. NO. 225, *supra* note 37, at 16, 1984 U.S. CODE CONG. & AD. NEWS 9A at 19 (the subsection (c) prohibition against imposition of financial condition resulting in pretrial detention is intended to preclude the sub rosa use of money bond to detain dangerous defendants).

72. See 18 U.S.C.A. § 3142(g) (West Supp. 1985).

73. *Id.* § 3142(f)(2).

74. See *id.* § 3142(f)(1); 18 U.S.C. § 924(c). But see *Orta*, No. 84-2530, slip op. at 2 n.4 (8th Cir. Apr. 29, 1985) (noting that government could have moved for a detention hearing under subsection (f)(1) but did not do so).

ance at trial and the safety of the community. If any set of conditions listed in subsection (c) can meet these two concerns, the defendant must be released.<sup>75</sup>

## 2. *Benefits and Detriments*

Although certain aspects of the pretrial detention statute are troubling, other aspects may actually improve upon the 1966 Act. It is well recognized, for example, that judges often subjectively assessed the potential dangerousness of defendants *sub rosa* and detained certain defendants by imposing an excessively high money bond.<sup>76</sup> By allowing judicial officers to openly consider danger to the community, the Act ensures a defendant that he or she will have an opportunity to present evidence contesting an allegation of dangerousness.<sup>77</sup> The prohibition against the use of money bond for detention purposes ensures that pretrial detention will not turn on wealth.

The underlying assumption that detention after a summary hearing satisfies either the individual's interest in freedom or the community's safety concerns is, however, disturbing. Reliable studies indicate that no set of factors can predict with reasonable accuracy which defendants will fail to appear at trial or which defendants will be rearrested while on bond.<sup>78</sup> A Harvard Law School study found, for example, that the factors used to determine dangerousness under the D.C. Act offered at optimum a forty percent chance of accurate prediction.<sup>79</sup> The study also discovered that those arrested for serious offenses were no more likely to commit serious offenses while on bail than those arrested for less serious offenses.<sup>80</sup> "Dangerousness" under any definition is very difficult to predict. Using factors taken in part from the 1966 Act, and which were designed to measure flight risks, to determine dangerousness only increases the probability of an inaccurate prediction of danger.

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75. See 18 U.S.C. § 924(c).

76. See, e.g., A. HALL, *supra* note 14, at 18; S. REP. NO. 225, *supra* note 37, at 10, 1984 U.S. CODE CONG. & AD. NEWS 9A at 19.

77. See generally Carbone, *supra* note 7, at 552-54.

78. Wheeler & Wheeler, *Bail Reform in the 1980s: A Response to the Critics*, 18 CRIM. LAW BULL. 228, 235-37 (1982).

79. See Ervin, *supra* note 20, at 296-97.

80. See Note, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 326-27 (1971).



The 1984 Act is also based on the assumption that bail jumping occurs frequently and is directly responsible for growing crime rates. Statistical evidence, however, raises grave doubts concerning both these assumptions. Between July 1975 and June 1983, for example, only 2.7% of the released defendants in the ten pilot districts where pretrial services were available failed to appear at trial.<sup>81</sup> A well-known study by the National Bureau of Standards found that pretrial felony crimes represented only five percent of those committed by defendants on release.<sup>82</sup> Also significant is the finding that most bail recidivism does not occur in the sixty- to ninety-day period immediately following arrest.<sup>83</sup> Because the Speedy Trial Act<sup>84</sup> requires that a federal defendant's trial be held within seventy days,<sup>85</sup> detention occurs during a period in which the defendant is less likely to commit new crimes.

Many commentators have noted that accurate statistics regarding crime on bail are impossible to obtain.<sup>86</sup> Few crimes actually are made known and solved; the rate of crime may be fifty percent higher than that reported.<sup>87</sup> Further, the past practice of detaining sub rosa defendants deemed dangerous may have lowered the rate of crime on bail.<sup>88</sup> While the statistics amassed do demonstrate a problem of crime on bail, predicting which defendants will commit serious crimes is much like looking for the proverbial needle in a haystack.

The costs of pretrial detention to both the defendant and society are great. Overcrowded jails are a well-known fact;<sup>89</sup> the Bail Reform Act of 1966 was concerned in part with alleviating the crowding problem. The cost of jailing a pretrial de-

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81. HON. G. TJOFLAT, PREPARED STATEMENT BEFORE THE SUBCOMM. ON COURTS, CIVIL LIBERTIES & THE ADMIN. OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY CONCERNING BAIL PRACTICES IN THE FEDERAL COURTS 8 (July 27, 1983) (on file at the William Mitchell Law Review office).

82. Ervin, *supra* note 20, at 294.

83. *Id.* at 294-95.

84. 18 U.S.C. § 3161-3174 (1982).

85. 18 U.S.C. § 3161(c)(1).

86. *See, e.g.*, Hess, *supra* note 25, at 283-84.

87. *Id.* at 284.

88. *Id.*

89. *Cf.* H.R. REP. NO. 1121, 98th Cong., 2d Sess. 34 (1984) ("[A]ny increase in detention . . . will be absorbed by existing federal facilities . . . . While any increase . . . will impose further burdens on federal, state, and local correctional facilities . . . there is no basis for relating the effects of this bill, by itself, to the need for future prison construction").

tainee is more than thirty-seven dollars per day.<sup>90</sup> Of the approximately 212,000 persons in jail, sixty percent are awaiting trial.<sup>91</sup> The costs to the defendant can range from inability to properly prepare a defense to loss of employment. Studies have also determined that a defendant detained before trial is more likely to receive a harsh sentence.<sup>92</sup> Given the great costs and minor benefits of pretrial detention, it is quite possible that "the bail process itself [has] become a scapegoat for an overwhelmed criminal justice system."<sup>93</sup>

### 3. Constitutional Concerns

Although an extended examination of the constitutional issues surrounding the pretrial detention provision is not within the intended scope of this discussion, the issues should be acknowledged. Many of the criticisms made by the late Senator Ervin against the D.C. Act are also made against the new federal Act. Opponents of the detention provisions argue that they violate the eighth amendment prohibition against excessive bail, contending that implicit in the eighth amendment is a right to bail which Congress has abridged. Proponents reply that the Constitution provides only a right to nonexcessive bail in situations where Congress has given a statutory right of bail.<sup>94</sup>

Those who oppose the pretrial detention provision also argue that it violates due process rights and the presumption of innocence, for it jails a defendant on the basis of a probable cause finding before he or she has been found guilty, and fails to provide adequate procedural safeguards. Those favoring the provision answer that pretrial detention is not punitive and

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90. See S. REP. NO. 77, *supra* note 3, at 2, 1982 U.S. CODE CONG. & AD. NEWS at 2378. *But see* H.R. REP. NO. 1121, 98th Cong., 2d Sess. at 34 (estimating the per diem care costs of detention at \$32).

91. A. HALL, *supra* note 14, at 13. The average yearly number of federal defendants is 42,000. H.R. REP. NO. 1121, 98th Cong., 2d Sess. at 34. In estimating the increased cost to the federal government of pretrial detention under the 1984 Act, the Congressional Budget Office (CBO) assumed an additional 11% of total federal defendants would be detained for an average of 21 additional days prior to trial. The CBO estimated an increased cost of \$2.5 million in fiscal year 1985, \$3.5 million in fiscal year 1986, and \$4.0 million in fiscal year 1989. *Id.*

92. Note, *supra* note 80, at 350.

93. Wheeler & Wheeler, *supra* note 78, at 230.

94. See generally Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 329 (1982) (discussing various arguments for and against bail).

thus does not require a full trial-type hearing. Adequate notice and hearing are provided in the detention statute, proponents argue, and the presumption of innocence does not apply to pretrial detainees.<sup>95</sup> Many of these issues are explored in a District of Columbia Court of Appeals case which upheld the constitutionality of the D.C. Act's pretrial detention statute.<sup>96</sup>

*C. Statutory Analysis: The Postconviction Provision: 18 U.S.C. Section 3143(b)*

*1. The Statutory Language*

The bail pending appeal provision of the 1984 Act is structurally less complicated than the pretrial provision, but equally worthy of concern. The 1966 provision incorporated a presumption favoring bail even after conviction.<sup>97</sup> In drafting the new provision to resemble the D.C. Act, Congress sought to eliminate the presumption favoring bail in section 4143.<sup>98</sup>

Under the 1966 Act, a defendant was entitled to bail pending appeal unless the judicial officer had reason to believe he or she was a danger to the community, presented a flight risk, was appealing for purposes of delay, or was making a frivolous appeal.<sup>99</sup> Under the new Act, the defendant's burden is much heavier, reflecting Congress's understanding that "[t]he conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law."<sup>100</sup>

Under the Act, release and detention pending appeal is treated separately from release and detention pending sentencing or pending appeal by the government. The legislative history explains that the distinction is based on the difference between a defendant needing a short time period to arrange

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95. See generally Meyer, *supra* note 7, at 1382 (discussion of the historical development of the right to bail).

96. See *United States v. Edwards*, 430 A.2d 1321, 1343 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982) (pretrial detention statute does not violate due process by denying bail pending appeal and is not unconstitutionally vague or overbroad).

97. See 18 U.S.C. § 3148 (repealed 1984).

98. S. REP. NO. 225, *supra* note 37, at 26, 1984 U.S. CODE CONG. & AD. NEWS 9A at 29.

99. See 18 U.S.C. § 3148 (amended 1984); S. REP. NO. 225, *supra* note 37, at 26, 1984 U.S. CODE CONG. & AD. NEWS 9A at 29.

100. S. REP. NO. 225, *supra* note 37, at 26, 1984 U.S. CODE CONG. & AD. NEWS 9A at 29.

his or her affairs before sentencing and a convicted criminal whose appeal may take years to determine.<sup>101</sup> An appeal by the government is distinguished because of the defendant's continued innocence.<sup>102</sup>

Subsection (b) of the statute requires that the defendant appealing or petitioning for certiorari be detained unless the judicial officer finds by clear and convincing evidence that he or she is neither likely to flee nor likely to pose a danger to the community if released under conditions set forth in the pretrial release statute.<sup>103</sup> The judicial officer must also find that the defendant's appeal is not for the purpose of delay, and that the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial."<sup>104</sup> Upon making these findings, the judicial officer must release the defendant in accordance with the pretrial release statute provisions.<sup>105</sup>

The sparse legislative history accompanying section 3143(b) emphasizes Congress's intent to eliminate the presumption favoring release pending appeal and to place the burden of establishing the four requirements for bail under subsection (b) on the defendant.<sup>106</sup> Materials evaluating the D.C. Act also provide little commentary on the bail pending appeal provision, choosing instead to focus on the pretrial release and detention provisions. There is thus minimal guidance in the interpretation of the four elements necessary to the granting of bail pending appeal under the new Act.

The most troubling component of the bail pending appeal statute is the requirement that the defendant show that there is a "substantial" question of law or fact "likely" to result in reversal or an order for new trial.<sup>107</sup> District courts confronted with the statutory language have interpreted it subjectively, believing the provision to require them to state a belief that they will be reversed on appeal. One district court opinion states

101. *Id.*

102. *Id.* at 27, 1984 U.S. CODE CONG. & AD. NEWS 9A at 30 ("In such cases, the defendant, of course, would not have been convicted, and he thus should be treated in the same manner as a person who has not yet stood trial, as opposed to a person who has been tried and convicted"); see 18 U.S.C.A. § 3143(c) (West Supp. 1985).

103. 18 U.S.C.A. § 3143(b)(2) (West Supp. 1985).

104. *Id.* § 3143(b)(2).

105. *Id.* § 3143(b).

106. See S. REP. NO. 225, *supra* note 37, at 27, 1984 U.S. CODE CONG. & AD. NEWS 9A at 30.

107. See *id.* ("[T]he burden under this subsection is on the defendant . . .").

that the Act "practically means that the district judge has to determine that he has probably made an error in the decision that he had rendered in the lower court . . . ." <sup>108</sup>

Section 3143(b) should not be read subjectively. The four circuit courts that have interpreted the provision have developed, with variations, a two-part objective analysis.<sup>109</sup> The defendant must first show that the question of fact or law presented on appeal is substantial. A "substantial" question has been interpreted as a significant or novel issue which is "fairly doubtful" or without controlling precedent,<sup>110</sup> an issue which is "fairly debatable,"<sup>111</sup> and a question which is "close" or could be decided either way.<sup>112</sup> If the defendant has raised a substantial question, the reviewing court must assume the defendant will prevail on the substantial question, and then must determine whether the defendant's victory is likely to result in reversal or a new trial. "Likely to result in reversal" has been interpreted as "so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal . . . or a new trial,"<sup>113</sup> and as describing a type of issue "that calls into question the validity of the judgment."<sup>114</sup> All appellate courts which have thus far considered the statute have agreed that a literal interpretation requiring the defendant to demonstrate that the issue he or she raises more probably than not will result in reversal or new trial is unacceptable. Such an interpretation would render the word "substantial" superfluous,<sup>115</sup> and invite subjective evaluation.

The Eighth Circuit has approved the two-part evaluation, with clarifications. We agree that a substantial issue is one that is "close," or could be decided either way. As the Eleventh

108. *United States v. Miller*, 753 F.2d 19, 22 (3rd Cir. 1985) (quoting Transcript of Hearing of Nov. 26, 1984 at 25).

109. *See United States v. Powell*, No. 84-2430 (8th Cir. May 1, 1985); *United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1985) (per curiam); *United States v. Handy*, 753 F.2d 1487, 1489 (9th Cir. 1985); *Miller*, 753 F.2d at 21.

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

111. *See id.*

112. *See Powell*, No. 84-2430, slip op. at 12 (8th Cir. May 1, 1985); *Giancola*, 754 F.2d at 901.

113. *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23).

114. *Handy*, 753 F.2d at 1490.

115. *Powell*, No. 84-2430, slip op. at 11-12 (8th Cir. May 1, 1985); *Handy*, 753 F.2d at 1489; *see also* N. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 4th ed. 1984).

Circuit has noted, an issue is not substantial merely because controlling precedent is nonexistent. An issue may be so clear, or the rulings of other circuits so persuasive as to render an issue inarguable despite lack of precedent.<sup>116</sup> Our circuit has also adopted the “integral to the merits” interpretation of the second part of the section 3143 test. We specify that “likely” should be given its common meaning, that of “more probable than not.”<sup>117</sup> We further recognize that the purpose behind section 3143 requires the defendant to satisfy the section 3143(b) requirements for each count of his or her conviction on which a prison sentence has been imposed.<sup>118</sup> Under the 1984 Act, bail pending appeal will be the exception rather than the rule.<sup>119</sup>

## 2. *Benefits and Detriments*

One government study has estimated that defendants on bail pending appeal have a fifteen percent rearrest rate, which is considerably higher than that of pretrial releasees.<sup>120</sup> The high recidivism rate and the fact that the defendant has been convicted may justify a stricter burden before the defendant is released pending appeal. Nonetheless, costs to society and the individual which were identified in conjunction with pretrial detention also apply to detention pending appeal. The indi-

116. See *Giancola*, 754 F.2d at 901; see also *Powell*, No. 84-2430, slip op. at 9 (8th Cir. May 1, 1985) (“The formulation is inexact . . . but we think experienced judges and lawyers will find it reasonably easy to apply”).

117. Although likely may also mean “credible,” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1310 (1971), allowing bail where a credible possibility exists that reversal or new trial would result from a defendant’s prevailing on his or her substantial questions would frustrate congressional intent to deny bail to the majority of defendants appealing their convictions. See S. REP. NO. 225, *supra* note 37, at 27, 1984 U.S. CODE CONG. & AD. NEWS 9A at 30 (“subsection (b) requires an affirmative finding that the chance for reversal is substantial”).

118. “[I]f one count imposing imprisonment survives, the reason for allowing bail pending appeal, that a defendant should not be imprisoned under a legally erroneous sentence, disappears.” *Powell*, No. 84-2430, slip op. at 10 (8th Cir. May 1, 1985).

119. See S. REP. NO. 225, *supra* note 37, at 26, 1984 U.S. CODE CONG. & AD. NEWS 9A at 29. Bail pending appeal initially may be less frequent for a second reason. Not only will fewer defendants be able to meet the section 3143(b) requirements, fewer defendants may try. Under the two part test, an objective determination must be made which many defendants may fear will jeopardize their case on the merits. These defendants will choose certain detention to probable denial of bail and possible prejudice to their appeal. As lawyers and defendants learn the rejection of bail will not prejudice the case on its merits, however, the number of petitions for bail pending appeal will be less affected by fears of bias.

120. See Note, *supra* note 80, at 322 n.126.

vidual's interest in freedom, in preparing his or her case, and in avoiding the stigma of jail are important. The unpredictability of determining a defendant's recidivist propensity or risk of flight is perhaps slightly lower, but remains far from certain.

A new cost is also introduced with the change in the burden the defendant must meet. For those defendants who understand that the objective bail analysis is unlikely to bias their cases on the merits, the certain increase in the number of bail denials will also increase the number of interlocutory appeals. The administrative costs could be staggering.<sup>121</sup>

### 3. *Constitutional Concerns*

The constitutional questions concerning section 3143, although not within the scope of this discussion, again center on the eighth amendment and the due process clause of the fifth amendment. Those raising constitutional challenges to the statute argue that the dependence on the district court's finding that he or she is likely to be reversed on appeal is an arbitrary elimination of a statutory right to bail, thus violating the eighth amendment.<sup>122</sup> Opponents of the statute further contend that due process rights are violated because a fair hearing is impossible in front of the judge who has presided over the trial in which the defendant was convicted. Due process is also said to be violated because the "likely to result in reversal" standard renders the decision-making process arbitrary and capricious.<sup>123</sup>

Proponents argue that because there is no constitutional

121. In the Eighth Circuit, we have created special bail panels on a rotating basis. We have served notice to all United States attorneys and the Justice Department that where a defendant is incarcerated and denied bail, the case will be expedited and heard from 60 to 90 days after notice of appeal. We have served notice to all court reporters and defense lawyers that no continuances will be allowed for transcripts or briefing, and no extension of time will be given to the government where the defendant is incarcerated. Reporters will be asked to hire substitute reporters to comply with time schedules.

122. See generally *Hunt v. Roth*, 648 F.2d 1148, 1154-67 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982).

123. The objective two-part analysis obviated this argument. See *Powell*, No. 84-2340, slip op. at 13 (8th Cir. May 1, 1985). Opponents also claim that section 3143(b) violates the ex post facto clause, U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1, when applied to defendants indicted for acts occurring before the enacting date of the 1984 Act. The ex post facto prohibitions do not, however, apply to changes in criminal procedures. *Miller*, 753 F.2d at 21.

right to bail pending appeal, Congress can limit bail to a select group. Most defendants pending appeal do not fit into the designated group with a statutory right to bail. Persons favoring the provision also argue that the defendant has been convicted, and at most is entitled to a nonarbitrary interpretation of the bail statute, which defendants receive. Finally, proponents contend that the judge making the finding is not acting unfairly; he or she is not performing any function he or she does not perform in reviewing a motion for a new trial.<sup>124</sup> A defendant need merely meet a standard developed in keeping with placing the burden on the defendant and with the state's interest in ensuring that punishment is not unduly delayed while the defendant exhausts all avenues of appeal.

## II. IMPACTS AND ALTERNATIVES

### A. *The Judicial System and The Bail Reform Act of 1984*

The impact of the Bail Reform Act of 1984 will be felt by all who play a role in the federal criminal justice system. The defendant has an interest in freedom and in the preparation of his or her defense. The 1984 Act may increase the fairness of the pretrial release or detention decisionmaking process as to those defendants who would have been candidates for the imposition of prohibitively high bail based on sub rosa determinations of danger.<sup>125</sup> For many "risk" defendants, however, the low correlation between the factors used to determine dangerousness and the real probability the defendant may recidivate on bail will result in unwarranted detention or pretrial restriction.

Society must bear the costs of overcrowded jails and increased numbers of welfare recipients caused by loss of jobs and savings while in detention. Society's costs also include the financial support of the defendant who must serve the longer sentence shown to have been imposed on those detained before trial.<sup>126</sup>

The judiciary has an interest in the fair and efficient administration of justice. Some aspects of the 1984 Act promote this

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124. Cf. *Powell*, No. 84-2340, slip op. at 13 (8th Cir. May 1, 1985) (reasoning the objective two-part test makes no demands different from those required in conjunction with motions for injunctive relief or stays pending appeal).

125. *But see supra* notes 60-62 and accompanying text.

126. *See supra* note 92 and accompanying text.



interest, but many do not. The presumptions raised in the pre-trial detention proceedings, the standards a defendant must meet in seeking bond pending appeal, and the general, although statistically erroneous, assumption that pretrial release is somehow "responsible" for the increase in crime rates: all of these factors have a negative impact on the courts. Interlocutory appeals may become commonplace, and judges who must render a decision on a petition for bail and then determine the merits may be viewed as biased. Frequent use of the 1984 Act's most restrictive provisions will have a detrimental effect on the defendant, the courts, and society.

### B. *Alternatives to Detention*

Despite the presumptions against release of certain categories of defendants, pretrial detention is still the alternative of last resort. The evidentiary requirements that the judicial officer find the defendant to be a clear and convincing safety risk, and a preponderance of the evidence flight risk, demonstrate that Congress has not completely abandoned the interest of the arrested suspect.

The balancing of the societal interests in community safety and in imposing just deserts upon the individual interest in retaining liberty is a decision of social policy. Congress has indicated an increased preference for the societal interests, but the individual's stake remains.

The Pretrial Services Act of 1982,<sup>127</sup> for example, can be administered in conjunction with the subsection (b) and (c) release conditions. The Act's legislative history demonstrates that Congress intended the legislation to deter flight and danger risks.<sup>128</sup> Increasing the capacity of pretrial services operations to supervise and aid released suspects can ensure better compliance by released defendants, and render detention unnecessary.

There are alternatives to wholesale detention of defendants. The most frequently suggested is the provision of a speedy trial.<sup>129</sup> A speedy trial limits a defendant's time on bail, and avoids the increased propensity to commit crime as the length

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127. See 18 U.S.C. §§ 3152-3155 (1982).

128. See S. REP. NO. 77, *supra* note 3, at 8, 1982 U.S. CODE CONG. & AD. NEWS at 2384.

129. See, e.g., Wheeler & Wheeler, *supra* note 78, at 238-39.

of the bail period is extended. Indeed, statistics demonstrate that a combination of an expedited trial and restrictive supervision will protect the community more than preventive detention.<sup>130</sup> Further, given proper procedural protections, a defendant could be forced to forfeit his or her right to bail if found to have committed a pretrial release crime.<sup>131</sup> Such forfeitures would protect the community against those defendants who are multiple recidivists. Finally, the use of consecutive sentencing for crimes committed while on pretrial release should aid in deterring such crimes.

For defendants seeking bond pending appeal, Congress has made a strong statement that the scales must tip in favor of community values. By using an objective standard to determine whether the defendant has raised a substantial issue likely to result in reversal, however, the defendant's interests can still be protected.

#### CONCLUSION

Historically, bail has served the purpose of deterring flight. Between the 1960's and the 1980's, however, growing concern over crime led to the enactment of District of Columbia Code provisions and the Bail Reform Act of 1984, which place community interests in safety on an equal footing with individual interests in freedom.

Despite congressional and political decisions to "get tough" on crime, the courts must continue to protect the rights of the defendant. Pretrial programs offering supervisory and rehabilitative services provide the best alternatives to pretrial crime. The expense of such programs will always be less than the cost of crowded jails and detainees waiting long months for trial or appeal.

Contrary to Attorney General Smith's characterization, judges are not lenient and courts are not weak. Rather, the criminal justice system is searching for an answer serving the interests of both the public and the individual.

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130. See Note, *supra* note 80, at 362-65.

131. *Id.* at 365-66.

APPENDIX  
THE BAIL REFORM ACT OF 1984, 18 U.S.C. §§ 3141-  
3150

§ 3141. Release and detention authority generally

(a) Pending trial.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

(b) Pending sentence or appeal.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

§ 3142. Release or detention of a defendant pending trial

(a) In general.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on his personal recognizance or upon execution of an unsecured appearance bond, pursuant to the provisions of subsection (b);

(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

(4) detained pursuant to the provisions of subsection (e).

(b) Release on personal recognizance or unsecured appearance bond.—The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.—If the judicial officer determines that the release described in subsection (b) will not reasonably

assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person—

(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release; and

(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(B) maintain employment, or, if unemployed, actively seek employment;

(C) maintain or commence an educational program;

(D) abide by specified restrictions on his personal associations, place of abode, or travel;

(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(G) comply with a specified curfew;

(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(J) undergo available medical or psychiatric treatment, including treatment for drug or alco-

hol dependency, and remain in a specified institution if required for that purpose;

(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.—If the judicial officer determines that—

(1) the person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

(e) Detention.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial. In a case described in (f)(1), a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that—

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable

cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code.

(f) Detention hearing.—The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any other person and the community in a case—

(1) upon motion of the attorney for the Government, that involves—

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves—

(A) a serious risk that the person will flee;

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or

the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

(g) Factors to be considered.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense



or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of detention order.—In a detention order issued pursuant to the provisions of subsection (e), the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) **Presumption of innocence.**—Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

### § 3143. Release or detention of a defendant pending sentence or appeal

(a) **Release or detention pending sentence.**—The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

(b) **Release or detention pending appeal by the defendant.**—The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of

imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) the the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial. If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142(b) or (c).

(c) Release or detention pending appeal by the government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

#### § 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

#### § 3145. Review and appeal of a release or detention order

(a) Review of a release order.—If a person is ordered released by a magistrate or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense,

a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

(b) Review of a detention order.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

(c) Appeal from a release or detention order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

#### § 3146. Penalty for failure to appear

(a) Offense.—A person commits an offense if, after having been released pursuant to this chapter—

(1) he knowingly fails to appear before a court as required by the conditions of his release; or

(2) he knowingly fails to surrender for service of sentence pursuant to a court order.

(b) Grading.—If the person was released—

(1) in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for—

(A) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, he shall be fined not more than \$25,000 or imprisoned for not more than ten years, or both;

(B) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, he shall be fined not more than \$10,000 or imprisoned for not more than five years, or both;

(C) any other felony, he shall be fined not

more than \$5,000 or imprisoned for not more than two years, or both; or

(D) a misdemeanor, he shall be fined not more than \$2,000 or imprisoned for not more than one year, or both; or

(2) for appearance as a material witness, he shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

A term of imprisonment imposed pursuant to this section shall be consecutive to the sentence of imprisonment for any other offense.

(c) Affirmative defense.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender, and that he appeared or surrendered as soon as such circumstances ceased to exist.

(d) Declaration of forfeiture.—If a person fails to appear before a court as required, and the person executed an appearance bond pursuant to section 3142(b) or is subject to the release condition set forth in section 3142(c)(2)(K) or (c)(2)(L), the judicial officer may, regardless of whether the person has been charged with an offense under this section, declare any property designated pursuant to that section to be forfeited to the United States.

### § 3147. Penalty for an offense committed while on release

A person convicted of an offense committed while released pursuant to this chapter shall be sentenced, in addition to the sentence prescribed for the offense to—

(1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or

(2) a term of imprisonment of not less than ninety days and not more than one year if the offense is a misdemeanor.

A term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.

### § 3148. Sanctions for violation of a release condition

(a) Available sanctions.—A person who has been released

pursuant to the provisions of section 3142, and who has violated a condition of his release, is subject to a revocation of release, an order of detention, and a prosecution for contempt of court.

(b) Revocation of release.—The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of his release that he not commit a Federal, State, or local crime during the period of release shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

(1) finds that there is—

(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

(B) clear and convincing evidence that the person has violated any other condition of his release; and

(2) finds that—

(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will

abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

(c) Prosecution for contempt.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

§ 3149. Surrender of an offender by a surety

A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of Rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

§ 3150. Applicability to a case removed from a State court

The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.







THE EASTERN TIMBERWOLF

*Canis Lupus*

*Photograph courtesy of the Minnesota Department of Natural Resources*