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Criminal Bail: How Bail Reform is Working in Selected District Courts

Statement of
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Before the
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Committee on the Judiciary
United Stated Senate

HOW BAIL REFORM IS WORKING IN SELECTED DISTRICT COURTS

SUMMARY OF STATEMENT BY
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In response to a congressional request, GAO reviewed the impact of the Bail Reform Act of 1984 in four district courts. This law replaced the Bail Reform Act of 1966 and changed the rules for detaining defendants before their trials.

In summary, in the four districts:

-- About 26 percent and 31 percent of the defendants were detained while awaiting their trials under the old and new laws, respectively. The stated reasons they were detained changed with more defendants being detained because they were considered likely to flee, a danger to a person(s) or the community, or both a flight and danger risk.

-- A provision of the new law intended to aid in the detention of certain types of defendants considered dangerous or likely to flee before their trial was used to varying degrees. The new law does not require federal prosecutors to, nor did they, seek pretrial detention of all defendants who met the law's criteria. Pretrial detention was sought for 39 percent of the defendants who met the criteria and 61 percent of them were detained.

-- Under both the old and new laws, a small percentage of defendants failed to appear for a judicial proceeding (about 2 percent) or were arrested for committing a new crime while released on bail (1.8 and Ø.8 percent under the old and new laws, respectively).

-- Court officials GAO interviewed believed the new law was generally an improvement over the old, but about half of them expressed concern over the time needed to attend detention hearings that are required by the new law.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our assessments of the impacts of the implementation of the Bail Reform Act of 1984 in selected district courts.

BACKGROUND

In the federal criminal justice system, one of the first decisions a judicial officer makes after a defendant comes into federal custody is whether the defendant will be released or detained before trial. To decide, the judicial officer will hold a bail hearing to obtain information about the defendant.

Currently, the judicial officer can elect to release the defendant contingent on financial or nonfinancial conditions, detain the defendant temporarily, or can deny bail and order the defendant detained during the pretrial period. In the latter case, the judicial officer must hold a separate detention hearing to determine whether detention is warranted or whether any release condition(s) will better ensure the person's appearance and the safety of the community. If a defendant does not comply with the nonfinancial conditions imposed by the judicial officers or fails to pay the financial bail, he or she can be detained without a detention hearing.

The Bail Reform Act of 1984 greatly expanded the extent to which judicial officers, in deciding whether to set or deny bail, can consider whether a defendant is dangerous. Under the old bail law (the Bail Reform Act of 1966), a defendant could only be denied bail and detained for dangerousness if the person was charged with an offense punishable by death (i.e., a capital offense). The new law specifies a wider range of defendants that can be detained as dangerous and provides specific criteria for identifying who is dangerous. By so doing, the new law intended to eliminate the use of sub rosa detention which refers to the setting of an extremely high money bail as an indirect method of detaining a defendant considered dangerous.

The new law also contains a provision which may be applied to certain defendants who the law defines as flight or danger risks. The provision--known as the "rebuttable presumption"--shifts the burden to the defendant to show that he/she is not a flight and/or danger risk. However, the prosecutor must still persuade the court that the defendant is a flight or danger risk.

On October 23, 1987, we issued a report to the Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, entitled Criminal Bail: How Bail Reform Is Working in Selected District Courts (GAO/GGD-88-6). We did our work between December 1985 and April 1987 in four courts--northern Indiana, Arizona, southern Florida, and eastern New York. Our objectives were to compare for the old

and new bail laws the extent and reasons that defendants were detained before trial and the extent defendants failed to appear for a judicial proceeding or were arrested for committing a new crime. We also reviewed the extent of use of the rebuttable presumption provision of the new law and obtained court officials views about the new law.

To satisfy our objectives, in each district we compared random samples of criminal felony cases commenced during two 6-month periods under the old and new laws--January through June 1984 and January through June 1986. We also interviewed judicial officers, prosecutors, defenders, and probation or pretrial services officers. We estimate that about 2,100 criminal felony cases under the old law and 2,200 cases under the new law were initiated in the four districts during the two periods we reviewed.

In summary, we found that about 26 percent and 31 percent of defendants were detained under the old and new laws, respectively. The stated reasons they were detained changed with more defendants being detained because they were considered to be a flight and/or danger risk. The percentages of defendants released on bail who later failed to appear for judicial proceedings or were arrested for committing a new crime were low under both the old and new bail laws. Court officials generally believed the new law is an improvement over the old law.

REASONS FOR DETENTION

Under the old bail law, all of the defendants detained in the four districts were detained because of failure to pay financial bail set by the courts. Failure to pay financial bail as a reason for detention decreased to 0 percent in northern Indiana, 2 percent in eastern New York, and 34 percent in Arizona, under the new bail law. In these districts, flight and/or danger risk became the predominant reason for detention. In southern Florida, 84 percent of defendants were detained under the new law because of failure to pay financial bail.

The large percentage of defendants in southern Florida who were detained for not paying their financial bail and, to a lesser extent, in Arizona raised the question of whether the judicial officers were using high financial bail as an indirect method of detaining dangerous defendants (sub rosa detention). In looking at the court records and talking to the judicial officers, we found no evidence to indicate that judicial officers in southern Florida or Arizona used sub rosa detention to detain dangerous defendants.

The new law leaves open to interpretation whether money bail can be set at an amount the defendant is unable to pay. We found the four districts were evenly split on their interpretation and implementation of this provision. It should be noted that as of

October 1987, five court decisions had found that bail did not have to be set at an amount that the defendant could pay.

USE OF REBUTTABLE PRESUMPTION PROVISION

Use of the rebuttable presumption provision varied from district to district. From our analysis of court records, we found that 93 percent of the defendants who met the rebuttable presumption criteria had been indicted for a drug offense for which the maximum term of imprisonment was 10 years or more. The new law does not require federal prosecutors to, nor did they, seek pretrial detention of all defendants who met the rebuttable presumption criteria. Pretrial detention was sought for 39 percent who met the criteria, and prosecutors were successful in obtaining detention in 61 percent of these cases.

EXTENT DEFENDANTS FAILED TO APPEAR AND COMMITTED NEW CRIMES

The percentage of defendants released on bail who failed to appear for judicial proceedings was 2.1 and 1.8 percent under the old and new laws, respectively. The percentage of released defendants who were arrested for committing new crimes was 1.8 and 0.8 percent under the old and new laws, respectively.

COURT OFFICIALS' VIEWS

The predominant feeling of court officials in the four districts was that the new bail law is an improvement over the old law and that it is more direct and honest because the law allows the judicial system to label a defendant as dangerous when that is what he or she is thought to be. However, a common concern expressed by about half of the court officials was the time needed to attend detention hearings.

FOLLOW-ON REVIEW OF THE BAIL REFORM ACT OF 1984

We are now completing a follow-on review of the impact of the Bail Reform Act of 1984 for the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The Subcommittee asked us to update and expand our first effort which I have summarized for you today. Our current effort will provide additional information on implementation of the law including the length of detention, post conviction detention, and sentencing outcomes of detained and released defendants. We should be able to provide you with the details of our findings later this year.

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This concludes my prepared statement. I would be pleased to respond to any questions.