HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 3006, H.R. 4264, and H.R. 4362

BAIL REFORM ACT—1981-82

JULY 29, 30, SEPTEMBER 16, 1981, AND FEBRUARY 25, 1982

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BAIL REFORM ACT—1981-82

WEDNESDAY, JULY 29, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, Sawyer, and Butler.

Also present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerical staff.

Mr. KASTENMEIER. The committee will come to order.

The subcommittee is convened this morning to begin a series of hearings on the Bail Reform Act of 1966. These hearings will continue tomorrow and following the August recess as well. It is my intention that these hearings provide the House with a thorough review of the Bail Reform Act in addition to whatever review has been accorded by our witnesses before the subcommittee and any others that have taken place. This will be a thorough review.

Bail, as an American criminal justice issue, has been with us since our earliest days. In response to colonial abuses, the eighth amendment to the Constitution was enacted to forbid the imposition of excessive bail. In 1789, Congress enacted a Federal statute permitting the requirement of money bail to insure the appearance at trial of those charged with Federal crimes, the theory being that the requirement of a financial deterrent to flight would adequately insure that the trial could go forward without the incarceration of the presumed innocent defendant.

However, money bail and the general conduct of the bail system became the subject of considerable criticism as a prime example of a traditional practice fraught with discrimination. In response to this climate, the Congress passed the Bail Reform Act of 1966, really the first basic change in the Federal bail law since 1789. It was greeted with great enthusiasm and hailed as a progressive measure. On June 24, 1966, the Bail Reform Act became effective and continues today.

The principal feature of the act is that personal recognizance or release on an unsecured bond shall be the presumptive determination in all cases. Other conditions cannot be imposed unless the bail-setting judicial officer determines that such release will not

reasonably assure the defendant's appearance. If such a determination is made, the judge must then consider each of a series of prescribed conditions in the order of priority listed in the statute; a combination of conditions may be imposed if one is considered insufficient.

The conditions enumerated in the statute are: release in the custody of some responsible person or organization; restrictions on travel, associations, or place of abode; a returnable cash deposit, not to exceed 10 percent of the bond set; the traditional bail bond, or cash in the amount of the bond; or any other conditions deemed reasonably necessary to assure appearance.

There is no provision in the statute specifically authorizing denial of bail for noncapital offenses, nor is there a provision in the law which specifically authorizes "danger to the general community" as a consideration in the determination as to whether or not to release an individual on bail. At present, the sole function of bail is to provide reasonable assurances of the appearance of the accused; it is not a demand for absolute certainty of appearance nor is it a crime-fighting device designed to keep possibly dangerous persons off the street.

Frankly, I believe it can be safely stated that the Bail Reform Act has not lived up to the high hopes of the Nation. Abuses of the money-bail requirements still take place, defendants who present little risk of flight are still incarcerated, and, it has also been strongly argued that the features of the act do not provide for the pretrial incarceration of truly dangerous, crime-prone defendants.

The subcommittee will begin today and tomorrow to examine each of these issues.

[Copies of H.R. 3006, H.R. 4264, and H.R. 4362 follow:]

97TH CONGRESS
1ST SESSION

H. R. 3006

To amend the Bail Reform Act of 1966 to authorize consideration of danger to the community in setting conditions of release, to authorize revocation of pretrial release for persons who violate their release conditions, intimidate witnesses or jurors, or commit new offenses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 2, 1981

Mr. SENSENBRENNER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Bail Reform Act of 1966 to authorize consideration of danger to the community in setting conditions of release, to authorize revocation of pretrial release for persons who violate their release conditions, intimidate witnesses or jurors, or commit new offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3146 of title 18, United States Code, is amended as follows:

(a) by inserting in subsection (a) the words "or the safety of any other person or the community" (1) after "as required" in the first sentence, and (2) after "for trial" in the second sentence;

(b) by amending paragraph (5) of subsection (a) to read as follows:

"(5) impose any other condition, including a condition requiring that the person return to custody after specified hours of release for employment or other limited purposes.";

(c) by adding the following sentence at the end of subsection (a): "No financial condition may be imposed to assure the safety of any other person or the community.";

(d) by amending subsection (b) to read as follows:

"(b) In determining which conditions of release will reasonably assure the appearance of a person as required and the safety of any other person or the community, the judicial officer shall, on the basis of available information, take into account such matters as the nature and circumstances of the offense charged, the weight of the evidence against the person, his family ties, employment, financial resources, character and mental condition, past conduct, length of residence in the community, record of convictions, and any

record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

SEC. 2. Section 3147 of title 18, United States Code, is amended:

(a) by changing the title to read:

"§ 3147. Appeal from conditions of release or order of detention.";

(b) by adding after the phrase "the offense charged," in subsection (b) the phrase "or (3) he is ordered detained or an order of detention has been permitted to stand by a judge of the court having original jurisdiction over the offense charged,"; and

(c) by adding after subsection (b) the following new subsections:

"(c) In any case in which a judicial officer other than a judge of the court having original jurisdiction over the offense with which a person is charged orders his release with or without setting terms or conditions of release, the United States attorney may move the court having original jurisdiction over the offense to amend or revoke the order. Such motion shall be considered promptly.

"(d) In any case in which—

"(1) a person is ordered released, with or without the setting of terms or conditions of release by a judge

of the court having original jurisdiction over the offense with which the person is charged, or

"(2) a judge of a court having such original jurisdiction does not grant the motion of the United States attorney filed pursuant to subsection (c),

the United States attorney may appeal to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may (A) remand the case for a further hearing, or (B) with or without additional evidence, change the terms or conditions of release, or order detention as provided for in this chapter."

SEC. 3. Section 3148 of title 18, United States Code, is amended to read as follows:

"§ 3148. Release in capital cases or after conviction

"(a) A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is awaiting sentence, shall be treated in accordance with the provisions of section 3146 unless the judicial officer has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, the person may be ordered detained.

"(b) A person who has been convicted of an offense and sentenced to death or to a term of confinement or imprisonment and has filed an appeal or a petition for a writ of certiorari shall be detained unless the judicial officer finds by clear and convincing evidence that (1) the person is not likely to flee or pose a danger to any other person or to the property of others, and (2) the appeal or petition for a writ of certiorari raises a substantial question of law or fact. Upon such findings, the judicial officer shall treat the person in accordance with the provisions of section 3146.

"(c) The provisions of section 3147 shall apply to persons described in this section, except that a finding of the judicial officer that an appeal or petition for writ of certiorari does not raise by clear and convincing evidence a substantial question of law or fact shall receive de novo consideration in the court in which review is sought."

SEC. 4. Chapter 207 of title 18, United States Code, is amended by adding after section 3150 the following new sections:

"§ 3150A. Sanctions for violation of release conditions

"(a) A person who has been conditionally released pursuant to section 3146 and who has violated a condition of release shall be subject to revocation of release and to prosecution for contempt of court.

"(b) Proceedings for revocation of release may be initiated on motion of the United States attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and the person shall be brought before a judicial officer in the district where he is arrested. He shall then be transferred to the district in which his arrest was ordered for proceedings in accordance with this section. No order of revocation shall be entered unless, after a hearing, the judicial officer finds that there is clear and convincing evidence that the person has violated a condition of his release.

"(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with procedures applicable to criminal contempt, it is established that the person has intentionally violated a condition of his release. The contempt proceedings shall be expedited and heard by the court without a jury. A person found guilty of contempt for violation of a condition of release may be imprisoned for not more than six months, or fined not more than $1,000, or both.

"§ 3150B. Sanctions for threatening witnesses or jurors while on release

"(a) A person who has been conditionally released pursuant to section 3146 and who has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a

prospective witness or juror, shall be subject to revocation of release.

"(b) Proceedings for revocation of release may be initiated on motion of the United States attorney. No order of revocation shall be entered unless, after a hearing, the judicial officer finds that there is clear and convincing evidence that the person has threatened, injured, intimidated or attempted to threaten, injure, or intimidate a prospective witness or juror.

"§ 3150C. Sanctions for committing serious offenses while on release

"(a) A person who has been conditionally released pursuant to section 3146 and as to whom there is probable cause to believe he has committed a felony while released shall be subject to revocation of release.

"(b) Proceedings for revocation of release may be initiated on motion of the United States attorney. No order of revocation shall be entered unless, after a hearing, the judicial officer finds by clear and convincing evidence that (1) a State or Federal magistrate, judge, judicial officer or grand jury has found probable cause to believe that the person has committed a felony and (2) such felony was committed while the person was released on the prior charge."

SEC. 5. Section 3152 of title 18, United States Code, is amended by adding at the end thereof the following new subsections:

"(3) The term 'felony' means any criminal offense punishable by imprisonment for more than one year by an Act of Congress or the law of a State.

"(4) The term 'misdemeanor' means any criminal offense punishable by imprisonment for one year or less by an Act of Congress or the law of a State.

"(5) The term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States."

97TH CONGRESS
1ST SESSION

H. R. 4264

To amend chapter 207 of title 18 of the United States Code with respect to detention of defendants before trial in criminal cases.

IN THE HOUSE OF REPRESENTATIVES

JULY 24, 1981

Mr. HUGHES introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 207 of title 18 of the United States Code with respect to detention of defendants before trial in criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Pretrial Detention Act of 1981".

SEC. 2. (a) Section 3146(a) of title 18 of the United States Code is amended—

(1) by striking out "Any" and inserting in lieu thereof "Except as provided in subsection (h) of this section, any";

(2) by striking out "required" and all that follows through "appearance of the person for trial" and inserting in lieu thereof "required and the safety of any other person or the community. If the judicial officer makes such a determination, the judicial officer shall, either in lieu of or in addition to the methods of release described in the first sentence of this subsection, impose the first of the following conditions which will give such assurance (but no financial condition shall be imposed other than to assure appearance of the person as required)"; and

(3) in paragraph (5), by striking out "assure appearance as required, including a condition requiring the person to return to custody after specified hours" and inserting in lieu thereof "give such assurance".

(b) Section 3146(b) of title 18 of the United States Code is amended—

(1) by striking out "will reasonably assure appearance" and inserting in lieu thereof "will give the assurance described in subsection (a) of this section";

(2) by inserting "such matters as" after "take into account";

(3) by inserting "and other local" after "family"; and

(4) by inserting "past conduct," after "mental condition,".

(c) Section 3146(d) of title 18 of the United States Code is amended by striking out "A person who is ordered released on a condition" and all that follows through "continuing the requirement.".

(d) Section 3146 of title 18 of the United States Code is amended by adding at the end the following:

"(h)(1) The judicial officer shall, as an initial matter in a proceeding under this section, determine whether such person—

"(A) is presently on probation, parole, or mandatory release for an offense punishable under State or Federal law; and

"(B) poses a risk of flight or a danger to the safety of any other person or the community.

"(2) If the judicial officer determines that such person is a person described in paragraph (1) of this subsection, such officer may order such person detained for a period of no more than 5 calendar days until the appropriate court, probation, or parole officer takes the person into custody or declines to do so. If such person is not taken into such custody, the judicial officer shall recommence appropriate proceedings

under this chapter. It shall be the duty of the Attorney for the Government to notify such appropriate court, probation, or parole officer of the determination under this section".

(e) Section 3147 of title 18 of the United States Code is amended—

(1) in subsection (a), by striking out ", or whose release on a condition" and all that follows through "3146(e)" and inserting in lieu thereof "under section 3146 or 3156 of this chapter"; and

(2) in subsection (b), by inserting "under section 3156 of this title or" after "In any case in which a person is detained".

SEC. 3. (a) Chapter 207 of title 18 of the United States Code is amended by inserting after section 3155 the following:

"§ 3156. Pretrial order in cases of danger to other persons or community

"(a) After a determination under section 3146 of this title that a defendant is eligible for release under such section, the judicial officer shall then hear and dispose of any motion for an order under this section, taking into account the matters described in section 3146(b) of this title. If the judicial officer determines that the requirements are satisfied for an order under this section, the judicial officer shall advance the date of trial, or recommend such date be advanced,

if such action will reasonably minimize the danger which the judicial officer has found to exist. If the judicial officer determines by clear and convincing evidence that such danger cannot be reasonably minimized by such means or by a condition or conditions of release imposed under section 3146 of this title, the judicial officer may order the defendant detained either at all or at specified hours before trial.

"(b) The judicial officer may make an order under this section only if the judicial officer finds that—

"(1) there is a substantial probability that the defendant committed the offense charged; and

"(2) the defendant poses a danger to the safety of any other person or the community, based on findings by clear and convincing evidence that—

"(A) if the offense charged is a violent crime, the defendant—

"(i) has committed a violent crime within the most recent cumulative two-year period the defendant was not confined in a correctional facility, and was convicted of that crime; or

"(ii) is on probation, parole, or release with respect to a violent crime;

"(B) if the offense charged is either a violent crime or a serious drug crime, the defendant's

pattern of behavior consisting of the defendant's past and present conduct poses such a danger; or

"(C) the defendant, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

"(c)(1) The attorney for the Government may move for an order under this section any time before final disposition of the case in the trial court. If the defendant has been released under section 3146 of this title, the attorney for the Government may seek the issuance of a warrant for the defendant's arrest on a showing of probable cause that the defendant should be detained under this section.

"(2) A motion for an order under this section shall be accompanied by an affidavit explicitly—

"(A) showing how the requirements of subsection (b) of this section are satisfied; and

"(B) setting forth the reasons why danger cannot reasonably be minimized by an order under this section other than an order for detention or an order under section 3146 of this title.

"(3) A motion under this section shall be heard and determined as soon as practicable unless a continuance is granted under this paragraph. A continuance sought by the defendant shall not exceed a period of five calendar days, unless the judicial officer determines there is good cause for exceeding such period. A continuance sought by the Government shall be granted upon a showing of good cause and shall not exceed five calendar days. The judicial officer shall take into account any time the defendant has been detained under section 3146(h)(2) of this title in determining whether there is good cause for a continuance sought by the Government. The defendant may be detained pending the hearing.

"(4) The defendant shall be entitled to be represented by counsel, to present witnesses and evidence, and to cross examine witnesses against the defendant.

"(5) Information stated in, or offered in connection with, any order under this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

"(6) No testimony of a defendant given during a hearing under this section shall be admissible against the defendant (except for impeachment purposes) in any other judicial proceeding, other than a proceeding under section 3150 of this title or a prosecution for perjury or false statement.

"(d) Not later than twenty-four hours after issuing an order under this section the judicial officer shall set forth in writing the findings of fact and conclusions of law justifying such order.

"(e) If a judicial officer finds that circumstances have changed so that the basis for detention under this section has been eliminated, the judicial officer shall release under section 3146 of this title a defendant so detained, or shall order or recommend advance of the trial date.

"(f) The trial of a defendant ordered detained under this section shall, consistent with the sound administration of justice, have priority over all other trials other than those already in progress. The case of a defendant detained under this section shall be brought to trial within sixty calendar days after the order for detention under this section is made, unless the trial has been delayed at the request of the defendant by a motion for a continuance. If the time limits set forth in this section expire, the defendant shall no longer be detained under this section.

"(g)(1) To the extent practicable, defendants detained under this section shall be confined in a place other than one designated for convicted persons.

"(2) Any restrictions on the rights such defendants would have if not so detained shall be as minimal as institutional security and order require.

"(3) Defendants so detained shall be afforded reasonable opportunity for private consultation with counsel, and for good cause shown shall be released upon order of the judicial officer in the custody of the United States marshal or other

appropriate person for limited periods of time to prepare defenses or other proper reasons.

"§ 3157. Credit for time detained

"Every defendant convicted of an offense shall be given credit, against any term of imprisonment imposed for such offense, for all time spent in custody under this chapter with respect to proceedings in connection with such offense.".

(b)(1) The table of sections at the beginning of chapter 207 of title 18 of the United States Code is amended by striking out the item relating to section 3152 and all that follows through the end of such table and inserting in lieu thereof the following:

"3152. Establishment of pretrial services agencies.
"3153. Organization of pretrial services agencies.
"3154. Functions and powers of pretrial services agencies.
"3155. Report to Congress.
"3156. Pretrial detention in cases of danger to other persons or community.
"3157. Credit for time detained.
"3158. Definitions.".

(2) Section 3156 of title 18 of the United States Code is redesignated as section 3158.

(c) Section 3158 of title 18 of the United States Code (as so redesignated by this section) is amended by adding at the end the following:

"(c) As used in section 3156 of this title—

"(1) the term 'violent crime' means a Federal or State offense that—

"(A) is punishable by imprisonment for a period greater than one year; and

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"(B) involves a substantial risk of harm through the use or threat of physical force against the person of another;

"(2) the term 'serious drug crime' means an offense that—

"(A) is punishable by a period of ten years or more imprisonment; and

"(B) violates the Controlled Substances Act, the Controlled Substance Import and Export Act, or the Act entitled 'An Act to facilitate increased enforcement by the Coast Guard by laws relating to the importation of controlled substances, and for other purposes' approved September 15, 1980 (21 U.S.C. 955a); and

"(3) the term 'judicial officer' has the same meaning such term has for the purposes of sections 3146–3150 of this title.".

I

97TH CONGRESS
1ST SESSION

H. R. 4362

To amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to permit pretrial detention of certain offenders, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 31, 1981

Mr. SAWYER (for himself, Mr. MCCLORY, Mr. TRIBLE, Mr. FISH, Mr. SAM B. HALL, JR., Mr. BUTLER, Mr. MOORHEAD, Mr. SENSENBRENNER, Ms. FIEDLER, and Mr. SHAW) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Bail Reform Act of 1966 to permit consideration of danger to the community in setting pretrial release conditions, to permit pretrial detention of certain offenders, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bail Reform Act of 1981".

SECTION 1. (a) Sections 3141 through 3151 of title 18, United States Code, are repealed and the following new sections are inserted in lieu thereof:

"§ 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 in an amount specified by the judicial officer, 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 pursuant to the provisions of subsection (d); or

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

"(b) RELEASE ON PERSONAL RECOGNIZANCE OR UNSECURED 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 judicial officer, 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 alcohol dependency, and remain in a specified institution if required for that purpose;

"(K) execute an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

"(L) execute a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof;

"(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 appearance of the person as required and to assure the safety of any other person and the community.

No financial condition may be imposed to assure the safety of any other person or the community. 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.—If the judicial officer determines that—

"(1) the person is, and was at the time the offense was committed, on—

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

"(B) 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

"(C) probation or parole for any offense under Federal, State, or local law; and

"(2) 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, for a period of not more than ten days, and direct the attorney for the Government to notify the appropriate court, probation, or parole official. 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.

"(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that—

"(1) 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; and

"(2) on the basis of information presented by proffer or otherwise, there is a substantial probability that the person committed the offense for which he has been charged;

he shall order the detention of the person prior to trial.

"(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—

"(1) in a case that involves—

"(A) a crime of violence;

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

"(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

"(2) in any other case, upon motion of the attorney for the Government or upon the judge'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; or

"(C) an offense committed after the person had been convicted of two or more prior offenses described in paragraph (1), or two or more State

or local offenses that would have been offenses described in paragraph (1) if a circumstance giving rise to Federal jurisdiction had existed.

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 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.

"(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) and 1510 (relating to obstruction of criminal investigation).

"(i) CONTENTS OF DETENTION ORDER.—In a detention order issued pursuant to the provisions of subsection (e), the judge 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.

"§ 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) that the appeal is not taken 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 subpena, 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.

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"§ 3146. Penalty for failure to appear

"(a) OFFENSE.—A person is guilty of an offense if, after having been released pursuant to this chapter—

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

"(2) he 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 felony or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction of an offense, he shall be fined not more than $5,000 and imprisoned for not more than five years;

"(2) in connection with a charge of misdemeanor, he shall be fined not more than $1,000 or the maximum provided for such misdemeanor, whichever is less, and imprisoned for not more than one year; or

"(3) for appearance as a material witness, he shall be fined no 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.

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

"A person convicted of a Federal, State, or local offense committed while released pursuant to this chapter shall be

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sentenced, in addition to the sentence prescribed for the offense for which he was on release, 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. The judicial officer shall enter an order of

revocation and detention if, after a hearing, the judicial officer—

"(1) finds that there is clear and convincing evidence that the person has violated a 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 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. 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.".

(b) Section 3154 of title 18, United States Code, is amended—

(1) in subsection (1), by striking out "and recommend appropriate release conditions for each such person" and inserting in lieu thereof "and, where appropriate, include a recommendation as to whether each such person should be released or detained and, if release is recommended, recommend appropriate conditions of release"; and

(2) in subsection (2), by striking out "section 3146(e) or section 3147" and inserting in lieu thereof "section 3145";

(c) Section 3156(a) of title 18, United States Code, is amended—

(1) by striking out "3146" and inserting in lieu thereof "3141";

(2) in paragraph (1)—

(A) by striking out "bail or otherwise" and inserting in lieu thereof "detain or"; and

(B) by deleting "and" at the end thereof;

(3) in paragraph (2), by striking out the period at the end and inserting in lieu thereof "; and";

(4) by adding after paragraph (2) the following new paragraphs:

"(3) The term 'felony' means an offense punishable by a maximum term of imprisonment of more than one year; and

"(4) The term 'crime of violence' means—

"(A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or

"(B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."; and

(5) in subsection (b)(1), by striking out "bail or otherwise" and inserting in lieu thereof "detain or".

(d) The item relating to chapter 207 in the analysis of part II of title 18, United States Code, is amended to read as follows:

"207. Release and detention pending judicial proceedings ..... 3141"; and

(e)(1) The caption of chapter 207 is amended to read as follows:

"CHAPTER 207—RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS"; AND

(2) The section analysis for chapter 207 is amended by striking out the items relating to sections 3141 through 3151 and inserting in lieu thereof the following:

"3141. Release and detention authority generally.
"3142. Release or detention of a defendant pending trial.
"3143. Release or detention of a defendant pending sentence or appeal.
"3144. Release or detention of a material witness.
"3145. Review and appeal of a release or detention order.
"3146. Penalty for failure to appear.
"3147. Penalty for an offense committed while on release.
"3148. Sanctions for violation of a release condition.
"3149. Applicability to a case removed from a State court.
"3150. Repealed.
"3151. Repealed.".

SEC. 2. Chapter 203 of title 18, United States Code, is amended as follows:

(a) The last sentence of section 3041 is amended by striking out "determining to hold the prisoner for trial" and inserting in lieu thereof "determining, pursuant to the provisions of section 3142 of this title, whether to detain or conditionally release the prisoner prior to trial".

(b) The second paragraph of section 3042 is amended by striking out "imprisoned or admitted to bail" and inserting in lieu thereof "detained or conditionally released pursuant to section 3142 of this title".

(c) Section 3043 is repealed.

(d) The following new section is added after section 3061:

"§ 3062. General arrest authority for violation of release conditions

"A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142(c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(L), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).".

(e) The section analysis is amended—

(1) by amending the item relating to section 3043 to read as follows:

"3043. Repealed."; and

(2) by adding the following new item after the item relating to section 3061:

"3062. General arrest authority for violation of release conditions.".

SEC. 3. Section 3731 of title 18, United States Code, is amended by adding after the second paragraph the following new paragraph:

"An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the pretrial release of a person charged with an offense, or denying a motion for revocation

of, or modification of the conditions of, a decision or order granting release.".

SEC. 4. The second paragraph of section 3772 of title 18, United States Code, is amended by striking out "bail" and inserting in lieu thereof "release pending appeal".

SEC. 5. Section 4282 of title 18, United States Code, is amended—

(a) by striking out "and not admitted to bail" and substituting "and detained pursuant to chapter 207"; and

(b) by striking out "and unable to make bail".

SEC. 6. Section 636 of title 28, United States Code, is amended by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial".

SEC. 7. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 5(c) is amended by striking out "shall admit the defendant to bail" and inserting in lieu thereof "shall detain or conditionally release the defendant".

(b) Rule 9(b)(1) is amended by striking out the last sentence.

(c) The second sentence of rule 15(a) is amended by striking out "committed for failure to give bail to appear to

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testify at a trial or hearing" and inserting in lieu thereof "detained pursuant to 18 U.S.C. § 3144".

(d) Rule 40(f) is amended to read as follows:

"(f) RELEASE OR DETENTION.—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information or indictment issued, the Federal magistrate shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the Federal magistrate amends the release or detention decision or alters the conditions of release, he shall set forth the reasons for his action in writing.".

(e) Rule 46 is amended—

(1) in subsection (a), by striking out "3146, 3148, or 3149" and inserting in lieu thereof "3142 and 3144";

(2) in subdivision (c), by striking out "3148" and inserting in lieu thereof "3143".

(f) Rule 54(b)(3) is amended by striking out "18 U.S.C. § 3043 and".

SEC. 8. Rule 9(c) of the Federal Rules of Appellate Procedure is amended by striking out "3148" and inserting in lieu thereof "3143".

Mr. KASTENMEIER. Our witness this morning, to lead off the hearings, is our distinguished colleague, the chairman of the House Judiciary Subcommittee on Crime. I happen to be a member of that subcommittee and I know of his expertise and his interest in this issue and that of the subcommittee.

I am very pleased to greet our distingushed colleague from New Jersey, the Honorable Bill Hughes.

Bill, you may proceed.

TESTIMONY OF HON. WILLIAM J. HUGHES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. HUGHES. Thank you, Mr. Chairman. Thank you, colleagues, for the opportunity to address you today on one of the most important problems in the criminal justice system: Should the Bail Reform Act of 1966 be amended to permit courts to consider whether a defendant seeking to be released pretrial is dangerous?

In the years before the Bail Reform Act was enacted, the system operated to favor the wealthy, and it discriminated against the poor through almost exclusive reliance on money bail. Even those defendants who were clearly not bail risks were detained pretrial if they were too poor to raise a money bond.

The Bail Reform Act performed an important service to society as a whole by requiring courts to release defendants on their own recognizance, without reliance on money bail, whenever the defendant's appearance in court could be reasonably assured. The Bail Reform Act is one of this country's most important pieces of legislation in the criminal justice area.

But it has now become quite clear that Congress needs to take another close look at how the pretrial release system is operating. While in 1966, when the Bail Reform Act was enacted, the critical issue was discrimination against the poor, in 1981 the critical issues are twofold.

First, we must insure that the act is sufficient to prevent defendants from fleeing prosecution.

Second, we must protect society from defendants who may present no flight risk but who present great risk that while on pretrial release they will endanger the public.

While the issue of bail reform is not directly before the Subcommittee on Crime, which I chair, the subcommittee has considered several areas, such as the operations of the Drug Enforcement Administration, and the pretrial services agencies, where the issues of flight risk and crime on bail cannot be avoided.

The subcommittee, in a variety of hearings, has heard from a number of witnesses who contend that the Bail Reform Act must be amended to permit courts to consider the issue of danger when deciding whether to release a defendant pretrial. I have personally spoken with a number of judges who decry their lack of authority to consider this issue and who, quite candidly, tell me that in various indirect ways they do so anyway. There are those who say that the present system is hypocritical and unfair to the public, just as in 1966 the system was unfair to the poor.

The factual situation is very complex. In the Federal system, the 10 pretrial services demonstration districts provide the only accu-

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rate statistics on flight risk and pretrial rearrests. For the latest most complete reporting period, 2.3 percent of all defendants fled prosecution, and 4.6 percent of all defendants were rearrested pretrial. The majority of defendants who are rearrested pretrial are those originally charged with property crimes as opposed to violent crimes.

While these figures may seem low, in the view of judges and other officers of the court, there are Federal defendants who are released pretrial only to be rearrested for dangerous crimes. If the courts were permitted to consider dangerousness, many of these defendants would not be released to prey on society again.

The flight problem is more serious in some areas of the country than in others. The most prominent example is Florida, where the rate of prosecutions for narcotics offenses, and the number of defendants who flee from narcotics prosecutions, are astounding. As I have noted, 2.3 percent of all defendants nationally jump bail; of this number, half are defendants charged with narcotics offenses. In Florida the figure is 12.6 percent who flee, 60 percent of whom are drug defendants. In other words, the rate of drug defendants in Florida who flee is six times the national average.

These figures may exaggerate the problem somewhat, since 40 percent of the Florida drug defendants have only been charged but never arrested. Some of them may not be aware that there are charges pending against them. But even excluding most of these defendants, it is clear that drug-related crimes are causing tremendous problems in Florida, and are representative of problems in other areas nationwide.

These figures show that there are two different problems one must consider in relation to the Bail Reform Act: flight risk and risk of danger.

The Bail Reform Act provides judges with the necessary authority to impose conditions and even pretrial custody on those defendants who present a risk of flight. The problem in this regard seems to be that judges do not always exercise that authority. To a narcotics defendant, a money bond of $1.5 million may be easy to post, and no great loss to forfeit in exchange for avoiding prosecution. Courts must begin to set money bonds that are commensurate with the net worth of the defendants, and Congress must be sure that they do.

There are a number of alternatives that would help to reduce the risk of flight and danger to the community. The pretrial services agencies are the most outstanding example of one alternative. The Subcommittee on Crime held extensive hearings on these agencies and found that the 10 demonstration districts have made remarkable progress in reducing rates of crime on bail and risk of flight. Pretrial supervision while on release has played a large part in these reductions, and the testimony before the subcommittee indicated that expansion of pretrial services would extend the success of the agencies throughout the country.

Mr. Sawyer, the ranking minority member of the subcommittee, and I have, therefore, introduced H.R. 3481 to extend pretrial services to every Federal judicial district where the courts think it is necessary. That bill is presently before the Rules Committee and,

as the chairman and other members know, is being held up before the Rules Committee on issue of danger to the community.

Perhaps the condition set forth in 18 U.S.C. 3146(a)(1), which authorizes the court to place the defendant in the pretrial custody, and under the supervision, of a designated person or organization, should be made more explicit, and should provide for the more extensive supervision by pretrial services organizations. Expansion of other conditions over a defendant released pretrial, and required urinalysis testing for defendants who are narcotics users, should also be considered.

The subcommittee has recently held hearings on the operation of drug-testing facilities used by the courts, and the Subcommittee on Crime will meet tomorrow to mark up H.R. 3963, a bill I have introduced to extend the authorization of these operations.

This subcommittee might also consider codifying the rights of the courts or the Government to refuse to accept a bond if the money for it comes from criminal activities. The right of the court to look beyond the posting of bond to inquire into its source has already been recognized in a second circuit case opinion, *United States* v. *Nebbia*. Consecutive sentences for defendants convicted of committing crimes while on pretrial release is another possibility. We cannot allow defendants to violate the conditions of their release with impunity, and leave them free to prey on society because there are no consequences for their transgressions.

There is only one preventive detention statute in the country, and that is in the District of Columbia. Its constitutionality has recently been upheld by the District of Columbia Court of Appeals in *United States* v. *Edwards*. While a few States permit the courts to consider dangerousness in deciding what conditions to impose on a released defendant, only in the District of Columbia are courts permitted to detain a defendant pretrial on grounds of dangerousness. The advantage of a statute such as the District's is that it sets forth stringent procedures with which the Government and the court must comply before the defendant can be detained.

We must and do recognize that the loss of liberty pretrial is a great hardship and should be used only when clearly appropriate and with safeguards to insure that the process is fair. That is why I have introduced H.R. 4264, a bill that substantially incorporates the provisions of the District of Columbia statute into title 18 of the United States Code.

My bill would provide that a court could detain a defendant who it believes is dangerous, but only after a hearing in which the court determines by clear and convincing evidence that the defendant is dangerous, and that no alternatives, such as conditions imposed on release or advancing the trial date, will protect the community.

My bill would also permit the courts to detain only those defendants charged with violent crimes or with serious narcotics offenses, and only in certain situations, when there is a substantial probability that the defendant committed the offense for which he or she is before the court, and when certain other circumstances exist that make such detention clearly appropriate, and the only way to protect the community.

Finally, H.R. 4264 improves upon the District of Columbia statute, in my judgment, in several other respects. It insures that the

defendant receives very important due process protections, such as the right to cross-examine Government witnesses who are called to testify at the hearing, a right that is not made explicit in the District of Columbia statute. It guarantees the defendant access to counsel during detention, and permits the defendant to be released from detention, under certain circumstances, if necessary for the preparation of the defendant's case.

H.R. 4264 also attempts to avoid the problem that has kept the District's statute from being used as much as it should be, even when it is obviously appropriate. In the District, courts simply set high money bail on the pretense that the defendant is a flight risk when, in reality, what the court believes is that the defendant is dangerous. H.R. 4264 specifically provides that money bail shall not be set to insure community safety, and requires the court to determine that the defendant is not a flight risk first, and is, therefore, eligible for release, before proceeding to the dangerousness determination.

Mr. Chairman, the Bail Reform Act needs to be amended to deal with a number of problems, and I have touched on some of them here this morning.

I believe that H.R. 4264, the bill that I have introduced, is a major step toward resolving some of these problems, and toward making our criminal justice system more fair and equitable for all concerned.

Thank you, and I would be very happy to respond to any questions.

Mr. KASTENMEIER. We thank our colleague for that brief and certainly to-the-point discussion of the problem as he sees it.

I would like to know a little bit about H.R. 4264. Eventually, probably in the leadoff hearing in September, we will ask our colleague, Mr. Sensenbrenner, who is the author of H.R. 3006, how your bill differs from the Sensenbrenner bill, if you are familiar with it.

Mr. HUGHES. I am somewhat familiar with it.

I have basically incorporated the D.C. Code with approximately four major changes. The right to counsel is not explicit in the D.C. Code; we have insured that the court has to go through a flight risk determination first—before the court gets to the determination as to whether the defendant presents a danger to the community. Both determinations would be made in one hearing, however.

In addition, H.R. 4264 guarantees a right of cross-examination which is not made explicit in the D.C. statute, and we have combined the danger to the community and violent crime provisions of the D.C. Code into one general criterion to be used by the court in determining whether or not the defendant is a risk to the community.

Those are the four major areas.

Mr. KASTENMEIER. In other words, your bill, in providing the defendant due process, goes beyond the case you cited which upheld the D.C. pretrial detention bill, *United States* v. *Edwards?* In other words, your bill actually provides more safeguards than *United States* v. *Edwards* found necessary in upholding?

Mr. HUGHES. That is correct, yes.

In fact, in reviewing the D.C. Code, we felt there were some areas where we could improve it. There are some other changes.

For instance, the D.C. authorities have had some difficulties with the time limits on a continuance for the prosecution. I have expanded those time parameters somewhat so that both the prosecution and defendant have 5 days, as opposed to 5 days for the defense and 3 days for the prosecution.

In addition, as I have indicated, there are two criteria used by the D.C. Code to determine dangerous and violent crimes. H.R. 4264 would apply to those defendants accused of violent crimes. It adds a separate category for serious narcotics offenses, and it maintains the third category set forth in the D.C. statute, where the defendant, for the purpose of obstructing or attempting to obstruct justice, threatens, injures, intimidates, or attempts to threaten, injure, or intimidate any prospective witness or juror.

Mr. Sensenbrenner's approach is strictly a provision that the court may take danger to the community into account without setting up procedures for the court to make that determination. We think that those procedures are important.

We think, in addition, that many of the problems that face us, in both drug and nondrug cases, can already be addressed by the courts. Courts across the country, can presently take into account the type of offender who is before the court. If it is a class 1 narcotics offender, for example, the court can deny bail now, in certain situations. Right now it is a guessing game as to whether or not a certain defendant can make bail, whether it is set at $1 million or $1.5 million. But if the individual before the court is not an American citizen, has been arrested for trafficking in narcotics, is a heavy trafficker, then the court is on notice that he is a potential flight risk and can incarcerate the defendant under those circumstances. It is just a matter of the court using its authority.

Courts in other instances are taking into account danger to the community. I have heard judges, who have appeared before the subcommittee say, we really don't have any problems with dangerousness, because we just take that into account on the issue of flight risk.

I think we have to put some honesty into that process. That is why we feel it is important to set up a process where the courts make that determination. The first determination should be whether a defendant is a flight risk.

Mr. KASTENMEIER. And if he is, you don't have to reach——

Mr. HUGHES. You don't reach the danger to the community aspect of it. But I think it is important to require the court to go through that procedure before determining whether the defendant presents a danger to the community. So we have set up a structure that will encourage that type of two-step procedure before the court. We think that is preferable.

Mr. KASTENMEIER. I have a number of other questions.

I am going to yield to my colleagues because we may have a vote shortly and I don't want to monopolize the time.

The gentleman from Virginia.

Mr. BUTLER. Just on that point, why is it important to go through this rigamarole? If the guy is a danger to the community, why should they have to go through all the other chairs first?

Mr. HUGHES. Because if the defendant is a flight risk, that is a fairly easy determination, I would think.

Mr. BUTLER. That is where the problem is.

Mr. HUGHES. The danger to the community requires an initial finding that there is clear and convincing evidence that the defendant has committed the charged offense before deciding whether he or she is dangerous. After all, with the first requirement, what we are trying to insure is that the defendant is going to be before the court when summoned to be there to answer the charge. He is presumed innocent until he appears before the court and is tried and convicted. So that presumption, as the gentleman well knows, carries throughout those proceedings.

The flight risk determination is the most important determination to guarantee it that the defendant is there. Another factor is whether or not this defendant is a missile who is going to or may hurt other people in the community. To reach that determination, requires a hearing to determine by clear and convincing evidence that the defendant is indeed a menace to the community. If we can't expedite the case and still protect the community, then the court, consistent with due process, must decide if the defendant may be detained, presents no risk of flight but is a potential risk to the community.

Mr. BUTLER. Thank you.

Mr. HUGHES. The reason we think these procedures are so important is because it is an important determination to incarcerate somebody for perhaps 5 or 6 months.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

What has been the experience, if you know—I see the next witness is Mr. Ruff, who maybe can answer it better—but I am wondering in the case of narcotics traffickers, has the pretrial detention been used successfully in the District of Columbia.

Mr. HUGHES. I wouldn't be able to respond to that. I really don't know.

Mr. RAILSBACK. I guess the reason I ask, in the case of a narcotics trafficker, I would think that it might be a little bit difficult depending on how you define danger to the community, to prove danger to the community in the absence of any history of violent crime or anything like that, although I guess narcotics in itself, narcotics offenses are classifed, aren't they, as dangerous crimes?

Mr. HUGHES. Yes. In fact, much of the violence we see today emanates from the trafficking in narcotics. The incidence of violent crime in Florida, for instance, is directly related to the trafficking in drugs.

Mr. RAILSBACK. Florida has a monumental problem, in my opinion, with not only Florida, but even in the city of Chicago we have the notorious Herrera family involved in trafficking and apparently many of them that had been arrested would simply post whatever bond and then take off.

So I think I appreciate very much the gentleman's remarks and his recommendation, and I think that it is time that Congress take a serious look to see if by reason of the change in criminal offenses and bail jumping and so forth, maybe we should tighten up the law.

I appreciate the gentleman's testimony.

Mr. HUGHES. I might say that drug offenders fall into a separate category. If the offense charged is either a violent crime or a serious drug crime, or if the defendant's pattern of conduct, consisting of his past and present conduct, poses such a danger, the defendant may be detained. But most of the drug trafficker cases that I am aware of involve a risk of flight more than they do a danger to the community.

Mr. RAILSBACK. Yes; except I wonder how that is applied where there is no history of past flight? In other words, it would seem to me it would be difficult to show a risk unless you can show that the trafficker has jumped bail before.

Mr. HUGHES. If there are no community ties, for instance, if you are dealing with somebody who is not an American citizen, who is arrested in this country for trafficking, there might be an undue risk of flight. But you are right, without some tie to present or past conduct, a court would be hard-pressed to make a determination that the defendant presents a danger to the community.

However, given the circumstances that we find in some parts of the country now in the area of drug trafficking, it may very well be that a U.S. attorney could develop that type of a pattern. That is why we have included that category.

Officials in the District of Columbia have had excellent experience with the statute. It has been used sparingly. Most of the cases, as I understand it, but certainly the U.S. attorney can testify to this better than I can, have been directed to danger to the community in non-drug-related matters.

Mr. RAILSBACK. Thank you very much.

Mr. KASTENMEIER. The gentleman from Michigan, Mr. Sawyer, who has been interested in this problem, as a member of both the Criminal Justice and the Crime Subcommittee.

Mr. SAWYER. Thank you, Mr. Chairman.

I am a little puzzled where the gentleman from New Jersey is coming from, to tell you the truth. And I happen to be ranking on the gentleman's subcommittee.

When we had before us the pretrial services in which I joined with the gentleman expediting through and getting through, I wanted to put an amendment on it to tie in with the provision we had in it allowing the pretrial investigator, whoever he might be, the probation officer or whatever, vis-a-vis the danger to the community, to add an amendment to the Bail Reform Act to allow that information in effect, if it is provided, to be used by the judge.

At that point it was not considered germane in the subcommittee. I then brought it before the Rules Committee in connection with the act. The gentleman would not support it at that point. He did not oppose it, but he would not support it.

Then they added—the Rules Committee, as an end product, then held up approving or granting a rule. I then added it to what amounts to the D.C. preventive detention provision, too, which was basically my amendment, to the pretrial services and routed it to the gentleman's office to see if he wanted to join now in seeing if we could put one through.

The next thing I know he put in another one himself. So yesterday I reintroduced mine. To tell you the truth the gentleman has

left me totally befuddled as to what he is doing or why he is doing it. I am curious.

Mr. HUGHES. The gentleman well knows I support modifying the Bail Reform Act. I have been consistent throughout. As the gentleman well knows, I endeavored to take up bail reform, to incorporate danger to the community into the pretrial services bill, and my request was rejected because our subcommittee did not have jurisdiction.

Mr. SAWYER. You wouldn't support it before the Rules Committee, where I tried to get the thing made germane, and then I never got any response from you after that when I routed the bill with that provision on the back. I find out you introduced your own bill. It confused me.

Mr. HUGHES. As the gentleman well knows, we are hung up on a jurisdictional dispute and, frankly, it was my agreement with the chairman of the full committee that I would not endeavor to exert jurisdiction since jurisdiction was before this subcommittee. I think I advised the gentleman that that was my concern.

Mr. SAWYER. I never got any response when I sent the bill up with this addition to it until I find out you just introduced your own bill.

Finally, when I realized that, I reintroduced the bill yesterday. The gentleman puzzles me.

That is all. I yield back, Mr. Chairman.

Mr. HUGHES. I am sorry that the gentleman feels that way, because frankly, I have done nothing except to support the general concept of bail reform. The only place that there perhaps may have been some misunderstanding was in not communicating to you that I was introducing a bill on which to testify here this morning.

But I join with the gentleman in trying to secure a modification of the Bail Reform Act. I have been consistent throughout on that issue. The only place where the gentleman can perhaps—I would think in all fairness—be disappointed would be in my refusal to try to take on jurisdiction where I have been informed that I don't have jurisdiction. I don't set up the jurisdictional lines around here.

It seems to me it was unfortunate that we couldn't have taken up modification of the Bail Reform Act at the same time we took up pretrial services.

Mr. SAWYER. I yield back.

Mr. KASTENMEIER. I think the Chair has to take some responsibility for events as they have happened. But I know of the gentleman from Michigan's interest in the subject preceding this Congress, as a matter of fact. But I did not know you had just introduced a bill, as I understand.

Mr. SAWYER. I did after—it had been sitting up at the gentleman's office for I do not know how long, but the gentleman introduced one of his own so I introduced mine yesterday.

Mr. KASTENMEIER. In any event that too shall be on our list of——

Mr. HUGHES. Let me say to the chairman that if I am not mistaken, the bill that Mr. Sawyer is talking about is a combination of pretrial services and bail reform. And I thought I had indicated to the gentleman I was not predisposed to support such a bill. If I did

not, I am sorry. I was under the impression that I had informed the gentleman, but I thought as long as there was movement before this subcommittee, I was not prepared to take up a combination of pretrial services and modification of the Bail Reform Act.

Mr. KASTENMEIER. The Chair appreciates the gentleman from New Jersey's position.

Mr. HUGHES. I wonder if I can find out from the gentleman from Michigan, is the gentleman talking about a bill combining the issues of pretrial services and bail reform?

Mr. SAWYER. Yes. And I had not been advised by the gentleman that he wasn't interested in doing that. In fact, I had suggested that I would send it up so he could consider whether he wanted to join in it and he thought that this was a good idea at the time and that was the last I heard about it.

Thank you.

Mr. KASTENMEIER. The gentleman from Virginia?

Mr. BUTLER. Thank you, Mr. Chairman.

You know it is embarrassing though that we have jurisdictional problems within the Judiciary Committee. This is a pretty amenable group of people. It seems to me we ought to have been able to work that bail reform and pretrial services into one piece of legislation, despite the intrasquad jurisdictional problems. To send this legislation on sort of in two halves does not do any credit to the committee. I hope before we get through playing with this we can put them both in the same package and send them on.

Mr. KASTENMEIER. If the gentleman will yield, I do not see that that is necessary. The Bail Reform Act of 1966 is an act which we can amend or not amend as we see fit. I do not know that we need to add it to other bills to deal with it in reconciliation or anything else.

I think we need to meet the issue head on. That is what we are engaged in.

Mr. BUTLER. I appreciate the chairman doing that. I just think that the jurisdictional disputes belong somewhere else. But I appreciate the contribution of the gentleman from New Jersey and I am interested in the mechanics, a little bit of your testimony and this legislation.

We talked about how really important it is to maybe get the flight problem resolved before we even get into the danger problem. But the way this legislation is written, if you make a determination, you can't get into the danger problem until there has been a determination that he is eligible for release under this section, under the flight provisions.

Suppose it takes some time to meet the conditions of release on the flight aspect, to meet the condition or maybe the amount of bail takes a little while to get the money together, or question about surety, any of those things, so whether the guy is eligible for release or not is up in the air for a period of time.

Mr. HUGHES. The court can detain him until that determination is made.

Mr. BUTLER. The court has to detain him?

Mr. HUGHES. Right.

Mr. BUTLER. Now once those conditions are met, then he is eligible for release. If he has been held for some little time under that,

while he gets his act together on that score, is it too late for the court to then go into an inquiry under this bill of whether he is a danger?

Mr. HUGHES. No. This bill doesn't contemplate two separate hearings. This would be all one hearing, a two-step process that the court would make. It may very well be that much of the evidence is relevant on both issues, both flight risk and danger to the community. If a determination——

Mr. BUTLER. I see. So the evidence is going to be taken?

Mr. HUGHES. At one hearing.

Mr. BUTLER. On flight as well as danger, all at one hearing?

Mr. HUGHES. That is correct; it doesn't envision two hearings.

Mr. BUTLER. All right. That was not clear to me.

Mr. HUGHES. If the court makes a determination that they are indeed two separate issues and that the orderly administration of justice requires two separate hearings, that is something else again, but it would be my belief that the court will take the testimony bearing on the defendant's flight risk and danger to the community at one and the same time, and then would have to go through a two-step process, the first determination being whether he is a flight risk. If that is resolved against the defendant, the court would not get to the second stage.

Mr. BUTLER. I contemplate a situation where they have the hearing on flight and the judge says I do not want to hear anything about danger until we resolve the flight issue. They say then well, it is obvious that we want to keep him around so we set a big bail and we go for a million dollars, since you mentioned that, and somehow they get the money together. Then the judge hasn't heard any evidence on the question of danger because—why should he? Flight was the first issue.

I do not see how you can get around having two hearings. The question in my mind is, is it too late to have the second hearing when you have tied him up on the flight issue while he meets those conditions?

Mr. HUGHES. I think the court has the inherent authority to detain the defendant until this determination is made and I do not envision, first of all, that the average case is going to require two separate hearings.

Mr. BUTLER. All right.

Now, the judicial officer can hear and dispose of any motion for an order under this section. Is there no question in your mind that the judge himself, Meri Motu, may make the determination without a motion from the Attorney General or from the District Attorney for detention under the danger provision?

Mr. HUGHES. There has to be a motion by the government. I can't imagine situations arising where the court would want to do it on its own motion. It would require a motion by the U.S. Attorney, not just for the initial hearing, but even if the defendant is released—where either no determination was made or where circumstances might later indicate that the defendant presents a danger to the community—the government at that time can move for another hearing. But it does take action by the prosecution.

Mr. BUTLER. And you are comfortable with that?

Mr. HUGHES. I can't conceive of any situations where the government would not want to be a willing partner in moving for such a hearing. If something comes to the attention of the court that would indicate the defendant is a danger to the community, as a matter of routine it would be referred to the U.S. attorneys.

Mr. BUTLER. All I know is that if somebody on bail commits a murder, the person who gets the blame is the court. About the third time that happened I, the judge would start looking at these things more carefully, whether the District Attorney did it or not.

Mr. HUGHES. I am not averse to having the court be able to do that on its own motion.

It may very well be that the subcommittee would want to consider that, but I can't conceive of many instances where the U.S. Attorney's Office would be short-circuited, where the U.S. Attorney wouldn't want to be the moving party. Obviously the U.S. Attorney is going to have to present the proof. So it seems to me that the U.S. attorney would have to be involved in it at all stages anyway.

Mr. BUTLER. All right. I am not bowing to your wisdom, I am just acknowledging it. You have good suggestions on page 5 of your testimony dealing with: should the flight provision be more specific, more explicit as to the place or persons in custody; a requirement of your analysis, consecutive sentences for defendants convicted; several suggestions which struck me as very reasonable. Are any of them in your bill?

Mr. HUGHES. We are marking up H.R. 3963 tomorrow, which addresses the urinalysis question. Right now that program is due to expire next year. That program has been very successful in identifying those probationers and parolees who show traces of narcotics drugs.

Mr. BUTLER. Will you consider the question of a condition of the defendant released pretrial or requiring a urinalysis testing for defendants who are narcotics users, will that be in the legislation you are considering tomorrow?

Mr. HUGHES. That is already one of the conditions that may be imposed as a condition of release. One of the things that we encourage in this bill is that, where a defendant does not present a risk to the community, and if in fact other conditions are imposed, one of them be that the defendant subject himself to urinalysis examination.

Mr. BUTLER. All right, fine.

May I ask you this: When you get through marking up your bill and if any of these suggestions belong in this bill and not in your bill, will you please have your counsel communicate with us?

Mr. HUGHES. Sure, I'd be happy to. That is a good suggestion.

It is unfortunate that we have so much overlap. It does present problems.

Mr. BUTLER. As one of the members of the subcommittee that was supposed to try to revitalize jurisdiction around here, we find that we run into problems with that. It is just one of the things that makes life interesting.

I yield back, Mr. Chairman.

Mr. KASTENMEIER. Let me just ask one further question. If the gentleman has the time, I would ask him to return after the rollcall which is in progress. Following up on the question just preced-

ing, does your bill call for a procedure which requires in the judge to determine that a narcotics dealer might also involve himself in violent crime, in order to avoid flight. Let's say the U.S. attorney asks for no bail and incarceration. However, the judge sets a $200,000 bail. At that point, the U.S. attorney says "Wait a moment, your Honor." Now we reach the second question. This defendant is also a danger to the community and we want to make a showing in that connection that he not be released on $200,000 bail to avoid flight, on which we lost the first one, but now we go to the second point.

Is that the way you contemplate it?

Mr. HUGHES. Yes.

Mr. KASTENMEIER. Then he makes a showing that the person is a danger to the community and should not be released on any money bail?

Mr. HUGHES. That is correct.

One of the criticisms we have heard of the D.C. Code is that the judges use risk of flight as a reason to incarcerate and never get to what, in effect, is the primary threat to society, that is that the defendant is a danger to the community. We try to avoid that.

We think that flight risk determination, although part of a hearing that would determine whether the defendant is generally a fit subject to be released, should be the first consideration, the first of the process that the court goes through in determining whether the defendant should go free on bail and if so, under what conditions, and if the conditions cannot satisfy the risk of danger to the community, then there is a process for the court to hold the defendants under those circumstances.

Mr. KASTENMEIER. Thank you, the committee will recess for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The committee will reconvene.

We hope momentarily one or two of our other colleagues will be here. When we recessed we were hearing from our colleague Mr. Hughes. Mr. Hughes will not be able to return forthwith. Accordingly, we hope he may return later for further questions.

But we are very pleased to have as our second witness today, and we are pleased he could wait until this time to be here. He is the distinguished U.S. attorney for the District of Columbia, Charles Ruff.

Mr. Ruff, you are most welcome and we are pleased to have you here this morning.

TESTIMONY OF CHARLES RUFF, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA

Mr. RUFF. Thank you.

I appreciate the opportunity to be here today and to talk to you a little bit about our experience with the pretrial release statutes in the District of Columbia, and particularly the preventive detention statute.

You have my prepared statement and I am at the chairman's pleasure with respect to whether it would be useful for me simply

to go through it or simply to answer questions that the committee may have.

Mr. KASTENMEIER. Well, notwithstanding the fact that it is given for the record and we will accept it, and without objection make it part of the record, still if you don't mind, if you don't care to read it, you may summarize it at least so we have the essence.

Mr. RUFF. Let me do that then.

As you know, we have in the District of Columbia essentially two bodies of law governing pretrial release, the Bail Reform Act of 1966, which governs in the U.S. District Court, and the bail laws contained in the D.C. Code, title 23, sections 1321 and following, which govern in our superior court. In their essence they are very similar. That is, they both contain presumptions in favor of release on personal recognizance followed by a graduated series of conditions which the court is admonished to impose, the least onerous of which must be imposed that will insure the defendant's appearance for trial.

The key difference between the two statutes is that the D.C. Code makes explicit provision for the court to consider the dangerousness of the accused, danger to any person or to the community at large, in deciding on release conditions, with one major exception. That is that the statute specifically provides that no financial condition, that is no money bond, no bail, may be set to respond to a finding of dangerousness.

There may be other conditions set, third party custody, restricted movement, curfew, what have you, to respond to that dangerousness issue, but money bond may not be set. The key provision for dealing with the dangerousness issue is what has come to be known as the preventive detention statute contained in section 1322 of title 23 of the D.C. Code. That statute permits the court to detain pending trial a defendant who is found to meet certain very strict criteria.

First, the court would question the nature of the crime for which the defendant has been arrested and the statute defines two classes of crime: No. 1, the dangerous offense, which is robbery, burglary, rape, arson, or narcotics; and No. 2, the crime of violence, rape, indecent liberties, kidnapping, robbery, burglary, manslaughter, and various forms of assault.

If the court finds that the defendant has been arrested for a dangerous crime, then the court must, in addition, find that the defendant's pattern of behavior consisting of his past and present conduct is such that there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community.

If the defendant has been arrested for a crime of violence, on the other hand, the court must find either that he was convicted of a crime of violence within the preceding 10 years or that this crime for which he was arrested was committed while he was on some form of either pretrial release, probation, or parole from still another crime of violence.

If either of these findings is made, then the court must go on to a third step, which is to determine that with respect to the offense for which the person was arrested and is before the court, there is "a substantial probability" that the defendant committed the crime

for which he was arrested, the legislative history making it clear that substantial probability falls somewhere in between the standard of probable cause which would normally be applied in a preliminary hearing after an arrest, and guilt beyond a reasonable doubt, which of course is the trial standard. Pretrial detention hearings are initiated by the U.S. Attorney on our motion and will be held immediately or not later than 5 days after the arrest, if either the Government or the defense seeks a delay.

Defendant is represented by counsel; this would be true in any criminal proceeding in the District of Columbia; counsel is appointed immediately upon his first appearance in court. The rules of evidence—by virtue of this statute—that would normally govern a trial, do not apply at pretrial detention hearings. So that hearsay testimony is admissible and indeed most frequently it is hearsay which is proffered at one of those hearings.

If the defendant is ordered detained after the court has made the various findings I have described, he must be tried within 60 days of detention or have his release, eligibility for release, treated under the normal pretrial release standards contained in section 1321.

As the committee knows, and as Congressman Hughes indicated, we have recently had our first formal ruling on the constitutionality of the preventive detention statute in *United States* v. *Edwards*. The Court of Appeals for the District of Columbia, sitting en banc, decided, in an opinion written by the chief judge and concurred in by six of his colleagues, that the statute was constitutional both on its face as tested against the requirements of the eighth amendment dealing with probation against excessive bail, and in the procedures that it established for determining whether or not an individual ought to be detained.

Essentially, the challenge that had been made against the bill focused first on the eighth amendment issue, which was disposed of simply by a conclusion after an extensive review of the history of the amendment that the prohibition against excessive bail did not in fact deprive the legislature of the right to provide for no bail at all.

With respect to the procedural aspects of the bill, the court concluded: No. 1, that preventive detention was not the equivalent of punishment that would be imposed after trial and thus that the Government did not have to carry its normal trial burden of "proof beyond a reasonable doubt."

No. 2, the court addressed the question of whether the defendant was given adequate notice of what acts or conduct would be relied on to meet that aspect of the standards imposed by section 1322 and concluded on the facts of *Edwards*—in this situation I might note the defendant had confessed to 17 previous robberies—that there was sufficient evidence of past conduct, evidencing the defendant's danger to the community.

And last, and perhaps most troublesome, the court coped with the issue of confrontation rights. The defendant demanded the right in this case, a rape case, to confront and question the victim of the rape. The Government took the position that it was not required to produce the victim—that indeed it would be an unnecessary intrusion on the victim in the particular circumstances of this

case to require her to come in and recount the details at this preventive detention hearing, and that it was sufficient that the proffer of evidence made through various police officers and through the confession of the defendant himself be used by the court as the basis for the conclusion that there was indeed a substantial probability that the defendant committed the offense.

The court dealt with this issue and concluded that, indeed, under the special circumstances of the preventive detention statute the full-blown right of confrontration and cross-examination that would be accorded the defendant in trial was not necessary at this pretrial stage.

Historically, Mr. Chairman, the U.S. Attorney's Office, being sensitive to many of the due process concerns that are implicit in the use of the preventive detention statute, as well as concerned for the resources which are required to cope with the expedited trial scheduling and the investigation of these offenses under a very short timetable, has been cautious in using the statute.

We have gone forward only where there has been a particularly strong showing, both of the defendant's liability for the current offense and his past proven record of dangerous conduct.

For example, just to give you a few statistics: In the first 4 years or thereabouts that we have statistics on the statute, that will run from the middle of 1976 through 1980, we moved for preventive detention in only 73 cases. The court granted 60 of our motions and I think it is worth noting that in each case where a defendant was preventively detained, he was thereafter convicted.

Just last year, to give you a more up-to-date comparison with our current statistics, we sought preventive detention 12 times in 1980, 10 of our requests were granted, and all the defendants, as I say, were convicted, including the two as to whom the motion was denied.

Looking back at our history of use of the statute, I made the conscious decision in this past year to begin increasing the use of the preventive detention provisions and so far in 1981 we have made 17 such requests, 10 have been granted, and 2 defendants pleaded guilty at the preliminary hearing. Of course we don't yet have the full record on the disposition of those cases because they have not all come to fruition.

I expect that, given the strong concerns that have been stated frequently by various members of the community and our own sense of the importance of dealing with the recidivist, this increased use of the preventive detention statute will continue.

I think there is one aspect of the statute which is frequently ignored which is very important for this subcommittee to focus on, and which really does provide for us a most important tool in dealing with the recidivist, with the repeat offender, and the offender who commits a crime while on pretrial release. That is the provision permitting us to seek the court to detain the defendant for a period of 5 days if the court finds that the defendant committed the current offense while either on parole or probation from any Federal, District of Columbia, or State agency.

During those 5 days we contact that parole or probation agency, we ask them to issue a detainer, a warrant based on the violation of parole or probation conditions, and the defendant is held pend-

ing trial, not on the preventive detention provisions of section 1322 but under the warrant of detainer issued by either the parole or probation authority.

Just to give you some sense of what the statistics are like in that area, in 1980, whereas, as I indicated, we only made 12 requests for preventive detention, 140 defendants were held on parole detainers and 42 defendants on probation detainers. So far in 1982, 62 defendants have been detained on parole and 9 have been detained pending probation revocation hearings. I expect that this use of the 5-day-hold provision will continue to be our principal weapon to deal with the repeat offender.

In sum, Mr. Chairman, I think it is fair to say that our experience as the only jurisdiction in the country with a formal preventive detention statute leads us to believe that we can use it appropriately to deal with the recidivist, with the person who has a repeated history of criminal conduct, as well as the person who commits offenses while on pretrial release for other crimes.

We try to use it carefully; we try to use it with due regard for the interest of the accused that he not be incarcerated until he has been found guilty; but it is important to us to balance that interest against the interests of the community. We think we have done so. We think the D.C. Code reflects an appropriate legislative balance of those interests.

We make judgments not on classes of defendants, not simply concluding that because a person has been charged with a particular form of crime he ought to be detained, but making individualized judgments about whether the particular individual, first, committed the crime that he is charged with and, second, has a history of criminal conduct which does enable us to predict that there is a high risk of harm to the community.

That I think summarizes my prepared statement, Mr. Chairman. I would be glad to answer the committee's questions.

[Statement of Mr. Ruff follows:]

PREPARED STATEMENT OF CHARLES RUFF

Mr. Chairman, members of the subcommittee, thank you for giving me the opportunity to appear before you today to discuss the experience of our Office under the District of Columbia's pre-trial release statutes.

As you know, the Superior Court of the District of Columbia operates under a body of laws in some ways similar to and in others very different from that which governs the United States District Courts here and throughout the country. The core of the Federal Bail Reform Act and the core of Section 1321 of Title 23, D.C. Code, are essentially identical: in both schemes there is a presumption in favor of release on personal recognizance and a graduated series of release conditions, ranging from third-party custody to formal bail bond, with a preference for the last onerous condition which will ensure appearance for trial. The key difference at trial but the likelihood of danger to any person or the community, as well.

In attempting to address the issue of dangerousness, however, the court may not impose any financial condition. The defendant who poses a danger may be placed in third-party custody or restricted in his movements and associations, but money bond may not be set for the purpose of detaining him unless there are also grounds for a finding that he is a poor reappearance risk.[1] Instead, the D.C. Code contains special provisions to enable the court to deal with the defendant who represents too great a danger to be released pending trial.

[1] Of course, among the factors statutorily mandated for consideration on this issue is the seriousness of the offense charged as well as the defendant's past conduct.

Section 1322, commonly known as the preventive detention statute, permits the court to detain pending trial a defendant who is found, after a hearing, to meet certain stringent criteria. The first criterion focuses on the nature of the crime for which the defendant has been arrested; the second on the defendant's past behavior and criminal record; and the third on the standard of proof which the government must adduce. If the defendant is arrested for a "dangerous crime" (e.g., robbery, burglary, rape, arson or narcotics), the court must find that his "pattern of behavior consisting of his past and present conduct" is such that "there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community." If the defendant is arrested for a "crime of violence" (e.g., rape, indecent liberties, kidnapping, robbery, burglary, manslaughter, and assault with intent to commit an offense or with a dangerous weapon), and either was convicted of another crime of violence in the preceding ten years or was arrested on the present charge while he was on pre-trial release, probation or parole for another crime of violence, the court must again find that no conditions of release will protect the community. In either case the court must find that there is a "substantial probability" that the defendant committed the crime for which he was arrested.[2]

A pre-trail detention hearing is initiated by the United States Attorney's motion and is held immediately unless the government seeks a continuance (a maximum of three calendar days) or the defendant seeks a delay (a maximum of five calendar days). The defendant is, of course, represented by counsel and may testify or present evidence if he wishes. The government's proof need not conform to the rules of admissibility which would govern a trial. If the defendant is detained, the trial of the underlying offense is given priority, and the defendant must be tried within sixty days of his detention or be treated under the normal pretrial release standards.

The pre-trial detention statute has been on the books for eleven years, but it was not until May 8, 1981, that its constitutionality was formally addressed by the District of Columbia Court of Appeals.[3] On that date the Court ruled, in an opinion by Chief Judge Newman, joined by six judges, that the statute is both constitutional on its face in authorizing pre-trial detention without bail and constitutional in the procedures it authorizes for determining that such detention is warranted. One judge dissented on the due process issue, and a second judge dissented on the ground that the statute is violative of the Eighth Amendment's prohibition against excessive bail.

The defendant had challenged the procedural aspects of the statute on a number of grounds: that the government should be required to carry the same burden it would have to carry at trial—proof beyond a reasonable doubt; that he was given insufficient notice of the acts on which the government would rely to establish his past conduct; and that he should have the right to confront and cross-examine the government's substantive witnesses. On each point, however, the Court concluded that the statute provided adequate protection for the defendant's rights: that pretrial detention is not punitive and that the trial standard of proof is not, therefore, required; that on the fact of this case (a confession of seventeen previous robberies) sufficient notice had been given; and that the same rules regarding confrontation of witnesses should apply as apply in a typical preliminary hearing where hearsay has historically been permitted.

Because the United States Attorney's Office has been sensitive to the due process issues posed by the preventive detention statute and because of the potential impact on police, prosecutorial, and judicial resources, we have historically been cautious in employing it. We have chosen to go forward only in those cases where the proof of the defendant's involvement in the crime for which he was arrested is particularly strong and where his past conduct clearly evidences a pattern of dangerous conduct. Responsibility for identifying cases meriting treatment under this statute and for handling the detention procedures has, since 1976, been entrusted to the Career Criminal Unit, which is made up of five senior Assistants and a complement of Metropolitan Police Department detectives. The Unit reviews each morning's "lockup" list and the supporting police reports to determine which cases may warrant our seeking a detention order. An Assistant and a detective then follow up the basic work done on the arrest in order to prepare for a detention hearing, and if detention is ordered, in many cases the Assistant will retain the case for trial in order to expedite preparation within the allotted sixty days.

[2] A separate basis for detention is provided where a defendant charged with any offense threatens a prospective witness or juror. In this situation the court must still conclude that no conditions of release are adequate to ensure the safety of the witness or juror.

[3] *United States* v. *Edwards*, Nos. 80-294 and 401 (D.C.C.A.)

In a large number of cases a decision will be made that, although detention under the statute may be possible on the facts available to the Assistant, it is preferable to rely on what is a relatively unknown statutory alternative—the "five-day hold" order. Such an order, provided for in Section 1322(e), permits the court to detain for five days any defendant who, when arrested, was on probation or parole for a federal, District of Columbia or state offense. During that five-day period the Assistant contacts the relevant parole or probation authority and asks them to issue their own warrant, and if they do, the defendant is then held on that "detainer" rather than under the D.C. Code pre-trial release provisions. Because many of the defendants whose past conduct gives rise to a threat of continued criminal activity if released pending trial fall into this category of probation or parole violators, the five-day hold provision has proven over the years to be our most effective weapon in dealing with the recidivist offender.

Reflecting the care with which we approach our use of the preventive detention statute, from 1976 through 1980 we moved for pretrial detention in 73 cases, and were successful in 60 of these. During that period every defendant who was ordered detained under the statute was convicted. In 1980 we sought preventive detention twelve times, and ten requests were granted; all defendants were convicted, including the two as to whom our motion was denied. Against the background of this experience with the statute, I have expanded our use of pretrial detention during 1981, and to date we have made seventeen requests; one was withdrawn, four were denied, ten were granted, and two defendants pleaded guilty at the preliminary hearing. In the face of increasing community concern over violent crime and the role of the repeat offender, I expect that this substantially increased use of the detention provisions will continue.

As I indicated earlier, the aspect of the statute which has proved most valuable to our Office has been the authority to seek five-day holds on probation and parole violators. A comparison with the preventive detention statistics may be helpful. In 1980, for example, 140 defendants were held on parole detainers and 42 defendants on probation detainers. Through early June, 1981, 62 defendants had been detained pending parole warrants and 9 pending probation revocation hearings. This volume reflects what can be expected to be a continuing emphasis on the parole and probation detainers to ensure the repeat offender's presence at trial and to minimize the risk of additional offenses.

Our experience with pretrial detention over the years leads us to have confidence in our ability to meet the extraordinarily difficult problem of the recidivist and the defendant who commits an offense while on pretrial release. Used carefully and with due regard for the interest of one charged with crime to be incarcerated only on a finding of guilt, the statute does not, in any sense, represent an undue infringement on the rights of criminal defendants. Rather, it represents an appropriate balancing of the defendant's interests with those of the community. Section 1322 of the D.C. Code reflects a legislative mandate to deal not with broad classes of defendants and presumptions of danger but, rather, with individualized judgments based on proven current and past criminal conduct. These judgments, taken together with the heavy burden the government must bear in establishing the commission of the charged offense and the provision for expedited trial, seem to us clearly to justify the special treatment of the limited class of defendants who fall within the statute's boundaries.

Mr. KASTENMEIER. Thank you very much, Mr. Ruff, for that brief but very useful and enlightening description of your experience in the District of Columbia.

There are a number of things I suppose I should know, but if I ever did know them I guess I have forgotten. For example, if you have someone detained 30 days and subsequently let's say they are sentenced for 90 days, does the period of detention count toward——

Mr. RUFF. Yes, it does, it counts toward that sentence. But generally, of course, if we have detained somebody under the pretrial detention statute they will be sentenced ultimately for much longer than 90 days, so that 30 or 60 days may not be very heartening to them in terms of whatever break it gives to them on their ultimate sentence.

Mr. KASTENMEIER. Would you expand a bit on the use of the 5-day-hold on probation and parole violators. Are these people whom you are charging with an offense also therefore in violation—prima facie in violation of parole or probation?

Mr. RUFF. That is exactly correct. Let me give you an example.

An individual who has been convicted of a serious offense and sentenced to Lorton is released on parole by the D.C. Parole Board. While on parole, that individual is arrested committing a burglary. We would then notify the D.C. Board of Parole that the individual has committed a serious offense, burglary of a home, and ask the Board to issue its warrant on the ground that there is inherent in any grant of parole a requirement that one not engage in criminal activity.

The Board would issue its warrant and thus the person, the defendant, would be held not on the basis of the burglary charge but on the basis that he was presumptively a parole violator. He would have the right, of course, to ask the Board of Parole to conduct a parole revocation hearing. But it has been our experience that most defendants are content not to press that issue before the Board of Parole and prefer simply to await disposition of the underlying offense.

So we have a substantial number of individuals who fall into this category and who remain in detention pending trial on the underlying offense, that is the burglary, without the issue of pretrial release by bail or third party custody or without the issue of preventive detention having to be raised.

Mr. KASTENMEIER. You say they are held for 5 days?

Mr. RUFF. They are held for 5 days pending the issuance of the warrant by the Parole Board. They issue the warrant. Thereafter the individual is held on the parole warrant, not by order of the court.

Mr. KASTENMEIER. And without a determination made as to revocation or the underlying charge?

Mr. RUFF. That is correct. Of course the defendant has the right to press for formal revocation but by and large they do not use that right.

Mr. KASTENMEIER. With respect to the question of flight, the risk of flight, you operate in two jurisdictions, and of course those are relevant.

Is there any distinction between the U.S. District and the District of Columbia with respect to the determination of what constitutes a risk of flight, how a bail might be set or might not be set?

Mr. RUFF. On that narrow issue, I think our experience is basically comparable in the two jurisdictions. I had some statistics run on our superior court experience and during 1980, for example, about 65 to 70 percent of all defendants who came to superior court were released either on their personal recognizance or some form of third party custody or other nonfinancial condition. Another 15 to 20 percent were dealt with by money bond, bail of some form, and then a variety of other alternatives were scattered among the remaining percentage.

The District of Columbia is a very stable community and we have an excellent pretrial services agency here which does a very rapid inquiry into the defendant's community roots and back-

ground; frequently our defendants do have community roots and have had for some time. That is true whether we are talking about district court or superior court. Thus there tends to be a comparable response.

One area in which—and this has been discussed a bit earlier this morning—the one area in which the district court has problems dealing with the risk of flight is in the narcotics area.

We do not have the kind of large-scale international narcotics trafficker that you have in Miami, for example, in the District of Columbia, but we do have a number of major narcotics dealers who therefore have the financial resources to find other places to live and also have the financial resources to make high money bonds if they are set. We do have some experience with the narcotics defendant who has a money bond set who pays it in and goes off and is never seen again.

I wouldn't think, though, that our experience in the U.S. district court is comparable to that of most other large urban areas because we really are a fairly well-defined and stable community here. I think from my broader experience in the Department of Justice that coping with that rich defendant, usually the one who is a narcotics dealer if he is making substantial sums of money, is perhaps the most difficult bail question that the U.S. district court in any district has to confront.

Mr. KASTENMEIER. Assuming they do not pose, at least within the meaning of the term, "a danger to the community." In those cases do you find yourself recommending detention without bond?

Mr. RUFF. There is a special problem in the District of Columbia which bears on that.

Until the new Uniform Controlled Substances Act which has been passed by the city council becomes effective, we do not have in the superior court a really useful narcotics statute. For example, first offender sales of heroin in the District of Columbia, no matter how large the amount, are misdemeanors under the District of Columbia law until such time as the new law takes effect, which, depending on what the Congress does over the next few days, will either be next Wednesday or the middle of September.

Therefore, almost all our major narcotics cases are tried in U.S. District Court where we do not have the advantage of the preventive detention statute. Thus I do not have any personal experience to give you on whether indeed preventive detention would make a substantial impact on the narcotics problem. I like to think it would.

I like to think that a narcotics offender is a danger to the community, especially the heavy trafficker, by definition, and if there were a Federal preventive detention law available, we would use it.

Mr. KASTENMEIER. I take it that preventive detention means detention because the subject is a danger to the community.

Mr. RUFF. That is correct.

Mr. KASTENMEIER. And not because of the likelihood of flight?

Mr. RUFF. That is right, it is a code word for the dangerousness side of the statute rather than the likelihood of flight.

Mr. KASTENMEIER. What relationship is there between the speedy trial act and the need or the resort to preventive detention? What is the interaction between these two issues?

Mr. RUFF. In the superior court we do not have a formal speedy trial act. There are judically imposed constraints on us to bring cases to trial as rapidly as possible. But in the superior court, a large urban street crime jurisdiction, you are talking about cases that typically will come to trial 6, 8, 10, 12 months after indictment; whereas of course in district court we are constrained by the 70-day-after-indictment limits of the Speedy Trial Act.

Since our preventive detention statute requires trial within 60 days, if you transpose that into the U.S. District Court, I would see it having very little impact on what are already the existing rules under the Speedy Trial Act.

I might say, though, that those limits, the 60-day-trial limit, do pose serious manpower problems for us. One of the reasons we have not made greater use of the preventive detention statute is that it takes so much in the way of police resources, prosecutorial resources and judicial calendaring resources to cope with that 60-day-expedited-trial requirement, that if we were to bring very many more we would begin to overload the judicial system in superior court.

Mr. KASTENMEIER. We heard Congressman Hughes discuss his bill. It provides for a hearing in which the defendant is brought in and the prosecutor addresses the question of risk of flight. Then, having exhausted that question, if a bond is set for the defendant and the U.S. Attorney feels that the subject is a danger to the community, he pursues the question of dangerousness and seeks preventive detention.

Is that more or less how you work under the D.C. Code?

Mr. RUFF. No, it is not.

I must admit, without having had an opportunity to study Congressman Hughes bill, I find that requirement troubling because in the real world what happens is that we make a determination virtually on the day of arrest or the next day at the latest that a particular individual, given the crime he has committed and his background, is a fit subject for preventive detention.

We come to the court when that defendant makes his first appearance, saying, "Your Honor, the Government intends to move for preventive detention in this case." The problem I see posed by going through the flight hearing and the setting of some condition of release before moving to the dangerousness issue is, candidly, one of logistics. I would have to think this through a bit more and give you my thoughts on it.

For example, I think Mr. Butler suggested this earlier: If you have a defendant, let's take a large-scale narcotics dealer, who is a risk of flight and for whom a $1,000,000 bond is set, and he languishes in jail for 30 days or 45 days and all of a sudden he comes up with the money, he could be gone before we ever learned about it and took action under the preventive detention provisions of the statute.

Yet it would seem, to us at any rate, a duplication of effort to go through the hearing with respect to roots in the community, likelihood of flight, and then have to go through on the same day, even if a $1,000,000 bond were going to be set on the flight issue, the Government's burden of proof (substantial probability) with all the

disclosure to the defendant, of what the Government's case may be, unless we know for sure that that is going to be required.

I really have some concerns about whether, just in the normal flow of events in a courthouse, that kind of split hearing is really the right solution.

Mr. KASTENMEIER. That is interesting.

My last question, and I will yield to my colleagues, but following up on that, let me make the assumption—he can speak for himself—that Congressman Hughes in his bill is interested in some of the constitutional issues that may not have been fully addressed by the *United States* v. *Edwards,* such as I understand it, complete presumption of innocence, the right to a fair trial, and so forth and so on, in which the full context may not have been, in terms of pretrial detentions, preventive detentions addressed in the *Edwards* case.

Therefore, I think Mr. Hughes may have cloaked the proceeding with what appears to be more cautiously, in terms of procedures, designed to assure the defendant of greater fairness.

Mr. RUFF. I must say I was a little puzzled at that.

Mr. KASTENMEIER. I shouldn't presume to speak for him.

Mr. RUFF. No, but the various protections that seem to be sketched out in Congressman Hughes' bill are, in fact, present either specifically in the code or by judicial determination in the District of Columbia.

For example, counsel is appointed the moment that a defendant walks into court, whether or not there is a preventive detention hearing in the works, so that from the very beginning of the defendant's exposure to the system in the District of Columbia, counsel is present and available to him, either retained counsel or appointed counsel.

With respect to generalized notions of due process, right of confrontation, and so forth, which seem to be particularly the focus of Congressman Hughes' bill, the law in the District of Columbia is pretty clear that there is an absolute right of confrontation; that is, whichever witnesses the government puts on the defendant is able to cross examine. The one area of dispute is whether the defendant can affirmatively call a particular witness to testify.

And, the general rule in the District of Columbia, as is true in every Federal district that I am aware of, is that in order, during one of these pretrial hearings, to require the presence of what otherwise would be a government witness, the defendant must make a proffer that that witness will have something to offer that would undermine the finding of probable cause at a preliminary hearing or, in this case, substantial probability.

For example, in the *Edwards* case, the effort to bring the victim of the rape before the court was viewed by the government, and I think appropriately so, as merely an effort to obtain discovery—in an unnecessary fashion to intrude on the privacy of that witness. And the court of appeals appropriately held, in our view, that that was not an element of the constitutional right of confrontation. So that right exists. There may be some debate over its scope, but we think the law in the District of Columbia adequately balances those interests.

Mr. KASTENMEIER. Thank you very much.

I yield to the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. All right. Thank you.

I am not clear; is section 1322(e) limited to the 5-day hold? Is that limited to the District of Columbia?

Mr. RUFF. It is limited to the District of Columbia. That is part of the District of Columbia Code, and is not contained in the Bail Reform Act.

Mr. BUTLER. Is it your recommendation that we make that applicable to other districts?

Mr. RUFF. It clearly would be. I think it is an extraordinarily valuable tool and does not infringe in the same fashion that the preventive detention statute does on that inherent right to liberty pending trial.

Mr. BUTLER. Thank you.

Now, the bill before us requires or suggests that if the judicial officer determines by clear and convincing evidence that such danger—is that the same standard you have?

Mr. RUFF. In essence it is; yes.

Mr. BUTLER. How do you express it?

Mr. RUFF. The statute is unclear with respect to the standard of proof on the generalized question of dangerousness. Candidly, it might have been more clearly drafted. But, by judicial interpretation, essentially the "clear and convincing" standard is the one that applies for all issues other than the substantial probability that he committed the offense that is particularly at issue in that case.

Mr. BUTLER. I am not clear. On your practice in the District with reference to a hearing on flight and the hearing on danger, are your practices the same thing that are in the statute?

Mr. RUFF. No. Basically we would reverse it. We would make a determination, let's say, when we first saw the list of people who had been arrested the night before, that a particular individual was a proper subject for an application for preventive detention. We would go before the court saying we intend to ask for preventive detention and would have a hearing on that. If the court denied preventive detention, then we would say to the court, "Your Honor, in addition to this there is a risk of flight," and we would ask the court to address, even if you are not going to detain him, the prospect of flight by setting money bond or other conditions.

So, we reverse the process that I think Congressman Hughes would have us follow in his bill.

Mr. BUTLER. That is what your statute says.

Mr. RUFF. That is our practice. There is no mandate in the statute.

Candidly, I have to tell you, in the normal manner of handling cases in any large urban court, I think our practice is the only feasible one.

Mr. BUTLER. I note the practical consideration there. I think the constitutional problems Mr. Hughes has with that, we have discussed.

Do you expect, now that you have the judicial blessing, do you expect to use this procedure more often?

Mr. RUFF. As I indicated, I have already begun, even before Edwards came down, as a matter of fact, to increase the use. I think

we have had enough experience with the statute to recognize those cases which appropriately would fall within its boundaries. We will never be able to get up to the point of any large number of preventive detention cases simply because of the practical problems I discussed earlier, the difficulties of staffing on our part and on the court's part, this 60-day expedited trial requirement. That will always be a limitation on us. Plus the fact you will find that many of the people who might otherwise fall into the preventive detention statute are recidivists on probation or parole and therefore we have the alternative of the 5-day hold and the probation and parole detainer which we find much easier to use and much more effective.

Mr. KASTENMEIER. Would you yield?

I do not understand why seeking preventive detention is a staffing problem.

Mr. RUFF. It is in two respects.

First of all, we have a maximum of 3 calendar days to prepare for the hearing, and thus have to devote virtually the full time of an assistant U.S. attorney and police personnel to investigating the underlying case so that we can meet our substantial probability burden, and to investigate the background of the individual and be prepared to make representations about past conduct.

Then we have to indict, which takes a substantial amount of manpower, and go to trial within 60 days. So it is not simply a matter of spreading the burden out, but virtually going full time with a particular assistant. Then the court has to find trial time on its calendar to be able to deal with the 60-day limitation.

Mr. KASTENMEIER. Thank you.

Mr. BUTLER. Now, is the expedited trial essential—is it your view that the expedited trial is essential to this legislation?

Mr. RUFF. I think there is no question that it is one of the principal factors that you have to weigh in the balancing of the defendant's right to liberty against the community interest. Whether 60 days is a magic number or not, I think can be easily debated. Indeed, we have suggested to the District of Columbia Council that 90 days would still be within the constitutional bounds but might ease some of our burden. But that is not the same problem faced by a U.S. attorney in other districts where he only has 70 days to go to trial under the Speedy Trial Act anyway, so the 60-day limitation on preventive detention probably wouldn't make that much difference to him.

Mr. BUTLER. Thank you.

I yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I want to welcome you to our subcommittee.

I remember after serving on the District of Columbia Committee that we discovered—and this goes back several years ago—that there really was a very high rate of recidivism, and that apparently a rather large percentage of the felony offenses being committed in the District were being committed by recidivists.

Do you recall that situation?

Mr. RUFF. It is undoubtedly the case, I think not only here, but in most urban areas; yes.

Mr. RAILSBACK. And that was before the inauguration of the career criminal program.

You know, I have been very curious, without being directly involved in any of the legislative committees that have had to do with the career criminal program, but I have been very interested in how successful it has been. I guess—I would like very much to ask you, and I realize this isn't directly related to bail reform although I do see you do assign the career criminal prosecutors to actually make that determination.

Mr. RUFF. That is right.

Mr. RAILSBACK. How has the career criminal program been working as far as the District of Columbia, and have you been able to cut into that very high rate of recidivism?

Mr. RUFF. Well, I wish I could say that we have been successful when measured by the reduction in recidivism in the District of Columbia. I can't say that. I think we have been successful in this sense: We have taken major offenders, taken them rapidly off the street, tried them, had a very high rate of conviction, and they have received long sentences. In that sense, I think we have been successful.

In the sense of reducing recidivism, unhappily not. I think it is a matter of resources, it is a matter of the nature of the crime problem in our city as well as any other major urban area. We still see, for example, the last time I looked at the statistics, something in the nature of 25 percent of all felony arrestees on pretrial release for another major offense.

Now, that is a very disturbing statistic. But I think, although we can come at it from our end of the system, that is trying to deal rapidly and effectively with them. I think the other issues before this Judiciary Committee as a whole, the issue of pretrial services and available alternatives, are really the key to dealing with the problem.

For example, in the District of Columbia we have, and I think everyone would agree, wholly inadequate third party custody resources. So that, other than money bond, incarceration pending trial, or some form of looser release condition, we don't have that middle ground alternative so that we can keep people off the streets under some control. It is in the statute; unhappily enough, I do not think we have the resources to use it.

I would like to do more of that, together with more done on our part, keeping the recidivist, once he is arrested. I think we can make some progress. But I have no optimistic prediction for you on that.

Mr. RAILSBACK. So, even though your pretrial detention has not really been employed that often, your testimony is that you believe it has been a help and that you would recommend its use in other jurisdictions?

Mr. RUFF. Yes. It is a help in the very special case. There is someone who comes through the system who screams out for pretrial incarceration and we need a tool to do that. That doesn't mean we are going to use it 100 times a year; we may only use it 50 times a year, up to our maximum potential, but we need it for that special case. Indeed, I think it is noteworthy in this discussion that, even in the U.S. district court, here and elsewhere, there are

cases in which we will ask the court and the court will grant our request, to hold an individual without bail on the ground that there is no combination of conditions which will guarantee his reappearance.

For example, Mr. Hinckley was held pending his commitment for mental examination without bail on the ground that there was no condition which would guarantee his reappearance. It is an unusual case. But even now, there is this inherent judicial authority in the U.S. district court to act in the special case, and I think it would be useful if the Congress gave that statutary blessing.

Mr. RAILSBACK. I am curious how many drug traffickers have jumped bail.

Mr. RUFF. I do not have the national statistics. I can tell you, from my own experience in the Department, that in the areas of southern California, Texas, and Florida, where our major international drug problem exists, as well as in New York, it doesn't take very many to jump bail to be a major problem.

Mr. RAILSBACK. I really meant in the District.

Mr. RUFF. We do not have that problem here in the District of Columbia.

Mr. RAILSBACK. Really? Why is that?

Mr. RUFF. First of all, we do not have the major international trafficker, the person who does a multimillion-dollar importing business. We have a very different pattern of trafficking in the District because we are not a port and we don't have an airport in our city. We get major dealers, people we try to put in jail, but not the person who is running down to South America to bring huge quantities of narcotics.

Also, this is a stable community. Our criminals tend to have some community roots. Although we do have fugitives in the narcotics area, because they know they are facing serious problems, it is by no means the kind of problem that exists in other areas of the country.

Mr. RAILSBACK. Thank you very much. I think your testimony has been very helpful.

Mr. RUFF. Thank you, Congressman.

Mr. KASTENMEIER. I just have two more questions.

What predictive devices do the judges and prosecutors use in the District of Columbia? The defendant's prior criminal record? What other predictive devices are relied upon to try to determine to what extent the individual may be a danger?

Mr. RUFF. Almost entirely past record; either adult criminal record here in the District and elsewhere throughout the country, or juvenile record. Unhappily enough, and it was true in the case of Mr. Edwards, many of our most serious and violent offenders are in the 18 to 22 age group who come to us with extensive juvenile backgrounds and whose first adult appearance may be with a serious crime of violence which, when we look back against that juvenile history, merits preventive detention. So we either use the adult criminal record for someone who has been through the system many times in an adult court or we go to the juvenile background for the young offender.

Mr. KASTENMEIER. We have of course dealt with parole and the U.S. Parole Commission, and prediction is always extremely difficult.

Mr. RUFF. It is.

Mr. KASTENMEIER. And the notorious case undoes probably a great deal of fairly competent prediction over a period of time.

One is reminded of the case of the newly-found author of the prison papers who, through Norman Mailer and other friends, got out of prison only to get involved in a homicide almost overnight.

Mr. RUFF. I do not think any of us is confident about our ability to predict, which is why, as Congressman Butler suggested, it is important for us to focus on that speedy trial, and I think it is important to look back and see that indeed our conviction record has been 100 percent with preventive detainees.

Mr. KASTENMEIER. Let me ask you this question, and I do not know how the answer falls.

In your judgment you were quite careful to give us cases from 1976 to 1980. You indicated that you had moved for pretrial detention in 73 cases and the courts approved 60.

Mr. RUFF. Yes.

Mr. KASTENMEIER. The question which you didn't answer, but about which there is some curiosity, what about the 13 cases? Did those people not having been detained, commit crimes pending their trials?

Mr. RUFF. I do not have the answer to that but I think I can find out for the committee. If you like I will report back to you on that.

Mr. KASTENMEIER. I am obviously not trying to embarrass anyone.

Mr. RUFF. No.

Mr. KASTENMEIER. But it is one of the few differentials or discriminating aspects we can find. Maybe it pits the court's judgment against the prosecutor's judgment, but there are 13 cases where your office and the courts differed. I would be curious to know how those 13 cases look.

Mr. RUFF. My guess would be, and I will give you more explicit statistics on this, that some of them were thereafter held on money bond, some we may have dismissed the charges against because in fact it turned out we had the wrong person or were otherwise unable to go to trial, and some I suspect simply went out in the community and were tried in due course without ever having committed another offense. But I will be glad to report to the committee on that.

Mr. KASTENMEIER. Thank you.

Now my last comment is this—the Justice Department is still formulating its position on this legislation. I know you are not free to give us an official departmental view on the bills. But do you have any personal advice for us based on your own very impressive record as a Federal prosecutor in approaching this subject.

Mr. RUFF. Congressman, I believe, as I indicated in responding to Congressman Railsback, that it is important to have the flexibility, to have the tool for use in the very limited number of cases in which it is likely to be needed. On the Federal side, those cases are going to be even more limited than they are on our side of the street, because the U.S. Attorney doesn't deal with the recidivist,

with the violent criminal as much as I do in my local prosecutor capacity.

I think it will be the narcotics defendant as well as perhaps a very limited group of violent criminals who happen to violate a Federal law and get caught up in the Federal system. We ought to have the flexibility to deal with them, however.

I think the only suggestion I would make is that it is possible to draft, witness the District of Columbia experience, a constitutional bill which balances the rights of the community and the individual. Congress ought to address that. There is some discussion I know about the abolishment of money bail and I would view that as a serious mistake; that too provides a great deal of flexibility in the system. It permits, indeed, many people to be released for whom otherwise one could not find adequate protections to guarantee their appearance.

So that I think money bond, the range of conditions that is provided in the Bail Reform Act, and a limited, carefully drawn preventive detention statutes, really would drastically improve the ability of the U.S. attorneys around the country to cope with these problems.

Mr. KASTENMEIER. Thank you very, very much. Your testimony was very helpful indeed.

Mr. RUFF. Thank you. I appreciate your having me.

Mr. KASTENMEIER. I note Mr. Hughes is here and perhaps our colleague can come back for just a moment. There are one or two questions that I had and I appreciate his returning. I know he was busy.

With respect to the way you have designed the bill, I do not know whether you are responding to constitutional issues addressed or not addressed in the *United States* v. *Edwards* opinion, but the question remains why your hearing was designed in the way it was to approach the flight question first, and whether you think that in other respects that due process, notwithstanding the fact this is not a full-blown trial, that sufficient due process is in fact afforded by your bill?

Mr. HUGHES. It is a combination of trying to address some constitutional issues and also trying to prevent some of the abuses that are suggested by the way the District of Columbia Act has been implemented.

I heard many parts of the excellent presentation of the U.S. attorney for the District of Columbia. He wants, as I understand his testimony, to think more about the process; that would require a judge first to dispose of the flight risk issue before moving onto preventive detention.

I hope that the U.S. attorney does give that some additional thought, because we have given a lot of thought to it and we think that, first of all, the flight risk issue should be addressed first because it is often an easier issue to address. If in fact the U.S. attorney concedes that the defendant is not a flight risk, then you move right on to preventive detention. If in fact there is some question about the defendant's flight risk, it seems to me that it would be less burdensome on the part of the U.S. attorney to move on that.

First of all, you don't have the time restrictions that you have with preventive detention. Under the D.C. Code, the Government

must try the case within 60 days. Even though we have incorporated the 60-day provision in our bill, I have some misgivings about whether that is sufficient time—whether or not the tool will be used by very busy U.S. attorneys' offices.

We believe that there are situations where flight risk is used as a way of avoiding the issue of whether or not the defendant presents a danger to the community. We require this two-step process so that we can minimize the use of flight risk for other than those situations where a defendant is indeed a flight risk. These are the reasons why we have drafted the bill as we have.

Once the U.S. attorney looks at the bill somewhat and gives it some additional thought, I am hopeful that he will see that that approach will minimize the use of flight risk as a reason for detaining when in fact it is really a danger to the community, which requires a little different standard.

Mr. KASTENMEIER. In the hypothetical case where we have a rather poor risk in terms of flight, and also a case can be made that the individual is dangerous, we will say in a narcotics situation—it may or may not be—what might the U.S. attorney do? Try to ask that the individual be held—that no sum of bail money would be a reasonable amount?

Mr. HUGHES. It is presently within the court's province to decide that none of the conditions that are available to the court will insure that the defendant, first of all, will be present. Then the court should move on to the question of danger to the community. If in fact the defendant falls into both categories, obviously the U.S. attorney is going to seek detention on both grounds.

Mr. KASTENMEIER. On both grounds?

Mr. HUGHES. Both that the defendant is a flight risk and danger to the community; there is no reason why the U.S. attorney can't seek detention on both grounds.

Mr. KASTENMEIER. But if he could make a case——

Mr. HUGHES. Of course if he decides to detain him as a flight risk, the court would never get to the second part. That is why I believe it makes sense to resolve the flight risk issue first. Once that is resolved against the defendant in an adversary hearing, then the rest of it is moot if he is a flight risk.

If he is not a flight risk but allegedly presents a danger to the community, then the prosecution must move ahead with clear and convincing proof that the defendant presents a menace to the community.

Mr. KASTENMEIER. If you avoid the second case you wouldn't run into all the problems that Mr. Ruff—notwithstanding the fact he doesn't like that particular way to proceed—all the problems he described when opting for preventive detention as a danger. In that case the resources that must be committed, he says, to determine even how many of these cases they can possibly pursue.

Mr. HUGHES. That is why I do not understand that particular argument, because if in fact I could make a case that the defendant is a flight risk, I certainly would not want to get into the elaborate hearing, to bind myself to the 3-day rule that they have; they have to prepare their case for preventive detention in 3 days in the District, they have to try the case within 60 days, they have to put in more of their case during the prevention detention hearing, if the

defendant is a danger to the community, than if the defendant is a flight risk and it would seem to me that I would prefer our procedures as a practical matter.

I think what the U.S. attorney indicated was that he wanted to think about that a little more; that his inclination would be to go right into a hearing on pretrial detention. I think that the arguments for not proceeding that way are just the opposite; that is why I think you have to dispose of the flight risk issue first.

I also would agree—I know it is perhaps not before this subcommittee right now—that it is very important to retain monetary bail as one of the options available to a court in trying to guarantee a defendant's presence, and also to make sure that we do have a full range of approaches that a court can take in dealing with a defendant.

Mr. KASTENMEIER. What do you say to people who suggest we shouldn't go to preventive detention, we should perfect increasing resort to speedy trial and to upgrade pretrial service agencies such as you have attempted to do in your bill, that this, in and of itself, might obviate the necessity for preventive detention?

Mr. HUGHES. In my judgment it is important to do all of those things, it is important to extend the pretrial services experience to the other district courts. It has been very successful. That is going to provide us with additional tools, to enable the courts to learn more about a defendant early on in the criminal justice process. It is going to provide supervision, helpful not just during the time that the defendant is out on bail but also to the court in determining whether he is a good risk for probation if the defendant is convicted.

It is going to minimize the incidence of rearrest. In effect, that program is important, just as speedy trial is important. It is important for us to move matters along. But there are those situations where a defendant may not present a risk of flight, but does present a risk to the community, and moving up the trial date may not alleviate that risk. We just can't accelerate these cases to the point where we can dispose of them overnight to minimize that risk.

Many of the continuances are requested by the defendant to be able to secure counsel and prepare for the defense. If the defendant is a menace to the community, we should be able to address that problem and, under existing law, we do not have that authority.

Mr. KASTENMEIER. That problem cannot be addressed by upgrading pretrial——

Mr. HUGHES. There is no way that, by accelerating the trial of cases or through pretrial services, we can reduce that entirely. That is why we are before this subcommittee. We tried to deal with that issue when we took up pretrial services. As the chairman well knows, having sat on that subcommittee when we marked up the pretrial services bill, we do provide that the pretrial service officer must report to the court any circumstances which would suggest a danger to the community. But we have not provided the judge with the tools to deal with that, once that information is conveyed to him.

Mr. KASTENMEIER. The last question I have goes to narcotics cases.

I think for the record we will assume, for example, the very difficult case perhaps typical of Florida and other jurisdictions that do not necessarily involve a danger to the community; we will assume for the purpose of argument they are not essentially. They may be very large narcotics dealers but they don't actually personally involve in the narrow sense a danger to the community.

On the other hand, risk of flight is very, very, very high indeed, probably as high a risk of flight as any type of case we commonly have.

As I understand it, if the judges today could cope with the problem that they can do so within the scope of present law, that they can set a bail or make a determination which would effectively deal with it. It appears very often they have underjudged, as you have pointed out, the capacity of the defendant to forfeit bail and to jump bail. The question I am asking: In that situation isn't present law adequate to deal with that?

Mr. HUGHES. In my judgment it is. If a judge determines that there are no conditions that can be imposed that will insure the defendant's presence before the court, then the defendant ought to be incarcerated. The judge has the authority under existing law to do that.

Now I can conceive of situations such as we read about, obviously, where you have an alien who has a reputation for being a kingpin, for trafficking in narcotics, who is arrested in this country in connection with an extensive criminal organization; it seems to me that that defendant is an obvious poor risk and to try to out-guess him, to try to figure out what bail is going to insure his presence, is just an exercise in futility. Where you are dealing with that kind of an individual, it seems to me we can't be assured that no conditions are going to insure his presence. He ought to be incarcerated until trial.

My bill would deal with that individual who may have other contacts in this country but whose pattern in trafficking in narcotics would suggest that he is a danger to the community. That individual, even though he has ties to the community, can be incarcerated under the pretrial detention provision in this bill once the court makes the finding that he indeed presents a danger to the community.

So you are dealing with two different situations; the alien arrested in this country who has no ties to the community, who is obviously a high roller in drugs, trafficking—a class 1 type of perpetrator; that individual can be dealt with under the existing law. If the judge is not assured that he is going to be present when requested, then the judge can incarcerate him.

The other type of drug trafficker—who presents a menace to the community, but may have some ties to the community so that he is not a flight risk, is dealt with in the bill I have presented.

Mr. KASTENMEIER. Well, on behalf of the subcommittee I want to congratulate you for your bill and for your work on the subject and for the interest and certainly for the help to this subcommittee. We hope we can work together in advancing something that will solve whatever it is that is perceived to be the problems to which you have testified here.

Mr. HUGHES. Thank you. I want to congratulate you and the subcommittee for moving ahead expeditiously.

Mr. KASTENMEIER. The subcommittee stands adjourned.

[Whereupon, at 12:20 p.m., the subcommittee adjourned.]

BAIL REFORM ACT—1981-82

THURSDAY, JULY 30, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:25 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Sawyer.

Also present: Timothy A. Boggs, professional staff member; Joseph V. Wolfe, associate counsel; and Audrey K. Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning on our second day of hearings on the Bail Reform Act and H.R. 3006 and H.R. 4264, the bills which deal directly with bail reform, we are very pleased to have as our witnesses first a very distinguished panel of judges and others who, through the probation service and otherwise, are in a unusual position to judge such proposals. They are the Honorable Gerald Tjoflat, who is a judge of the U.S. Court of Appeals for the fifth circuit. Judge Tjoflat has been a witness before this subcommittee before and we have had occasion to work with him at various conferences.

We are very pleased to greet Judge Alexander Harvey of the U.S. District Court for Maryland, who is Chairman of the Criminal Law Committee of the United States Judicial Conference.

Also part of our panel, Mr. Guy Willetts, Chief of the Pretrial Services Branch, Probation Division, Administrative Office of U.S. Courts, and Mr. William A. Cohan, Jr., Chief of the Division of Probation, Administrative Office of the U.S. Courts.

So in behalf of the subcommittee, let me say we are very pleased to have you here this morning and to hear from you on this important subject.

Judge Tjoflat.

TESTIMONY OF HON. GERALD TJOFLAT, JUDGE, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT; HON. ALEXANDER HARVEY, U.S. DISTRICT COURT OF MARYLAND, CHAIRMAN, CRIMINAL LAW COMMITTEE OF THE U.S. JUDICIAL CONFERENCE; GUY WILLETTS, CHIEF, PRETRIAL SERVICES BRANCH, PROBATION DIVISION; AND WILLIAM A. COHAN, JR., CHIEF, DIVISION OF PROBATION, ADMINISTRATIVE OFFICE OF U.S. COURTS

Judge TJOFLAT. Thank you, sir.

Mr. Chairman, I have submitted a written statement to the committee and would be grateful if it could be received as part of the record.

Mr. KASTENMEIER. Without objection your 11-page statement, together with its appendices, will be accepted and made part of the record and you may continue as you wish.

Judge TJOFLAT. If I might, I will summarize briefly what that statement attempts to establish.

I have traced the history of bail reform in the Federal court system culminating in the adoption of the Bail Reform Act of 1966.

I have then indicated that the act failed to provide for the gathering of information about accused persons awaiting trial, in order to enable the judge or judicial officer setting bail to make an informed bail decision.

The Congress has observed, in legislative history relating to the Speedy Trial Act of 1974, that under the Bail Reform Act judges either detained defendants in violation of the spirit of the act or guessed at the defendant's likelihood of flight, anticipating a failure to remain within the jurisdiction of the court, because they did not have sufficient information to make informed bail decisions.

This congressional observation led to the enactment of title II of the Speedy Trial Act of 1974, in which Congress directed that pretrial services agencies be established in 10 Federal districts on an experimental, or pilot, basis in order to remedy the deficiency previously existing—the failure of the system to provide judges with sufficient information to make informed bail decisions.

The purpose of the pretrial services agencies in these 10 districts was to gather information relating to the defendant and the offense with which he is charged, in order to permit the judge to make an informed bail decision, and then to monitor and supervise the defendant's performance under the conditions of bail.

The Congress in title II directed the Director of the Administrative Office of the U.S. Courts to report to the Congress on the experience in these 10 pilot districts; Congress wanted to know whether there was a decrease with the pretrial services agencies' operation in unnecessary pretrial detention. Congress also wanted to know whether or not crime on bail, committed by those released, and the incidence of failure to appear for court appearances, were reduced as a result of the supervision and monitoring of the defendants admitted to bail.

The director's report, filed a couple of years ago, after roughly 4½ years of experience with the pretrial services agencies in these 10 districts, indicated that judges, prosecutors, defense attorneys, and all others involved in the pretrial services function thought that pretrial services improved the quality of justice in the bail process. Statistics indicated that the incidences of failure to appear and crime on bail were reduced about 50 percent among those released under the Bail Reform Act.

The Director suggested to Congress that pretrial services be implemented on a nationwide basis. The Judicial Conference of the United States endorsed the Director's position.

My statement indicates that two of the great concerns of Congress, that is the propensity of offenders to commit crime while admitted to bail and the incidence of their failure to appear for court

appearances, can be reduced even further if the pretrial services function is spread so that it is system-wide. Crime on bail can probably be reduced—that is my judgment—if judicial officers can take into account the danger of the accused to other persons or the community in considering what conditions to impose on bail.

The statement does not address the subject of pretrial detention, Mr. Chairman, simply because I was not advised of any particular bill pending before this committee at the time the statement was drafted, which was last week. I am advised that since that time H.R. 4264 has been introduced. I have read H.R. 4264 and am prepared to answer any questions or make observations regarding the pretrial detention provisions that bill provides.

Mr. KASTENMEIER. Fine. Thank you, Judge Tjoflat, for that very brief discussion.

[The complete statement of Judge Tjoflat follows:]

PREPARED STATEMENT OF GERALD B. TJOFLAT

Mr. Chairman, committee members, I am Gerald B. Tjoflat and have served as Judge of the United States Court of Appeals for the Fifth Circuit since December 1975 I was a United States District Judge for the Middle District of Florida from October 1970 until my appointment to the appellate bench. From June 1968, until October 1970, I was a Judge of the Circuit Court, Fourth Judicial Circuit of Florida. Since January of 1977, I have been a member of the Advisory Corrections Council. (U.S.C. 18 5002) Since January 1973, I have been a member of the Judicial Conference Standing Committee on the Administration of the Probation System and was appointed chairman of that Committee in May 1978. This service on the Council and the Probation Committee has enabled me to become well acquainted with the bail practices in our criminal justice system.

We are all well aware of the dimension of the current crime problem. My brief remarks today focus on one aspect of that problem: the crime committed by accused persons released on bail. The public cries out for protection from those who commit new crimes while they are on bail awaiting trial.

One solution would seem to be to deny bail altogether to those who have a propensity to engage in criminal conduct and to hold them in custody until they are tried and sentenced or discharged.

Putting aside momentarily any legal arguments that might counsel against this as a wholesale solution, we must consider the resources that would be required to implement a system-wide pretrial detention program.

The February 9, 1981, edition of Business Week indicated the magnitude of the monetary cost involved especially in these times of marked austerity at all levels of government. Business Week reported:

"A jail-building boom, fueled by more than a decade of Federal litigation over prisoners' rights, is sweeping the country. F. W. Dodge reports that the total value of contracts awarded annually for the construction, expansion, and renovation of jails and prisons increased 602 percent during the last 10 years, from $73.9 million in 1970 to $529 million in 1979. Dodge, the country's leading building-information service and a division of McGraw-Hill Information Systems Co., says the aggregate cost came to $2.3 billion—and that figure does not cover the sums paid to fight the lawsuits that preceded many of the projects. More than 370 jails are being built or expanded now, most of them under court order. Given runaway inflation, no one will guess what the cost will be."

Before suggesting a possible solution to the crime-on-bail problem, I think it appropriate to review the history of bail reform.

Historically, the bail process in these United States has centered on money. The ground rules were, and in many jurisdictions still are, simple—if an accused person could acquire the necessary collateral, usually money, to meet the amount of bail set by a judicial officer, he went free. If not, he stayed in jail until his case was closed. Since the 1960's, studies have documented the deficiencies and shortcomings of translating the risk of flight or danger to the public into dollars and cents.[1]

[1] National Conference on Bail and Criminal Justice, Proceedings and Interim Report, Wash., D.C., p. 965; President's Commission on Law Enforcement and Administration of Justice, Task

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A legislative effort by the Congress to eliminate "the evils inherent in a system predicated solely on money bail . . ." [2] and provide long overdue reforms culminated in the Bail Reform Act of 1966. The stated purpose of the Act is: "to revise practices relating to bail to assure all persons, regardless of their financial status, shall not needlessly be detained when detention neither serves the ends of justice nor the public interest." [3] It directs the judicial officer setting bail in determining the conditions under which the accused is released, to consider the nature of the charges against the accused and the weight of the evidence supporting those charges, his family ties, employment, financial resources, character, mental condition, length of community residence, prior criminal record, previous court appearances, and any instance of flight to avoid prosecution.[4] The Act requires that the accused be released on his personal recognizance or unsecured bond unless the judicial officer has reason to believe that those two conditions of release will not reasonably assure the accused's appearance. In that case the judicial officer may then impose any one or a combination of the following conditions: Third party custody, restrict travel, association or residence, an appearance bond with a 10 percent deposit, a fully secured bond, and any other condition that will reasonably assure appearance, including a requirement that the accused return to custody after specified hours.[5]

The Bail Reform Act provided what seemed to be a blueprint for a fair as well as an effective method of making bail decisions. The Act proved to be deficient, however, because the judicial officer had no means of obtaining the information necessary to make informed bail decisions. The problem of crime-on-bail became critical.

This deficiency in the Bail Reform Act was described in the Senate Report on the Speedy Trial Act of 1974, which stated:

"Although there are no statistics on the operation of the Bail Reform Act outside of the District of Columbia, it is common knowledge that many judges are reluctant to release defendants pursuant to the Act and all too often when they do, defendants either commit subsequent crimes or become fugitives. This situation exists because district courts do not have personnel to conduct interviews of arrested defendants so that judges can make informed decisions as to whether to release defendants.

"Judges without sufficient information on a defendant's eligibility for pretrial release either detain the defendant until trial or guess at the defendant's likelihood remain in the jurisdiction. When the Court takes the former course, it, in effect, ignores both Federal law and constitutional requirements that a defendant be released prior to trial." [6]

This typical observation of the implementation of the Bail Reform Act led commentators to recommend the establishment of para-judicial entities charged with the specific duty of ascertaining and reporting facts relevant to the release of defendants pending trial.[7] In response, Congress enacted Title II of the Speedy Trial Act of 1974, authorizing the establishment of a pretrial services agency in each of 10 federal district courts, on an experimental basis. The Director of the Administrative Office of the United States Courts was charged with establishing these agencies and reporting to the Congress on their operation. The Judicial Conference assigned oversight responsibility for this pilot program and the drafting of the Director's Comprehensive Report to the Conference Committee which I presently chair.[8]

The stated purpose of this Speedy Trial Act was "to assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening supervision over persons released pending trial and for other purposes." [9] Title II established

Force Report: The Courts Washington, D.C., 1967, pp. 37-38; National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Washington, D.C., 1973, pp. 98-107.

[2] H. Rept. 1541, 89th Congressional 2d Session (1966), p. 9.

[3] Bail Reform Act of 1966, Public Law 89-465, sec. 2, (89 Stat. 214, 216, 18 U.S.C. 3146-3152), hereinafter referred to as Bail Reform Act of 1966.

[4] 18 U.S.C. 3146(b).

[5] Ibid. 3146(a).

[6] S. Rept. 93-1021, 93d Congress, 2d session. (1974, p. 24 and 25.)

[7] National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Wash., D.C. 1973, pp. 126-127. American Bar Association Project on Standards for Criminal Justice. Pretrial Release, Second Edition, Tentative Draft, Washington, D.C.; American Bar Association, 1978, p. 32. Also see 78 Comp. Gen. 105, wherein the General Accounting Office concluded "The Federal Bail Process Fosters Inequities. U.S. judicial officers do not have the information and guidance they need to set bail conditions in Federal Courts . . ."

[8] Report of the Proceedings of the Judicial Conference of the United States, Sept. 25-26, 1975, p. 62.

[9] Speedy Trial Act of 1974, Public Law 93-619, 88 Stat. 2076, 18 U.S.C. 3161 (1976).

the experimental pretrial services agencies to enable the judicial officers in the 10 pilot districts to make informed bail decisions, to provide supervision and support for those defendants released, to monitor their compliance with the conditions of release and to provide for prompt reporting of violations of those conditions.

In providing these pretrial services, the Congress plainly recognized the concern for community safety, as well as the risk of flight.

Each of the approximately 40,000 criminal defendants annually entering the federal judicial system must have a bail hearing before a judicial officer. In the 10 demonstration districts, each defendant is interviewed by a member of the pretrial services staff concerning the defendant's family and community ties, financial resources, health, prior criminal record and history of previous court appearances. Within one to two hours, this and other relevant information about the defendant is verified and reported to the judicial officer responsible for the bail decision. The initial bail hearing is then convened. Armed with the verified information about the defendant the judicial officer is prepared to make an informed decision on release and to structure individualized and detailed release conditions. the pretrial sevices program provides personnel to monitor the defendant's compliance with these conditions and to report immediately any violations of those conditions to the court.

The efficiency of the bail setting process involved in the experimental program in the 10 districts has resulted in earlier bail decisions and the release of more defendants pending trial. Often the availability of close supervision and monitoring by pretrial services officers has resulted in the release of defendants otherwise thought to present a risk of flight. The greater release rates thus achieved alleviates jail overcrowding and soaring detention costs—now estimated to average $20 per day.[10]

Following passage of the federal Bail Reform Act, a number of states passed similar statutes. Despite these enactments, however, jails continued to be filled. At present, literally hundreds of jails are involved in litigation over allegations of overcrowding and other conditions of pretrial confinement.[11]

The United States Marshal s Service has contracts with approximately 750 county jails for the care, safe-keeping, and subsistence of approximately 5,000 federal detainees daily. Currently, 61 of these jails have been ordered by the federal courts to improve their conditions of confinement.[12] In many cases where local jails have come under the scrutiny of the courts and unsatisfactory conditions have led to the removal of federal prisoners, the Marshal's Service has found it increasingly difficult to find suitable locations for the confinement of detainees.

Due in part to this jail crisis, over 400 jurisdictions have established pretrial services agencies to provide pretrial services to their courts. Twenty-five state legislatures and commissions are currently examining their bail laws for the purpose of streamlining and improving their pretrial release practices.[13] Because a number of nationally based studies and organizations have pointed out the limited societal value of money bail, specifically compensated sureties (bondsmen), many states have considered reforms that would curtail the use of bondsmen in the pretrial release process.

Before moving on to my recommendations, I believe it is important to summarize what is known about pretrial release and bail practices in the United States today. I should state that any references I make to the federal system are supported by data collected by the Pretrial Services Branch of the Administrative Office of the United States Courts, and statements made about state and local jurisdictions are supported by data collected by the Pretrial Services Resource Center, which is an LEAA funded clearinghouse for pretrial services agencies.

1. The vast majority of defendants who are released awaiting disposition of their case return for all court appearances.

Research demonstrates that over 90 percent of all defendants appear as directed to court. Those jurisdictions with active pretrial release programs have appearance rates of 95 percent and over.[14] In the federal agencies, the appearance rates increased from 95 to almost 98 percent during the Title II experimental period.

[10] Recently completed national survey on all contract detention facilities by Evaluation Staff, U.S. Department of Justice.

[11] Interview with D. Allen Henry, Technical Assistance Associate, Pretrial Services Resources Center, Washington, D.C.

[12] January 1981 draft report, Study of the Federal Short-Term Detention Problem in the Western District of Washington, evaluation staff, U.S. Department of Justice, p. 4.

[13] Henry interview, supra.

[14] See, for example, Wayne Thomas, Bail Reform in America, Berkeley, CA: University of California Press, 1976, pp. 87-105; Paul Wice, Freedom for Sale, Lexington, Mass.: Lexington Books, 1974, pp. 65-73; Jeffrey Roth and Paul Wice, Pretrial Release and Misconduct in the Dis-

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2. The vast majority of defendants who are released are not rearrested.

Research studies indicate that rearrest rates vary between three and four percent in various local jurisdictions; even where overall rates are high, there are relatively few arrests for serious or dangerous crimes.[15]

The Pretrial Services Branch of the Administrative Office examined its own data to ascertain the extent of the serious crime on bail problem. Of those defendants eligible for release, about 90 percent were admitted to bail; of those, 1,377, or 4 percent, committed further crimes while on bail. Of those new crimes, 813, or 2.5 percent were felonies, thus the crime-on-bail problem does not seem to be pronounced in the 10 experimental districts.

3. Release on recognizance and other nonfinancial forms of release are as effective as, if not better than, financial methods of release in assuring appearance in court and minimizing pretrial arrests.

Several studies have shown that defendants released through the efforts of a pretrial services agency or on other nonfinancial release conditions have higher court appearances rates and lower pretrial arrest rates than those released on money bail.[16]

The findings of the Title II experiment confirmed this: As the percentage of nonfinancial releases incresed, the percentages of failures to appear and rearrests decreased.

4. The establishment of effective pretrial release procedures can bring about reductions in the pretrial detainee population without increasing the rates of rearrest or nonappearance.

The experience of a number of cities leads to the general conclusion that jail populations can be reduced without adversely affecting the community.[17] Separate studies in Denver, Rochester, and San Francisco have demonstrated the effectiveness of release agencies in reducing detained populations without increasing bail violations.[18] The most dramatic example may be seen in the City of Philadelphia, where in the five years following the creation of a pretrial services agency, the detention population decreased by 28 percent but bail violations did not increase.[19]

While the districts in which the federal pretrial services agencies were instituted did not experience detention reductions of the magnitude of Philadelphia's the Title II experiment did reveal that fewer individuals were detained and fewer committed violations.

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trict of Columbia, Washington, D.C.: Institute for Law and Social Research, 1978 unpublished draft, pp. II-54, 55; Mary Toborg, Martin Sorin, and Nathan Silver, "The Outcomes of Pretrial Release; Preliminary Findings of the Phase II National Evaluation", Pretrial Services Annual Journal (vol. II), Washington, D.C.: Pretrial Services Resource Center, 1979, pp. 150-151; S. Andrew Schaffer, Bail and Parole Jumping in Manhattan in 1967, New York, NY: Vera Institute of Justice, 1970, p. 3; Stevens Clarke, Jean Freeman, and Gary Koch, "The Effectiveness of Bail Systems: An analysis of Failure to Appear in Court and Rearrest While on Bail". Chapel Hill, N.C.: Institute of Government, University of North Carolina, 1976, Table 1. More generally, see also Michael Kirby, Findings 1, "Recent Research Findings in Pretrial Release, Washington, D.C.: Pretrial Services Resource Center, 1977 (hereinafter cited as Findinds 1; Kirby, FTA, "Failure to Appear: What Does it Mean? How Can it be Measured?," Washington, D.C.: Pretrial Services Resource Center, 1979 (hereinafter cited as FTA). Donald Pryor, Pretrial Issues, "Current Research: A Review", Washington, D.C.: Pretrial Services Resource Center, 1979.

[15] Roth and Wice, supra 1, pp. II-49-50, 52 (misdemeanors only); Wice, supra 1, p. 75; AOC Report, Supra 2, p. 54; Gerald Wheeler and Carol Wheeler, "Two Faces of Bail Reform: An Analysis of the Impact of Pretrial Status on Disposition, Pretrial Flight and Crime in Houston", Houston, TX: unpublished, 1980, pp. 18-19; William Landes, "Legality and Reality: Some Evidence on Criminal Proceedings", Journal of Legal Studies, (vol. 3), 1974, p. 309; Malcolm Feeley and John McNaughton, The Pretrial Process in the Sixth Circuit: A Quantitative and Legal Analysis, unpublished, 1974, p. 40.

[16] Clarke, et al., supra 1, table 4; Roth and Wice, supra 1, pp. II-48-58; Michael Kirby, An Evaluation of Pretrial Release and Bail Bond in Memphis and Shelby County, Memphis, Tenn.: The Policy Research Institute, Southwestern College, 1974, p. 4 (hereinafter cited as Bail bond in Memphis). All show clear differences in favor of nonfinancial release on both court appearance and rearrest variables. Also see, Findings 1, supra 1, p. 8, note 43, p. 12; FTA, supra 1, pp. 3, 7.

[17] Pretrial Services Program, Denver, Colorado: Cost Benefits and Effectiveness, Denver, Colo.: unpublished 1976; Cost-Benefit Analysis of the Monroe County Pretrial Release Program, Rochester, N.Y.: Stochastic Systems Research Corp., 1972; Elisabeth Jonsson, Benefits and Costs of Own Recognizance Release: An Empirical Study of the San Francisco OR Project, San Francisco, Calif.: School of Public Policy, June 1971.

[18] Thomas, supra 1, pp. 37-46, 65-79, 87-105.

[19] Dewaine Gedney, "The Philadelphia Detention Population", Philadelphia, Pa.: Pretrial Services Division, Court of Common Pleas, 1977; David Runkel, "More Suspects are Staying Home Awaiting Trial", Philadelphia, Pa.: The Sunday Bulletin, Dec. 4, 1977, p. 1; Henry, supra 14, p. 9.

5. The risk of nonappearance or of serious crime on bail has not been shown to increase with the seriousness of the original charge.

A review of the many studies of bail practices leads to the inescapable conclusion that severity of charge is not a good predictor of nonappearance in court or pretrial rearrest.[20]

In the 10 Title II pretrial services agency districts, defendants charged with felonies had lower bail violation rates than those charged with misdemeanors.

6. The rates of nonappearance and pretrial rearrests can be reduced while increasing release rates by the use of notification procedures, supervision and conditional release.

The utilization of the above procedures has been shown to be effective in reducing bail violations in a number of jurisdictions. The federal agencies adopted these techniques and as previously stated, bail violation rates decreased in their districts.

7. The cost of pretrial service mechanisms can be favorably compared with the cost of unnecessary pretrial detention.

A number of studies in different types of communities have demonstrated that effective pretrial release programs can save money. Using the $20 a day detention cost, a federal pretrial services officer need only effect the release of 15 defendants, who otherwise might have been detained, for one hundred days each, to pay for his or her salary, fringe benefits, office space and supplies.[21]

At the outset, I have pointed out the difficult situation the criminal justice system finds itself in today when considering the issue of bail. The public rightfully demands protection from all criminals, including those released on bail. As for the latter, there seems to be little societal consensus to pay for the construction of expensive jails to house defendants awaiting trial.

Therefore, I would like to suggest two approaches to bail reform be considered by the Congress. It is my opinion that legislative adoption of these approaches will allow the federal criminal justice process, and state and local systems as well to deal effectively with the crime-on-bail problem.

1. Provision of Pretrial Services—

The report of the Director of the Administrative Office of the U.S. Courts on Title II demonstrated that while more defendants were released in the demonstration districts, crime-on-bail and faiures-to-appear were reduced by about 50 percent compared to the years immediately prior to the passage of the Speedy Trail Act. The report identifies the reduction in crime-on-bail from 8 to 4 percent. Failures-to-appear were reduced from 6.6 to less than 3 percent.[22]

On the basis of the favorable observations of judges, magistrates, and others, and the overall favorable statistical results of the program, it was recommended by the Director of the Administrative Office that statutory authority be granted to continue the pretrial services agencies permanently in the 10 demonstration districts, and further, that statutory authority be given for the expansion of the program to other district courts when the need for such services is shown.[23] It was further recommended that the district courts be authorized to appoint pretrial services officers under standards to be prescribed by the Judicial Conference of the United States.

In March of 1980, the Judicial Conference of the United States passed the following resolution:

"The Committee on the Administration of the Probation System of the Judicial Conference of the United States has reviewed the report of the Director of the Administrative Office of the United States Courts on the experiment with Pretrial Services Agencies created by Title II of the Speedy Trial Act of 1974.

"That report states that judges and magistrates in the demonstration districts have expressed substantial satisfaction with and strong support for the continuation of services rendered by those agencies. These views appear to be grounded in the utility of information provided by pretrial services officers to the judicial officers re-

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[20] Thomas, supra 1; Jan Gayton, "The Utility of Research in Predicting Flight and Danger", prepared for the Special National Workshop on Pretrial Release, San Diego, Calif., April 1978, p. 15; Goldkamp, supra 4, p. 97; Clarke, et al., supra 1, Issues, Supra 1, p. 15.

[21] See note 17, supra. See also Ch. VI of "Pretrial Intervention Mechanisms: A Preliminary Evaluation of the Pretrial Release and Diversion From Prosecution Program in New Orleans Parish", New Orleans, La.: unpublished, 1976; Susan Weisberg, Cost Analysis of Correctional Standards: Pretrail Program, Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, May 1978, p. 54; California State Board of Corrections, Report of Inspection of Local Detention Facilities to the California Legislature, March 1980, p. 190.

[22] Fourth Report on The Implementation of title II of the speedy Trial Act of 1974, Administrative Office of the U.S. Courts, June 29, 1979.

[23] Ibid.

sponsible for setting bail. Judicial officers in the 10 demonstration districts stated that they were able to make better informed decisions as a result of the regular, prompt, and impartial information provided by the agencies. This is consistent with the findings of the 1978 Comptroller General's Report to the Congress regarding the Federal bail process, in which the General Accounting Office cited the need for better defendant-related information and supported the continuation and expansion of this particular Pretrial Services Agency function.

"The Conference places great reliance on the opinions of the judicial officers. The Conference also places significance in the Director's findings that the operations of the Federal agencies compared favorably with state programs and that they have provided additional services to the courts which have improved the administration of criminal justice.

"The Conference therefore recommends the continued funding and expansion of the pretrial services operation.[24]

As a result of the experience with the pretrial services program and on the strength of the recommendation of the Director's reports and the support of the Judicial Conference, several bill's have been introduced in Congress. These bills called for pretrial services to be provided in all judicial districts. S. 923 was passed by the full Senate and H.R. 3481 is still spending in the House. Although the Judicial Conference has not had an opportunity to consider these bills they are consistent with the Conference's previous position that pretrial services should be established where necessary.

2. Considering risk of crime-on-bail—

As you are aware, the Bail Reform Act allows the judicial officer only to consider the risk of flight and not the risk of crime when setting conditions of bail prior to conviction.

At its meeting of September 15-16, 1977, the Judicial Conference of the United States recommended revision of the federal bail statutes to authorize judicial officers, in setting conditions of release, to consider the safety to any other person in the community.[25]

Such a change would allow judicial officers to openly consider evidence of a defendant's potential danger to the community, and based on these considerations, devise conditions of release that would limit the likelihood of pretrial criminality.

The opportunity to consider a defendant's danger to others or to the community, in combination with a pretrial services program that would provide verified information to the judicial officer monitoring the defendant's compliance with his conditions of release and promptly deal with any violations of those conditions would be a major step toward the solution of the crime-on-bail problem.

Mr. KASTENMEIER. Judge Harvey.

Judge HARVEY. Yes; I did not submit a prepared statement but my committee, which is the Committee on the Administration of Criminal Law, has been extremely interested in this question of amending the Bail Reform Act to permit the trial judge, judicial officer, to consider danger to the community for some time.

Just by way of a little history, the Judicial Conference on three different occasions has approved amending the Bail Reform Act to include as a danger factor to the community. In 1971 the Conference approved such a bill. I think the bill before it then was introduced by Congressman Celler and again more recently.

H.R. 3006, at least the first part, picks up very nearly the recommendation of the Judicial Conference, where it adds "or the safety of any other person or the community" as a factor to be considered by the judicial officer in deciding on conditions of bail.

The other portions of the bill have not been studied by our committee, but the Conference and our committee certainly has supported and is in favor of the first portion of the bill.

[24] Report of the Proceedings of the Judicial Conference of the United States, Mar. 5-6, 1980, p. 30.

[25] Report of the Proceedings of the Judicial Conference of the United States, Sept. 15-16, 1977.

Now I might mention a few factors which have caused the Conference and the committee to take this approach. As a trial judge, I have seen a good deal of this. I think the Conference and the trial judges have been quite concerned about the number of times where individuals out on bail commit additional crimes. The question is exactly what can we do about it.

The Bail Reform Act at this time does not explicitly cover that point. However, there are conflicting decisions in the circuit courts. The D.C. circuit has said that a judicial officer may not consider danger to the community or any other person in setting conditions of bail. The sixth circuit, on the other hand, in a case said a judicial officer could. This is another reason why the Conference and our committee would approve language such as in the first part of H.R. 3006 which would make this a factor.

It is certainly not a conclusive factor but, along with everything else, all the other factors to be considered, this is something that the judicial officer would be concerned with.

H.R. 4264 was, I believe, just introduced last week. We have not had an opportunity to study that; the preventive detention aspects of it, that is. We have not had an opportunity to comment on it.

As far as the other portions of H.R. 3006, there are some questions that individually I would raise. There is some language in there about a different type of standard, a clear and convincing evidence standard. I do not know of any other place in the criminal law where we have that standard. Of course we have reasonable doubt.

The findings now made by the judicial officer are made presumably by preponderance of the evidence. I think it might complicate matters to put a standard such as that in there. There are other aspects which, on further study, we might comment on.

The net of it is that my committee and the Conference supports fully the first part of this, where you would put into the Bail Reform Act a factor permitting consideration of this question of danger to the community.

Judge Tjoflat, in his written report, comments on that in the very last couple of pages upon where the Conference stands on that aspect of it. But I would be glad to answer any questions on this subject. This has been a matter of great interest to our committee and the Conference over the years and there has never been a bill that has been passed which has introduced this aspect to the Bail Reform Act.

Mr. KASTENMEIER. Thank you, Judge Harvey.

Next we would like to hear from Mr. Willetts, chief of the pretrial services branch.

We have your statement, Mr. Willetts. Proceed as you wish.

Mr. WILLETTS. Thank you, Mr. Chairman.

I will attempt to highlight some of the statistics that the pretrial service demonstration program has collected in the areas of crime on bail, crime committed by those released, and failure-to-appear rates.

We have collected data on 45,000 Federal offenders over a 5-year—well, in excess of a 5-year period—in these 10 demonstration districts.

At the beginning we discovered that the failure-to-appear rate by those released on bail was 6.7 percent, and we have had a steady decline since that time to about 2 percent.

New crimes committed by Federal offenders released on bail at the beginning of the project are 8.4 percent and have been reduced to about 4 percent.

We believe the major cause for this reduction is the fact that judicial officers responsible for setting bail now have verified information concerning each defendant prior to making a decision.

In addition, we know that we have improved the release rate, and that about 90 percent of the defendants coming into the Federal system are released. We think the significance of this is that, even though more persons have been released, we have seen approximately a 50-percent drop in new crimes committed by those released and in those who fail to appear.

It seems to me that the committee would be interested in trying to determine what constitutes dangerousness and how much it involves Federal offenders who are released in determining what impact you would expect a change in the Bail Reform Act to make, at least in the Federal system.

We have looked at released defendants who have been convicted of a prior felony. Of 8,827 who were released, 427, or 4.84 percent, were rearrested and charged with a new felony, State or Federal.

We also examined the defendants, who were initially charged with a felony, and who were released and subsequently arrested and charged with a new felony. The data reflects that of 34,573 defendants who were charged with felonies, 28,870 were released on bail and 792, or 2.74 percent, were arrested and charged with a new felony while on release.

It is important to recognize that all defendants charged with a felony who have also been convicted of a prior felony are not always convicted on the current criminal charges.

Of all the criminal defendants in the data bank, 34,573, or 91.5 percent, were charged with felonies and 9,361, or 27 percent, were not convicted.

In addition, of 11,732 defendants with prior felony records who were charged with a felony, 2,586, or 22 percent, were not convicted.

I think the point I am trying to make here is that if you detained persons based on their prior record and the instant charge, or just the instant charge, or a combination of either, you would just detain a number of people who will not be convicted.

I just thought the committee would be interested in that.

Finally, we have analyzed the incidence of crime on bail by looking at the original charges of defendants. This data reveals that defendants charged with robbery have had rearrest rates ranging from 10 to 16 percent during the years the pretrial services agencies have been operating.

Narcotics case defendants have had rearrest rates that range from 3.8 to a low of 2.6 during the past year.

Defendants charged with larceny and theft offenses have had the second highest rates of rearrest and those rates have remained around 10 percent throughout the life of the project, with a recent decline in the last year.

Forgery and counterfeiting case defendants have fluctuated between 10.6 in the first year and 9.4 in the last year.

Other categories such as embezzlement, fraud, and miscellaneous Federal crimes have had substantially lower rearrest rates than the ones mentioned above.

In addition to this statistical information we have attempted over the last 3 years to obtain statisticians to help us devise a scheme whereby we could develop a predictive device on the danger issue and on the flight issue. Repeatedly I am told that, with a violation rate in the failure to appear area or in the crime on bail area of 4 to 6 percent, it is very difficult, if not impossible, to develop a reliable predictive device, a scoring system if you will, that would give a valid result or be a valid predictive device.

For that reason, even though we have 5 years of experience, we don't have a predictive device, statistically speaking. We were reticent to impose one since people who are supposed to know how to do this type of thing tell us it is difficult to have a valid one with this low violation rate. I think the committee is interested, I hope, at least in how many people are going to be impacted at least in the Federal courts by changing the law to consider danger—and if so, which ones?

[The complete statement of Mr. Willetts follows:]

PREPARED STATEMENT OF GUY WILLETTS

Mr. Chairman, members of the Committee, I am Guy Willetts, Chief of the Pretrial Services Branch, Division of Probation, Administrative Offices of the United States Courts. I have served in this capacity since May of 1975 when the branch was created to oversee the pretrial services program established by Title II of the Speedy Trial Act of 1974.

The Speedy Trial Act of 1974 was passed to address the problems of unnecessary detention and crime on bail in the Federal Criminal Justice System. Title I was designed to reduce the overall length of time from arrest to final disposition and Title II was to provide for the establishment of pretrial services agencies in 10 judicial districts on an experimental basis. These agencies were to maintain effective supervision and control over, and provide supportive services to, defendants released on bail. Their primary functions are to:

(1) To collect, verify, and report to the judicial officer, information pertaining to the pretrial release of persons charged with an offense and recommend appropriate release conditions;

(2) Review and modify the report and recommendations;

(3) Supervise and provide supportive services to persons released to their custody; and

(4) Inform the court of violations of conditions of release.

The experimental agencies in the 10 districts have been operational an average of 64 months. Pretrial Services Officers of the 10 agencies have interviewed over 45,000 defendants. They have supervised 22,400 defendants who were released on bail. In addition to their statutory duties, officers and clerical supporting staff have been required by the Pretrial Services Branch to complete an extensive data report on each defendant interviewed. We now have 45,114 defendants included in the pretrial services data base from these 10 districts.

We believe this data base to be the most comprehensive source on Federal bail practices available. This subcommittee is now considering legislation that is aimed at reducing crime committed by those released on bail. Crime on bail, like any other problem cannot be dealt with effectively unless its magnitude is understood.

Our experience, based on this data, indicates that in the 10 demonstration districts prior to the formation of the pretrial services agencies, new crimes committed by federal offenders released on bail occurred at a rate of 8.4 percent and failures to appear occurred at the rate of 6.7 percent. Both rates have steadily declined to the point that the data suggest this year's crime on bail rate will be less than 4 percent and the failure to appear rate will be less than 2 percent. Each category has been statistically and numerically reduced by over 50 percent. We believe that the major

cause of this reduction is the fact that judicial officers responsible for setting bail now have verified information concerning each defendant prior to setting bail. A surprising set of complementary statistics reveal that more defendants are released at the initial bail hearing and overall. Our present rate of release is approaching 90 percent.

More specifically, we examined released defendants who had been convicted of a prior felony and learned that out of 8,827 who were released 427 (4.84 percent) were arrested and charged with a new felony (State or Federal).

We also examined the defendants who were initially charged with a felony who were released and subsequently arrested and charged with a new felony. The data reflects that of 34,573 defendants who were charged with felonies 28,870 were released on bail and 792 or 2.74 percent were arrested and charged with a new felony while on release.

It is important to recognize that all defendants charged with a felony who have also been convicted of a prior felony are not always convicted on the current Federal charges. Of all the criminal defendants in the data bank, 34,573, or 91.5 percent, were charged with felonies and 9,361, or 27 percent were not convicted. Of 11,732 defendants with prior felony records who were charged with a felony, 2,583 or 22 percent were not convicted.

Finally, the Pretrial Services Branch has analyzed the incidence of crime on bail by looking at the original charges of defendants. The data reveals that defendants charged with robbery have had rearrest rates ranging from 10 to 18 percent during the years the pretrial services agencies have been operating.

Narcotics cases have had rearrest rates that have gone from a high of 6.8 percent in the first year of operation to a low of 2.6 percent during the past year.

Defendants charged with larceny and theft offenses have had the second highest rates of rearrest and the rate has remained at around 10 percent throughout the years with a decline of 7 percent in the past year.

Forgery and counterfeiting cases have fluctuated between rates as high as 10.6 percent in the first year and 5.4 percent in the last year.

The remainder of the general categories such as embezzlement, fraud and the miscellaneous federal crimes have all had rearrest levels substantially lower than the aforementioned charges.

Mr. Chairman it is my hope that the information I have presented to this subcommittee will be of assistance in our mutual concern regarding the reduction of pretrial crime.

Mr. KASTENMEIER. Thank you, Mr. Willetts. It seems there is a tremendous amount of difficulty in using statistics, that is, distilling the statistics to evidence one single conclusion or fact. I say that because one has to look at one group against another group which may be detained by other means; high bail, not to avoid flight perhaps but at least, unsaid, nonetheless because of the danger of the individual.

I note that your prepared statement did not go to predictive devices and that your statistics in your prepared statement, as you stated, were for other purposes.

Mr. WILLETTS. Right.

Mr. KASTENMEIER. We had the interesting case yesterday of Mr. Charles Ruff, the U.S. attorney for the District of Columbia, who operates both under the D.C. Code and the preventive detention statute and the Federal courts which have no such statute. Mr. Ruff had statistics as to all those cases in the last 5 years or so that were recommended to the judiciary for preventive detention and the high ratio where that application was agreed to by the judiciary.

But one thing he did not have for us at that time was the number that was rejected by the judiciary, because presumably it was a test of who was right or wrong. One could actually tell whether that small sample—some 14—did to any great degree get involved in further dangerous behavior during the course of the release prior to trial or not. But we eventually will have that information.

This is the point where we have a rollcall vote and I am told it is on House Res. 124. We will have to recess for that purpose and we will return forthwith.

Accordingly, the subcommittee is recessed for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The meeting will reconvene.

I would now like to call on the fourth member of the panel, Mr. William Cohan, who is Chief of the Division of Probation, Administrative Office of the U.S. Courts.

Mr. Cohan.

Mr. COHAN. Thank you, Mr. Chairman.

I have a prepared statement.

Mr. KASTENMEIER. Very brief statement, two pages.

Mr. COHAN. Yes. I would ask that it be incorporated into the record.

Mr. KASTENMEIER. Without objection.

Mr. COHAN. The point I am trying to make is simply that the Federal probation system stands prepared to conduct the necessary investigations should the Congress decide to include dangerousness as one of the factors to be considered in the bail process. The probation system has a long history of experience in conducting investigations and making assessments of dangerousness and making recommendations either to judicial officers or to paroling authorities.

In fact, during the course of the usual year we will do about 110 investigative reports, most of which deal in one way or another either with dangerousness or the absence of it.

We deal with defendants starting at the earliest stages after arrest, preparing pretrial or the pretrial diversion recommendations. We prepare presentence investigations on nonconvicted defendants, where that is a practice in the court, to assist the court in determining whether or not to accept a plea agreement. We have experience in the preparation of presentence reports for convicted defendants, in determining whether or not to recommend voluntary surrender of a convicted person who has been sentenced to incarceration, and in recommending to the Bureau of Prisons whether or not some special designation should be made in view of either the danger that the offender would present to others or the possibility of danger to the offender.

Throughout the probation, parole, supervision process, the danger to the community is one of the continuing concerns; it guides probation officers on whether or not they should release information regarding a person under supervision to a third party—if the officer feels that he has a reasonably foreseeable risk involved in placing a person in an employment situation, for example.

Finally, in the decision that has to be made on whether or not to recommend revocation, either of probation or parole guidelines for such recommendations call for particular attention to whether or not danger to the community is a factor. In fact, the case law on revocation is leaning toward the direction that rehabilitation should be fully exhausted unless there is a danger to the community, so that you have to weigh the aspect of rehabilitation or danger

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to the community in making a revocation recommendation in the court and the parole authority has to consider that in their final decision. Throughout the course a career of a probation officer, for many years, is doing this sort of thing.

In the event Congress does pass legislation that would establish dangerousness as a factor to be considered, and legislation that establishes pretrial service programs on a national basis, the courts could look to the probation officers as well as the pretrial services officers to provide this sort of service.

That summarizes my statement.

[The complete statement of Mr. Cohan follows:]

PREPARED STATEMENT OF WILLIAM A. COHAN, JR.

Mr. Chairman, I am William A. Cohan, Jr., and a I am the chief of the Probation Division of the Administrative Office of the United States Courts. As the authorized agent of the Director of the Administrative Office the Chief of the Probation Division is empowered by 18 U.S.C. 3656 to formulate generals rules for the power conduct of probation work, to promote the efficent administration of the Probation System, and the enforcement of the probation laws in all United States courts.

At the present time this subcommittee is considering proposed amendments to the Federal Bail Reform Act which would permit judicial officers to consider the potential danger of a defendant and to establish restrictive conditions of release or detain without bail those defendants who pose a potential risk of danger to other persons or the community.

As you are aware, since 1975 the Probation Division has administered pretrail services agencies in ten demonstration districts established under Title II of the Speedy Trail Act. In addition six U.S. probation offices have provided pretrail services on a volunteer basis. Each of those units has endeavored to reduce the incidence of crime committed by defendants by investigating and supervising defendants during the time prior tht the trail. Mr. Willetts, who is the chief of the Pretrial Services Branch, will be testifying in detail about the results those agencies have achieved in reducing crime on bail.

In the current session of Congress there are two bills which, if enacted, would establish pretrail services on a national basis.

S. 293 has passed the Senate without reference to the issue of danger to the community. However, H.R. 3481 has been reported out of the judiciary committee of the House with a provision which requires that a pretrial services officer, "Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and recommend appropriate release conditions for such individual."

H.R. 3481 also requires the pretrial services officer to "inform the court and the United States Attorney of all apparent violations of pretrial release conditions, arrests of persons released to the custody of providers of pretrial services or under the supervision of providers of pretrial services, and any danger that such persons may come to pose to any other person (or the community, and recommend appropriate modifications of release conditions."

Both bills leave the determination of the type of administration organization to the individual courts and the Judicial Conference of the United States. We assume however, that many courts will elect to have the pretrial services functions provided by existing U.S. probation staff.

The Federal Probation System presently consists of 1,627 officers, 1,035 clerks, and 40 probation officer assistants situated in over 300 offices throughout the Nation. Since the establishment of the Probation System, officer have been conducting investigations and making assessments of the potential dangerousness of offenders. Recommendations based upon these assessments are then made to district court judges, U.S. attorney, and parole authorities.

Probation officers are directed by various statutes, regulations, and guidelines to consider the potential danger a defendant or a person under supervision poses to the community. This type of assessment is made by probation officers in the process of preparing presentence reports, classifying offenders for supervision, planning supervision, deciding to disclose certain information to third parties, and reporting violations of both parole and probation.

The U.S. Probation Officers Manual states that the protection of the community is one of the primary objectives of supervision and that:

To protect persons and property from illegal and antisocial acts by persons receiving probation and parole services, the probation officer will:

Assess the nature and degree of danger presented by persons under supervision;

Determine the course of action that will best protect the community;

Provide the court or Parole Commission with information and recommendations related to means of community protection;

Exercise such supervision and control of clients in the community as will be essential to protect the public, taking preventive or corrective action as necessary; and

Analyze methods to improve diagnostic and predictive capabilities in relation to community protection.

In 1980 probation officers prepared 112,000 reports related to the aforementioned duties with the attendant considerations of danger to the community. Should the Congress decide to include a defendant's potential danger to the community as an element in the bail decision, the probation system stands ready to assist judicial officers by conducting investigations, making recommendations, monitoring compliance with conditions, and reporting violations of those same conditions.

Mr. Chairman, this concludes my remarks. I appreciate the opportunity to appear before you today and I shall be pleased to answer any questions you may have.

Mr. KASTENMEIER. Thank you.

Of course, dangerousness to the community may be a particular challenge to you in terms of pretrial services.

I think we need to separate out violations of parole, because they can be dealt with in other ways, as far as detention goes.

Mr. COHAN. Yes.

Mr. KASTENMEIER. But you will have to deal with the person who doesn't happen to be on parole, or is not on probation, but is arrested for a crime and may have, nonetheless, a background which suggests some difficulty. Incarceration is not an option available to you?

In other words, the pretrial services do not contemplate incarceration, they contemplate multiple ways of best dealing with the individual short of incarceration.

Mr. COHAN. Right.

Mr. KASTENMEIER. Although I assume that the conditions could be imposed upon the individual which approach incarceration, if a person is in charge of the individual or if they agree to remain in an institutional setting which is not precisely incarceration, but for the purposes of mitigating the opportunities to commit a crime or to violate terms of bail, I suppose that can approach incarceration as far as limitations on the individual.

Mr. COHAN. Yes, sir. I think there are several roles that the pretrial service officer or the probation officer or the person providing the pretrial support to the judicial officer plays. There is a lot of attention focused on the investigative role to assist in making an informed decision.

I think a continuing and in my mind very important aspect of it is their presence to provide supervision which will allow the judicial officer to structure, hopefully, an appropriate level of conditions of release—an appropriate level of restrictions—with some assurance that the compliance with those conditions would be monitored and, in the event of failure to comply, there would be prompt reporting to the judicial officer who could then either modify the conditions or take what action he felt necessary.

I think that the performance of the 10 demonstration projects in the pretrial service program demonstrates that the crime-on-bail rate can be reduced, and the new ingredient there was supervision.

Mr. KASTENMEIER. For a person not knowledgeable in the general area of pretrial release or bail, should I understand that speedy trials in the Federal system, that pretrial services and that preventive detention for presenting a danger to the community are various aspects of the form of tool, that is speedy trial and pretrial services, the purpose of which is used in part to avoid the necessity of resort to what is now presently in the law pretrial detention.

Philosophically is that one of the reasons for developing these two areas, speedy trials for criminal defendants and pretrial services? Are they considered an alternative in a sense to having to ultimately go to preventive detention, to deal with a certain class of individual?

Mr. COHAN. Certainly——

Mr. KASTENMEIER. I address this to the panel.

Mr. COHAN. The whole speedy trial concept, title I and title II, was intended to reduce crime—not only to provide a speedy trial, but to reduce crime by persons during pretrial release and to avoid unnecessary detention.

Judge TJOFLAT. Congress, Mr. Chairman, was aware of the fact that unnecessary detention was built into the system. Judges, either because they set bail too high—monetary bail for example—or set other conditions, and individuals were being detained awaiting trial unnecessarily, with no legitimate reason for it. That is my reading of the congressional intent. If you accelerate the trial, which was in the public interest as well as the defendant's interest, and in the interest of the overall system, and if you also supervise persons on release, and if bail officers have more information to make informed decisions, then we would be releasing people under the appropriate conditions, and we would cut down crime while folks were awaiting trial and—at the same time—we would eliminate the undesirable detention that was built into the system.

There will always be some of that, as long as you have, I suppose, monetary bail or other conditions of bail that operate in the same fashion.

Mr. KASTENMEIER. I would like to return to that later but in the interest of fairness I do want to yield to the gentleman from Michigan. I have a series of questions I would like to develop with the panel.

First I yield to my friend for 5 minutes.

Mr. SAWYER. I only have one or two. It was indicated that in a certain number, a certain percentage—I suppose it will always be thus—are acquitted, not necessarily found innocent but not found guilty; therefore, the inference that there would be some of these people would be detained under the preventive detention type thing, and that is probably true.

But when you look at the history of the District of Columbia ordinance or whatever it is called, there were only I think 55 actually detailed over the 20-year period, something between 5 and 6 a year on the average.

Wouldn't you think that when it is used that sparingly the chances of getting someone who is going to be acquitted is far

below, at least, what would be the offense of those who are acquitted after going to trial; would you think that would be a reasonable assumption.

Judge HARVEY. I would agree with that.

I think another answer to that is that under the present Bail Act, as careful as the judicial officer might be, there are individuals who cannot make bail and who are later acquitted, so already there are a few in the system.

I think it is a balancing process. On the one hand, there is a mechanism for preventing some crimes by people who commit successive crimes and—balanced against that—how many will there be who may eventually be acquitted who have to be detained? But I think we already have that. I am not sure what the statistics show, but I am not sure you are going to get a great many more if you add dangerousness to the Bail Act.

Mr. SAWYER. Also, it would seem to me, whether or not it is a listed criterion, that judges do pay some attention to the relative strength, at least apparent strength or weakness of the case against a defendant; I think he generally would be aware if it was a very marginal arrest or charge situation. Undoubtedly I would think so.

Judge HARVEY. That is in the act as a factor which the judge should consider. But this is another reason that is advanced for putting dangerousness in the statute. A great many times the judge or the magistrate will detain somebody or put a very high bail, taking into account dangerousness and calling it something else. If you put it in the act, then it is a factor that he can honestly and conscientiously deal with.

Mr. SAWYER. Yes. We have had a number of judges on panels who have in effect indicated, whether it is a direct criterion or not, they take it into account in the likelihood-to-appear evaluation, in fact. So I suppose—also, as I recall the case, there is a sixth circuit involving a defendant named Wind.

Judge HARVEY. The Wind case, you are correct.

Mr. SAWYER. That is ambivalent. I have read this case twice, they keep combining the threat to the witness with danger to the community, whenever they say them together, so it is hard to say whether they really found just danger to the community had it not been a threat to the witness; they use them in the conjunctive every time they use them.

Judge HARVEY. There is a later sixth circuit case that throws some light on that, Bigelow, in which they narrowed it, and said that the Wind case was really the threat to the witness rather than general dangerousness.

Mr. SAWYER. I haven't read that Bigelow case but I will have to read it.

Judge HARVEY. Previously we mentioned there was a District of Columbia Circuit case that says flatly you cannot consider in any way dangerousness under the present Bail Reform Act.

Mr. SAWYER. I am interested. I had not known there was a subsequent sixth circuit case.

Judge HARVEY. If you would like that citation, I can give it to counsel.

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Mr. SAWYER. Yes, I would like it, because I sort of view the sixth circuit as the oracle of all the Courts of Appeal of the country.

Judge HARVEY. I have it here, 544 2nd 904, 1976.

In the Wind case in 1975, the sixth circuit said that, in effect, preventive detention was available only to insure the orderly progress of the criminal prosecution. So they really narrowed the earlier decision which indicated it was wide open, perhaps, and used the language in the disjunctive.

Mr. SAWYER. I yield back.

Mr. KASTENMEIER. I think you may have indicated your answer to this, but for the record perhaps I can phrase the question more directly.

It has been suggested that Federal judges are currently using preventive detention-like decisions under the present law; that is to say that judges are detaining for trial presumably dangerous defendants where their primary concern is not flight risk but danger to the community. I guess the question is, do you believe this to be true and, if it is true, what should our response to this practice be?

Judge TJOFLAT. Mr. Chairman, I do not know whether it is true or not. I can only speak from my experience as a district judge in the middle district of Florida for 5½ years and for the fifth circuit for an equal length of time.

Assuming a bail hearing before a fair judge with both sides, the government and the defendant, being adequately represented, I think that dangerousness to the community or other persons may well be taken into account legitimately by the judge—because I think that bears on the risk of flight.

Somebody who is—who may well have a strong case against him—and who has a propensity to go out and commit further offenses and will probably be arrested and probably be incarcerated on the first charge or the second charge—is likely to flee. I think the judge appropriately takes dangerousness into account.

In these enormous drug conspiracy cases in Florida with which I am quite familiar, there are some who say district judges set bail, of $1, $2, or $3 million to detain the defendant. But the fact of the matter is that those bails are made. There are folks who would willingly post $1 or $2 million cash and go to Europe or South America or wherever because you haven't even made a dent.

So I think the argument can be just as well made that the judge is setting bail that high to insure the defendant's presence and he simply may choose not to post it. That is a very tough judgment call. Very few defendants are going to come in in those cases and tell the court precisely what they have stashed away in the Bahamas or wherever in terms of cash; they may just choose to wait it out.

Their counsel may tell them, "just rest in the jail for a short time, the Speedy Trial Act will get you an early trial, and we think motion to suppress will be granted and there is no use telling the court, IRS and a lot of other people what your resources are."

My impression on the whole is that the judges in the Federal system don't use high monetary bail to such an extent that it operates to detain a defendant simply because they think he is bad news to the community if he is released.

Mr. KASTENMEIER. Do you consider that the present statutes are wholly adequate for the purposes of flight risk?

Judge TJOFLAT. No. I think the Bail Reform Act must be amended to permit a judge to take into account in setting bail prior to trial—just as he may take into account in settling bail pending appeal—the question of danger to the community. If I may expand momentarily on that point, there are two essential issues, it seems to me, facing a trial judge in these cases.

One, the judge has the inherent power and responsibility of managing his docket—and that means all of the cases and the specific cases.

He has the responsibility in the interest of justice and in the public interest to insure that a case is quickly brought to trial without any injury done to parties, witnesses, jurors and the like. I think the judge has the inherent power to issue whatever orders are necessary to insure that a case is orderly moved to a trial date in a safe and efficient way and at the same time insures everybody a fair trial.

Now, H.R. 4264, for example, would permit preventive detention to be used where a defendant is threatening witnesses, jurors and the like—obstructing justice. I think a judge has the power to issue ancillary orders in the aid of his jurisdiction in those kinds of cases, and I wouldn't call those preventive detention cases.

Likewise, when a judge sets bail, he is concerned initially with the appearance of the defendant, but overriding that is his concern that the appearance of overall justice is accomplished, to the public as well as to the defendant, that is. That is why I think dangerousness to the community is involved.

Now when pretrial detention neither serves the purpose of fundamentally insuring the defendant's presence or insuring the orderly progression of the case at trial with the safety of all concerned in the prosecution, but rather, serves to incapacitate or remove from society bad persons who happen to have gotten indicted in the Federal system, we are dealing with different objectives. We are now taking the occasion to say "By the way, you are bad news, and while we think the case could go to trial without any difficulty and it may well be that you can appear, you are the type of person who has the propensity to commit a crime." We are talking about simply sentencing somebody much in the sense a judge would take into account incapacitation in sentencing a convicted defendant and removing him for a while from society. The judge is just saying: "We are going to remove you from society for whatever time it takes to bring the case to trial." That is the major concern I think of all the commentators. That is why due process hearings of great elaborateness are provided for.

What concerns me in H.R. 4264 is the nature of that hearing from a practical point of view.

On page 7 of the bill, it states: "Information stated in or offered in connection with any order under this section need not conform to the rules pertaining to the admissibility of evidence in a court of law."

The paragraph above that states: "The defendant shall be entitled to be represented by the counsel to present witnesses and evidence, and to cross-examine witnesses against the defendant."

Let's look at that from a practical point of view.

Here is an individual charged with a crime who fits the criteria, let's say, for preventive detention. He is a major drug dealer or he is involved in a big drug conspiracy or extortion racket. It is an organized crime sort of a case which the bill addresses.

The prosecutor comes before the judge and says: "I want this defendant detained." The prosecutor, under this bill, would be entitled to make a proffer, speaking proffer of what he would show in order to satisfy the judge that there is a substantial probability that the defendant is guilty of the crime charged. The judge must make that finding under this bill. So the prosecutor articulates in a narrative way what the case will be.

A defense counsel worth his salt is going to object to that form, the prosecutor is going to say well, the State says that the court may entertain evidence like a proffer which doesn't conform to the rules. But the defense will say, "but I am entitled to present witnesses and evidence and to cross-examine witnesses against the defendant."

Adequately informed and equipped defense counsel are going to call for the government to produce a witness list before the defendant is detained. The judge is going to have an awfully difficult time in my judgment with a reconciliation of these two provisions.

Does this bill mean that the right of a defendant to present witnesses and evidence and to cross-examine witnesses against the defendant depends on whether the prosecutor wants to make a verbal proffer and forego an evidentiary presentation?

If several circuits construed this bill to mean that a defendant in one of those situations is entitled to a witness list and to subpoena the Government's case, you know precisely what is going to happen.

In the very cases that Congress is concerned about—and the public and the courts are concerned about, the serious organized crime cases which present enormous danger on a widespread basis to the community—the defendant is going to have a witness list and the chance to run through a bunch of witnesses who may well be intimidated in the process. This bill would operate to provide discovery in those cases. The history of discovery before the Congress has been that prosecutors have universally opposed any kind of a measure in the criminal rules of evidence which would require the prosecution to disclose witnesses.

The bottom line is that if this statute were enacted and construed in a way that would allow the defendant to have the prosecution's case, I do not think there is a prosecutor that would have the nerve to bring a petition to the court asking for the defendant to be detained. If the bill were adopted and construed in this way, I have a serious question whether the Congress would not be quick to repeal this statute because it unwittingly enacted a defense discovery mechanism in the very cases in which the prosecution historically has resisted any form of discovery.

That is one practical problem that I see in this bill—or in any bill—which would provide for a full due process hearing, calling of witnesses and the like, on the part of the defense.

There are other problems. What is the impact in the prosecutorial branch of tying cases up? You can't get these organized crime

cases to trial in 60 days today. Now you are going to have a detention hearing and a requirement that they go to trial in 60 days. I think that is impossible.

What about the appeal rights? If the defendant is in the court of appeals and has been detained, he is asking the court of appeals for an emergency order releasing him, or a stay of the district court's order. To me there would be substantial impact from a procedural point of view and a workload point of view in the courts of appeals.

Mr. KASTENMEIER. Your position is that the author of the bill, in order to assure a modicum of due process, has unwittingly provided more problems potentially than possibly can sustain the mechanism he suggested.

Judge TJOFLAT. In the middle and southern districts of Florida, Mr. Chairman, where most of the criminal cases of the organized crime drug variety arise, I daresay there won't be a case in which the U.S. attorney would subject his witnesses to pretrial discovery of the type that would be available under this bill.

Mr. KASTENMEIER. Let me ask you a different question and you may not care to answer it, but do you think some measure of due process would be required, apart from what you presumably are recommending, that danger to the community be a factor in considering flight; supposing that we consider as in this case the flight risk be separated from danger to the community?

Judge TJOFLAT. If you also separate danger to the community from the orderly administration of the case?

Mr. KASTENMEIER. Yes.

Judge TJOFLAT. I do not think that kind of a due process hearing is required. When the prosecutor comes to the judge with the defense counsel and says, "Your Honor, the defendant is intimidating witnesses, we are going to trial in a month, he is intimidating witnesses, and I am concerned about obstruction of justice with a jury," I think right then a district judge would have the inherent power to issue constraint orders.

I am not talking about locking the defendant up on the spot. The amount of due process the defendant would be entitled to in those circumstances of course would depend upon the sanction the judge might impose. The greater the sanction up to and including total deprivation of liberty would require more of a due process hearing. But in this bill that kind of a hearing is required in all these cases, including those obstruction of justice cases that impede the court's administration of justice.

So if you amend the Bail Reform Act to allow dangerousness to be taken into account, I wouldn't couple this kind of a hearing with that amendment.

I do not know if I answered the question.

Mr. KASTENMEIER. You have now taken the most difficult case, intimidating witnesses. Supposing someone is, at least in the minds of those conducting the investigation, the U.S. attorney, a danger to the community in the more general sense.

Judge TJOFLAT. A bank robber?

Mr. KASTENMEIER. A very violent robber.

Judge TJOFLAT. A bank robber, and you think that while he is on bail he will commit another robbery?

Mr. KASTENMEIER. And doesn't care to make a case as far as risk of flight, for one reason or another; then he has to confront not the more obvious case for the court, and furthermore when we are talking about risk of flight we are talking about conditions of release.

Judge TJOFLAT. You could lock him up under the Bail Reform Act for 23 hours a day, I suppose; a literal reading of the act would permit that?

Mr. KASTENMEIER. But not 24 hours a day?

Judge TJOFLAT. No. Or you could put him in the custody of a third party for 24 hours a day. You could make that custody pretty constraining, put him in the lawyer's office for all 24 hours or some such place.

Mr. KASTENMEIER. I started to raise that question with Mr. Cohan, arising out of my own ignorance, as to how graduated up to incarceration one could make that——

Judge TJOFLAT. Under the Bail Reform Act, the first condition is, place the person in the custody of a person or organization agreeing to supervise him. Now that is a very broad statement and an imaginative judge in my view under that statement could come close to putting somebody in a jail-type setting.

Mr. KASTENMEIER. Halfway house?

Judge TJOFLAT. Halfway house; it is a debatable question.

Judge HARVEY. I think it is an extension of what is presently in the Bail Reform Act; if you add dangerousness, then it is another factor. And you often get a question of due process in a bail hearing; there is a lot of law on that, as to how much, what the evidence is, and so forth.

Mr. KASTENMEIER. So if you just put it in the present statute with this additional factor, it may be just a question of degree. It doesn't mean that it is an entirely separate preventive detention due process type of hearing, and I think there is a good deal of case law on this which would be helpful if this factor was added.

Judge TJOFLAT. And, Mr. Chairman, under the Bail Reform Act as it now stands and as it would if amended to include dangerousness, the judge's focus at the bail hearing on the charged offense would be to the same extent that it would be under H.R. 4264.

Mr. KASTENMEIER. But to summarize, see if I understand correctly: The panel is agreed that we do not require, at least as far as your recommendation is concerned, a District of Columbia Code-style preventive detention act, but what we might well use is an expanding of the definition to include danger to the community as far as the flight risk is concerned, and that in other respects we can rely upon the flexibility in pretrial services, coupled with the Speedy Trial Act, and others I suppose, to manage the problem of the dangerousness of the arrestee, is that correct?

Judge TJOFLAT. I think that is a fair summary, Mr. Chairman.

Mr. KASTENMEIER. Does the gentleman from Michigan have further questions?

Mr. SAWYER. No.

Mr. KASTENMEIER. We have, I must report, another vote. I think we could stay on a very long time. I have learned a great deal. Of course, I appreciate availing myself of the views of the panel, Judge Tjoflat, Judge Harvey, Mr. Willetts, and Mr. Cohan.

It may well be that we will have further questions of you at some time, either by letter or otherwise, as we try to resolve this problem and presumably act affirmatively with respect to some recommendation.

In any event, in behalf of the subcommittee, I want to express our appreciation to the four of you, Judges Tjoflat, Harvey, Mr. Willetts, and Mr. Cohan, for your appearance this morning. We are very indebted to you.

Let me also say that the hour is late in the morning, but if Prof. Freed will be good enough to remain, we will be back in 10 minutes and continue with Prof. Freed.

Accordingly, the subcommittee will be recessed for 10 minutes.

[Recess.]

Mr. KASTENMEIER. The subcommittee will come to order.

The Subcommittee is now pleased to greet Prof. Daniel Freed, Yale Law School, who served prominently in the Justice Department in the 1960's and who was a central figure in the drafting of the Bail Reform Act and in other matters relating to the general issue of pretrial defendants. We are very pleased to have someone with his historical perspective and practical experience in the field.

Mr. Freed, you are indeed welcome.

TESTIMONY OF DANIEL FREED, PROFESSOR, YALE LAW SCHOOL

Mr. FREED. Thank you, Mr. Chairman.

I would like, with your permission, to offer my prepared statement for the record and to proceed independently of it, making some of the points that are in there and a number that have been omitted.

Mr. KASTENMEIER. Without objection, your statement will be received in the record. You may continue as you wish.

Mr. FREED. The basic issue that I see before this committee is, Why should the Judiciary Act of 1979 be amended by the Congress? The Bail Reform Act of 1966 did not make any change, any fundamental change, in the nature of the right to bail in Federal courts in this country. The unalterable rule since the first Congress enacted the Judiciary Act to establish Federal courts was that there was an absolute right to bail in noncapital cases and a qualified right to bail in capital cases.

The problem of crime on bail is not, as many speeches and statements and articles would suggest, new in 1981 or in the decade of the seventies, or in this century.

The problem of dangerous defendants has existed as long as there has been criminal law, and concern by the courts for the conduct of persons while released, as well as to assure their appearance when there was a trial, has always been a concern of the criminal justice system and I think of the bail process.

Some people believe that there is a need in 1981 to enact a brandnew unprecedented authority in the Federal system to detail people prior to trial without a trial for incapacitation purposes, just as stated by Judge Tjoflat.

Others believe that no detention authority is valid in the Federal system, that it would violate the eighth amendment. I do not agree with either of those positions, as far as what the issue is. I do not

think a statute is needed to detail dangerous defendants and I do not think that the question of constitutionality under the Eighth Amendment is the primary question that this committee should consider.

I do think it is an important question, I do think serious constitutional doubts would attend any change in basic Federal law, but I question the necessity for a detention statute, and it is to that question of necessity that I wish to devote my remarks today. What I basically would like to know is what is new about the problem of crime on bail and about the ability or inability of the bail system to deal with it that generates so much smoke and so much eloquence in favor of a detention statute, that is missing if one takes a look at the history of bail.

First, some basic facts. Today's system detains enormous numbers of defendants in the Federal system as well as in the States.

In the pretrial service agency districts alone, just 10 districts, over a period of 5 years for which data was collected, 43 percent of all Federal defendants were held in detention for some period of time from 1 day on up to many months.

Many of those defendants were eventually released on bail. A few, I think the figure is some 6,000 out of a total of 45,000 defendants in those districts in the 5 years, were detained throughout the period up to adjudication, and at the end of that period of full detention, some were convicted, some were sentenced to prison, some were acquitted, and some were given noncustodial sentences.

Detention is not new, nor does the Bail Reform Act require detention.

One of the things that we paid great attention to in the 1960's when the idea of a comprehensive bail statute was first suggested, was to validate the detention which existed prior to the bail reform era, and that was necessary.

The purpose of the Bail Reform Act was to reduce unnecessary detention, and a great many studies and experiments had demonstrated that an awful lot of people were being detained at very high expense to the Federal courts and to the State courts without any need, because they presented no significant risk to the community. But, in the course of writing the Bail Reform Act to encourage factfinding and alternative methods of release, my colleagues and I in the Justice Department and all those who worked on the bills in the Congress, were very careful to make no pretense that the purpose of the bill was to release all defendants prior to trial.

There is no such statement in the statute, there is no such statement in the legislative history, and all of the subsequent 15 years of history under the Bail Reform Act indicate that huge numbers of defendants have been detained since 1966 as they were before. But there were some changes, important changes.

And, there was a substantial reduction in needless detention, although, if one looks back at statistics, I think you will find that in the Federal system the bulk of the drop in detention, in needless detention, took place in the 2 years prior to enacting the Bail Reform Act. And, by the time the act was passed, it basically reflected new Federal policy that largely evolved voluntarily by action of U.S. attorneys and Federal judges who, having read about or heard about or attended conferences about bail reform, found

that it was unnecessary to impose monetary conditions on a great many defendants who posed no significant risk prior to trial.

But, if you read the Bail Reform Act, you will see that it has a statement of purpose; there aren't too many bills that Congress passes with statements of purpose. But section 2 of the Bail Reform Act states:

> The purpose of this act is to revise the practices relating to bail to assure that all persons, regardless of financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention service is neither the end of justice nor the public interest.

In the substantive provisions of the act, the word "detention" is found repeatedly. And the reason why a 24-hour right to review was provided is that it was expected that countless defendants would be detained at the initial bail hearing, and the reason why appeals to the district court were provided is that it was contemplated many people would not be released after their 24-hour review, and the reason why expedited appeals to the court of appeals were provided is that it was contemplated the District courts would not release people who had already three times been up for a bail or a bail review hearing.

The Bail Reform Act is the first in Federal history that inserts a crime-control purpose in the text of a pretrial release hearing. Crime control can be considered either for capital cases or for cases pending appeal. The judge can either set conditions of release to preclude danger to the community, or the judge may detain the person in a capital case or on appeal.

In section 3146, a provision was made for part-time detention, released from custody only during specified hours. No such detention authority in noncapital cases has ever been provided before in the Federal system. But there it was inserted so that part-time detention could be ordered where it was thought that people could not safely be released full time prior to trial.

Finally, it was very clear that the money bail system, while being subordinated in importance, was maintained and that there would be significant full-time detention by the setting of high money bail. Not only are all those detention authorities and consideration of dangerousness mentioned specifically in the bill, but when the Department of Justice came before the House Judiciary Committee in 1965, there were persistent questions from members of the committee about the problems of crime on bail.

The Deputy Attorney General at that time acknowledged to the committee that the draft of the Bail Reform Act that was being proposed was not an ideal statute, that it didn't deal fully with all the problems of dangerousness that one could suppose, that we didn't know how to draft such a statute, but that no statute was needed in order to persist in the many ways in which Federal courts had previously detained noncapital defendants prior to trial.

If you look in the prepared statement of Ramsey Clark and in the questions of the committee to Ramsey Clark as Deputy Attorney General in 1965, you will see a host of methods of pretrial detention itemized and acknowledged by the Justice Department. And all of those methods of pretrial detention, whether by revocation of release, by setting high money bail, by commitment for mental examination, I think there was a total of 11, all of those

methods that were in use prior to 1966 remain in use today and account for the overwhelmingly large number of persons who are detained in the Federal courts, and, of course, those methods are preserved in the States where detention rates are even higher.

Therefore, there is on the face of it no basis for any suggestion that the Bail Reform Act requires pretrial release and doesn't consider the dangerousness of defendants. It is true, however, that no criteria of danger to the community was put in the bill for persons awaiting trial on noncapital charges. No such criterion ever existed prior to the statute, no criterion exists up until the present time.

The Judicial Conference has recommended that such a factor be inserted. While I would suggest a change in language which I will come to later, I see no objection to inserting such a consideration. I believe, as the judges already testified to you, that that is already done by Federal judges and State judges everywhere; I do not think it will make any difference in the setting of bail.

I do think many people will feel happier that judges are saying openly what they say privately and what they say in conferences. I see no reason to deny that concern about the conduct of defendants while released has been and ought to be a legislative consideration for the judiciary.

But, I believe that that consideration should be limited to the setting of release conditions as the Judicial Conference has recommended, and should not be a basis for a denial of bail in noncapital offenses.

If you authorize the denial of bail in noncapital cases, you will, after 192 years, be changing Federal law, and before you reach the question of constitutionality—after all, the eighth amendment was enacted by the same Congress that enacted the Judiciary Act—the question is, What do you know today that Congressmen didn't know in 1789 and that magistrates and judges in this country in colonial times, and in England long before, didn't know?

What is it that is new about dangerousness that requires a finding, a judicial finding that an unconvicted person is dangerous?

I think such a finding would be a very unfortunate requirement to insert in Federal law. If you authorize and require a Federal judge, for the purpose of detaining a noncapital defendant, to find that he or she is dangerous, you are imposing a penalty which no subsequent trial can remove. If that defendant is acquitted or not convicted, there will remain on the defendant's record forever a finding that he or she was dangerous, made on the first day or the second day or the third day after arrest without ever weighing the facts in the pending case, and of course without having any facts on which you could predict dangerousness in the future.

I think it is a totally unnecessary and harmful finding to make. I think it will put judges in a very difficult position and I think, in fact, that this factor more than any other accounts for the enormous restraint that has been exercised by U.S. attorneys in the District of Columbia for the first 11 years of their detention statute, and I think it accounts for the great restraint with which judges have ordered defendants preventively detained.

It is a very, very awesome responsibility to ask a judge on the first day or the fifth day to find that a person arrested is so dangerous that he should be labeled a danger to the community and held

in incapacitation, not to assure his appearance at trial but to prevent him from committing future crimes.

As Judge Tjoflat said, that is the function of the trial and sentence in our system. If you are going to enact a preventive detention statute, you should acknowledge that you are, for some people, going to authorize judges to try and sentence them in 1 day, without rules of evidence, without proof beyond a reasonable doubt, without a jury, and with just the trust that you have good records that you can establish a good record of prediction.

I could understand the Congress feeling compelled to enact a detention statute if you found that in the jurisdiction over which you have authority, the Federal court, there was an enormously high rate of crime on bail. But you have no such data.

As Mr. Willetts and the judges indicated, the rate of arrest, rearrest on bail—nobody has given you statistics about convictions of felonies committed on bail—the rate of crime on bail in the Federal system is extraordinarily low. It is so low it is unbelievable.

But if you read the testimony before Congressman Hughes' subcommittee, you will see acknowledged over and over again that the truly dangerous defendants were not released in the pretrial service agency districts.

Crime on bail was certainly considered by the judges and magistrates and U.S. attorneys in pretrial service agencies and a great deal of detention persisted. The bulk of the dangerous people were detained. If you have crime rates or arrest rates of 2, 3, 4 percent, that is an astonishing record. I think it is due in part to the very careful supervision provided by pretrial service agencies and is due in large part to the fact that the bail system detains people in 1981, 1976, the last 5 years, as it has detained them throughout history.

There is really no factual case that can be made for a detention statute in Federal courts that can have such a tiny incidence of rearrests on bail. It strikes me that the legislation approved by the—already passed by the Senate and approved by the full Judiciary Committee of the House to establish pretrial service agencies throughout the Federal system is certainly the way to proceed, if one doesn't wish to revolutionize Federal law, change the 1789 statute before testing whether the remaining crime on bail problem in the Federal system can't be taken care of by pretrial service agencies.

But the more basic question is why is danger to the community not a part of Federal law in noncapital cases today? Why wasn't it put in by the First Congress in 1789? Why has it never been thought of in legislation that anyone can find in this country prior to the last decade or two?

I think the reason has to do with a dramatic change that the bail system underwent in this country, a change that has never occurred in England, in the 19th century, when the common law system of personal sureties began to be replaced by bondsmen.

I think the reasons for that historic change in the 18th century were very laudable and liberal. The change occurred carefully. I think that the change has validity even today. We were a frontier country, not a stable society, in which people kept moving out of the cities, off into frontier areas and new places and we were, in many ways, a community of strangers. It was thought unfair that

the traditional bail system, with the need to find a reliable friend to act as surety, should be responsible for the detention of so many citizens as they moved West or South or wherever they went.

So there grew up, and there are different accounts of the history of it, there grew up a system of people in the community offering their services, sometimes voluntarily to strangers and sometimes for a fee, in order to attest to the reliability of a defendant.

And throughout the 19th century the idea of compensated sureties began to spread in this country. If one reads State cases as well as Federal cases in the latter part of the 19th century, you will see that the issue of compensation or prohibition against compensation to sureties was the major issue. Some courts found that it was flatly against public policy to pay a surety, to promise to indemnify him; that if a defendant would be permitted to compensate his bondsman or his surety, he could in effect buy his freedom and escape.

The bail system that grew up, the money bail system that grew up to assure appearance at trial, could also in the view of some courts be used to assure escape from trial. There was really no way of telling. If you could buy your way out of jail, you might wish to come back, or whoever helped you might wish to assure your appearance at the trial. Or if the money was not important and the surety was part of your criminal business or the surety didn't know you well enough, you could skip town, you no longer had any stake.

The importance, the historical importance of the surety seems very much to have been lost on present-day legislatures and courts. But if you want to see it mentioned, and mentioned prominently, in the history of this country, just take a look at a rundown of State constitutional provisions in the United States today, very similar to those that were in most but not all of the original colonies at the time the country was established, and you will see that the typical provision for bail reads something like the following:

All persons shall be bailable comma upon sufficient sureties comma except in capital cases where the evidence is clear or the presumption great.

What that language means to me, what I think it meant to our predecessors, is that all persons were to be eligible for admission to bail in noncapital cases, upon sufficient sureties; upon presentation to the court of sufficient number of reliable persons so that the court, when releasing the defendant, would have confidence that reliable members of the community were going to bring that defendant back; that they were willing to attest to his or her character and reliability and be willing to risk their own lands or financial resources to bring the person back.

There is no mention in those early days of compensated sureties. I think that compensated sureties grew up for reasons I have already suggested, when too many of us began to move into communities where we had no friends. And a crucial case came to the Supreme Court in 1912 in *Leary* v. *United States,* in which the Government tried to impose a trust on some funds posted as indemnification for surety. And the major issue litigated before the Supreme Court was whether to outlaw as against public policy the indemnification of a surety or whether to allow it.

And Justice Holmes, in a fairly brief opinion, had the following things to say about the change from classic surety to the bail system:

> It is said that the bail contemplated by the revised statutes is common law bail and that nothing should be done to diminish the interest of the bail

That means the surety—

> in producing the body of his principal. But bail no longer is the mundium, although a trace of the old relationship remains in the right of arrest. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000 and that sum was the measure of the interest on anybody's part, and it did not matter to the government what person ultimately felt the loss, so long as it had the obligation it was content to take.

In other words, the Supreme Court was saying that when you set bail for defendant, you could get the defendant back or you could get his bond, it didn't make any difference.

That decision to me is a watershed in American history, because it validated, it said it was consistent with public policy to permit defendant to indemnify or promise to indemnify or post collateral with his surety.

I think the Supreme Court undoubtedly ruled the way it did not only because of its notions about contracts in 1912 but also because it felt that bail was too important as a liberalizing institution in enabling release of persons prior to trial to invalidate it and put it all back on the idea of personal surety.

But it is very significant that the High Court in England only 3 years earlier, in the case of *Rex* v. *Porter,* confronted exactly the same question about whether or not it would be against public policy to indemnify a surety. And it ruled that it was indeed against public policy, in fact it was a criminal offense for a defendant to offer or have anyone offer on his behalf to indemnify a person who undertook to be a surety.

It was unlawful, the court said, in that it tended to produce a public mischief. The idea was that when courts said bail with sureties, they were taking back from the defendant an obligation to forfeit his own money if he failed to appear and, in addition, they were taking the pledge of a surety to forfeit the surety's money or property. So there were two independent sources that the court could look to for assuring appearances.

The English court said once you allow indemnification of sureties, you are just reducing the assurance to one person, the defendant, and that is not enough, that doesn't guarantee appearance.

It strikes me that the Congress today, without abolishing the money bail system for that proportion of cases where it serves a useful purpose, could in fact consider the history out of which bail arose and go back to the idea of the personal surety and the attestation or willingness to stand for the reliability of the defendant that were posed by those words "such sureties" in the State constitutions, and that you could explore several devices.

I wouldn't want to propose statutory language, but I think it would be worthwhile for this committee in its future hearings to explore the usefulness of several devices.

One would be to authorize a court, where it is concerned about the behavior of a defendant, or where it is concerned about the ap-

pearance at trial of a defendant who is considered to be an exceptionally high risk, to require that the defendant post bail, money bail, and present sufficient sureties, where the court can decide how many sureties and in what amount, and where there is a prohibition in connection with that particular requirement of any payment of money or promise of indemnification as between the defendant and the surety.

This would not be unprecedented. You will certainly find decisions in State and Federal courts throughout history and running right up until today where courts refuse to accept bond that defendants offer to the court. They refuse to accept a surety because they don't know where the money came from, they refuse to accept sureties because they don't understand or don't trust the relationship between the defendant and the surety.

Some courts have throughout history been very attentive to the problem of the relationship between the defendant and his surety, his bail, his bondsman. And I personally do not understand the high skip-rates, the high failures to appear in narcotics cases that are coming out of some Federal districts after people post millions of dollars in bail and run away, because those courts, it seems to me, have full authority to refuse to accept cash or refuse to accept bondsmen where the court lacks confidence that the cash will produce the defendant or that the bondsman cares about bringing the defendant back.

And where the bondsman has been indemnified by the defendant, the bondsman makes his money, the defendant goes free, the court is left with what Justice Holmes gave it, left with $1 million bail in the Treasury and if the court is happy, then everyone can go home, and if the court is not happy because the defendant has fled, then the court, I would think, on the net go-around would not accept high money bail or compensated sureties.

I think that authority exists classically, I think it can be authorized specifically by the Congress today. I see no reason why failures to appear should be a problem in the Federal system under the Bail Reform Act, under the Judiciary Act of 1789. I think it is a problem we have sort of fallen into today. Many Federal judges and State judges undoubtedly avoid it by not accepting bail from certain persons. And perhaps what you need is more training seminars for dealing with high risk cases by court systems.

The second method, apart from uncompensated sureties, would be just the opposite of the provision that is found in the District of Columbia preventive detention statute and is found in the bill proposed by Congressman Sensenbrenner and Congressman Hughes. Those bills say that no financial condition may be used to assure the safety of the community. It seems to me that is wrong.

It seems to me that you ought to be able to authorize courts to require a financial condition to protect the safety of the community in those few cases where someone predicts there may be misbehavior and there is to be a financial penalty, not only if the defendant fails to appear but fails to maintain good behavior in the interim. It seems to me that is just a market question again.

You might even wish to allow compensated sureties. To what extent do you wish to permit private transactions between defendants and bondsmen in which someone will stand surety both for appearance and for lawful behavior in the meantime.

Just one other suggestion before ending my statement.

I would avoid, as I indicated earlier, any suggestion that courts should find defendants prior to trial to be a danger to the community. It strikes me that the traditional language to deal with this problem would be much preferable. The language can be down in a couple of statutes and cases in different places, in different times in history. But I like particularly the language that has been quoted by a number of courts recently from the Massachusetts body of liberties, promulgated in 1641, which talked about releasing persons prior to trial with assurance of their appearance and good behavior in the meantime.

It seems to me that to assure good behavior, like to assure appearance, is really the function of bail; to what extent can the court by its conditions of release gain some assurance that the person would behave in a proper manner? No need to predict disappearance, no need to predict future crime; just set your conditions with regard to the conduct you wish to obtain, not the thing you fear.

And once you say I am imposing on you an obligation to appear at trial and maintain good behavior in the meantime, you, the court, are telling the accused and his or her surety exactly what you expect. And the more difficult your surety requirement, the more difficult it will be for that person to meet it. But if they meet your condition, no reason why you shouldn't permit them to be released. If they fail to meet your conditions, they will be detained as defendants have been detained throughout history.

I would like to stop there. I apologize for speaking so long.

[The complete statement of Mr. Freed follows:]

PREPARED STATEMENT OF PROF. DANIEL J. FREED

Mr. Chairman and members of the subcommittee, the core purpose of a number of bills now pending before this committee and its counterpart in the Senate is to protect the community against crimes by dangerous felons during the interlude between their initial arrest and their eventual trial. It is a goal to which all law-abiding citizens would readily subscribe. It is not a new goal in historic terms. Only the methods proposed are different.

It is a goal toward which several colleagues and I devoted substantial effort in 1964-66 in the Department of Justice when the Bail Reform Act was being drafted. We devoted countless hours in the early months to the task of developing a bill that would contain both liberal release procedures and authority for preventive detention, and that would convert the money bail system into a system of explicit judicial decisions to release or to detain. None of those drafts ever survived close scrutiny either in the Department of Justice or on the Hill.

In the end, the best we were able to do was to devise a legislative formula that, among its many release criteria and procedures, specified a crime control criterion for bail-setting or denial of bail in capital cases and on appeal, authorized part-time detention contemplated full-time detention on high money bail in noncapital cases. In his testimony before the House, the Deputy Attorney General acknowledged the difficulties of the bail crime problem and the drafting process, and itemized methods by which Federal courts could continue after the Act, as before it, to detain high risk defendants.

The Bail Reform Act of 1966 was not envisioned as a perfect statute. Its comprehensive and fair attention to many details of bail administration, and its fidelity to the history of bail in the Federal system, gained overwhelming bipartisan support led by Congressmen Celler and McCulloch in the House, and be Senators Ervin and Hruska in the Senate. But the problem of crime on bail did not cease being of concern to the Justice Department in the latter 1960's. As Director of the Office of

Criminal Justice I remained involved in a variety of initiatives that evidenced the Department's determination both to reduce needless detention and to curtail dangerous release.

One such initiative, in cooperation with the Federal courts in Washington, D.C., was the establishment of the Judicial Council Committee on the Operation of the Bail Reform Act in this city. Chaired by District Judge George Hart, the Committee in 1969 recommended, by divided vote, the enactment of a preventive detention statute for D.C. A second initiative was the earliy drafting in 1968 of a proposed Speedy Trial Act for the Federal system. Among other things, it proposed expedited trials for high risk defendants released pending trial, and the establishment of pretrial control agencies to make bail recommendations and supervise released defendants in selected Federal districts.

Looking back now on the decade of the 1970's, we know that Congress in 1970 enacted a preventive detention statute for the District of Columbia only, and the Speedy Trial Act of 1974 for the Federal court system. Until very recently, the detention statute was used rarely and crime on bail continued to vex the courts and the public in Washington. In 1980, hearings in the House and Senate were held to assess the operation of the ten experimental Pretrial Service Agencies established under Title II of the Speedy Trial Act. The verdict was favorable.

This year, the Senate has passed legislation that would establish such agencies wherever needed in the Federal courts, and the House Judiciary Committee favorably reported a similar bill. One striking fact about the record of Federal Pretrial Service Agencies concerns crime on bail: as of the 1980 Hearings, the rearrest rate in PSA districts had been cut in half. The rate in Board districts for convicted defendants went from 7 to 3.4 percent; in Probation districts, from 9.1 to 4.5 percent.

This skeleton outline of legislative approaches to the bail crime problem affords a useful background for considering future bail legislation. Several bills pending in 1981 again try to authorize Federal judges to prevent crime on bail by ordering pretrial detention in noncapital cases upon a finding that the defendant is dangerous. A number of objections to such bills have often been registered in the past: that they incorrectly assume that judges can accurately predict crime; that they impermissibly abridge the constitutional right to bail; that they unfairly punish innocent persons without trial; that they would aggravate the already serious jail overcrowding problem by needless detention.

My testimony today is rooted in the belief that reasonable crime control and a right to bail have been accommodated throughout history and can coexist today. I view the right to bail as fundamental and pervasive, but there have always been limits on pretrial release. Similarly, I view crime on bail as a distressing problem that can be reduced, but that cannot be eliminated without eliminating pretrial release itself.

Throughout history, the bail system has served to release many accused persons and to detain others. This was true for centuries prior to the Bail Reform Act, and remains true today. The balance between release and detention has fluctuated in different generations. Some fluctuations are reflected in legislation, most strikingly in England between 1275 and 1689. Other fluctuations reflected changes in the way judges exercised their discretion due to shifting crime and imprisonment rates; or to changes in the political climate; or to changes in structures of judicial administration. Similar pressures persist today.

The questions for the Subcommittee, as in the past, are whether to alter the balance between release and detention, and where to draw the line. There are no easy answers.

There is no reason to believe that you will find that the balance being struck by Federal law and practice today is just right. There will always be room for improvement.

At the same time, I doubt that you will uncover facts that could lead a reasonable legislator to believe that a dramatic reduction in pretrial crime can be produced in the near future simply by rewriting a Federal statute. The political benefits of advocating crime-fighting legislation are well known, but the practical benefits in curbing crime by changing the basic principles of the bail system are at best marginal. That lesson was taught by the District of Columbia experience in the 1970's.

Distortion may be a major impediment to your work. You will encounter a number of proposals based on erroneous or misleading descriptions of bail law today, or bail history, or "statistics" about bail crime or bail jumping. You will hear frequent arguments pertinent to local crime and system deficiencies in the states, but they will often prove irrelevant to the Federal system. As you listen to proponents of imprisonment and incapacitation immediately after arrest, you will increasingly perceive attempts to make the bail system a scapegoat for the nation's

crime problem, and a surrogate for the traditional process of trial, conviction and sentence. It will be important throughout to remember that you are examining one tiny part of a complex criminal justice system, and that all sorts of unexpected side effects can flow from throwing the system out of balance.

Many facts laid before you will be solid and disturbing. They often will leave you puzzled about remedies. I refer particularly to data that will show, or suggest, that a substantial number of mistakes are made in bail decisionmaking each day. As in any large volume human system, many decisions prove wrong in the light of hindsight.

For example, a number of Federal defendants released on bail flee to avoid prosecution; a few remain fugitives for months or years. In addition, a number of defendants released on bail engage in some kind of criminal activity in the interlude even though they diligently return as required for court hearings. No one has yet shown how the misdeeds of these errant defendants could have been predicted and prevented without at the same time erroneously detaining a much larger number of Federal defendants unnecessarily.

The same is true on the detention side. A number of Federal defendants who are detained before trial each year are not convicted. A number of them are convicted but are not sentenced to serve additional time in prison. In addition, a number of research studies over the years have suggested that, controlling for other variables, defendants who are detained before trial are adversely affected in their rates of conviction or the severity of their sentences. Here again it is difficult to expect a perfect system in which judicial officers could be expected, in decisions made on sparse information almost immediately after arrest, to accurately forecast the future. They cannot single out for detention only those defendants who, much later, will be fairly convicted and appropriately sentenced to imprisonment.

When you tally up all the retrospective evidence of unsafe bail releases and unnecessary detention decisions, you will begin to see the bail system in full perspective. You will understand how nearly every bail decision a judge makes runs the risk of being wrong, and how almost no bail decision can be immune from criticism so long as the case is pending. You will appreciate how very difficult is the daily task of the United States Magistrate or District Judge. A major question for the Congress is whether it is able to codify in legislative language any new instructions that will increase the ability of the judiciary to predict the future.

Many courts and commentators believe that the basic vice of a preventive detention statute would lie in its unconstitutionality under the Eighth Amendment. I disagree. The more basic question, I suggest, must take you back one step:

What new development in 1981 requires Congress to repeal the right to bail in noncapital cases—a right that has persisted in Federal law for the 192 years since the Judiciary Act of 1789?

I believe that if you study that single question, you will conclude that bail crime has been reasonably controlled in the past, and can be reasonably controlled in the future, without a revolutionary repeal.

The central facts for you to examine are: (1) that dangerous noncapital defendants and crime on bail have been considered and controlled by the bail system itself for more than 700 years; (2) that the system accomplished this goal without ever authorizing or requiring a court to find that a pretrial defendant was a danger to the community; (3) that the system relied on the availability of uncompensated sureties who, by agreeing to take custody of defendants, provided assurance of their appearance and good behavior in the meantime; (4) that this system was undermined at the beginning of this century by an unfortunate statutory interpretation by the Supreme Court in *Leary* v. *United States;* and (5) that without abolishing the useful functions of the money bail system, Congress could restore vitality to the historic bail system, reasonably control pretrial crime, and preserve a meaningful right to bail.

I would be pleased to take the Subcommittee on this excursion through history.

Mr. KASTENMEIER. Thank you, Professor Freed.

Let me yield to my colleague, Mr. Sawyer, first. I have a number of questions, but I yield to the gentleman from Michigan.

Mr. SAWYER. Well, as long as I have a professor here, something has always bothered me and you happen to have touched on it.

Most State constitutions, or at least many of them, have provisions applying to bail substantially, as you read it, and Michigan is

one of those States. What does it mean when they say that "when the presumption is great?"

Presumption of guilt, where do they get that from, do you know where that expression came from?

Mr. FREED. I have tried very hard to find the origin of that language. It does go back at least—it does go back at least into the 18th century. I think it is founded in the Northwest ordinance promulgated in 1787, I think it is found in some State or colonial charters. But at the moment I do not know who devised it, therefore I do not have a legislative history for it.

It seems to me to relate directly to the statute of Westminster which was the first major codification of bail law in England in 1275. It was very clear in reading through the categories of unbailable persons and unbailable offenses and unbailable situations that persons who were caught in the act or who were caught with the fruits of a crime in their possession were deemed unbailable, because it was so clear to the statute writers at the time that they were guilty.

And in a variety of situations that were written into statutes since that time, it seems to me that the notion was, if guilt is clear, if there is no defense from the circumstances of the arrest, there is no question but that the person committed the act—we will deal with intent in the future—there is no question that the person committed the act, then the evidence is clear or the presumption great.

I think that the term "presumption great" came from things like the possession of stolen goods. The presumption was, how did he get your goods if he didn't steal them? Either he took them directly or took them through a fence. But the idea was, and Blackstone has this in his commentary in the latter part of the 18th century, that if the law is not indifferent about guilt, if guilt is clear, then what point is there in having a bail system, what point is there in releasing people?

Now those formulations came in times where there was still a lot of capital punishment around and where it was thought no point in risking someone disappearing when it is absolutely clear they are going to be convicted.

I think it is more difficult to interpret that kind of language today, where the penalties are not so severe, where capital punishment is only a minor part of the arsenal of criminal sanctions and where we much more believe in due process and the appropriate methods for securing convictions.

I think the idea was this person is guilty, therefore don't risk his release. But you will notice that that language in a State constitution means that even persons accused of capital offenses have a right to bail by sufficient sureties if the evidence doesn't meet that standard. And there is a lot of litigation in the 19th century about what it is that the State has to prove in order to show that the evidence is clear or the presumption great. And in some places the standard for that proof is very close to trial standards.

Mr. SAWYER. Well, apparently in the application of this, though, what are capital cases—they differ somewhat.

In Michigan we never had capital punishment, in effect, but all of our cases that would mandate or authorize up to life imprisonment are capital cases by definition. One thing that keeps confusing me when I get into a Federal situation is that apparently only in those cases in which a death penalty can be issued is a capital case under Federal law.

Now in the methodology of holding people, some of which you touched on, these 11 different ways, apparently it is under one of those things that they are holding this fellow likely, the attempted assassination of President Reagan.

Mr. FREED. They held him on the mental examination—examination for mental competency to determine whether he was competent to stand trial.

Mr. SAWYER. How long can they hold him? Suppose somebody made a determined effort to get him out with the Bail Reform Act in place, is there any time limit to that?

Mr. FREED. That is a very important question, it is very important in the Federal system and in the States. There is widespread belief that altogether too many people are held by courts, mostly State courts, today on grounds of mental competency examination and some of the more recent legislation attempts to impose a time limit on the period within which a report must be made back to the court on the question of the person's competency. And if there are serious questions about the person's sanity, there needs to be a civil commitment action, but that you can't just put someone in a mental competency examination holding period and hold him forever.

I am not sure whether Federal law addresses the time limit on holding but my guess is that any good lawyer worth his salt would challenge what seems to be a prolonged holding on that ground.

Mr. SAWYER. You know, I personally would like to have the law so that a fellow like Hinckley could be held without worrying about time limits of examination and so on. In order to do that, don't we require a change in the bail reform?

Mr. FREED. I can't think, offhand, of any case in which serious legitimate questions about the sanity and competency of a defendant were met by a ruling of a court that said, "We have to release this possibly crazy dangerous person because of his right to bail."

The right to conduct a mental examination and the opportunity to have civil commitment proceedings seems to me to override the bail process. Many people believe that it should be the subject of further legislative regulation, but it seems to me that that is the major ground on which people normally thought of as crazy and dangerous are held and that very often those cases result either in civil commitment or in a finding of competency and a trial results.

I can't think of any case where such a person has been released pending trial. There are cases that don't involve such dangerous crimes, where courts do order a mental examination but order it out of custody so they will release a person, for example, under the Bail Reform Act into the custody of such and such a hospital for a mental examination and a report back to the court in a reasonable period of time.

I think there may even be some time limits for that in the regulations under the Speedy Trial Act.

Mr. SAWYER. The thing that bothers me is why should we have to go through any kind of a subterfuge where a person, at least in

my opinion, would be so obviously dangerous to let loose, and have to go through some—why not just be able to say that.

Mr. FREED. My sense in the *Hinckley* case is that no one thought of the subterfuge, that defense counsel didn't object—I am not closely familiar with the case—and that the commitment for mental examination of people who are suspected of being insane or incompetent are for the most part carefully handled by the court and defense lawyers and prosecutors, that it is not used as a dodge, that the length of time may become aggravated and that may have to be the subject of legislation; that there have been successful class action suits in some States to compel the defining of a person's status as to whether they are being held indefinitely for trial or whether they have been committed under lawful procedures as insane.

But I do not believe, Mr. Congressman, that there are any cases that demonstrate the inability of the Federal courts to deal with people who appear to be insane or incompetent, where the courts don't have sufficient power to hold the person until there is an adequate examination and report back to court.

I, myself, wouldn't think if I were the defendant attorney—and I do not believe you would think if you were the judge—that someone's notion from what we read in the newspapers about a crime justifies indefinite detention on dangerousness grounds because we are worried about that person from what we read. It seems to me what we need is factfinding here and that is what we are getting in the competency and civil commitment procedures.

Mr. SAWYER. I yield back.

Mr. FREED. I wonder if I could pick up on some question that Mr. Sawyer asked a previous witness with respect to the District of Columbia preventive detention statute. I believe it was your point, since there were only 50 or 60 persons detained in 10 years under that statute, why should we worry about abuse when it has obviously been used so carefully?

Mr. KASTENMEIER. I was going to ask that question in a broader context, that was my first question. We had Mr. Ruff in yesterday.

The District of Columbia experience seems to suggest that it is possible to run a reasonable, manageable, constitutional, at least somewhat effective detention program. Have you studied the District's program and if so, are you troubled by it and if so, why?

Mr. FREED. Yes, I have studied it; yes, I am troubled by it; no, I do not think it proves you can run a reasonably reliably preventive detention system.

Mr. KASTENMEIER. Then please answer his question.

Mr. FREED. I was involved in the group that formulated and oversaw the study in 1970 and 1971 shortly after the District of Columbia statute was enacted to determine the effectiveness of that statute, its fairness, et cetera, it was very clear from that early study which has been published by the Georgetown Institute and the VERA Institute of Justice, it was very clear from that study that the early operation of the Bail Reform Act neither vindicated the hopes of its sponsors nor the fears of its opponents.

The statute basically didn't do anything. The reason why it didn't do anything, why there were so few detention hearings asked and so few defendants detained under it, is that the money

bail system existed before and existed afterward. The reason why the statute had been used so sparingly in the last 10 years is because huge numbers of persons have been sought to be detailed by process computers under the old money bail system, high money bail was set, the District of Columbia jail has been full, the decade of the seventies has seen jail riots, jail construction, jail litigation.

You know the District of Columbia has had abundant detention in the last 10 years. It was just under the old money bail system. So preventive detention didn't have to be used under that statute. The fact that they could hold just a few hearings and hold them so fairly is a testimonial to the fact that there weren't very many cases in which they worried about high money bail.

The real question is whether the language that was inserted in that statute, and has been proposed by Mr. Sensenbrenner and Mr. Hughes, that no financial conditions shall be used to assure the safety of the community, whether anybody means what that language says. It is clear it wasn't meant in 1970, it is clear that a judge who wishes to detain someone today will say, if asked, I set that financial condition to assure the person's appearance. Sure I thought he was dangerous but also I thought he would not appear.

As long as you have the money bail system to detain people prior to trial, it is going to be charged with being unfair and it may be charged by some with being ineffective, but it certainly won't require reliance and a preventive detention statute.

If you were to switch, if you were to decide that you wanted to abolish money bail, a position to which many liberals and conservatives agree, but which I don't agree with, then I think you would have to say that from there on there will only be nonfinancial methods of release and the courts will be authorized to detail the kinds of procedures that are in the District of Columbia bill, or I think preferably in the American Bar Association standards on pretrial release, which has a number of detention provisions and very careful procedures for validating detention.

I think if you have those procedures, then you would have a test of fair preventive detention. But I also think, as Judge Tjoflat testified earlier, that you probably bring the system to its knees; that it would be impossible to conduct all the hearings and bring forth all the evidence and comport with all the requirements of due process and get anything close to the number of detainees in the system, in that kind of statute that you have today under the money bail system.

So it is really a question in the end of balancing. If you like to detain everyone, you could repeal all the bail statutes. If you would like to maintain some kind of balance between pretrial release and necessary detention, I am not persuaded that there is any system better than the traditional one that relied on sureties, on uncompensated sureties, and that left in prison those people who couldn't produce enough guarantee of their own appearance as to good behavior.

Mr. KASTENMEIER. As I recall, Mr. Ruff's advice to us was that he was using a balanced system, he did not want to terminate money bail, because it has been very useful, very often relied upon, and that indeed all these devices gave him great flexibility and gave the courts flexibility in responding to various defendants.

But let me go back to the question I asked you. What has gone wrong with the District of Columbia detention program? That is, what has happened that convinced people that it was a bad system? Why is it so bad?

I did not hear in your statement anything that would have shocked us into believing that the District of Columbia Committee, of which we are not members, made a dreadful mistake in adopting it.

Mr. FREED. I think the problem with the District of Columbia statute, the way it has turned out, is that it basically hasn't been used. It wasn't needed, it hasn't been used, there is no showing that the 15 or 30 people detained or 50 people detained during those years would not have been detained under the money bail system.

It wasn't a test of either principle that the witnesses before the District of Columbia Committee contended for. It didn't prove that large-scale unnecessary detention would be brought about by a detention statute in an unfair way. It didn't prove that because it wasn't used for that purpose. And it didn't prove that detention authority explicit in noncapital cases was needed, after 192 years of the Judiciary Act, was needed in order to protect the safety of the community.

So it was a political statute that they worked very hard to draft its provisions, they drafted it quite fairly, all things considered. Whether it is constitutional or not, different people have different opinions. But it isn't a real statute in the real world.

The problem with enacting it to the Federal system is that unlike claims of 70 percent crime on bail rate for robbers, 30 percent crime on bail rates for narcotics addicts, whatever, the crime on bail rates alleged in the Federal system are in the 2-, 3-, 4-, 5-, or 6-percent range, and what you are asking for is a dramatically different method of proceeding and a dramatic change in basic law with no showing of any benefit to any interest from changing basic law. So that you never reach the constitutional question because you haven't shown that there is a problem that the system isn't dealing with.

The problem of some crime on bail exists and of some failure to appear exists, but those are problems of prediction. There is no indication in any study that I have seen that any judge predicted crime on bail of a defendant that he released, or predicted failure to appear by a defendant he released but felt compelled under the law to release those people.

Until you have a witness coming forward saying, I am compelled to do something that is against the public interest by the bail system that we have had in this country since 1789, if you are persuaded that a judge or a prosecutor can make a case for that proposition, then maybe you would be justified in changing the law. I do not think any such case can be made.

Mr. KASTENMEIER. I think you make the case that such a change is not needed. You have said that very clearly.

Apart from that, do you have some very deep fear that preventive detention in future society would present from a civil liberties standpoint or from a specter of who is detained and why, something we ought to dread and go into?

Is there some fear of what the result would be if we didn't detain generally in the system?

Mr. FREED. Yes, I think it would be very unwise as a matter of policy. I think it is likely but not certain that it would be held unconstitutional. I think Judge Tjoflat really put his finger on it, when he said when you have a preventive detention statute on grounds of future danger, not risk to witnesses, not risk to flight, not jeopardy to the judicial process, but misconduct in the future, then what you are doing is saying "I want to incapacitate this dangerous person because he belongs in prison." That is the function of trial and sentence.

When you try to put it in the bail system you are saying we don't need a trial by jury and a sentencing system such as has grown up in this country. We don't need that for people we think are bad, we can lock them up right on the first day.

I think that is wrong under the Constitution, under many amendments, I think it is wrong as a matter of policy. I think, as I indicated earlier, that that stigma that would be attached in a large volume system, if you were going to seek—if the thousands of people detained in the District of Columbia since 1970 had all been held under the preventive detention statute, you know you would have had statistics today of thousands of people out of maybe the 20,000 or 30,000 detained, thousands who were acquitted or not convicted or got misdemeanor and got noncustodial sentences.

You would have all sorts of people talking about the number of people walking the streets today who have been labeled dangerous to the communities and they can't protect themselves against it. They got acquitted of the charges but that label sticks, it is just like the Scarlet Letter. It seems to me that is the basic reason why findings of dangerousness were never inserted in bail law and why it would be a dreadful mistake to begin inserting it today.

Mr. KASTENMEIER. Of course it is not unthinkable that we label people, even by statute. We have such a thing as a dangerous offender under the Organized Crime Control Act.

Mr. FREED. After conviction, exactly, and that is fair. That is when the system becomes entitled by a finding of guilt and an application by the prosecutor and a presentence report and a decision by a judge, months after arrest and after trial. They have decided that the crime of which the person has been convicted and the pattern of conduct that has been shown demonstrates that as a society we should impose a long prison sentence to incapacitate this person.

That is exactly what the trial and sentencing system is for. Predictions at that stage are after the person has been convicted by due process of law. The only question is, can you do it without a trial?

Mr. KASTENMEIER. In other ways we do the same thing closer to home.

The Abscam cases where, whether guilty or not guilty, the system has designated certain people predisposed to commit a crime when they may not have and indeed may be innocent of anything.

Mr. FREED. But predisposition in the entrapment cases is an allegation, it is an element of proof, but the jury either acquits the de-

fendant or convicts the defendant. The jury doesn't acquit the defendant of a crime but convicts him of being predisposed. Predisposed is just an element of the proof going toward conviction.

So sure, all of us are subject to being accused of anything every day. We need to protect ourselves if we are unjustly accused. The question is whether we want to authorize a tribunal to find us to be dangerous before we have our trial.

Mr. KASTENMEIER. One thing that bothers Mr. Sawyer, and I share the concern, is the argument that—"Well, we certainly don't want preventive detention because we are already incarcerating these people, these people are detained, these dangerous people are detained." We are doing it under a fiction.

We are doing it under the fiction of providing for high money bail or suggesting they might engage in flight, any number of ways we might revoke their bail. We can consider them mentally ill, that we deny them freedom, but we do that under a different system. Rather than speaking for the person so detained, you are speaking for the system which finds another reason for accomplishing the same end.

Should Mr. Sawyer and I indulge in the fiction or should we confront the fact that there is such a thing as a danger to the community which we ought to recognize or not recognize? But it isn't comforting to us to say well, the system rationalizes it in other ways. It would seem, in a sense at least, some of them, to be fictions.

Mr. FREED. I agree that today's system looks like it proceeds on a fiction. That is why I said at the outset that I tended to agree with the preceding witnesses that some form of amendment to express the concern of the Congress about danger to the community would be appropriate, but that the form of language—I could see if there were a statement of purpose in the act it would be something like to express the concern of Congress to prevent released persons from being a danger to the community. But in the substantive language about procedure, I would talk about the purpose of bail being to assure appearance and good behavior in the meantime and to authorize courts to set conditions of release, to assure the appearance of defendants and their good behavior in the meantime.

I think that is precisely what this committee and the Senate did in title II of the Speedy Trial Act. You set up 10 pretrial service agencies for the purpose of reducing crime by persons released pending trial, and you authorized supervision and you asked for statistical reports on crime on bail. You addressed the question of the conduct of persons while released. You did it in title II of the Speedy Trial Act.

I see no reason why you should not do that in the text of the Bail Reform Act so that it is clear that both purposes that concern you, and that are considered by judges every day, are legitimate for the system to consider.

So I support your desire to amend the statute to clear up that ambiguity.

Mr. KASTENMEIER. In other words, do you think that it is desirable to amend the 1968 Bail Reform Act in that particular way?

Mr. FREED. Yes.

Mr. KASTENMEIER. As I understand it, largely in the sense recommended by the preceding panel.

Mr. FREED. That is correct.

I have used different language. I try to write out for myself a definition of the problem. It might go something like this: A person will be said to maintain good behavior if during the period of release he refrains from threatening potential witnesses, tampering with evidence, interfering with the course of justice or committing any imprisonable offense against a criminal law.

That would be one of the purposes of the statute you could set release conditions for that purpose and you could revoke people's bond for violating that condition. And you would not be labeling anybody a danger to the community; you would be expressing your purpose.

Mr. KASTENMEIER. One last question. You indicated that the bill before us presents constitutional problems. I think that was also said about the District of Columbia Preventive Detention Act, and yet we found out, at least as treated by *United States* v. *Edwards,* that those problems were not sufficient to render the act unconstitutional. Would you agree if these bills were able to follow *United States* v. *Edwards* they would be minimally acceptable in constitutional terms?

Mr. FREED. No. I believe *United States* v. *Edwards* was wrongly decided; I think the history of bail was wrongly interpreted and described. I think the problems of surety, the basic dependence of the bail system on sureties, was overlooked by that court and I think they never reached the question of necessity, which is the one that I have been talking to your committee about today.

I do not think you ever have to enact a statute like that. But I think that the statute in the District of Columbia presents very serious constitutional questions for all the reasons that were raised by witnesses in the late sixties and early seventies, but for the most part those questions have never really arisen in the District of Columbia because the statute has been used so sparingly. So no question it has been administered very thoughtfully and fairly, but it hasn't been administered as a preventive detention system, it is just a simple statute that is used once in a while and no one has explained on the public record to me why money bail wasn't adequate for those cases.

Mr. KASTENMEIER. I am glad I asked that of the right witness. I am afraid if I asked Judge Tjoflat or Judge Harvey, they would not be able necessarily to state that the case was wrongly decided.

Mr. FREED. That is the privilege of not being a judge.

Mr. KASTENMEIER. In any event, this has been very illuminating and I want to express the gratitude of the committee for your appearance here today, Professor Freed, and not only for your clear and succinct views about legislation concerning the issues, but for the history of bail reform in this country and even in prior times.

That, for the record and for our own edification, is most helpful. Indeed, I only regret more members were not present to share today's hearing.

In any event, with that we will conclude today's hearings and resume hearings on the subject when we return in September.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

BAIL REFORM ACT—1981-82

WEDNESDAY, SEPTEMBER 16, 1981

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Railsback, and Sawyer.

Staff present: Timothy Boggs, professional staff member, Joseph Wolfe, associate counsel, and Audrey Marcus, clerk.

Mr. KASTENMEIER. The meeting will come to order. We hope to be joined by several other colleagues. The subcommittee is convened today to continue hearings on legislation to amend the Bail Reform Act of 1966. Each of the bills pending before us seeks to include in the bail determination process a judgment regarding the dangerousness of the defendant. Each bill would permit the denial of release on bail of defendants who are determined to be dangerous.

Present law does not permit such a judgment to enter into the bail determination. Historically, the sole function of bail has been to provide reasonable assurances of the appearance of the accused at his trial. Release on bail may be denied only if the court determines that detention of the presumedly innocent defendant is necessary to assure trial appearance.

The bills pending before us would give an added function to bail. For the first time in the Federal system, bail would be given a crime-preventing function. The bail-setting hearing would become an opportunity for the prosecutor to ask for the immediate incarceration of the defendant pending trial because of an expectation that he may commit future crime while released on bail.

We have already heard a variety of views on this question.

From Congressman Hughes, chairman of the Subcommittee on Crime, we heard of the need for a bill such as the one which he has proposed, H.R. 4264, which would establish a preventive detention procedure for use in Federal courts.

From Charles Ruff, the U.S. attorney for the District of Columbia, we heard of the use of the present District of Columbia preventive detention program. This program, the only one in the country, has been used carefully and, according to Mr. Ruff, with some success. Recently the Court of Appeals for the District of Columbia in

Edwards v. *United States* held this District of Columbia system to be constitutional.

From the Judicial Conference of the United States, Judge Gerald Tjoflat testified that it was indeed appropriate to permit judges to consider the "dangerousness" of the defendant when setting bail, but that the sole function of bail must remain to secure the appearance of the defendant at trial. He suggested that a dangerous defendant may be less likely to appear at trial. He resisted the establishment of a preventive detention system, citing both constitutional and policy objections.

Also rejecting preventive detention was Yale professor Daniel Freed, a noted scholar in the field. Professor Freed urged us to heed the historic function of bail, to consider whether there is not a constitutional objection to preventive detention, and to study the need for a Federal detention program. He suggested that, in fact, Federal bail determinations and pretrial services currently work quite well in securing the appearances of defendants at trials and in reducing crimes committed by Federal defendants who are pending trial. Professor Freed did not object to the inclusion of "dangerousness" in the judges' bail determination, but agreed with Judge Tjoflat that the sole function of bail must remain to guarantee the appearance of the defendant at trial.

Today we will continue to hear opinions on this difficult question. Our colleague, Judiciary Committee Congressman Jim Sensenbrenner, author of H.R. 3006, will present his bill. And subsequently the American Bar Association's position will be presented by Prof. James George of the New York University Law School.

Also I should note that since our last hearing Mr. Sawyer, of the subcommittee, has introduced a bill on this topic, H.R. 4362. Finally, it is of interest that both the administration and the Senate Judiciary Committee are currently studying this matter.

On August 17, the Attorney General's Task Force on Violent Crime made a recommendation to the President that the administration support a preventive detention provision. I had hoped that we would be able to hear from the Department of Justice this week, but they are not yet ready to present the administration's position. We will hear from them when they are prepared.

And Senators Kennedy and Thurmond have each introduced related bills, and Senate hearings are commencing this week. Clearly there is a growing interest in this legislation.

Now, I would like to call on our colleague, Jim Sensenbrenner, who has taken leadership in this area, presenting the earliest bill in this session, H.R. 3006. Jim?

TESTIMONY OF HON. JAMES F. SENSENBRENNER, JR., A U.S. REPRESENTATIVE FROM THE STATE OF WISCONSIN

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman and members of the subcommittee. It is my great pleasure to appear before you today as the subcommittee continues its deliberations on the crucial issue of amending the Bail Reform Act of 1966.

It is my firm belief that after 15 years of operation, the Bail Reform Act contains serious and fundamental deficiencies which should be corrected without further delay. My strong concern in

this area prompted me to introduce H.R. 3006 at the beginning of this Congress. In May, I joined 11 other members of the Judiciary Committee, including Messrs. Sawyer and Butler, in a bipartisan call for correcting these deficiencies in the Pretrial Services Act of 1981, which was reported by the full committee. It struck me as incongruous that our committee would choose to throw money at the problem of bail crime without addressing the fundamental underlying issues.

On July 31, 1981, I cosponsored H.R. 4362, the comprehensive Bail Reform Act of 1981, which was introduced by the gentleman from Michigan, Mr. Sawyer, and is also cosponsored by the ranking minority member of this subcommittee, Mr. Railsback, and the gentleman from Virginia, Mr. Butler.

A substantially similar bill was introduced in the Senate on that same date by Judiciary Committee Chairman, Strom Thurmond and Senator Edward Kennedy. Two weeks after that bill was introduced, the Attorney General's Task Force on Violent Crime recommended legislation of this nature. I am encouraged to witness real movement on this important issue at last.

Under section 3146 of title 18, a judicial officer is prohibited in noncapital cases from considering whether or not a defendant will pose a danger to any other person or the community if he is released prior to trial. The only factor which he is entitled to consider is the likelihood that the defendant will appear on his trial date. By contrast, under section 3148, the judicial officer may weigh both factors in capital cases. This bifurcated approach completely ignores the fact that many of the crimes where the defendant poses the greatest danger to the community—drug trafficking in particular—are not capital crimes. Because of this nonsensical distinction, the Bail Reform Act, in practice, has fallen woefully short of achieving some of the goals that were espoused at the time of its passage.

The legislative history clearly evidences an intent to reduce the misuse of money bail so that persons accused of crime would not remain incarcerated prior to trial merely because of inability to pay. Regrettably, because "danger to the community" is a prohibited factor under the act, another perversion of money bail has arisen. Many judges apparently set high bail amounts with danger in mind but publicly justify them on the basis of failure to appear at trial.

Of course, no one can really blame a judge who resorts to this subterfuge when for instance there is every indication that the defendant will rob a bank if released. Certainly, public faith in our judicial system is shattered when judges are forced to resort to such measures—and some have admitted that they do.

My bill, H.R. 3006, is a modest proposal, incorporating some imperative changes in the act. First, it would amend section 3146 of title 18 to permit the judicial officer to consider "danger to the community" as a factor in setting release conditions in a noncapital case. The judge would be authorized to consider, among other things, the type of offense involved, the weight of the evidence against the accused, and the defendant's past conduct, including any record of appearance—or nonappearance—at court proceedings, and his conviction record. In keeping with the original spirit

behind the 1966 act, it would specifically prohibit the imposition of any financial condition of release to assure the safety of individuals or the community.

Second, my bill permits revocation of release where there is clear and convincing evidence found in a hearing that a defendant has violated a condition of release; or has threatened, injured, or intimidated a witness or juror. Revocation is also authorized where, after a hearing, the judicial officer finds clear and convincing evidence that a Federal or State judicial officer or grand jury has found probable cause to believe that the defendant has committed a felony while on release.

Third, the attorney for the Government is permitted to appeal release conditions. This parallels one recommendation by the Attorney General's Task Force on Violent Crime.

Fourth, provisions are included to safeguard the community against a defendant's judge shopping to obtain release or modification of release conditions.

Finally, and again as recommended by the task force, H.R. 3006 shifts the presumption in favor of releasing defendants awaiting disposition of appeals. It would require detention unless there is clear and convincing evidence of a likelihood that the defendant will appear at trial or will not pose a danger, and the appeal raises a substantial question of law or fact.

In addition to the basic changes included in my bill, H.R. 3006, H.R. 4362 includes several worthwhile improvements. It mandates a pretrial detention hearing to inquire into possible flight and community safety in crimes of violence, crimes punishable by life imprisonment or death, and certain narcotics offenses. A hearing may be initiated where there is serious risk of flight or obstruction of justice, or where the defendant has two or more prior convictions of certain serious crimes. Before ordering detention, the judicial officer must find that no conditions of release will assure appearance and community protection and that there is substantial probability that the defendant committed the charged offense. It would also extend the presumption against release to the period during which the defendant is awaiting sentencing.

Parenthetically, let me say that perhaps the most publicized crime that has existed or occurred allegedly this year is an additional reason why a bill like H.R. 3006 should be promptly enacted into law. The alleged crime I'm referring to is the assassination attempt on the life of the President of the United States.

Had the accused, Mr. Hinckley, lived in the Washington, D.C. area, and since the crime he is accused of is not a capital offense since the President of the United States did not die as a result of the crime, Mr. Hinckley could not have been denied bail. And since he comes from a wealthy family, it's obvious that they could have made the bail that the judicial officer would have imposed.

Merely because Mr. Hinckley's residence was outside the Washington metropolitan area could the judicial officer under the present law have him held without bail, which of course is the case.

So I think this is an added reason why the danger to the community or a person within the community issue should be resolved such as proposed in H.R. 3006.

Mr. Chairman, I am hopeful that the subcommittee will seriously consider the bills which are before it and proceed to markup in the relatively near future. I will be glad to provide any assistance in this effort and concur with the hopes expressed by the gentleman from Michigan, Mr. Sawyer, upon introducing H.R. 4362, that we have a bill on the President's desk by the end of the session.

I'll be happy to answer questions.

Mr. KASTENMEIER. Thank you, Mr. Sensenbrenner. You might tell the committee, what is the difference between H.R. 3006 and H.R. 4362?

Mr. SENSENBRENNER. H.R. 3006 is a very narrow bill. H.R. 4362 is a little bit more encompassing.

The provisions of H.R. 3006 include, first, that danger to the community or a person be one of the factors included in deciding whether an accused would be admitted to bail.

Second, H.R. 3006 permits revocation of release where there is clear and convincing evidence found in a hearing that the defendant has violated a condition of release or has threatened, injured, or intimidated a witness or a juror.

Third, the Government can repeal bail decisions and release conditions.

In my bill there are provisions included to prevent judge shopping.

Finally, as recommended by the task force, my bill shifts the presumption in favor of releasing defendants awaiting disposition of appeal, so there is presumption that the defendant would stay in jail awaiting his appeal unless there is clear and convincing evidence of a likelihood that the defendant will appear at trial and that the appeal raises a substantial question of law or fact.

So in the case of an appeal which might be determined to be frivolous by a judicial officer, the defendant would be incarcerated following sentencing during the time that his appeal was being decided.

Now H.R. 4362, as I understand it, is a substantially broader bill. I am not intimately familiar with all of the provisions of H.R. 4362. I believe that Mr. Sawyer would be.

But my bill is extremely narrow, and hits the roughest edges of the Bail Reform Act.

Mr. KASTENMEIER. Which of the two bills at this point do you recommend to us?

Mr. SENSENBRENNER. I would like to see the broader bill recommended, but if there is not the support in the subcommittee, I believe H.R. 3006 contains the bare essentials of bail reform that should be speedily enacted.

Mr. KASTENMEIER. Two witnesses, Judge Tjoflat and Professor Freed, when asked, both suggested the procedures required in your bill are so cumbersome and unworkable that Federal prosecutors would be reluctant to resort to them, simply for the purpose of having the defendant retained prior to trial.

Prosecutor Ruff's testimony on this question tended to support this view, at least, by implication, since they rarely actually use it in the District of Columbia because the prosecutors do not want to lay out their case that early for the purpose of merely availing themselves for the detention of the accused.

Can you comment on that?

Mr. SENSENBRENNER. I would respond to that criticism in this way. If there is too much bureaucracy, of course the government would not use the procedures established in the bill. However, at the same time, I think there's a growing consensus that there are some pretty wide loopholes in the Bail Reform Act of 1966 that do need plugging. My concern was that there be sufficient protections contained in the law for defendants to avail themselves so there would be no question that an amendment to the Bail Reform Act would be found constitutional, since obviously any amendment will be litigated.

Mr. KASTENMEIER. What response, if any, do you have to constitutional objections to any of these preventive detention programs? Do you think there are constitutional issues raised by this?

Mr. SENSENBRENNER. There certainly is a constitutional issue, but I would point out that H.R. 3006 is not a preventive detention bill, as has it has been defined by most of the people who have discussed this issue.

It is certainly substantially narrower than the Sawyer version or the Thurmond-Kennedy version relative to incarcerating defendants prior to trial.

Mr. KASTENMEIER. Another question which has been raised by those with reservations about the bill is the need for the bill. One can argue that the District of Columbia may be different from the rest of the Federal system, insofar as we're not talking about local jurisdictions, and that the frequency of violent crimes, for example, in the Federal system for purposes of the application of Federal law are not that great and that the Administrative Office of the U.S. Courts has testified crime on Federal bail is actually decreasing, et cetera.

So what I'm asking you, Jim, is, what do you see as the justification in terms of need in the Federal system as opposed to State and local law?

Mr. SENSENBRENNER. I think one should consider the nature of the offense on which the accused is facing charges. I probably think the best example of that is the *Hinckley* case.

As I mentioned in my prepared testimony, had Hinckley resided in the Washington metropolitan area and since he is not accused of a capital offense, he could not have been denied bail under the law as it exists. He could have been released on the bail that his family would have provided him. If he wished to continue stalking the President of the United States or anyone else during the period that he was out on bail, he could have done so.

Again, I think, one must look at these issues on a case-by-case basis. And while the *Hinckley* case is probably the most glaring example, due to the nature of the offense, I do think that that is a decision that should be left, first, to the prosecutor in deciding what type of bail or denial of bail to ask for and, second, to the magistrate or the judge who sets the bail.

Mr. KASTENMEIER. Could not Mr. Hinckley have been detained under the D.C. Code for D.C. violations as a dangerous person, since that also would apply to the more serious Federal crime with which he was charged—but also concurrent violations of the D.C. Code under

the Preventive Detention Act of the District of Columbia? That determination might have been made.

Mr. SENSENBRENNER. That is true. However, had the assassination attempt on the President's life occurred across the river in Virginia, then the D.C. Preventive Detention Act would not have applied. I think the prosecutors would have had to go back to square one, which was the case at the time of the assassination of President Kennedy when merely State charges were proffered against Lee Harvey Oswald, and he never did get to trial.

I believe as a result of what happened in Dallas following the assassination of President Kennedy, the Congress was moved to establish a Federal crime on assassination or attempted assassination of the President.

Mr. KASTENMEIER. Well, serious as it was, there presumably are other compelling reasons, to be advanced for this new test of dangerousness. That is on the *Hinckley* case, I would think, because these cases that come up once—and hopefully not more often than once in a 5-year or 10-year span—may not alone be enough to justify changing the standards.

Mr. SENSENBRENNER. I would just point out, Mr. Chairman, as I was driving into work yesterday, there was a story on the radio news program that indicated that a defendant who was on trial for drug trafficking in the District of Columbia did not appear after the noon recess of the trial because he was apprehended while attempting to sell drugs to an undercover police officer, while the jurors and the court and the attorneys were out eating lunch.

Many of the serious cases that are prosecuted in the Federal court system—and I'm not sure whether this one was in the Federal court system or the D.C. court system—do involve drug traffic. I would submit that drug trafficking is just as much a danger to the community as the so-called crimes of violence—murders, rapes, muggings, and the like, as well as attempted assassination of the President. The kind of option, as proposed in H.R. 3006, should be available in the multitude of drug trafficking cases that do come before the Federal courts, that are being prosecuted as Federal offenses.

Mr. KASTENMEIER. The last question I have is, what would be the cost of the program established by your bill?

Mr. SENSENBRENNER. I have no idea. Again, the answer to your question would depend upon the manner in which prosecutors would attempt to utilize the new law and how agreeable judicial officers who do set bail would be with prosecutors' decisions.

It would be very hard to make any kind of educated guesstimate, although I'm sure the Congressional Budget Office would be happy to do so at the proper time, because that's their job.

Mr. KASTENMEIER. We will obviously eventually avail ourselves of that, although in consideration of any bill of this sort, we like to have at least a general notion of what the costs are in connection with it. That is also our job.

I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I think I just want to thank you for your, I think, very fine statement. I personally agree with many of the remarks in your statement. I think it is significant that the Task Force on Violent Crime

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did include a recommendation very similar to the bills that you are supporting.

Perhaps, Mr. Chairman, we will be able to get Gov. Jim Thompson or the former Attorney General, Griffin Bell, to come and lend their support to what they're doing.

Mr. KASTENMEIER. If my friend from Illinois will yield, we have attempted to do that. The administration's position is, they are not yet ready to present the administration position and prefer that we not separately invite the task force. I'm sure the administration would wish to speak for itself and presumably does not want the panel to speak for the administration or be misunderstood in that connection.

So thus far, we have been agreeable to waiting for the administration to get its act together to make a presentation. I hope that will be in a matter of a week or two.

Mr. RAILSBACK. Good. I want to thank my good friend again for his very fine statement.

Mr. KASTENMEIER. The gentleman from Michigan, author of H.R. 4362?

Mr. SAWYER. Yes. First, I would like to thank the gentleman from Wisconsin for giving his time to come here and also to acknowledge that he was the first off the block, in effect, in this Congress anyway, to attempt to get something done about the problem.

We had attempted to get it considered along with the Pretrial Services Act. We were so successful in persuading the Rules Committee that it ought to be done that they denied a rule on the whole bill. So we overaccomplished. [Laughter.]

There is an area—and, of course, I've often thought of the Hinckley situation myself. He is one of the people I would be most leery about releasing if I were a judge charged with making the decision.

But actually it's burglary and narcotics which are the two almost chronic groups of offenders out on bail. Burglars usually go out and earn their legal fee by conducting more burglaries while they're out on bail—or at least very, very often. And a recent study by the Administrator of the U.S. Courts shows that 31 percent of those who fail to show are narcotics violators, and some 53 or 50-plus percent of those who have totally jumped bail and are still at large are narcotics violators. They eventually, apparently, do—or a large number do what the gentleman has referred to having heard on the radio.

I notice that Charlie Bennett of Florida, who is very concerned about this narcotics thing, having had a son who came to ill in connection with it, has introduced a bill in effect authorizing a denial of bail to large narcotics dealers because there are such tremendous amounts of money involved that they have apparently taken to just sort of treating it as a little overhead when they're doing business, posting huge amounts of bail and jumping. The last I saw, it was something approaching 400 of them—fugitives now at large. It has jumped up to hundreds of thousands of dollars in bail.

It just seems to me that what we have done—and as I read the history of the Bail Reform Act—it really has not been decided to foreclose the question of dangerousness to the community. It was really left as a controversial thing to be considered separately and

later and then never was. That's as I read the history of it. That's kind of what happened.

And actually many of the judges who testified indicate that in practicality they do take this into consideration. But they put it on another basis, so that they don't run afoul of that restriction.

It seems to me, we have forced duplicity on the judges that shouldn't be forced. It seems to me, it's a perfectly legitimate consideration, and I think it's time we addressed it.

Again, I want to credit the gentleman from Wisconsin for his time and effort in pursuing this worthwhile goal. If we can accomplish it, with whatever bills, we can accomplish in substance, giving the judges a right to take this into consideration.

Mr. SENSENBRENNER. In response to the nice comments the gentleman from Michigan has made, presently the dividing line is the difference between capital and noncapital offenses. It seems to me that that dividing line, while perhaps a justifiable dividing line in 1966 before all the Supreme Court cases on the constitutionality of the death penalty came down, is no longer a valid dividing line today. And there are a lot of noncapital offenses under our present Criminal Code, that defendants are just as dangerous to the community as they would be under capital offenses in the 1966 style.

Mr. SAWYER. I agree. I also get constantly puzzled by the use of this term, "capital offenses," because I come from the State of Michigan which never had a death penalty. And a capital offense under the laws of Michigan, is any offense which would carry life imprisonment, which also includes armed robbery, incidentally. It is an exception to the Youth Criminal Act, where you can expunge your record under certain circumstances—it excludes capital offenses, which excludes in Michigan even armed robbery is excluded as a capital offense.

So, having come from that environment, it is always confusing to me when someone uses the term capital offense. Of course, in many, many areas they are not capital offenses now because of the Supreme Court decisions, and the State not having readjusted its laws to meet the criteria. And that is true of many Federal—actually, under the Federal laws, most of them have not been redone to meet those criteria.

We have been through that on the Criminal Code problem, whether by not having reput in the death penalty, we in effect eliminated it—in actuality it isn't there now because the statute didn't have it, and have not been redone to meet the criteria.

So to all intents and purposes, this capital offense thing is a catch-22 thing as near as I can tell.

Mr. KASTENMEIER. Will the gentleman yield?

Mr. SAWYER. I yield back.

Mr. KASTENMEIER. Let me ask the gentleman from Wisconsin, and the gentleman from Michigan—you said mandate pretrial detention hearing, I think referring to H.R. 4362, the possible flight and community safety after crimes of violence, crimes of punishment by life imprisonment or death, and certain narcotic offenses.

I haven't read the text in that connection. Is it explicit and discrete in terms of what charges it includes and does not include?

Mr. SENSENBRENNER. Mr. Chairman, that is not in my bill. That is in the bill of the gentleman from Michigan, Mr. Sawyer. But my

bill is not a pretrial detention bill. It merely adds the factor of danger to the community for persons within the community, among the factors that a judicial officer can consider in making a determination on whether to deny bail to the accused.

Mr. KASTENMEIER. H.R. 3146 as well as H.R. 3148?

Mr. SENSENBRENNER. Yes.

Mr. KASTENMEIER. You don't actually list those crimes to which it applies, but I think the other bill does.

Mr. SENSENBRENNER. I think that's correct.

Mr. KASTENMEIER. All right.

With that in mind, let me say thank you. Since you are the original author of H.R. 3006, may I ask how many cosponsors you have?

Mr. SENSENBRENNER. We have nine cosponsors.

Mr. KASTENMEIER. We appreciate your appearance. I am not sure how soon we will hear from the administration when it gets to a point of considering one of these measures. But we would like to consult you again as we proceed to a decision on this issue.

We appreciate your appearance with us.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Next, the Chair would like to call Prof. B. James George, Jr., professor of law at the New York Law School, representing the American Bar Association, and also presently chairman of the ABA Standing Committee on Association Standards for Criminal Justice. He is a past chairman of the ABA's criminal justice section. Throughout his teaching career, he has specialized in criminal law and procedure.

Professor George is accompanied today by Mr. Richard P. Lynch, staff director of the ABA Standing Committee on the Association Standards for Criminal Justice.

Professor George and Mr. Lynch, we greet you both. Please proceed as you wish.

TESTIMONY OF PROF. B. JAMES GEORGE, JR., PROFESSOR OF LAW, NEW YORK LAW SCHOOL; CHAIRMAN OF THE ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, ACCOMPANIED BY RICHARD P. LYNCH, STAFF DIRECTOR, ABA STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE

Mr. GEORGE. Thank you, Mr. Chairman. On behalf of the association, I would like to express our appreciation for the privilege of appearing before this subcommittee.

I believe you have our formal written statement, and, if I may, I will simply highlight a few matters from it.

The association has rather recently reconsidered this problem. In the original 1968 standards, the assumption was that the only purpose of any form of pretrial release was to insure the appearance of a defendant in court as required.

However, that position was substantially reconsidered in developing the second edition of the ABA Standards. Our earlier assumption was viewed as being too narrow. In our revision we determined that danger to the community and efforts to obstruct the administration of justice were legitimate factors in deciding whether or not a defendant should be free pending the termination of the

proceedings. And the revision recognizes that the likelihood of reappearance, while not unimportant, is simply one factor.

The present ABA Standards incorporate three rather significant concepts which I believe do relate to the legislation under consideration by this subcommittee.

First, it is quite legitimate for the judicial system to take into account danger to the community in deciding whether an individual should be put out under essentially unconditional release, or whether the individual should be out in the community subject to whatever conditions are appropriate to try to forestall danger to the community.

Second, unmonitored conditions during pretrial release are likely not to be of maximum effectiveness. And therefore, we urge a pretrial service agency, however labeled in a jurisdiction, as a device to monitor those defendants who are put out on conditional release.

The third point is that if an individual who has been conditionally released commits another offense, or engages in activity which can find probable cause determination that the individual will endanger witnesses, obstruct justice or endanger the safety of the community, then that person can be pulled back in under appropriate procedures, and the matter of original release can be reconsidered by the releasing court.

And, if at that time it appears that there is no other way to safeguard the community than to detain that individual until the completion of a criminal proceeding, then a court should be allowed to take that action.

We do differ from the pending proposals in that we would require a period of conditional release before there could be detention pending completion of the criminal trial.

The association position rests upon a feeling that predictors of violent behavior are not adequately established, and that the mere fact that a person has a prior criminal record should not, in and of itself, be taken as a token or badge of dangerousness to the community. Hence, the association feels that in balancing a claim to individual liberty against the need of the community to be protected against dangerous activities, there should be an initial time period during which the community takes perhaps some risk. The risk is that the release conditions established by the court are not adequate or that the supervision of those conditions is not adequate.

Our standards therefore balance these two competing interests. We believe this is constitutional.

We do suspect that the more one goes toward a denial of all pretrial release based upon past convictions and general predictors of dangerousness, the more vulnerable the system becomes under due process.

The American Bar Association position rests essentially on *Gerstein* v. *Pugh,* which held that the fourth amendment, coupled with due process, does require an establishment of probable cause for any significant pretrial detention.

And as the underlying scientific or objective basis for denying release becomes more uncertain, we think the constitutional problems become greater. But, if after conditioned release the individual does not comport with the expectations of the system and does pose a danger to the safety of the community, then we are inclined

to believe that the further detention for prompt trial will be constitutional.

If there are any questions that I can try to answer, I will be delighted to have that opportunity.

Mr. KASTENMEIER. I compliment you, Professor George, on the brief, succinct and clear presentation of the position of the American Bar Association.

May I inquire whether you speak for the American Bar Association, or for the Standing Committee on Association Standards for Criminal Justice?

Mr. GEORGE. Since the standards have been adopted by the House of Delegates, they reflect official ABA policy, and therefore I do represent the ABA and its views.

Mr. KASTENMEIER. I understand your position that you would generally entertain the notion of detention only after the defendant has failed in some way while released on bail.

Are there any situations in which pretrial detention following arrest would be appropriate?

Mr. GEORGE. That is without an initial period of release?

Well, the position of the association is at the present time, no. That the association——

Mr. KASTENMEIER. Capital crimes?

Mr. GEORGE. It would not matter, capital or noncapital. The position of the association is that there should be no arbitrary distinction based on that, and our standards are aimed at all State and Federal crimes. And hence, the basic claim to the presumption that people should be on the street pending completion of proceedings, applies across the board.

But then we bring in these other dimensions of protection of the community based on the individual case, and not based on a category of defendants or of crimes.

Mr. KASTENMEIER. So present law permits it in capital cases?

Mr. GEORGE. Yes, we are aware of that.

Mr. KASTENMEIER. I'm just exploring your position on that.

You are not seeking a change?

Mr. GEORGE. No, I'm simply expressing that the ABA's preferred policy would not turn on the category of the particular offense.

Mr. KASTENMEIER. In other words, you would recommend a change which would permit—which would require release on bail, and if the defendant failed, then permit incarceration. And you would not distinguish between capital and noncapital offenses?

Mr. GEORGE. We do not.

Mr. KASTENMEIER. I think that is consistent with what Mr. Sawyer and others have suggested, that capital and noncapital offenses——

Mr. GEORGE. We make no such distinction. However, under our standards we provide for a preliminary inquiry about releasability in all felony cases.

I think the deliberations of the Standing Committee which led to the proposals before the House of Delegates suggested that, for example, there might be some people charged with murder, who would be unlikely to commit harmful acts again.

And to say that no person in the group charged with first degree murder should ever have the opportunity for preconditioned release, seemed to us draconian. Therefore, we would prefer to allow the same judgments to be made in murder cases that might be made in robbery cases or rape cases.

Mr. KASTENMEIER. Of course, we are talking about the federal system.

Do you have statistical data to support a motion that we have a change in the law? Is there an increase in crime while on bail that you can point to, which suggests the need for such a change?

Mr. GEORGE. The association has engaged in no empirical studies to provide new data.

Mr. KASTENMEIER. Could you review for us, Professor George, what constitutional issues might relate to this question still in 1981 which we ought to consider? For example, let me—as I recall the testimony, there is at least one which changes a presumption from the prosecution or court to the defendant, to the accused, in terms of whether or not entitlement to release is possible. Does that change of presumption raise some questions?

Mr. GEORGE. I think there is enough in the judicial statements over the years to suggest that the fact of conviction changes the assumptions. Therefore, it probably is constitutional to place the burden on the defendant who has lodged an appeal to satisfy the court that he or she will not endanger the community or will not decamp during the appeal period.

In the association standards, we do not go quite that far. The general tenor would be that if the Government or prosecution wishes to object to the pretrial release, it ought to make the case, but it's not as firmly and directly stated as the bills in question do.

When it comes to the matter of preconviction release, I think the more that a presumption of detainability is used, the more vulnerable it may become. If one works from the analogy of presumptions cases like *County Court* v. *Allen* and *Montana* v. *Sandstrom,* indicate that the less empirical data to support that assumption, the more vulnerable that presumption becomes.

I'm not sure that one could generalize and say that most defendants released pending completion of criminal proceedings prove, by their actions, to be dangerous. If it were assumed that persons charged with dealing in larger amounts of controlled substances would continue to deal, this selective presumption might be supportable by pragmatic data. But simply to say that, across the board, more released defendants are likely to commit crimes pending adjudication than are not, I think that's a vulnerable assumption.

Also I would flag for possible consideration the assumption that people having certain characteristics are more likely to commit crimes than others. The Supreme Court hasn't passed directly on that. I would, however, suggest that it might be useful to look at *Reid* v. *Georgia* in 448 U.S. 438. That case had to do with a profile used by DEA officials at airports to try to screen out incoming passengers, to arrest incoming passengers to find whether, indeed, they were trafficking in controlled substances. In *Reed,* the officers were right, but the Supreme Court said there was no basis for that profile, even to create probable cause to arrest. It's an analogy only, but nevertheless, I think it suggests that there is some vulnerability in any legislative system that assumes all citizens or

most citizens with certain characteristics are likely to engage in certain kinds of unlawful conduct.

Mr. KASTENMEIER. Congress, as I recall, did that in the Organized Crime Control Act or—I've forgotten—where they denominated what they called "dangerous offenders," if you will remember.

Mr. GEORGE. Yes.

Mr. KASTENMEIER. Using tests of prior convictions.

Mr. GEORGE. But that followed an adjudication, did it not, by a jury?

Mr. KASTENMEIER. Yes.

Mr. GEORGE. And at that point, I think constitutional concerns are much more nearly satisfied than they would be in a pretrial, in a sense ad hoc determination. It's not ex parte, but even so it's not fully litigated on the matter of guilt or innocence.

Mr. KASTENMEIER. Do you see any other constitutional issues that you are required to look at or that we might look at in connection with the changes we're contemplating to the law?

Mr. GEORGE. To the extent that we're discussing the relationship between the penalty for violation of preconviction release and the crimes charged might be recognized, I think that's compatible with the ABA sentencing, alternatives and procedures standard.

I'm not sure whether there are any other matters that could surface through the Attorney General's task force, if that ultimately is presented. But my first impression in scanning the task force recommendations is that they do not create significant constitutional problems.

Mr. KASTENMEIER. As I recall, you indicated that the vulnerability of the accused to incarceration occurring after release would be those defendants charged with felonies?

Mr. GEORGE. No, not in form. We at least have the abstract possibility that some serious misdemeanors might pose a danger to the community. It depends on the character of the misdemeanor and the characteristics of other activities that this kind of misdemeanant might engage in. It's setting the conditions, in other words. We could have conditioned release for misdemeanors, as much as we could for a felonies, even though in the real world it's not likely to happen too often.

Mr. KASTENMEIER. At the outset, you indicated that you have gone the other direction, but let me ask you, did the ABA consider limiting the option of pretrial detention to defendants charged with particular offenses, violent capital offenses, violent crimes, narcotic offenses? Was that debated or discussed?

Mr. GEORGE. In the committee and with the reporter's memorandum these matters were considered. When the draft standards went to the ABA House of Delegates, however, were free of any such distinctions, in part because the association was asked to adopt policies that could extend to all State jurisdictions, as well as all Federal jurisdictions. Therefore we tried to shy away from formal distinctions that might be meaningful in some jurisdictions but not in others. And there was approval by the house of delegates of the policies recommended. So one can't say whether there was a debate or not. But the issues have been canvassed in the black letter language with supporting commentary. Commentary is

not formal ABA policy, but nevertheless it is a background against which policy decisions are made in the house.

Mr. KASTENMEIER. Professor George, what is your answer to the preceding witness, Mr. Sensenbrenner, who, like others will cite the *Hinckley* case as suggesting a liability to cope with that kind of case?

In your formulation, he would not be incarcerated. He would have had to commit some form of second offense.

Mr. GEORGE. Yes, that's true. Now various conditions, perhaps quite onerous conditions, could properly be placed on an individual, if there were any thought that he or she might engage in activities dangerous to the community; however, it would require a personal, subjective ad hoc showing in a pretrial inquiry that in light of the individual's background and activities this person is dangerous. And if this person is not dangerous, and pretrial release is denied, it's because there is an assumption that all persons charged with a particular crime are so dangerous that they have to be retained in custody. Although generally we say pretial criminal defendants should not suffer the stigma, inconvenience, and hardship of incarceration this arbitrary group is denied freedom because it is a group.

This could raise, depending on the attitude of the reviewing court, in essence, an equal protection problem, I should think. That is an improper legislative classification, treating apparently like people unalike, but without an observed rational justification for that discrimination and application.

Mr. KASTENMEIER. What is your reaction to—I may not characterize it quite accurately, but the testimony of some of the Federal judges who say, yes, indeed, they do think it's appropriate for the courts on occasion to expand on the use of incarceration to avoid flight by really having subjectively in back of their mind the dangers to the community, and so as a matter of fiction, sometimes they say, "Well, we'll incarcerate this individual, deny him bail" for whatever, for purposes of avoiding flight when, in fact, they don't like the crime, and they wonder whether this individual is dangerous.

But the same judges recommend to us, let the law alone. Let them apply it in that elastic fashion that while, true, it involves a fiction, to wit, the individual is being denied freedom to avoid flight and, in fact, it is the other purpose.

What is your response to that?

Mr. GEORGE. The clear preference embodied in the ABA standards is that there should not be hypocrisy, or the devious use of apparently lawful alternatives, in order to achieve an end that, indeed, is desirable, but nonetheless is still characterized as unlawful. As long as one works on the assumption that the only purpose of pretrial release is to bring defendants back into court, then any other consideration should be outlawed. The drafters of the ABA standards knew that under the traditional use of surety bonds or money bail courts were setting amounts that in constitutional terms were viewed as reasonable, but which as a practical matter simply would not be feasible for most defendants.

Therefore, the traditional bail system was being manipulated to create the illusion of safety. The price for this was that many

people who were not truly dangerous to the community were being held in custody because they were poor, whereas some quite dangerous people were not bothered by the high money bail amount. As the Representative's description of some of these drug dealing cases would illustrate, it becomes the cost of doing business.

The position of the association is that, for example, compensated sureties should not be part of the system. The reason is that we want to keep people under control. It is a fiction that a surety bonding company is going to be exercising control over the conduct of the persons on release. That has always been a fiction: Why maintain the fiction? The ABA takes the position that money bail from an individual or a noncompensated surety should not be used routinely, but only when it is determined that it achieves a specific purpose in the individual case. In other words, nothing short of release should be invoked, unless there is a purpose for invoking it.

I think I would have to say that a suggestion to leave the classic system alone and to let judges with their good will and excellent motives manipulate it to achieve safety for the community, is not what the ABA wishes to encourage.

Mr. KASTENMEIER. Thank you, Professor George.

The gentleman from Michigan?

Mr. SAWYER. Do I understand that you feel there should be a conditional release, kind of no matter what, except the unlikelihood of appearance, until there has been some further act that would justify detention without bail?

Mr. GEORGE. Or a course of conduct which poses that danger. We do not suggest that revocation of release should always have to turn on a new criminal act. Predelinquent behavior might do it. But yes, it is the association's position that every person should have at least a period of preadjudication release.

Mr. SAWYER. What about—getting down to a case—not *Hinckley,* but how about *Speck,* the guy that murdered those eight nurses in Chicago. Assume there was no likelihood or particular likelihood that he would not appear. Are you in favor of some kind of conditional release for that kind of guy?

Mr. GEORGE. The position of the ABA standards is yes.

Mr. SAWYER. I can tell you as a member of the ABA, I would have to take exception, and you would do the same, with Manson and people like that.

Mr. GEORGE. Again, as a matter of the stated position, that would be a possibility.

Mr. KASTENMEIER. Would the gentleman yield. I know I took a long time, and he's hardly taken any at all.

Mr. SAWYER. Sure.

Mr. KASTENMEIER. Some of these cases involve the extra question of mental capacity of the defendant, whether or not the individual is in such a state that for his own benefit or society's he ought to be released, not in terms of crime committed but in terms of the mental health of the individual, whether the individual is insane or not, even though they are openly processed in the criminal justice system. You'd almost have to examine that role of society, of the trappings of the community or the Government, as well as the merely criminal justice system, it would seem to me.

I think in the *Speck* case or the *Manson* case, we're talking about people who—while they may ultimately be incarcerated and be responsible for their actions—it would seem in the short term that they would be given a psychiatric examination, be reasonably retained for those purposes.

Mr. GEORGE. Our committee is working on the drafting of standards relating to mentally ill persons in the criminal justice system, and very likely there would be the possibility of diagnostic or civil commitment, of a person who is determined to be dangerous, and it might be relatively summary in nature.

I suppose I should return to Representative Sawyer's question to say that, in effect, anyone in any system can set up a few extreme instances which test the system. We can, for example, talk about freedom of religious practice and the acceptance of sects that most of us would view as aberrant. Most of the time we say as a starting premise that these groups have to be allowed freedom of expression. But, if a People's Church or a James Jones situation should arise within the United States, that obviously calls into some question our assumptions. The assassination of President Kennedy called many of our assumptions into deepest question, and if Oswald had not been killed, I am sure the system would have had serious stresses.

Nevertheless, the association did not find a way of screening out the Manson and Speck kind of cases, without exposing other persons who are really not that dangerous to the possibility of preconviction detention. It's a policy judgment. I speak only for the ABA as its policies now stand, and this is offered solely for whatever use the committee might wish to make of it.

Mr. SAWYER. This represents—they were ready to come off their earlier position, the ABA.

Mr. GEORGE. Yes, sir, that's very true.

Mr. SAWYER. Hopefully, they will continue to progress in their approaches to the problem. I agree with you on the run of the mine murder cases. I say run of the mine, I guess no murder case can appropriately be called run of the mine, But the kind of a case where a triangle affair, the husband shoots the wife or the wife shoots the husband or something else——

Mr. GEORGE. The cases do differ.

Mr. SAWYER. Yes. But in many of those kinds of cases, obviously the individual is not dangerous. There is no real reason for pretrial detention. Although I might say that in my State of Michigan, people are never released if they are charged with first-degree murder, and it makes no difference whether the case is one that you think ought to call for it or not.

It is just tradition pattern in the State courts there, that a first-degree murder charge is not bailable. And they hang their hat on that rather peculiar constitutional provision in the State that many States have, I have found out, that says something to the effect that bail is denied when cases of murder or treason—when proof is evident, or the presumption is great—something crazy like that.

But nevertheless, they hang their hat on it.

But, it seems to me you know, sitting as a judge, if someone were, that they could make a determination quite easily within

the, as I say in the run of the mine cases if you will, that this is not danger to the community, and under circumstances to assure appearance.

It seems to me you have got to give the presiding judge some authority in a case like Speck or Manson, to make a determination not based on some theory that he won't appear, but that this guy is dangerous and we are not going to have to wait until he kills somebody else to satisfy us that he ought to be kept incarcerated.

It seems to me that that's what we are concerned about. This so-called preventive detention law in the District is a very unattractive law from a prosecutorial point of view. And I have been a prosecutor, and I have also been a trial lawyer on the other side of the fence.

But, you have to lay out almost your whole case if the defendant wants you to, if they want to take advantage of the various provisions of that law.

So, as I recall it, it's only been used like 10 or 15 times, or something like that, over its 10-year history. And maybe that's as it should be. Those cases where the prosecutor is that concerned about this person getting out that he is willing to do that, it is sort of a self-imposed restriction.

But, it just seems to me that to leave nothing but hypocrisy in effect in the judge's hands. He has got to have some authority, in my view, to make the determination pretrial, preconviction, that this person poses a danger to the community and ought to be detained without letting him go to see if he kills somebody else while you consider detaining him.

Mr. GEORGE. Establishing criteria would be a major legislative role. I simply can assure you in your capacity as an ABA member, that as the legislative and judicial process evolves, that the standing committee is constantly monitoring the standards and if it seems appropriate in light of developments, we propose a black letter change to the house of delegates—and that is one of the assigned functions of the committee—it is not unlikely that in some future year or meeting of the house of delegates reconsideration of this matter might be requested.

Mr. SAWYER. I have here a letter, a "Dear Colleague" letter, as we call them, sent out by Charlie Bennett, Congressman from Florida. Charlie is very concerned, (*a*) because he is from Florida; but (*b*) because he had a kind of family tragedy in the past with the narcotics traffic. And he is soliciting support of a bill that he has apparently just introduced. I haven't seen the bill. The letter is only dated September 9.

But, he wants the ability to deny bail on big-time—as he uses the terminology—you might technically want to define that, but—big-time drug smugglers, which he is concerned about, because of the fact that there is now developing a pattern of their jumping these very large amounts of bail. They have been setting bail up in the $20-odd millions down in Florida, some of them, and they jump bail with a million dollars, treating it more or less as an expense of doing business.

I guess they estimate that it is now a $64 or $65 billion business nationally, the biggest business in the State of Florida, including tourism, citrus fruits and everything else estimated at some $5 billion, something of that order. You know, what the heck is a million dollars here and there.

Do you feel that if a bill like that, along that line, but was drafted to meet reasonably legal criteria as to defining what you are talking about in size and scope, is it your opinion that that would be constitutional? That you can constitutionally do that?

Mr. GEORGE. If the Congress should deny absolutely a right to preconviction release to people charged with violating a certain provision of the Controlled Substances Act, it would probably be a fifth amendment question incorporating equal protection issues. In other words, is there an adequate factual data base to say that an overwhelming percentage of the persons charged with violating a particular section of the Controlled Substances Act will skip and will not appear?

And, I think it might be vulnerable on that basis.

Now, to the extent that conditioned release can allow the elaboration of whatever conditions are likely to keep the persons in the jurisdiction, that would be proper.

Also, to the extent that these people are aliens, I take it that there are administrative processes that could be used to detain them pending deportation proceedings. And the Supreme Court——

Mr. SAWYER. Apparently the Administrative Officer of the U.S. Courts did a study in ten demonstration districts under this Experimental Pretrial Services Act. Thirty-one percent of the defendants that failed to appear in the last five years, were charged with narcotic offenses, and 53 percent of those still at large were charged with narcotic offenses. Presumed now that those are large narcotic offenses.

Would those kind of statistics, do you think, support the categorization of large narcotic dealers as not being subject to money bail?

Mr. GEORGE. Might I ask whether those figures are elaborated to show how many of those people were U.S. citizens, and how many of them were aliens?

Mr. SAWYER. I don't know.

Mr. GEORGE. It seems to me that might be germane to the inquiry. Because to say that 30 percent, 40 percent, 50 percent of the class of offenders are likely to flee and to say on that basis that there should be a denial to all in the category, raises a question about the point at which the statistical probability become sufficient to deny, under *Gerstein* v. *Pugh* concepts, all released people because they are in that class?

And I ask about the citizens versus aliens, because if you found a very high percentage of aliens who were skipping, and a criterion for denial of release were to be alien status coupled with the character of the offense, then it is possible it could stand later judicial evaluation.

Mr. SAWYER. A lot of former citizens are now aliens.

I yield back.

Mr. KASTENMEIER. I just have one last question, or perhaps suggestion or request.

If possible, I would think the subcommittee would like to see the ABA recommendation which you presented this morning, reduced perhaps simply to bill form. It would be very useful to us, so that we could consider it as an option.

Mr. GEORGE. We will undertake it to the best of our ability.

Mr. KASTENMEIER. We would appreciate that if it is available to me or to the counsel. At least I would like to consider it as a possibility of having that as a legislative option before the subcommittee.

[The statement follows:]

STATEMENT OF PROF. B. JAMES GEORGE, JR., CHAIRPERSON, STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION CONCERNING BAIL REFORM

Mr. Chairman and Members of the Subcommittee on Courts, Civil Liberties and the Administration of Justice:

My name is B. James George, Jr. and I am a Professor of Law at the New York Law School. I chair the American Bar Association's Standing Committee on Association Standards for Criminal Justice and I am a former Chairperson of the Association's Criminal Justice Section. I am pleased to be here today to represent the views of the American Bar Association on bail reform legislation as those views are articulated within the ABA Standards for Criminal Justice.

The American Bar Association has spent considerable time and energy in the formulation of standards regarding pretrial release. Indeed, this subject is dealt with in a 116-page chapter (Chapter 10) of the ABA Standards for Criminal Justice, second edition, Little, Brown and Company, 1980. To assist the Subcommittee in its deliberations I have attached the Association's black letter Standards on Pretrial Release as an appendix to this testimony.

Our 31 separate black letter standards on pretrial release deal with key issues which appear in bail reform legislation presently under consideration by your Subcommittee as exemplified by H.R. 3006 and H.R. 4264. Those issues include proposed amendments to the Bail Reform Act of 1966 which would: Authorize judicial consideration of "danger to the community" on setting conditions for pretrial release; authorize revocation of pretrial release for persons who violate conditions of their release, intimidate witnesses or jurors, or commit new offenses; and, provide for the pretrial detention of certain defendants.

The American Bar Association has carefully-wrought policies on these important issues. These policies have been formally adopted by the ABA's House of Delegates and are set forth in detail as the Association Pretrial Release Standards. In order, I would like to address the principal reform elements contained within legislation under consideration by your Subcommittee and to advise you of the ABA's views regarding these elements:

JUDICIAL CONSIDERATION OF DANGER TO THE COMMUNITY IN SETTING CONDITIONS OF PRETRAIL RELEASE

H.R. 3006 would amend 18 U.S.C. 3146(a) so as to allow a judicial officer to consider the safety of the community as well as the likelihood of the defendant's reappearance in reaching a decision as to whether or not a defendant should be placed on pretrial release. Moreover, H.R. 3006 would preclude the use of monetary release for the purpose of assuring the safety of the community. At present the Federal Bail Reform Act precludes consideration of community safety in noncapital cases.

An examination of the American Bar Association's Standards on Pretrial Release will reveal that this Association has paid close attention to community safety in the drafting and adoption of its standards. Indeed, community safety and crime prevention were central factors in the Association's consideration of pretrial release issues. For example, Standard 10-1.3(b) states that "constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication." Next, Standard 10-4.4 provides for a pre-first-appearance inquiry to assist the court in setting release conditions. We specifically state that the agency conducting such an inquiry should explore, *inter alia*, the defendant's character and reputation, the defendant's prior criminal record and any facts indicating the possibility of violations of the law if the defendant is released without restrictions. Standard 10-5.1 favors release on a defendant's own recognizance; however, we indicate that the presumption in favor of such release may be overcome by a finding that there is substantial risk of nonappearance or a need of additional release conditions. In Standard 10-5.2(e) we provide that a judicial officer may "impose any other reasonable restriction designed to ensure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice." Moreover, at Standard 10-5.3 we indicate that every jurisdiction should provide a pretrial service agency or similar facility to monitor and assist defendants prior to trial. An important function of such pretrial service agencies is to "promptly inform the court of all apparent violations of pretrial release conditions. . . ."

Our standards favor the release of defendants pending adjudication and they favor the release of eligible defendants on their personal recognizance. For defendants who do not qualify for that form of release, we favor the setting of specific release conditions designed to, *inter alia*, protect the safety of the community. Unlike the federal statute our standards do not differentiate between capital and noncapital cases. In all cases under our standards where a defendant is in custody and charged with a felony we call for a pre-first-appearance inquiry (Standard 10-4.4.). That inquiry, to be undertaken by the pretrial service agency, includes a determination about the defendant's prior criminal record, prior court appearances as required any facts indicating the possibility of violations of law if the defendant is released without restriction. The purpose of this inquiry is to make recommendations to the court regarding the conditions which should be imposed on the defendant's release.

Mr. Chairman, I think these factors make it clear that American Bar Association policy favors judicial consideration of community safety as an important aspect of conditional release.

AUTHORIZE REVOCATION OF PRETRIAL RELEASE FOR PERSONS WHO VIOLATE CONDITIONS OF THEIR RELEASE, INTIMIDATE WITNESSES OR JURORS, OR COMMIT NEW OFFENSES

Throughout the pretrial Release Standards drafting process this Association was mindful of the fact that some criminal defendants on bail pending trial commit additional offenses, engage in acts to intimidate witnesses and violate terms and conditions of their release. Our standards address these troubling aspects of criminal justice administration. One of the most important features of our comprehensive treatment of pretrial release concerns our unequivocal call for the establishment of effective pretrial service agencies in all jurisdictions. Standard 10-5.3 states in part: "Every jurisdiction should provide a pretrial service agency or similar facility to monitor and assist defendants released prior to trail." That admonition has a dual purpose. It recognizes that many criminal defendants need—and can benefit from—the delivery of a wide variety of services. In addition, however, it recognizes an equally important monitoring function to be carried out by the agency. The standard calls for the pretrial service agency to provide "intensive supervision for persons released into its custody" and would also require that the agency promptly report all apparent violations of pretrial release conditions. The imposition of strict pretrial release conditions becomes a hollow act unless a defendant's compliance with those conditions is monitored closely and effectively. Moreover, monitoring must be followed by swift law enforcement and judicial follow-up of reported violations. We hear a continuing cry for certainty and swiftness in the criminal justice process. Nowhere are those elements more desirable than in the pretrial release area. Defendants who violate the conditions of their release must be called promptly to account.

Our Standards 10-5.7 and 10-5.8 address those cases where defendants on pretrial release violate the conditions of such release or commit crimes while awaiting trial. In each case we provide for swift law enforcement and judicial action to take such persons into custody and to convene a pretrial detention hearing.

PRETRIAL DETENTION

While the central thrust of the Association's 31 separate black letter Standards on Pretrial Release favors bail for persons accused of crime pending adjudication, our standards also recognize that "some restraints on the defendant's liberty may be crucial to allow the process to go forward. . . ."

ABA Standard 10-5.9 deals specifically with pretrial detention and it provide a procedure for a pretrial detention hearing which may be triggered by:

A judicial determination that monetary bail is necessary, coupled with defendant's failure to satisfy that condition;

A judicial determination that defendant has willfully violated a condition of release;

A judicial determination that there is probable cause to believe defendant has committed a crime while on pretrial release; or,

By formal complaint from a prosecutor, law enforcement officer or representative of the pretrial service agency that defendant is likely to flee, threaten

or intimidate witnesses, or *constitutes a danger to the community* (emphasis added).

The fourth triggering event set forth above relates to a defendant's "dangerousness." This Association recognizes that some defendants on bail pending trial do commit additional offenses and we share the concern over this problem expressed by both law enforcement agencies and the public. Yet, as lawyers we know that the denial of bail is a serious step which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of this conflict between interests, Standard 10-5.2 provides for the setting of "any reasonable restriction designed to ensure . . . the safety of the community." The standards provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calender days (Standard 10-5.7). The standards also provide that where probable cause is shown to believe a released defendant has committed a new crime, a pretrial detention hearing should be scheduled within five calendar days (Standard 10-5.8). Finally, the standards provide for full pretrial detention hearings (Standard 10-5.9) and for the accelerated trail of detained defendants (Standard 10-5.10).

Notwithstanding the recent decision by the D.C. Court of Appeals which upheld the District of Columbia's pretrial detention (*U.S.* v. *Edwards,* D.C. Court of Appeals No. 80-294 and *Edwards* v. *U.S.,* D.C. Court of Appeals No. 80-401, decided May 8, 1981), the constitutionality of preventive detention remains to be tested by the Supreme Court.

Our standards, Mr. Chairman, provide a detailed mechanism for triggering a pretrial detention hearing based upon present conduct and not upon a generalized prediction of dangerousness. Under Standard 10-5.9 a defendant may be determined to constitute a danger to the community and may be detained because: The defendant has committed a criminal offense since release; or, the defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the community.

American Bar Association policy favors the release of defendants pending the determination of guilt or innocence. Notwithstanding that overriding predilection for release, our standards recognize and provide for pretrial detention where a defendant's alleged commission of a new crime or a defendant's violation of release conditions require swift judicial action to ensure the integrity of the criminal justice process. We require that the detention decision be based solely upon evidence adduced at a formal pretrial detention hearing. Further, we require that such evidence be "clear and convincing."

Mr. Chairman, I ought to point out that the American Bar Association's Standard on Pretrial Detention (10-5.9) represents a relatively recent change in American Bar Association policy. The first edition of our Pretrial Release Standards (1968) contained no provision for pretrial detention. In February, 1979 the ABA's House of Delegates approved the addition of a pretrial detention standard. This new standard requires a judicial officer to convene a pretrial detention hearing when a defendant fails to satisfy the conditions of monetary bond, when a defendant has violated a condition of release, when there is probable cause to believe that a defendant on release has committed a crime, or when an appropriate official by verified complaint alleges that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitutes a danger to the community. I have already alluded to the factors which determine whether or not a defendant constitutes a danger to the community under Standard 10-5.9. In the main those factors are ones which occur subsequent to initial pretrial release. Thus, a defendant who commits a new offense or a defendant who violates conditions of initial release would be subject to a pretrial detention hearing because of acts committed while on release. In contrast, H.R. 3006 and H.R. 4264 would seem to allow pretrial detention based more heavily upon a defendant's past conduct and therefore upon a prediction as to the defendant's likely future conduct. Because of our concerns over general predictions of future dangerousness, we have attempted to limit our pretrial detention standard to cover cases in which a pretrial detention hearing is triggered by the defendant's violation of release conditions. Although this is a most difficult and troubling area for lawyers, I think you will find that the ABA Standards on Pretrial Release contain a scrupulous regard for the safety of the community. In a general sense our Pretrial Release Standards favor the release of charged defendants and suggest that those defendants who qualify for release should be most carefully monitored by effective pretrial service agencies. Our standards also call for prompt reporting of release violations and for equally prompt judicial action upon the receipt

of such reports. Then, and only then, do our standards fully support the concept of pretrial detention.

The task of finding solutions to the social blight of crime and delinquency is not an easy one. For 18 years the American Bar Association has labored to produce standards which will improve the fairness and the effectiveness of our criminal justice system. The 469 black letter standards contained within the ABA Standards for Criminal Justice represent the views of the world's largest volunteer professional association. These standards embody our legal learning, our experience and our aspirations for a system of criminal justice which truly protects the public while dealing fairly and expeditiously with those charged with crimes. I commend the ABA Standards for Criminal Justice to you and your colleagues, Mr. Chairman, with the hope that they will assist you in the exercise of your important responsibilities.

In summary, Mr. Chairman, American Bar Association policy favors judicial consideration of community safety as an important element in the formulation of pretrial release conditions. American Bar Association policy favors, after appropriate and procedurally adequate hearings and based upon clear and convincing evidence, the revocation of pretrial release for persons who violate conditions of that release, intimidate witnesses or jurors or who commit new offenses. Finally, our policy does not favor the use of pretrial detention based solely upon a defendant's past conduct or upon a general prediction of future dangerousness.

APPENDIX

AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE

CHAPTER 10—PRETRIAL RELEASE

PART I. GENERAL PRINCIPLES

Standard 10-1.1. Policy favoring release

The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not been judicially established to economic and psychological hardship, interferes with their ability to defend themselves, and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents a major public expense.

Standard 10-1.2. Definitions

(a) Citation: a written order issued by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time. The form should require the signature of the person to whom it is issued.

(b) Summons: and order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) Release on own recognizance (sometimes referred to as "personal recognizance"): the release of a defendant without bail but upon an order to appear at all appropriate times, to refrain from criminal law violations, and to refrain from threatening or otherwise interfering with potential witnesses. Release on own recognizance is not inconsistent with the imposition of other nonmonetary conditions reasonably necessary to secure the presence of the accused and to protect the safety of the community.

(d) Release on monetary conditions: the release of a defendant upon the execution of a bond, with or without sureties, which may or may not be secured by the pledge of money or property.

(e) First appearance: that proceeding at which a defendant initially is taken before a judicial officer after arrest.

Standard 10-1.3. Conditions on release

(a) Each jurisdiction should adopt procedures designed to maximize the number of defendants released on their own recognizance. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case. Methods for providing the appropriate judicial officer with a reliable statement of the facts relevant to the release decision should be developed.

(b) Constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

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(c) Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably ensure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond. Compensated sureties should be abolished, and a defendant held on financial conditions should be released upon the deposit of cash or securities of not less than ten percent of the amount of the bail, to be returned, at the conclusion of the case.

Standard 10-1.4. Intentional failure to appear

Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense. Each jurisdiction should establish an adequate apprehension unit designed to apprehend defendants who have failed to appear or who have violated conditions of their release.

PART II. RELEASES BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1. Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

Standard 10-2.2. Mandatory issuance of citation

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.

(b) Except as provided in paragraph (c), when an arrested person has been taken to a police station and a decision had been made to charge the person with a misdemeanor, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in paragraphs (a) and (b) need not apply and the defendant may be detained:

(i) When an accused subject to lawful arrest fails to identify himself or herself satisfactorily;

(ii) When an accused refuses to sign the citation after the officer explains to the accused that the citation does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) When an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;

(iv) When the accused has no ties to the jurisdiction reasonably sufficient to assure accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or

(v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

(d) When an officer fails to issue a citation pursuant to paragraph (c), the officer should be required to indicate the reasons in writing.

Standard 10-2.3. Permissive authority to issue citations in all cases

(a) A law enforcement officer acting without a warrant who has probable cause to believe that a person has committed any offense for which the officer could legally arrest the person should be authorized by law to issue a citation in lieu of arrest or continued custody. The officer should be strongly encouraged to do so unless one or more of the circumstances described in standard 10-2.2(c)(i)-(v) are present. The statute authorizing such action should require that the appropriate judicial or administrative agency promulgate detailed rules of procedure governing the exercise of authority to issue citations.

(b) Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

Standard 10-2.4. Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

Standard 10-2.5. Persons in need of care

Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if the person appears mentally or physically unable to care for himself or herself.

PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

Standard 10-3.1. Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to prevent imminent bodily harm to the defendant or another, or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, no law enforcement officer may arrest the accused for the offense without obtaining a warrant.

Standard 10-3.2. Mandatory issuance of summons

The issuance of a summons rather than an arrest warrant should be mandatory in all misdemeanor cases unless the judicial officer finds that:

(a) the defendant previously has intentionally failed to appear without just cause in response to citation, summons, or other legal process for an offense other than a minor one, such as a parking violation;

(b) the defendant has no ties to the community reasonably sufficient to assure appearance and there is a substantial likelihood that the defendant will refuse to respond to a summons;

(c) the whereabouts of the defendants are unknown and the issuance of an arrest warrant is a necessary step in order to subject the defendant to the jurisdiction of the court; or

(d) an otherwise lawful arrest is necessary to prevent imminent bodily harm to the defendant or to another.

Standard 10-3.3. Application for an arrest warrant or summons

(a) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require the applicant to produce such information as reasonable investigation would reveal concerning the defendant's:

(i) residence:

(ii) employment:

(iii) family relationships:

(iv) past history of response to legal process, and

(v) past criminal record.

(b) The judicial officer should ordinarily issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

(c) In any case in which the judicial officer issues a warrant, the officer shall state the reasons in writing or on the record for failing to issue a summons.

Standard 10-3.4. Service of summons

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

Standard 10-4.1. Prompt first appearance

Unless the accused is released on citation or in some other lawful manner, the accused should be taken before a judicial officer without unnecessary delay. Except during nighttime hours, every accused should be presented no later than [six] hours after arrest. Judicial officers should be readily available to conduct first appearances within the time limits established by this standard. Under no circumstances should the accused's first appearance be delayed in order to conduct in-custody interrogation or other in-custody investigation. An accused who is not promptly presented shall be entitled to immediate release.

Standard 10–4.2. Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of that case. The proceedings should be conducted in clear and easily understandable language calculated to advise the defendant effectively of the defendant's rights and of the actions to be taken against him or her. The appearance should be conducted in such a way that other interested persons present may be informed of the proceedings.

(b) Upon the accused's first apearance, the judicial officer should inform the accused of the charge and the maximum possible penalty upon conviction. The judicial officer should also provide the accused with a copy of the charging document and take such steps as are reasonably necessary to ensure that the defendant is adequately advised of the following:

(i) that the defendant is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) that, if the defendant is as yet unrepresented, the defendant has a right to counsel and, if the defendant is financially unable to afford counsel and the nature of the charges so require, counsel forthwith will be appointed;

(iii) that the defendant has a right to communicate with counsel, family, and friends, and that, if necessary, reasonable means will be provided to enable defendant to do so; and

(iv) that, where applicable, defendant has a right to a preliminary examination.

(c) An appropriate record of the proceedings should be made. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(d) No further steps in the proceedings should be taken until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(e) In every case not finally disposed of at first appearance, and except in those cases in which the prosecuting attorney has stipulated that the defendant may be released on his or her own recognizance, the judicial officer should decide in accordance with the standards hereinafter set forth the question of the defendant's pretrial release.

(f) It should be the policy of prosecuting attorneys to encourage the release of defendants upon their own recognizance in compliance with these standards. Special efforts should be made to enter into stipulation to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.

Standard 10–4.3. Release of defendants without special inquiry

Defendants charged with misdemeanors or appearing pursuant to a summons or citation should be released by a judicial officer on their own recognizance without the special inquiry prescribed hereafter, unless a law enforcement official gives notice to the judicial officer that he or she intends to oppose such release. If such a notice is given, the inquiry should be conducted. No defendant appearing pursuant to a citation or summons should be detained unless the judicial officer states in writing new or newly discovered information unavailable to the official issuing the summons or citation which justifies more stringent conditions of release.

Standard 10–4.4. Pre-first-appearance inquiry

(a) In all cases in which the defendant is in custody and charged with a felony, an inquiry into the facts relevant to pretrial release should be conducted prior to our contemporaneous with the defendant's first appearance unless the prosecution advises that it does not oppose release on recognizance or the right to such an inquiry is waived by the defendant after consultation with counsel.

(b) The inquiry should be undertaken by the pretrial services agency established pursuant to standard 10–5.3.

(c) In appropriate cases, the inquiry may be conducted in open court. Inquiry of the defendant should carefully exclude questions concerning the details of the current charge.

(d) The inquiry should be exploratory and should include such factors as:

(i) defendant's employment status and history and the assets available to defendant to meet any monetary condition upon release;

(ii) the nature and extent of defendant's family relationships;

(iii) defendant's past and present residence;

(iv) defendant's character and reputation;

(v) names of persons who agree to assist defendant in attending court at the proper time;

(vi) defendant's prior criminal record, if any, and, if previously released pending trial, whether defendant appeared as required;

(vii) any facts indicating the possibility of violations of law if defendant is released without restrictions; and

(viii) any facts tending to indicate that defendant has strong ties to the community and is not likely to flee the jurisdiction.

(e) The inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The agency should formulate detailed guidelines to be utilized in making these recommendations, and, whenever possible, the recommendations should be supported by objective factors contained in the guidelines. The results of the inquiry and the recommendations should be made known to participants in the first appearance as soon as possible.

PART V. THE RELEASE DECISION

Standard 10–5.1. Release on defendant's own recognizance

(a) It should be presumed that the defendant is entitled to be released on his or her own recognizance. The presumption may be overcome by a finding that there is a substantial risk of nonappearance or a need for additional conditions as provided in standard 10–5.2.

(b) In determining whether there is a substantial risk of nonappearance, the judicial officer should take into account the following factors concerning the defendant:

(i) the length of residence in the community;

(ii) employment status and history;

(iii) family and relationships;

(iv) reputation, character, and mental condition;

(v) prior criminal record, including any record of appearance or nonappearance while on personal recognizance or bail;

(vi) the identity of responsible members of the community who would vouch for the defendant's reliability;

(vii) the nature of the offense presently charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of nonappearance; and

(viii) any other factors pertaining to the defendant's ties to the community or bearing on the risk of intentional failure to appear.

(c) In evaluating these and any other factors, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge.

(d) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement of the reasons for this decision.

Standard 10–5.2 Conditions of release

Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous of the following conditions necessary to assure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

(a) release the defendant to the custody of a pretrial services agency established pursuant to standard 10–5.3;

(b) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, where appropriate, to accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court;

(c) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to certain geographical areas of premises;

(d) prohibit the defendant from possessing any dangerous weapons, engaging in certain described activities, or using intoxicating liquors or certain drugs; or

(e) impose any other reasonable restriction designed to assure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

Standard 10–5.3. Pretrial services agency

Every jurisdiction should provide a pretrial services agency or similar facility to monitor and assist defendants released prior to trial. The agency should:

(a) conduct pre-first-appearance inquiries pursuant to standard 10–4.4;

(b) provide intensive supervision for persons released into its custody pursuant to standard 10–5.2(a);

(c) operate or contract for the operation of appropriate facilities for the custody or care of persons released, including, but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services;

(d) promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released to its custody and under its supervision and recommend appropriate modifications of release conditions;

(e) supervise other agencies which serve as custodians for released defendants and advise the court as to the eligibility, availability, and capacity of such agencies;

(f) assist persons released prior to trial in securing any necessary employment and medical, legal, or social services;

(g) remind persons released prior to trial of their court dates and assist them in getting to court.

Standard 10–5.4. Release on monetary conditions

(a) Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.

(b) The sole purpose of monetary conditions is to assure the defendant's appearance. Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct.

(c) A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense.

(d) Upon finding that a monetary condition should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to 10 percent of the face amount of the bond. The deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court. In setting the amount of bail, the judicial officer should take into account the defendant's financial ability to post the bond. The judicial officer should also take into account all facts relevant to the risk of willful nonappearance, including:

(i) the length and character of the defendant's residence in the community;

(ii) defendant's employment status and history;

(iii) defendant's family ties and relationships;

(iv) defendant's reputation, character, and mental condition;

(v) defendant's past history of response to legal process;

(vi) defendant's prior criminal record;

(vii) the identity of responsible members of the community who would vouch for defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(ix) any other factors indicating defendant's roots in the community.

(f) Monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.

(g) Monetary conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to

be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

Standard 10–5.5. Compensated sureties

Compensated sureties should be abolished. Pending abolition, they should be licensed and carefully regulated. The amount which a compensated surety can charge for writing a bond should be set by law. No licensed surety should be permitted to reject an applicant willing to pay the statutory fee or to insist upon additional collateral other than specified by law.

Standard 10–5.6. Review of release decision

(a) Upon motion by either the defense or the prosecution alleging changed or additional circumstances, the court should promptly reexamine the release decision.

(b) Frequent and periodic reports should be made to the court as to each defendant who has failed to secure release within [two weeks] of arrest. The prosecuting attorney should be required to advise the court of the status of the case and why the defendant has not been released or tried.

Standard 10–5.7. Violation of conditions of release

(a) Upon sworn affidavit by the prosecuting attorney, a law enforcement officer, a representative of the pretrial services agency, or a licensed surety established probable cause to believe that a defendant has intentionally violated the conditions of release, a judicial officer may issue a warrant directing that the defendant be arrested and taken forthwith before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer shall either (i) set new or additional conditions of release, or (ii) schedule a pretrial detention hearing within five calendar days pursuant to standard 10–5.9.

(b) A law enforcement officer having probable cause to believe that a released defendant has violated the conditions of release should be authorized, when it would be impracticable to secure a warrant, to arrest the defendant and take him or her forthwith before the judicial officer setting the condition of release.

Standard 10–5.8. Commission of crime while awaiting trial

When it is shown that a competent court or grand jury has found probable cause to believe that a defendant has committed a crime while released pending adjudication of a prior charge, or when the prosecution, a law enforcement officer, a representative of the pretrial release agency, or a surety presents the judicial officer with a sworn affidavit establishing probable cause to believe that the defendant committed such a crime, the judicial officer may issue a warrant directing that the defendant be arrested and taken before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer should schedule a pretrial detention hearing pursuant to standard 10–5.9 within five calendar days.

Standard 10–5.9. Pretrial detention

(a) A judicial officer shall convene a pretrial detention hearing whenever:

(i) a defendant has been detained for five days pursuant to standards 10–5.4, 10–5.7(a)(ii), or 10–5.8, or

(ii) the prosecutor, a law enforcement officer, or a representative of the pretrial services agency alleges, in a verified complaint, that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitute a danger to the community.

(b) At the conclusion of the pretrial detention hearing, the judicial officer should issue an order of detention if the officer finds in writing by clear and convincing evidence that:

(i) the defendant, for the purpose of interfering with or obstructing or attempting to interfere with or obstruct justice, has threatened, injured, or intimidated or attempted to threaten, injure, or intimidate any prospective witness, juror, prosecutor, or court officer, or:

(ii) the defendant constitutes a danger to the community because:

(A) the defendant has committed a criminal offense since release, or

(B) the defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the safety of the community; or

(iii) the defendant is likely to flee and:

(A) the defendant is presently detained because he or she cannot satisfy monetary conditions imposed pursuant to standard 10–5.4 and no less stringent conditions will reasonably assure defendant's reappearance, or

(B) the defendant has violated conditions of release designed to assure his or her presence at trial and no additional nonmonetary conditions or monetary conditions which the defendant can meet are reasonably likely to assure the defendant's presence at trial.

(c) The judicial officer shall not issue an order of detention unless the officer first finds that the safety of the community, the integrity of the judicial process, or the defendant's reappearance cannot be reasonably assured by advancing the date of trail or by imposing additional conditions on release. In lieu of an order of detention, the judicial officer may enter an order advancing the date of trial or imposing additional conditions on release.

(d) Notwithstanding the order of detention, any defendant detained pursuant to standard 10-5.9(b)(iii)(A) shall be released whenever the defendant meets the original monetary conditions set upon release.

(e) Pretrial detention hearings shall meet the following criteria:

(i) The pretrial hearing should be held within five days of the events outlined in standards 10-5.4, 10-5.7(a)(ii), 10-5.8, or 10-5.9(a)(ii). No continuance of the pretrial detention hearing should be permitted except with the consent of the defendant in hearings held pursuant to standards 10-5.4, 10-5.7(a)(ii), and 10-5.8 or the consent of the prosecutor in hearings held pursuant to standard 10-5.9(a)(ii).

(ii) In order to provide adequate information to both sides in their preparation for a pretrial detention hearing, discovery prior to the hearing should be as full and free as possible, consistent with the standards in the chapter on Discovery and Procedure Before Trial.

(iii) The burden of going forward at the pretrial detention hearing should be on the prosecution. The defendant should be entitled to be represented by counsel, to present witnesses and evidence on his or her own behalf, and to cross-examine witnesses testifying against him or her.

(iv) No testimony of a defendant given during a pretrial detention hearing should be admissible against the defendant in any other judicial proceedings other than prosecutions against the defendant for perjury.

(v) Rules respecting the presentation and admissibility of evidence at the pretrial detention hearing should be the same as those governing other preliminary proceedings, except that when the defendant's detention is premised upon the commission of a new criminal offense, the rules respecting the presentation and admissibility of evidence should be the same as those governing criminal trials.

(f) A pretrial detention order should:

(i) be based solely upon evidence adduced at the pretrial detention hearing;

(ii) be in writing;

(iii) be entered within twenty-four hours of the conclusion of the hearing;

(iv) include the findings of fact and conclusions of law of the judicial officer with respect to the reasons for the order of detention and the reasons why the integrity of the judicial process, the safety of the community, and the presence of the defendant cannot be reasonably assured by advancing the date of trial or imposing additional conditions on release; and

(v) include the date by which the detention must terminate pursuant to standard 10-5.10.

(g) Every pretrial detention order should be subject to expedited appellate review.

Standard 10-5.10 Accelerated trial for detained defendants

Every jurisdiction should adopt, by statute or court rule, a time limitation within which the defendant in custody pursuant to standard 10-5.9 must be tried which is shorter than the limitation applicable to defendants at liberty pending trial. The failure to try a defendant held in custody within the prescribed period should result in the defendant's immediate release from custody pending trial.

Standard 10-5.11. Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

Standard 10-5.12. Credit for pretrial detention

Every convicted defendant should be given credit, against both a maximum and minimum term, for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed, or as a result of the underlying conduct on which such a charge is based.

Standard 10-5.13. Release to prepare for trial

Upon a showing by a defendant detained pursuant to standard 10-5.9 that his or her temporary release is necessary in order adequately to prepare the defense, the judicial officer should order defendant's release in the custody of the defense attorney or, when this is inadequate to assure defendant's presence at trial and the safety of the community, a law enforcement officer. No such release shall be for a period longer than six consecutive hours.

Standard 10-5.14. Treatment of defendants detained pending trial

A defendant who is detained prior to trial should be confined in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending trial, and any restrictions on the rights the defendant would have as a free citizen should be as minimal as institutional security and order require. The rights and privileges of defendants detained pretrial in no instance should be more restricted than those of convicted defendants who are detained.

CHAPTER 21—CRIMINAL APPEALS

PART II. TRANSITION FROM TRIAL COURT TO APPELLATE COURT

Standard 21-2.5. Release pending appeal; stay of execution

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release may properly be placed on the appellant. The decision of the trial court should be subject to redetermination by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted if the court finds that there is substantial risk that the appellant will not appear to answer the judgment following conclusion of the appellate proceedings, or that the appellant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice. In deciding whether to release a convicted defendant pending appeal, the trial court should also take into account the nature of the crime and the length of sentence imposed, together with factors relevant to pretrial release.

(c) Execution of a death sentence should be stayed automatically when an appeal is instituted.

(d) Dilatory prosecution of an appeal through acts or omissions of appellant or appellant's counsel should be ground for termination of the release of appellant pending appeal.

(e) In a jurisdiction with an intermediate appellate court, when review in the highest court is sought by a defendant-appellant, the question of custody pending action by the highest court may be redetermined by the intermediate appellate court or a judge thereof. When review is sought by the prosecution, standards relevant to custody of defendants pending prosecution appeal from trial court decisions should be applied. Decisions concerning custody by the intermediate appellate court or judge thereof should be subject to review by the highest court.

Mr. KASTENMEIER. Professor George, on behalf of the subcommittee we wish to thank you for your participation today. You have been very helpful.

Mr. GEORGE. Thank you for your kindness.

Mr. KASTENMEIER. That concludes today's hearings.

The subcommittee stands adjourned.

[Whereupon, at 11:40 a.m., the hearing was adjourned.]

BAIL REFORM ACT—1981-82

THURSDAY, FEBRUARY 25, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Sawyer.

Staff present: Timothy A. Boggs, counsel; Joseph V. Wolfe, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee is convened today to continue our hearings on proposed amendments to the Bail Reform Act of 1966. The amendments pending in the bills before the subcommittee have as a goal to protect the community against crimes by dangerous felons during the interlude between their initial arrest and their eventual trial. It is a goal to which all law-abiding citizens would readily subscribe, including those who may take exception to the proposed methods of the pending legislation.

Bail practices and problems have been with us for a long time, existing in Federal law since the Judiciary Act of 1789 and in predecessor colonial and British codes. The subcommittee has had the benefit of the excellent testimony of Prof. Daniel Freed of Yale Law School who reviewed for us the almost 700-year history of bail practice.

In the 20th century, money bail and the general conduct of the bail system became the subject of considerable criticism as a prime example of a traditional practice fraught with discrimination. In response to this climate, the Congress passed the Bail Reform Act of 1966, the first basic change in the Federal bail law since 1789.

It was greeted with great enthusiasm and hailed as a progressive measure. On June 24, 1966, the Bail Reform Act [18 U.S.C. 3146 et seq.] became effective and continues today.

The principal feature of the act is that personal recognizance or release on an unsecured bond shall be the presumptive determination in all cases. Other conditions cannot be imposed unless the bail setting judicial officer determines that such release will not reasonably assure the defendant's appearance.

If such a determination is made, the official must then consider each of the prescribed conditions in the order of priority listed in the statute; a combination of conditions may be imposed if one is considered insufficient.

The conditions enumerated in the statute are:

Release in the custody of some responsible person or organization;

Restrictions on travel, associations, or place of abode;

A returnable cash deposit, not to exceed 10 percent of the bond set;

The traditional bail bond, or cash in the amount of the bond;

Or any other conditions deemed reasonably necessary to assure appearance.

There is no provision in the statute specifically authorizing denial of bail for noncapital offenses. Nor is there a provision in the law which specifically authorizes danger to the general community as a consideration in the determination as to whether or not to release an individual on bail. At present, the function of bail is to provide reasonable assurances of the appearance of the accused.

Even though the Bail Reform Act does not permit the consideration of the defendant's dangerousness or his detention due to danger, it is widely acknowledged—and the subcommittee has heard from Federal judges on this point—that often a supposedly dangerous defendant is detained by the device of a high money bail.

I find this practice to be rather intellectually dishonest and perhaps illegal, although perfectly understandable from the Court's point of view. One of my intentions in the legislative process is to try to clarify and provide an added measure of honesty to our Federal bail hearings.

Further, the subcommittee will have to review the predictability of dangerousness, the Constitutional implications of denial of release prior to trial, the jail overcrowding and cost problems inherent in the proposals before us, and the genuine scope of the problem we are trying to solve, that is, the commission of crime by Federal defendants who are released prior to trial.

The subcommittee has several bills pending before us, including H.R. 4362, authored by Mr. Sawyer, a member of the subcommittee. Also, we have at least two draft proposals before us, one prepared by the American Bar Association and a varient on this prepared by the subcommittee staff.

Today, to comment on the issue and the legislation, we have two excellent groups of witnesses. First, Deputy Associate Attorney General Jeffrey Harris, to represent the administration and, second, David Landau and with him is Martin Michaelson, to represent the American Civil Liberties Union.

We are very pleased to greet you, Mr. Harris, and you may proceed, sir, as you wish, and identify your colleagues.

TESTIMONY OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER A. PAULEY AND MOLLY WARLOW

Mr. HARRIS. Thank you, Mr. Chairman.

First, let me introduce my colleagues from the Department; Molly Warlow on my right and Roger Pauley, on my left, who will accompany me here today.

I would like to thank you for this opportunity to present the views of the Department of Justice on the issue of bail reform, and to comment briefly on the three bail reform bills before the subcommittee, H.R. 3006, H.R. 4264, and H.R. 4362.

My prepared statement is rather lengthy. If it is acceptable to the subcommittee, I will submit my written statement for the record and confine my remarks today to a summary of its contents.

Mr. KASTENMEIER. Yes; that certainly is acceptable. Your 32-page statement will be received and made a part of the record, and I compliment you on that statement. It is an excellent statement.

Mr. HARRIS. Thank you.

Presently, Federal release practices are governed by the Bail Reform Act of 1966. The goal of the Bail Reform Act, achieving fairer and more rational release decisions, was a laudable one, and one which the Department of Justice continues to support.

However, 15 years of experience with the Bail Reform Act have demonstrated that, in some important respects, it does not permit the courts to make release decisions that strike the proper balance between the interests of defendants and the need to protect the integrity of our judicial process and the safety of others.

Today, I would like to present to the subcommittee the major reforms which the Department recommends to achieve necessary improvements in our bail laws. Many of these reforms were recommended by the Attorney General's Task Force on Violent Crime, which I served as Executive Director. Several of the areas of reform that we recommend are addressed in the bail bills before the subcommittee.

The most prevalent criticism of the Bail Reform Act is that it does not permit the courts, except in capital cases, to consider in the pretrial release decision the danger a defendant may pose to the safety of others if released. Under current law, the sole issue that may be addressed is whether the defendant will appear for trial. In the Department's view, this is the act's most serious defect.

In most respects, the Bail Reform Act precludes any responsible response to the serious problem of crimes committed by persons on release, a problem that persists in spite of what is believed to be a not uncommon practice of setting high money bond to detain potentially dangerous defendants.

At this time, there seems to be a growing consensus that our law should recognize that the danger a defendant may pose to others is as valid a consideration in the pretrial release decision as is the presently permitted consideration of risk of nonappearance. Indeed, all three bills before the subcommittee would amend current law to include consideration of this factor in all pretrial release decisions.

The harder issue before the subcommittee is how are the courts to be permitted to respond once a finding has been made that a defendant's release poses a risk to the safety of others. In some cases, this danger might be acceptably mitigated by imposing release conditions, such as third-party custody or alcohol or drug abuse treatment. But in other cases, both offender and offense characteristics will give a strong indication that the defendant is likely to engage in further serious criminal activity if released into the community, and that this threat to community safety cannot be acceptably

countered by imposing even the most stringent of release conditions. It is in these cases that the courts must be given authority to deny pretrial release.

In reaching the conclusion that our bail laws must be amended to permit the courts to deny bail to those defendants who pose the most grave risks to the safety of others, the Department has given full consideration to the issue of whether such a statute would be constitutional.

We are confident that a pretrial detention statute that is appropriately narrow in application and that provides sufficient procedural safeguards would pass constitutional muster. I respectfully refer the subcommittee to my written statement for a full discussion of the constitutional issues.

Providing statutory authority, in limited circumstances, to order the detention of especially dangerous defendants would, in our view, permit the courts to address the issue of pretrial criminality more effectively and honestly than under the present strictures of the Bail Reform Act.

Furthermore, this alternative would be fairer to many defendants than the de facto detention which many believe is achieved in the present system through the imposition of excessively high money bonds. Concerns about a defendant's dangerousness would be addressed in a straightforward way in the pretrial detention hearing. It would be necessary that information bearing squarely on the issue of dangerousness be presented, and the defendant would be given an opportunity to respond to this evidence and present any mitigating information.

Both H.R. 4264 and H.R. 4362 contain pretrial detention provisions. For reasons discussed in my written statement, our clear preference is for those in H.R. 4362, and we would urge their adoption with these three amendments. The rationale for these amendments is fully discussed in my written statement.

First, we suggest an amendment that would make it clear that the factors upon which the court relies in denying release be established by clear and convincing evidence.

Second, we strongly recommend deletion of that part of the standard for an order of detention that would require a finding of a substantial probability that the defendant committed the offense with which he is charged. This we regard as especially important, and from our discussions with prosecutors in the District of Columbia, the requirement of substantial probability of guilt on the underlying offense is one of the principal reasons that the District of Columbia statute has not been used effectively.

Third, the Department recommends that detention generally be required where a defendant has been convicted, within a reasonably related period of years, of a serious offense that was committed while he was on release.

There are, in addition to pretrial detention, other measures that should be included in our bail laws that would further enhance our ability to deter and respond effectively to bail crime.

First, we recommend that all released defendants be subject to a mandatory condition that they refrain from committing a crime while on bail. H.R. 4362 contains such a mandatory release condition.

Second, we believe that the violation of this condition—that is, the commission of a crime while on release—should, if the second crime is a serious one, generally result in the mandatory revocation of the defendant's bail.

Third, the Department recommends the adoption of a provision that would permit the temporary detention of persons who are arrested while on a form of conditional release. Both H.R. 4264 and H.R. 4362, like the current provisions of the D.C. Code, contain a section permitting such temporary detention.

The Department, however, prefers the 10-day detention period of H.R. 4362 over the 5-day period in H.R. 4264. In our view, the 10-day period represents a more reasonable time frame for notifying the releasing authorities and allowing them to respond.

As I noted earlier, while current law does not permit consideration of dangerousness in most pretrial release decisions, this consideration is permitted where postconviction release is sought. The postconviction release provisions of the Bail Reform Act are, nonetheless, in our view, seriously flawed, for they presumptively favor release of convicted persons.

Like the Violent Crime Task Force, the Department believes that there are compelling reasons for reversing this presumption.

First, it is at odds with the presumptive validity of conviction at law. Second, this adoption of a liberal release policy for convicted persons undermines the deterrent effect of conviction and erodes the community's confidence in the criminal justice system by permitting convicted persons to remain at large even though their guilt has been established beyond a reasonable doubt.

In addition to reversing the standard favoring postconviction release, we also urge that, when release is sought pending appeal, the defendant be required to establish that his appeal presents a substantial question of law or fact on which he is likely to prevail.

H.R. 4362 would fully implement these recommendations in the area of postconviction release. So would H.R. 3006, except to the extent that it would retain the current standard for release pending imposition or execution of sentence.

In our assessment of the Bail Reform Act, we have also identified areas in which legislation would facilitate the ability to meet the traditional purpose of the act: Assuring the appearance of the defendant. We have three recommendations in this area. I respectfully refer the subcommittee to my written statement for a discussion of these recommendations.

Our final recommendation is that the Government be given a right to seek review and appeal of release decisions analogous to that now provided for defendants. There is now only very limited case law addressing this issue. In practice, release decisions are often hastily made. We believe that, as a matter of sound policy and basic fairness, the Government should be able to seek reconsideration of those release decisions which it views as clearly inappropriate.

These, then, are the recommendations of the Department of Justice for amendment of our bail laws. Of the three bail bills before the subcommittee, H.R. 3006, H.R. 4264, and H.R. 4362, none would implement all these recommendations. However, H.R. 4362 comes

the closest, and we believe that it represents the kind of comprehensive approach to bail reform that is urgently needed.

In sum, we believe that this bill sets forth the basic framework for much needed reform of our bail laws, although we urge that it be improved in several of the recommendations I have mentioned today.

Mr. Chairman, that completes my statement, and at this time I would be pleased to try to answer any questions you or other members of the subcommittee may have.

[The statement of Mr. Harris follows:]

STATEMENT OF JEFFREY HARRIS, DEPUTY ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I would like to thank you for the opportunity to present the views of the Department of Justice on the issue of bail reform, and to comment briefly on the three bail reform bills before the Subcommittee (H.R. 3006, H.R. 4264, and H.R. 4362).

In recent years, federal bail laws have been the subject of increasing criticism and debate. Last year, both the President and the Chief Justice called for reform of our bail laws, and the Attorney General's Task Force on Violent Crime, which I served as Executive Director, made several recommendations aimed at improving federal bail laws. In addition, the introduction of numerous bail reform bills during this Congress by members of both the House and Senate underscores the widely held view that there is an urgent need to provide the federal courts with the tools to make rational and appropriate bail decisions. The Department of Justice shares the position held by many in the Congress, the judiciary, the law enforcement community, and the public at large, that we must act to address the deficiencies of our bail laws.

Presently, federal release practices are governed by the Bail Reform Act of 1966. Prior to its enactment, the decision to release a defendant on bail was largely a matter within the discretion of the courts, and there was little statutory guidance to assist the courts in the exercise of this discretion. Furthermore, an over-dependence on cash bonds coupled with delays in bringing defendants to trial -- delays which have now been substantially reduced through implementation of the Speedy Trial Act of 1974 -- resulted in the

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lengthy pretrial incarceration of too many federal defendants, a disproportionate number of whom were poor. The Bail Reform Act, by providing a comprehensive set of criteria to be applied by the courts in making release determinations and encouraging the use of forms of conditional release tailored to the characteristics of individual defendants as alternatives to the use of cash bond, did much to achieve fairer and more rational bail decisions - goals which the Department of Justice continues to support.

However, fifteen years of experience with the Bail Reform Act have demonstrated that, in some important respects, that Act does not permit the courts to make release decisions that strike the proper balance between the rights of defendants and the need to protect the integrity of our judicial process and the safety of the public.

In my statement today, I will first discuss the reforms which the Department recommends to achieve necessary improvements in our bail laws. Many of these recommendations are, as I will note, the same as, or similar to, those made by the Violent Crime Task Force. I will then turn to a brief discussion of the bail reform bills before the Subcommittee in light of these recommendations.

DEPARTMENT OF JUSTICE RECOMMENDATIONS FOR BAIL REFORM

1. Consideration of Dangerousness in the Pretrial Release Decision.

The most prevalent criticism of the Bail Reform Act is that it does not permit the courts, except in capital cases, to consider in the pretrial release decision the danger a defendant may pose to

others if released. The sole issue that may be addressed is the likelihood that the defendant will appear for trial. Thus, the federal courts are without authority to impose conditions of release geared toward assuring community safety or to deny release to those defendants who pose an especially grave risk to community safety. If the court believes that a defendant poses a significant danger to others, it faces a dilemma; it can release the defendant prior to trial in spite of these fears, or it can find a reason, such as risk of flight, to detain the defendant by imposing high money bond. Too often the resolution of this dilemma causes the court to make an intellectually dishonest determination that the defendant may flee when the real problem is that he appears likely to engage in further criminal activity if released.

We believe that the law must be changed so that it recognizes that the danger of a defendant may pose to others is as valid a consideration in the pretrial release determination as is the presently permitted consideration of the likelihood that the defendant will flee to avoid prosecution. It is, in our view, intolerable that the law denies judges the tools to make honest and appropriate decisions regarding dangerous defendants.

The concept of permitting an assessment of defendant dangerousness in the pretrial release decision has been widely supported. In his September, 1981 address to the International Association of Chiefs of Police, the President called for an amendment of current law to permit pretrial detention of the most

dangerous federal defendants. In February of last year, the Chief Justice in his annual address to the American Bar Association, noted the "startling amount of crime committed by persons on release pending trial," and stressed the need to provide greater flexibility in our bail laws so that judges may give adequate consideration to the element of future criminality in making bail decisions. Endorsements of the validity of weighing the issue of dangerousness are incorporated in the release standards developed by such groups as the American Bar Association, 1/ the National Conference of Commissioners on Uniform State Laws, 2/ The National District Attorneys Association, 3/ and the National Association of Pretrial Service Agencies. 4/ Furthermore, the laws of several states recognize that dangerousness is an appropriate concern in bail determinations, 5/ as does the District of Columbia Code,

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1/ American Bar Association, Standards Relating to the Administration of Criminal Justice: Pretrial Release (1979), Standards 10-5.2, 10-5.8, and 10-5.9.

2/ National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (1974), Rule 341.

3/ National District Attorneys Association, National Prosecution Standards: Pretrial Release (1977), Standard 10.8.

4/ National Association of Pretrial Service Agencies, Performance Standards and Goals for Pretrial Release and Diversion (1978), Standard VII.

5/ States permitting some consideration of defendant dangerousness in the pretrial release determination include Alabama, Alaska, Arkansas, Colorado, Delaware, Hawaii, Kentucky, Maryland, Minnesota, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, and Virginia. Also, two states, Wisconsin and Michigan, recently passed amendments to their state constitutions to permit consideration of dangerousness in the bail determination and to permit pretrial detention.

passed by the Congress in 1970, which provides that the risk a defendant poses to community safety may be a factor in setting release conditions and may also, in certain circumstances, serve as the basis for denying release entirely. 6/

This widely based support for giving judges the authority to weigh risks to community safety in bail decisions is a response to the growing problem of crimes committed by persons on release -- a problem that is growing in spite of what is believed to be a not uncommon practice of setting high money bond to detain potentially dangerous defendants. In a recent study conducted by the Lazar Institute, "[a]pproximately one out of six defendants in the eight-site sample were rearrested during the pretrial period. Almost one-third of these persons were rearrested more than once, some as many as four times, before their original cases were settled."7/ A similar level of pretrial criminality was reported in a study of release practices in the District of Columbia conducted by the Institute for Law and Social Research, where 13% of all felony defendants released were rearrested in the pretrial period. Among defendants released on surety bond, the form of conditional release which under the D.C. Code, like the Bail Reform Act, is used for only those defendants who are the greatest

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6/ 23 D.C. Code §§1321 and 1322.

7/ Lazar Institute, Pretrial Release: A National Evaluation of Practices and Outcomes - Summary and Policy Analysis, (Washington, D.C., August 1981) (hereinafter cited as the Lazar Study).

bail risks, the incidence of pretrial arrest reached the alarming rate of 25%. 8/

While statistics on rearrest rates, although they vary considerably, give some indication of the extent of the problem of pretrial criminality, it is probable that they do not fully reflect the seriousness of the problem of dealing with dangerous defendants under the Bail Reform Act, since we know that many crimes remain unsolved and never result in arrest, and thus cannot be reflected in figures based on rearrest rates.

In order to provide an adequate mechanism to deal with dangerous defendants who are seeking release, federal bail laws must be changed. First, the issue of the risk a defendant may post to community safety must be acknowledged as a legitimate concern in all release decisions. Second, the courts must be given the authority to order the detention of those defendants who are so dangerous that no conditions of release will reasonably assure the safety of other persons and the community.

We do not suggest that pretrial detention will entirely solve the problem of pretrial criminality or that it is appropriate for more than a relatively small portion of federal defendants.

8/ Institute for Law and Social Research, Pretrial Release and Misconduct in the District of Columbia 41 (April 1980) (hereinafter cited as the INSLAW study).

There are studies which report lower incidences of rearrest of released persons. For example, a study designed to assess the effectiveness of pretrial service agencies established under the Speedy Trial Act reported a marked decline in rearrest rates from 10% to 4% in the ten demonstration districts. Administrative Office of the United States Courts, Fourth Report on the Implementation of the Speedy Trial Act of 1974, Title II, Washington, D.C., June 1979, at 49.

However, we must recognize that much of the dangerous and violent crime now plaguing the country is committed by career criminals, those who have absolutely no respect for the law or the rights of our citizens, and who repeatedly commit crimes with a not unwarranted confidence that the odds of their being arrested, much less sent to prison for their crimes, are very much in their favor. It is with respect to this group of defendants that the courts must be given the opportunity to consider the option of pretrial detention.

In reaching the conclusion that our bail laws must be amended to permit courts to deny bail to those defendants who pose the most grave risks to the safety of other persons and the community, we have given full consideration to the question whether such a statute would be constitutional. It is our conclusion that a pretrial detention statute that is appropriately narrow in application and that provides sufficient procedural safeguards would pass constitutional muster.

This position has been bolstered by the recent decision in United States v. Edwards (decided May 8, 1981), in which the District of Columbia Court of Appeals en banc upheld the constitutionality of the District of Columbia's pretrial detention statute. In this case, the court rejected the most commonly raised argument concerning the constitutionality of pretrial detention, that is, that pretrial detention is violative of the due process clause in that it permits punishment of a defendant prior to an adjudication of guilt. The court concluded, correctly

in our view, that pretrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence, but rather that it seeks "to curtail reasonably predictable conduct, not to punish for prior act," and thus is constitutionally permissible under the Supreme Court's decision in Bell v. Wolfish, 441 U.S. 520 (1979). 9/

Some opponents of pretrial detention argue that it is improper to deny release on the basis of predictions of future behavior. However, we believe that judges can, with an acceptable level of accuracy, identify those defendants who are most likely to pose a danger to the safety of others if they are released prior to trial. While such predictions are not infallible, it is clear that the presence of certain combinations of offense and offender characteristics, considering such questions as the nature and seriousness of the offense charged, the extent of prior arrests and convictions, and a history of drug addition, have a strong positive relationship to the probability that the defendant will commit a new offense while on release.

Furthermore, the concept of basing release determinations on the likelihood of future conduct is not new to federal law. The courts are already required in all release decisions under the Bail Reform Act to predict defendant behavior with respect to the issue of appearance. Under that Act, the courts are also required

9/ United States v. Edwards, No. 80-294, slip op. at 20-25, (D.C. App. May 8, 1981), petition for cert. filed, (July 8, 1981) (No. 81-5017). After a lengthy analysis, the court also rejected the argument that the Eighth Amendment's prohibition on excessive bail implicitly guarantees a right to pretrial release.

to predict whether defendants awaiting trial for capital offenses and convicted defendants awaiting sentencing or disposition of appeals will pose a danger to the community if released. Similarly, a federal magistrate may detain a juvenile under 18 U.S.C. 5034 pending his juvenile delinquency proceeding in order to insure the safety of others. We see no reason why similar assessments of the probability of future criminality should not also be made as to adult defendants awaiting trial. Indeed, the INSLAW study suggested a greater ability to predict pretrial rearrest than failure to appear. 10/

Nonetheless, since assessing the risk of future criminality is a difficult task, we recommend generally that pretrial detention should be ordered only when the facts indicating the dangerousness of the defendant have been established by "clear and convincing" evidence. This would provide a high standard for invoking pretrial detention on a case-by-case basis, and is consistent with a recommendation of the Violent Crime Task Force. However, like the Violent Crime Task Force, we also believe that there is one group of defendants -- those who have in the past committed a serious crime while on pretrial release -- who should be presumed to be dangerous and ineligible for release. Such defendants have already established beyond a reasonable doubt, first, that they are dangerous, and second, that they cannot be trusted to abide by the law while on release. A provision that

10/ INSLAW study, supra note 8 at 63-64.

would deny release to these defendants would not only incapacitate those who have demonstrated that they are likely to engage in further criminal activity if released, it would also serve as a strong deterrent to criminal conduct by those who are released.

Pretrial detention is a serious matter, for it deprives a defendant of his liberty prior to an adjudication of guilt, and, as noted above, we do not believe it is appropriate for other than the small, but identifiable, group of most dangerous defendants. However, it is our view that where there is a high probability that a person will commit additional crimes if released, the need to protect the public becomes sufficiently compelling that a defendant should not be released pending trial. This rationale -- that a defendant's interest in remaining free prior to conviction is, in some circumstances, outweighed by the need to protect societal interests -- is, in essence, that which has served to support court decisions sanctioning the denial of bail to defendants who have threatened jurors or witnesses, 11/ or who pose significant risks of flight. 12/ In such cases, the societal interest at issue was the need to protect the integrity of the judicial process. Surely, the need to protect the innocent from brutal crimes is an equally compelling basis for ordering detention pending trial.

11/ See, e. g., United States v. Wind, 527 F.2d 672 (6th Cir. 1975); United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969).

12/ See, e. g., United States v. Abrahams, 575 F.2d 3 (1st Cir. 1978).

It is the Department's position that giving the courts the authority to deny release to defendants who pose a serious and demonstrable danger to the safety of others is not only sound policy, but would also represent a more honest way of addressing the problem of potential misconduct by persons seeking release. Despite the fact that the Bail Reform Act prohibits any consideration of defendant dangerousness, much less detention based on high probability of future criminality, it is widely believed that many courts do achieve the detention of particularly dangerous defendants by requiring the posting of high money bond, even if the defendants may pose little risk of flight.

That such instances of de facto detention of dangerous defendants would occur is hardly surprising. As noted earlier, current law places our judges in a desperate dilemma when faced with a clearly dangerous defendant seeking release. On the one hand, the courts may abide by the letter of the law and order the defendant released subject only to conditions that will assure his appearance at trial. On the other hand, the courts may strain the law, and impose a high money bond ostensibly for the purpose of assuring appearance but actually to protect the public. Clearly, neither alternative is satisfactory. The first leaves the community open to continued victimization. The second, while it may assure community safety, casts doubt on the fairness of release practices.

Providing statutory authority, in limited circumstances, to order the detention of especially dangerous defendants would, in our view, permit the courts to address the issue of pretrial criminality both effectively and honestly. Furthermore, we believe that this alternative would be fairer to defendants than the present practice. In the pretrial detention hearing, the government would be required to come forward with information bearing squarely on the dangerousness of the defendant, and the defendant would be provided an opportunity to respond directly to this evidence.

2. Other Measures Addressing Bail Crime.

While we believe that pretrial detention of the most dangerous defendants is crucial to reducing the number of crimes now committed by persons released pending trial, there are additional, and more modest, changes which would further enhance our ability to deter, and respond effectively to, bail crime.

First, the Department, like the Violent Crime Task Force, recommends that whenever a defendant is ordered released, the court should be required to impose a condition that the defendant not commit another crime while on release. We believe that it is appropriate in every instance in which an arrested person is released that this mandatory condition be imposed so as to stress to the defendant the legitimate expectation of both society and the court that he be law-abiding.

Second, we recommend that a violation of this condition of release, i.e., the commission of another crime while on bail, should result generally in the revocation of the defendant's release. We believe that once it is established that there is probable cause to believe a released defendant has committed another serious offense, the defendant has, through his own actions, established his dangerousness and his inability to abide by the conditions of his release, and that he should, without any additional showing, be ordered detained.

Third, we recommend the adoption of a provision that would permit temporary detention, for a period of up to ten days, of a defendant who has been arrested for a crime and is already on a form of conditional release such as bail, probation, or parole. This would give the arresting authorities a reasonable opportunity to contact those authorities who originally released the defendant so that they may, if appropriate, pursue revocation proceedings in light of the defendant's subsequent arrest. A similar provision is now included in the release provisions of the D.C. Code, and in his testimony before this Subcommittee, former United States Attorney Charles Ruff noted that this provision, which complements the D.C. Code pretrial detention statute, has been an extremely effective tool in dealing with recidivists.

3. Denial of Release to Assure Appearance.

For the most part, the forms of conditional release sanctioned by the Bail Reform Act have been adequate to assure the appearance of defendants at trial. Statistically, the rate of failure to

failure to appear among federal defendants is quite low. Nonetheless, there is an identifiable minority of defendants as to whom no form of conditional release is adequate to assure appearance. With respect to these defendants, the courts should be given clear statutory authority to deny release without the need to impose high money bond to accomplish this result. While the Bail Reform Act contains no provision authorizing the court to detain outright a defendant that it finds is a significant flight risk, the implicit authority of the courts to deny pretrial release to defendants who are likely to flee to avoid prosecution has been recognized in case law. 13/

Despite this case law upholding the power to order detention of defendants who are severe flight risks, it has been our experience that many judges are reluctant to exercise this power because of the absence of specific authority in the federal bail statutes. Again, as has been the case with extremely dangerous defendants, there is instead a tendency to achieve detention through the imposition of high money bonds. While we believe that, in some cases, money bond can be an effective mechanism for assuring appearance, it is also clear that in cases where the only means of assuring appearance is through detention, prosecutors sometimes feel compelled to achieve this result by seeking, and some judges are willing to set, money bonds in amounts the defendant cannot realistically be expected to meet.

13/ See, United States v. Abrahams, 575 F.2d 3 (1st Cir. 1978), and United States v. Meinster, 481 F. Supp. 1121 (S.D. Fla. 1979).

This misuse of the money bond system can and should be avoided by giving the courts specific authority to detain defendants who pose substantial flight risks. As noted by the Violent Crime Task Force in its endorsement of this change in our bail laws, permitting denial of bail in those cases where no form of conditional release will assure appearance would be not only a more honest way of addressing the problem of flight to avoid prosecution, but more effective as well. Too often we have been surprised by the ability of defendants who are engaged in extremely lucrative criminal activity -- particularly those who are major narcotics traffickers -- to meet extraordinarily high money bonds, and to willingly forfeit these bonds by fleeing the country. With respect to such defendants, the most stringent form of release recognized by the Bail Reform Act -- money bond -- is not sufficient to assure their appearance at trial. In such cases, the law should make it clear that an order of detention is appropriate.

4. Post-conviction release.

In the Violent Crime Task Force's discussion of its recommendations for amendments of current bail laws, the present standard governing release after conviction was described as "[o]ne of the most disturbing aspects of the Bail Reform Act," for it presumptively favors the release of convicted persons who are awaiting imposition or execution of sentence or who are appealing their convictions. Under 18 U.S.C. 3148, a person seeking release after

conviction must be released on the least restrictive conditions necessary to assure appearance unless the court finds that the person is likely to flee or pose a danger to the community. Only if such a risk of flight or dangerousness is found, or, in the case where release is sought pending appeal, the appeal is found to be frivolous or taken for delay, may the judge deny release.

Like the Task Force, the Department is of the view that there are compelling reasons for abandoning the present standard which presumptively favors post-conviction release:

> "First, conviction, in which the defendant's guilt is established beyond a reasonable doubt, is presumptively correct at law. Therefore, while a statutory presumption in favor of release prior to an adjudication of guilt may be appropriate, it is not appropriate after conviction. Second, the adoption of a liberal release policy for convicted persons, particularly during the pendency of lengthy appeals, undermines the deterrent effect of conviction and erodes the community's confidence in the criminal justice system by permitting convicted criminals to remain free even though their guilt has been established beyond a reasonable doubt." 14/

Thus, the Department joins the Violent Crime Task Force in recommending that the standard for post-conviction release be amended so that, as a general rule, release on bail would not be presumed for convicted persons who are awaiting imposition of execution of sentence or who had been sentenced to a term of

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14/ Attorney General's Task Force on Violent Crime, Washington, D.C., August 17, 1981, at 52. A footnote to this passage referred to the fact that the low rate of reversal of federal criminal convictions -- 10.4% for cases terminated during the twelve month period ending in June 1979 -- gives support to the presumptive validity of criminal convictions in the federal courts.

imprisonment and were awaiting appeal; rather release would be permitted only in those cases in which the convicted person is able to provide convincing evidence that he will not flee or pose a danger to the community and, if the person is awaiting appeal, that the appeal raises a substantial question of law or fact likely to result in reversal of conviction or an order for a new trial. A similar standard is now incorporated in the release provisions of the District of Columbia Code. 15/

5. Government appeal of release decisions.

The Bail Reform Act now specifically provides defendants with opportunities to move for reduction of bond, and to seek reconsideration and review of release decisions. However, the Act does not provide the government any analogous rights to appeal release decisions. Thus, the situation has arisen where, faced with what it believes to be an improper release determination, the government has been powerless to seek review of a hastily made decision which permits the defendant to flee the jurisdiction or to return to the community to commit further crimes.

While we have had some success in arguing that the government is not precluded, in certain cases, from seeking reconsideration of a release order, despite the lack of any specific statutory

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15/ D.C. Code sec. 23-1325.

authority to do so, 16/ we believe that as a matter of both sound policy and basic fairness, the government should be given clear authority to appeal release decisions.

6. Penalties for bail jumping should be more closely proportionate to the penalties for the offense originally charged.

One of the ways in which the law seeks to deter flight to avoid prosecution is by making bail jumping a separate punishable offense (18 U.S.C. 3150). Under current law the maximum penalty for bail jumping is five years' imprisonment if the offense originally charged was a felony, and one year's imprisonment if the offense originally charged was a misdemeanor. However, the bail jumping penalties can effectively serve the goal of deterrence only if they are more closely proportionate to the penalties for the offense with which the defendant was charged when he was released.

Under the present system, the five-year penalty for bail jumping may dissuade a defendant charged with an offense punishable by a five or ten year prison sentence from fleeing.

16/ In United States v. Zuccaro, 645 F.2d 104 (2d Cir. 1981), the authority of the government to request that a trial judge amend conditions of release that had been set by another juicial officer was found to be implicitly contemplated by the Bail Reform Act. Zuccaro, who had a long history of arrests for serious crimes, was charged with a hijacking involving the theft of $750,000. The day after his bail was set by a magistrate at $150,000, the government filed a motion with the District Court to increase the amount of bail. The District Court ordered an increase in the amount of bail to $350,000, and the defendant unsuccessfully appealed the validity of the order.

But where the penalty for the original offense is in the range of twenty years or above, the present penalty for bail jumping may not be an adequate deterrent to flight, for the defendant may be tempted to go into hiding until the government's case becomes stale and witnesses are unavailable, and then surface to face only the five year penalty for bail jumping rather than the much more severe penalty for the offense originally charged.

Therefore, we urge that the penalties for bail jumping be made more closely proportionate to those for the offense originally charged. This was also a recommendation of the Violent Crime Task Force.

7. Inquiry into the sources of property used to post bond.

Increasingly, federal prosecutors are faced with the problem of defendants, particularly those engaged in highly lucrative criminal activities, who forfeit large money bonds and flee prosecution. These defendants, who use the proceeds of their illegal activities to post bond or provide collateral for corporate surety bonds, view forfeiture of bond as just another cost of doing business. Indeed, it appears that there is a growing practice among those engaged in large scale criminal activities of setting aside a portion of the proceeds of crime to cover this "cost."

The rationale of the use of money bond as a form of conditional release is that the prospect of forfeiture of the bond can be a sufficient incentive to assure appearance. However, this

rationale does not hold true where the proceeds of crime are used to finance the bond and forfeiture is in fact anticipated as the cost of avoiding prosecution. Thus, the source of money or other property used to post bond may be determinative of whether the bond will an effective means of assuring the defendant's presence at trial.

Presently, there is some question whether the courts have full authority to inquire into the sources used to post bond and to deny bond if they are not satisfied that the source of the property is such that the bond will be effective in assuring the defendant's appearance. 17/ Thus, we recommend that the courts be given specific statutory authority to inquire into the source of money or other property offered to fulfill financial conditions of release, and to refuse to accept the money or property if it appears that because of its source, it will not reasonably assure the appearance of the defendant at trial.

17/ Rule 46(d) of the Federal Rules of Criminal Procedure permits the courts to require a surety, other than corporate sureties, to file an affidavit listing the property use to secure a bond, ant it is likley that this provision authorizes a hearing into the soruce of property to secure a bond, at least with resepct to non-corporate sureties. However, there is no express authority for the courts to make a similar inquiry where the bond is to be provided by a corporate security. Nonetheless, at least two courts have conducted such an inquiry. See, United States v. Melville, 309 F.Supp. 824 (S.D.N.Y. 1970), and United States v. DeMorchena, 330 F.Supp. 1223 (S.D. Cal. 1970).

DISCUSSION OF BILLS BEFORE THE SUBCOMMITTEE

I would now like to turn to a discussion of the three bail reform bills before the Subcommittee (H.R. 4362, H.R. 4264, and H.R. 3006) in light of the Department's recommendations for amendment of our bail laws that I have described. After a review of these bills, it is our assessment that H.R. 4362 represents the best vehicle for accomplishing these improvements. This bill, in our view, sets forth the basic framework for much needed bail reform, although we will suggest several ways in which we believe that it can be improved. H.R. 4362 is substantially similar to S. 1554, the comprehensive bail reform bill recently approved by the Senate Judiciary Committee. 18/ Several of the improvements to H.R. 4362 that I will suggest today were incorporated in S. 1554 by the Senate Judiciary Committee.

1. Consideration of Defendant Dangerousness in the Pretrial Release Decision

All three of the bills before the Subcommittee would permit the courts to consider defendant dangerousness in the pretrial release decision. However, only H.R. 4264 and H.R. 4362 would provide for the denial of pretrial release to those defendants

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18/ The only substantive difference between H.R. 4362 and S. 1554, as introduced, is that H.R. 4362 would retain moeny bond while S. 1554, as introduced, did not. In its consideration of S. 1554, the Senate Judiciary Committee restored the option of imposing financial conditions of release, an action which the Department strongly supported. As approved by the Senate Judiciary Committee, S. 1554, like H.R. 4362, contains safeguards against the misuse of money bond.

who pose an especially grave risk to the safety of others. Providing for the pretrial detention of the most dangerous of offenders is a change in current law that the Department believes is essential. Although I will make suggestions for improving the pretrial detention provisions of H.R. 4362, we believe that these provisions are preferable to those in H.R. 4244 because of two aspects of the latter bill that we find problematic.

The first drawback of the pretrial detention provisions of H.R. 4264 is its mandate of a bifurcated proceeding in which the court must first go through the exercise of determining the eligibility of the defendant for release under section 3146, and, I assume, set conditions of release as is required under that section. Only after this step is completed may the court then proceed with a hearing concerning pretrial detention. This procedure seems an extremely inefficient use of limited judicial and prosecutorial resources. 19/ Furthermore, this scheme, at least as we understand it, appears to be conceptually self-contradictory. In determining release eligibility under section 3146, as it would be amended by the bill, the court is to determine the form of release which is appropriate in light of both the risk of flight and danger to the community which may be posed by the defendant. Yet the very basis for pretrial detention

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19/ I understand that when asked his views on this sort of procedure during testimony before the Subcommittee in July of last year, former United States Attorney Charles Ruff voiced similar criticism.

under this bill is an assessment that no form of conditional release will be sufficient to minimize acceptably the threat the defendant poses to the safety of others.

The second problem with H.R. 4264's pretrial detention provision is its requirement that once the court determines the the defendant poses a significant danger to the safety of other persons, it still may not deny release unless it makes the additional finding that the alternative of advancing the trial date will not reasonably minimize this danger. Of course, common sense tells us that the more we limit the period of release, the less opportunity the defendant will have to engage in further criminal activity. However, we do not view the formula advanced in H.R. 4264 as a workable one. First, the extent to which our already overcrowded criminal dockets can be manipulated to achieve even speedier trials for especially dangerous defendants is very questionable. Second, trial dates would have to be significantly advanced to achieve a real minimization of the threat posed by particularly dangerous defendants. In the Lazar study, for example, forty-five percent of the rearrested defendants were rearrested within four weeks of their initial release. 20/ Preparing for trial within such limited time constraints would in many cases be extremely difficult for our already overburdened federal prosecutors, and as a result our chances for obtaining conviction of the most violent and dangerous offenders -- the category of defendants for whom conviction is vital if we are to protect society -- will be diminished.

20/ Lazar study, supra note 7, at 51.

H.R. 4362, on the other hand, presents neither of these problems, and thus, in our view represents a better approach to pretrial detention. We would, however, make these suggestions for improving the pretrial detention provision of H.R. 4362. In order for a court to deny pretrial release under H.R. 4362, the court would has to make two findings: first, that there are no conditions of release that "will reasonably assure the appearance of the person as required and the safety of any other person and the community," and second, that there is a "substantial probability" that the defendant committed the offense with which he is charged.

With respect to the first of these findings, we believe that the factors upon which the judge bases his determination of the necessity of pretrial detention be supported by clear and convincing evidence, and would suggest an appropriate amendment to make this clear. Generally, the court should consider a range of factors and make the detention decision on a case-by-case basis. Thus, as a general rule, we do not believe that it is appropriate to identify a particular factor or combination of factors as necessarily indicative of dangerousness, since the information supporting this conclusion will likely vary considerably from case to case. However, as noted in the first part of my statement, we believe that there is one circumstance which constitutes compelling evidence that the defendant will pose a grave threat to others if released, and that is where he has previously been convicted of a serious crime which he committed while on release. In our view, such defendants may be presumed, on the basis of

this factor alone, to be very poor risks, and we urge that H.R. 4362 be amended to require, generally, that such defendants be denied release.

Our second and equally major concern with H.R. 4362's standard for pretrial detention is that it, like H.R. 4264, requires the government to establish a "substantial probability" that the person committed the offense with which he is charged. This is the standard currently in the D.C. Code and has been construed by the District of Columbia Court of Appeals in United States v. Edwards, supra, as being "higher than probable cause" and "equivalent to the standard required to secure a civil injunction" (slip op. p. 38). The Edwards opinion, however, strongly suggests that probable cause -- a standard consistently sustained by the Supreme Court as the basis for "significant restraints on liberty" (ibid.) -- is a constitutionally sufficient standard, and we believe that the "substantial probability" factor should be eliminated as needlessly burdensome. In our view, a better balance between the defendant's interest in pretrial freedom and the public's interest in protecting the community is struck by requiring probable cause to believe that the defendant committed the crime with which he is charged -- a requirement that would necessarily appply in detention proceedings by virtue of current criminal procedure 21/ -- coupled with proof

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21/ At the initial appearance before a magistrate, the point at which the release determination is to be made, the defendant either appears by virtue of an arrest warrant or a summons which must, under Rule 4(a) of the Federal Rules of Criminal Procedure, be supported by a judicial finding that there is probable cause
(footnote continued on next page)

by clear and convincing evidence of the facts relied on to conclude that he poses a danger to other persons or the community.

Our objections to the "substantial probability" requirement stem not only from the view that the probable cause requirements of current law are sufficient to assure the validity of the charges against the defendant and to support in appropriate cases a determination to deny release, but also from the practical problems entailed in coming forward with the additional evidence necessary to meet this standard, particularly in those cases in which arrest is not preceded by a full investigation or lengthy grand jury proceedings. Unless a case is fully developed, it may be impossible in the short period of time within which the detention hearing must be held to muster the additional evidence necessary to meet this standard in light of the devotion of time and manpower required in such an effort. In our experience and discussions with prosecutors in the District of Columbia, these difficulties in meeting the analogous requirement under the District of Columbia's pretrial detention statute were cited as a principal reason for the prosecutors' failure to request a pretrial detention hearing, as required under that statute, for most of the last ten years.

(footnote continued from previous page)
to believe a crime has been committed and that the defendant committed the crime, or if no warrant has been issued at the time of the defendant's initial appearance, Rule 5(a) requires the filing of a complaint that complies with the probable cause requirements of Rule 4(a). Thus, at the time of bail hearing, the validity of the charges against the defendant will have already been scrutinized. Furthermore, the issue of probable cause will again be examined in the course of a preliminary hearing or the filing of an indictment.

Thus, we recommend the deletion of the requirement that the government demonstrate a "substantial probability" that the defendant committed the crime with which he is charged before detention may be ordered. 22/

2. Other Measures Addressing Bail Crime

Refraining from Criminal Activity as Mandatory Condition of Release

Of the three bills, only H.R. 4362 would require, in all cases, the imposition of a mandatory condition of release that the defendant not commit a federal, State, or local offense during the period of release. As noted in the first section of my testimony, the Department strongly supports the inclusion of this mandatory release condition.

Revocation of Release Upon the Commission of a Serious Offense While on Release

H.R. 3006 includes a specific section providing that a person will be subject to revocation of his release if there is probable cause to believe that he committed a felony while on release. H.R. 4362 provides generally that the sanction of revocation is to be available if a person violates a condition of his release, and under this bill the commission of such a crime

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22/ We note that, in any event, owing to an apparent drafting error, the "substantial probability" requirement in H.R. 4362 has been applied not only in cases which detention is sought on the basis of dangerousness, but also in cases in which the basis for detention is risk of flight or the obstruction of justice involving threats to, or intimidation of, witnesses or jurors, contrary to logic and present law. See 23 D.C. Code 1322, in which the "substantial probability" test is applied only where the basis for detention is dangerousness.

is a violation of the mandatory release condition discussed above. Where the crime committed on release is a serious one, the Department believes that merely permitting revocation of release is not a sufficient response. Instead, it is our position that where there is a probable cause showing that a person has committed a felony while on release, the law should generally require that his release be revoked.

Temporary Detention to Permit Revocation of Conditional Release

Both H.R. 4264 and H.R. 4362 contain provisions permitting the temporary detention of persons who are arrested while they are on a form of conditional release. The purpose of these provisions, which the Department strongly supports, is to permit the defendant to be held in custody for a short period so that the original releasing authorities can be notified of his arrest, and take action to revoke his release, if appropriate. This temporary detention provision is limited to a five-day period in H.R. 4264, as is the temporary detention provision of the current D.C. Code. The Department believes that H.R. 4362's ten-day period provides a more realistic time for notifying the releasing authorities and giving them an opportunity to respond.

One aspect of the temporary detention provision of H.R. 4362 which does concern us is its requirement that the court find that "no condition or combination of conditions will reasonably assure the appearance of the person... and the safety of any other person or the community." This is the same standard the bill prescribes for an order of pretrial detention based on dangerous-

ness or risk of flight. In light of the class of defendants to which the temporary detention provision applies -- those arrested while on bail, parole, or probation -- we urge that a less stringent standard be adopted. For example, the temporary detention provision of H.R. 4264 simply requires a finding that the defendant "poses a risk of flight or a danger to the safety of any other person or the community," and under the analogous provision of the D.C. Code, the required finding is simply one that the defendant "may flee or pose a danger...." The Department endorses these somewhat less stringent standards.

3. Denial of Release to Assure Appearance

Only H.R. 4362 would include a specific provision authorizing the pretrial detention of persons who pose especially severe risks of flight. As I noted earlier, the inherent authority of the courts to deny release in such circumstances has been recognized in case law, but codification of this principle would be a significant improvement.

4. Post-Conviction Release

Both H.R. 3006 and H.R. 4362 would amend current law governing post-conviction release. The Department recommends amendment of these provisions in two respects. The first, and most significant change would be to reverse the current presumption favoring post-conviction release. The second change would be to require, in cases where release is sought pending appeal, that the convicted person demonstrate that his appeal raises a substantial question of law or fact likely to result in reversal of his conviction or

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an order for a new trial. H.R. 4362 would accomplish these changes fully, as would H.R. 3006, except to the extent that it would not reverse the standard presumptively favoring release in cases where bail is sought pending imposition or execution of sentence.

5. Government Appeal of Release Decisions

As was discussed earlier, the Department strongly endorses an amendment to current law to permit the government to appeal release decisions. Both H.R. 3006 and H.R. 4362 would achieve this goal.

6. Penalties for Bail Jumping

All three bills would leave unchanged the current penalties for bail jumping: up to five years' imprisonment where the originally charged offense was a felony and up to one year's imprisonment where the original offense was a misdemeanor. As I noted in the first part of my statement, the Department advocates a readjustment of the penalties for bail jumping so that they more closely parallel the penalties for the offense with which the defendant was charged when he was released. It is our view that this reform would make the prospect of prosecution for bail jumping a more effective deterrent to flight.

7. Inquiry into the Source of Funds Used to Post Bond

The last of the Department's recommendations for improvement of our bail laws was the inclusion of a provision specifically authorizing the court to conduct a hearing into the sources of property used to post bond. None of the bills before the Subcommittee would provide for such hearings. In our experience,

financial conditions of release do not adequately assure the appearance of the defendant when the source of property pledged to secure release is the proceeds of crime. Thus, the Department recommends that the Subcommittee include in any bail reform legislation it may approve a provision authorizing the courts to conduct inquiries to determine the source of property used to secure release.

CONCLUSION

In my testimony today, I have presented to the Subcommittee the major recommendations of the Department of Justice for improving our federal bail laws, and have assessed the extent to which the three bills before the Subcommittee would implement these recommendations. None of the bills would accomplish all the improvements we have outlined. However, of the three bills, H.R. 4362 comes the closest, and it also represents a comprehensive approach to bail reform that is, in the Department's view, necessary.

Clearly, the most important issue that the Subcommittee must consider in these hearings is the pretrial detention of the most dangerous defendants. Pretrial detention is a controversial issue. However, in our view, the time has come to recognize that it is no longer tolerable that our law requires judges to order the release of defendants who pose obvious and grave risks to the safety of others. The Department of Justice urges the Subcommittee to approve legislation that would give our courts the authority to deny release to that small but identifiable group of dangerous defendants.

Mr. Chairman, that completes my statement, and at this time I would be pleased to try to answer any questions that you or other members of the Subcommittee may have.

Mr. KASTENMEIER. You didn't comment on, and I am not sure whether you have it or not—a proposal by the American Bar Association which would require consideration of the dangerousness in the setting of bail release conditions and would permit detention prior to trial only if a condition of release were violated. I think that is basically their proposal.

Are you familiar with it?

Mr. HARRIS. Yes, I am. Our view is that the proposal we have outlined today, namely, to allow a determination as to dangerousness in the first instance, is the sounder of the proposals. The problem we have with the proposal you mention, Mr. Chairman, is that it basically does not allow a court to make that decision until after, so to speak, giving the defendant one bite of the apple, after he is on release or on some condition of release and violates it.

We believe a court ought to be able to make that determination when first confronted with the defendant.

Mr. KASTENMEIER. What would be the effect of adoption of let's assume H.R. 4362, Mr. Sawyer's bill, with your amendments? What would be the effect in terms of detainees? How many detainees would you anticipate, and where might they be detained and what might the costs be?

Mr. HARRIS. It's hard to give you numbers, but it is fair to say that Mr. Sawyer's bill, with the amendments we recommend, would result in more people being detained and, at a substantial cost. As we all know, jails, both in the State and Federal system, are at capacity, if not more.

We believe that this bill ought to be used sparingly and in addition all other means that we have at our disposal to make more rational decisions be used so we only detain those who really do present serious risks of flight or danger be taken. That would include the following:

Vigorous adherence to the Speedy Trial Act, the use of pretrial service agencies——

Mr. KASTENMEIER. Pretrial supervision over defendants.

Mr. HARRIS. That is correct. To insure that those agencies provide the kind of advice to the courts so that we have rational decisions separating those who need to be detained from those who don't because, very frankly, we do not have the ability in gross numbers to detain more people than we are now without substantial building of new jails.

That doesn't appear to be in the offing. So what we are suggesting, really, and what I think is reasonable to expect, is that we will not change our population substantially because there simply is not the ability to do that in terms of places to detain, but we would change the mix so you would have persons detained pretrial who are the most serious cases in both the risk of flight and the dangerousness category.

Mr. PAULEY. Mr. Chairman, I just wanted to add that as to cost, while it is of course true that pretrial detention is costly, as Mr. Harris mentioned, in the event of conviction and a sentence to imprisonment of the detained individual, the amount of time that he was detained pretrial would be credited toward the service of his sentence, so he would not be imprisoned for a longer time as a result.

Mr. KASTENMEIER. Presuming his conviction.

Mr. PAULEY. Presuming his conviction, which I think one must do in terms of the class of people we are talking about.

Mr. KASTENMEIER. Mr. Harris, I didn't quite understand the mix. You said some people of course, I understand, under your plan, would be detained so as to avoid flight, others because of a danger to the community, this would constitute a mix; but it isn't a mix of the same numbers, it would be an increment built on top of the other, so it would be in addition, is that not what you had in mind?

Mr. HARRIS. Yes. I would say that, let me put it this way, if we had excess jail capacity and such a bill were passed, it is probably true, in my judgment, that there would be a greater number of people detained pretrial.

What I am suggesting is in the present situation where the jails are at capacity, and we simply don't have the physical ability to change the gross numbers, we will have to be more careful to ensure that those who are detained are really required to be.

Mr. KASTENMEIER. Of course, there will be some who will be released who will not be found guilty or sentenced to time, and in those cases it may be questionable whether the pretrial detention was a good social policy.

What comment would you have about that?

Mr. HARRIS. That is very true. However, that same concern now applies to those who may present a risk of flight and are detained, later to be acquitted or convicted and not sentenced to a term of incarceration. The only thing I can really say about that is that society regards the detention of people who propose a great risk of flight to be something that is necessary in order for our judicial system to work, and I think we have reached a point in our history in which the community says that their interests, in terms of releasing dangerous people, have to be balanced against the interests of individual defendants.

While it is true that under either theory of detention, pretrial flight or dangerousness, there is occasionally a person who spends time detained who is later acquitted or not sentenced to incarceration, that is one of the difficult balancing processes that is necessary.

Mr. KASTENMEIER. I have just one other area to explore with you before I yield to my colleague.

There is mixed sentiment about the necessity of this, at least in the Federal system. Some of the reports indicate a need or utility for this essentially talking about crimes in the State system, the more common crimes, and the nature of some of those arrestees. We already have a detention statute for the District of Columbia and you alluded to Charles Ruff's testimony before this committee.

I am not sure whether he criticized the present statute in that connection so much as merely to comment somewhat objectively, I thought, or at least from his own experience they didn't use it very much because of the prosecutorial problem of having to present the case for detention.

It just wasn't valuable enough. They felt that it was more useful to permit the defendant to be released and build their case ultimately for his conviction at the regular trial rather than to present much of it at the detention hearing. So, as a result, in the District

of Columbia, the U.S. attorney seldom avails himself of that statute.

You suggested that any law we pass might make it more attractive for a prosecutor, presumably in that connection. Your point I guess is that in a Federal system there just are not the large number of cases which seem to compel pretrial detention as there might be or as the case might well be made in the State systems.

What is your comment on that?

Mr. HARRIS. State systems which have the responsibility for the traditional common law crimes are more likely to be faced with the kind of defendant that would require incarceration for dangerousness. However, that is not to say that the Federal system does not confront such individuals, although in lesser numbers.

In our Federal jurisdiction over narcotics, for example, there are very often extremely dangerous people who present themselves before the U.S. district courts. In addition, such crimes as bank robbery and others cause us to come in to contact in the Federal system with persons who might fit the description of presenting a danger to the community.

So, I would agree with you that in total numbers the Federal system is confronted with less of these persons. However, there are substantial areas of Federal jurisdiction which do cause people who present danger to the community or others to come before the Federal courts.

Mr. KASTENMEIER. Do you have data to support the need, that is to say, does data exist which indicates the number of crimes which are committed by Federal defendants before trial when they are released?

Do you have any data?

Ms. WARLOW. There is a limited study of testing the pretrial service agency program under the Speedy Trial Act which also looked at the utilization of the probation system in dealing with people who are released prior to trial, and that was limited to I believe there are 10 districts.

In that they showed a lower incidence of arrests, correctly, as you suggest, in the Federal system than we see in studies which examine local or State jurisdictions. There they had a range of from 10 to 4 percent, although the focus of the study was essentially on the effectiveness of the two different types of programs. But that gives us some indication you are correct, there is a somewhat slighter incidence of rearrest in the Federal system.

Mr. KASTENMEIER. Which study is this?

Ms. WARLOW. This is a study that was conducted by the Administrative Office of United States Courts on the implementation of the Speedy Trial Act looking at the pretrial service agencies and the effect of this.

Mr. KASTENMEIER. Can you ascertain from that for the committee how many Federal defendants prior to trial commit crimes that might have suggested that pretrial detention was desirable?

Ms. WARLOW. I think the study points out a difficulty in that you have an incidence of rearrest and I don't know the figures exactly. But, the study also indicates that 15 percent are already detained under the Bail Reform Act which, of course, doesn't on its face permit any type of pretrial detention.

The suggestion is, of course, that some of these defendants do represent extreme political risk and thus they are being detained because of the legitimate inability to meet a high money bond. In other words, the court has determined that a high money bond is necessary.

But it is also likely that a number of these defendants who are in fact detained, of this 15 percent, probably present a serious danger, and it is suggested some judges simply will go ahead and post a high money bond. There may be an appearance factor, but they will do so in hopes of achieving detention.

Mr. KASTENMEIER. But what that suggests, then, is that the present system seems to be working, if those 15 percent are already detained, whether appropriate or not, under high money bond or to avoid flight or whatever. What about those that are not? I mean, that is where I presume the real needs come; those that are released and then commit crimes.

Ms. WARLOW. I think this is exactly the mix Mr. Harris has talked about, that you do have a portion of defendants being detained because of an inability to meet conditions of release.

There may be some who are severe risks of flight, some who pose severe danger to the community, but because the law does not require judges to really focus in on that, require the government to come forward with evidence bearing specifically on those issues, there is an element of uncertainty whether the de facto type of detention we have now is really separating the most dangerous defendants in the greatest numbers.

Mr. KASTENMEIER. The study is not definitive in that respect?

Ms. WARLOW. No; I don't believe so.

Mr. HARRIS. The other point is we would hope the numbers would not be terribly great. We do think it's a tool that ought to be available for judges, because if you or I were a Federal judge today and we were faced with a defendant and were convinced he would appear in our courtroom when we ordered him to, and he walked out on the street and committed some heinous crime, and he came back on day two and we were still convinced he would appear, and we put him back on the street and he committed another heinous crime, and came back before us on day three; then if he is back before us and if we are really honest and believe he will appear, he is entitled to be released once again.

We don't believe that strikes a proper balance between the needs of society for protection and the rights of a defendant. We think the tool ought to be available.

We hope, Mr. Chairman, as you seem to suggest in your questions, that there will not be a great number of persons who judges will find it necessary to detain for this reason. We would prefer as many defendants to be released as possible pretrial. It's a tremendous burden, tremendous expense, but the vehicle has to be available when the judge is convinced it's necessary to be able to detain for that reason.

Mr. KASTENMEIER. But without arguing that point, what I am saying is based on past experience of 3 years, 5 years, whatever the studies entail, we ought to be able presently to be fairly precise about our expectations in this regard as to the number of defendants that might be so affected because that in part suggests a need.

If we can tell how many are detained for other reasons, or who are unable to make bail, we ought to be able, it seems to me, to make at least an approximation of what is involved here, what we are talking about in the Federal system. I would not say we could do that for say all of the State systems. It's too large a sampling and too many jurisdictions are involved, but in the Federal system I would think we could come up with an approximation.

Mr. HARRIS. We will look into that further and see if such numbers are capable of devining. If they are, we will provide them.

Mr. KASTENMEIER. I understand, Mr. Harris, that precision is not possible. But if I were asked or any of us on the floor of the House, for example, how many people we are talking about here, we have no guidance in those terms, and we should have, I think.

I would like to yield to the gentleman from Michigan, Mr. Sawyer.

Mr. SAWYER. I wish to note, apparently, based on the study by the Institute for Law and Social Research, or INSLAW as it is referred to, that they have, with a 1980 study, shown they could predict with greater reliability the likelihood of committing a crime while on release rather than the failure to appear which they are required to do.

Mr. HARRIS. That is their position. As you know, Mr. Sawyer, they are a very highly respected research organization on such issues. They have said that they can identify with regard to the risk of flight issue more salient factors than most prosecutors use and, on top of that, that even using their own best determinants of risk of flight they would feel more comfortable being able to make judgments about dangerousness based on factors they can identify than risk of flight. You are exactly correct.

The argument that it is impossible to predict future dangerous behavior, and therefore, we should not have such a bill as yours, Mr. Sawyer, I think is one which is a red herring. Judges are required to make predictions about future human behavior every day. In the juvenile setting, it's made pretrial. When judges sentence people they are making judgments about behavior. And as you suggest, the INSLAW study provides salient factors with which they say they can make such predictions with some degree of accuracy.

Mr. SAWYER. A Federal magistrate, as you mentioned with defenders under 18, has the full power to do that pending their delinquency hearing, to restrain them because of danger to other people. I would not see a good reason why they would be more able to do it with someone under 18, to predict, than they would be someone over 18.

Mr. HARRIS. That is exactly right, Mr. Congressman; I agree with that.

Mr. SAWYER. Apropos of what I thought was a pretty acute observation by Roger Pauley, who is usually pretty acute anyway, in my experience, acute I should say, that really they are credited with the time served anyway and so maybe the gross period of incarceration would not be changed by the fact that there was a pretrial detention.

A suggestion was made how about those that are not convicted. Apparently, history, to the extent we have it, would indicate that

that is a relatively isolated situation. We had testimony July 1981, July 29, by Charles Ruff who was the U.S. District Attorney for the District of Columbia and he is referring to this pretrial detention that they have available. He said, and I am reading from his official filed statement here:

> From 1976 through 1980 we moved for pretrial detention in 73 cases and were successful in 60 of these. During that period every defendant who was ordered detained under the statute was convicted.
>
> In 1980 we sought preventive detention 12 times and 10 requests were granted. All defendants were convicted, including the two as to whom our motion was denied.

So while undoubtedly that might undoubtedly in an isolated case occur, I would not think, based at least on the history we have, it would be sufficiently frequent to render invalid the observation made by Mr. Pauley.

I also feel on this question of incarceration and not just in jails but prisons too, that really, I guess at least as I see it, there are really three reasons that can be used:

One, punishment; two, protection of the rest of the social order, and three, rehabilitation. I think the rehabilitation has been somewhat discredited at this point by most authorities and by history such as we have it.

I think we are just going to have to develop out of the many, many alternatives other satisfactory punishment options as opposed to detention as a punishment option, and really narrow it down on the one thing; namely, protection of the rest of the social order.

Probably if we analyze our prison population, that would be required as to a relatively small percentage of the entire ones incarcerated enough so it would significantly, at least it would be a reduction from the total prison population sufficient to think solve our overcrowding problems for a long time in the future.

I think it's just been too freely used as the punishment device when there are other means available that perhaps would be more effective and just as punitive without some of the aspects and expense of incarceration.

But I do think incarceration is, unfortunately, in many, many cases, and having spent some time as an urban prosecutor, I am very aware of this, many, many times there is really no other alternative for the protection of the rest of the social order from just habitual, repetitive criminals, and of a dangerous variety.

So I think to limit the judiciary or delimit them from consideration, danger to society is really taking away the one thing that really does justify confinement as opposed to perhaps some of the other possibilities.

Mr. HARRIS. I guess if you look at the question of dangerousness versus risk of flight, as a member of society, I would guess that my personal opinion on this would be representative of the average person. If they had a choice of having a nondangerous person flee the jurisdiction and never be brought to trial, as opposed to having a dangerous person out on the streets, that they would keep the dangerous person in pretrial custody and take their chances that the nondangerous person will flee.

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So what I am really saying is that it would seem to me that society would tell us, the people in the United States would tell us today that in terms of pretrial confinement, their primary concern is the danger that the defendant represents to them. Risk of flight, my guess would be a secondary concern for most Americans.

Mr. SAWYER. I think you are right. Incidentally, I think your suggested changes are good and I will yield back, Mr. Chairman.

Mr. KASTENMEIER. One final question, as raised by Mr. Sawyer, was the question of predicting dangerousness. You seem sanguine that one could do this. You say it's clear that various characteristics have a strong positive relationship to the probability the defendant will commit a new offense on release. It has been suggested this view is not really borne out by the newly released report of the National Institute of Justice which states, among other things:

> Another approach that has been recommended for reducing pretrial arrest rates is to permit the preventive detention of defendants who are likely to commit crimes during the pretrial release period.

Unfortunately, they conclude,

> No consistently reliable way of accurately identifying such defendants has yet been developed.
>
> Past studies have not been notably successful in their applicability to predict pretrial arrests, nor are the findings from the national evaluation of pretrial release more promising.

This continues, therefore, to be a point of controversy in the dialog and in the discussion of the utility of preventive detention, and that is the predictability of dangerousness. I just wonder whether you have any further comment on that point?

Mr. HARRIS. I do have two comments. One of the approaches we suggest in determining dangerousness, and I think probably one of the best indicators of future behavior, is relevant past conduct. In cases in which someone has previously, within say a period of 5 years been in a pretrial release status and been convicted of committing a serious crime while on a pretrial release status, we say that that ought to presumptively make the person dangerous when he comes to court again and that the court ought to look at his past conduct while on pretrial release, and that ought to be a very strong indicator.

That would, in addition, have the very positive effect we believe of creating a deterrent to committing crime while on bail; namely, that if you do commit crime while on bail and are convicted of committing such a crime, that you recognize that should you appear before a court again in the next 5 years you will presumptively be considered dangerous, so there will be a deterrent effect on your conduct while on bail, because it will affect your ability to be released in future cases.

Second, I am familiar with the quote which you read, Mr. Chairman. I would suggest that I am not sure whether the study you have before you considered the INSLAW study, which Mr. Sawyer mentioned, which identifies offense and offender characteristics which they say can determine pretrial dangerousness better than pretrial risk of flight.

I do think it's an area of social science which will remain in controversy. I do not think judges or anyone else can predict human

behavior with certainty, and I am not sure if that were possible that we would find that to be desirable.

So, I agree that it is an area of controversy. I disagree with the study saying that they have not found any way of so predicting. I think the INSLAW study does provide a framework.

Mr. KASTENMEIER. I realize the difficulties of statistically justifying a position in an area of social measurement of this sort. On the other hand, there are some interesting possibilities. That is one of the reasons I was asking you for some of your own forecasting in this connection.

Mr. Sawyer mentioned Charles Ruff's testimony, which was very interesting testimony. In it he did cite the statistics Mr. Sawyer cited, to wit: That they had asked for 73 detentions, and 60 were granted; they had asked for 12 in another year and 10 were granted. I don't think we have the report, but we asked I think it was his office for this analysis.

Where the judge failed to grant the request in those 2 cases on the 13 cases earlier, 2 cases later, where his judgment was pitted against the courts in terms of the dangerousness of these individuals, what about those 15 cases, since they were released, did they, in fact, commit crimes or did they not? Whose judgment was borne out? At least that would be, while a small sampling, indeed might be an indicator as to the effective exercise of judgment, both prosecutorial judgment and judicial judgment in this area.

I cannot say that one should base on that small sampling, but it might be useful, indicating something to us.

Mr. HARRIS. We will see if we can get that. I would only point out that obviously the cases in which the judge disagreed with the U.S. attorney are probably, of the total sampling of those granted and those not granted, the most marginal cases. But I do agree it would be interesting to look at that.

Mr. KASTENMEIER. Yes, and as to others that in fact were detained, presumably we cannot tell because they were never released, at least not released prior to trial.

On behalf of the committee, Mr. Harris, I want to thank you for your appearance, you and your colleagues. You have been very helpful to the committee and we appreciate your statement. During the period we consider this question and legislation relating to this question we hope to be in further touch with you.

Mr. SAWYER. Mr. Chairman, may I make just one comment apropos to the observation you made. In the case of *United States* v. *Edwards,* where the District of Columbia early release statute's constitutionality was tested, and upheld, I might say, in that particular case the court denied the motion for pretrial detention, and while the defendant was released he committed and was charged with the crime of burglary, robbery, and sodomy in an incident while he was out on bail; so there is at least one instance on which he let them out and the answer is an emphatic yes.

Mr. KASTENMEIER. Someone picked a good case to proceed with, obviously.

Mr. HARRIS. Thank you for the opportunity to testify. We look forward to working with you. We consider this an important issue and would be happy to work with you and your staff in any way to try and do the public's business.

Mr. KASTENMEIER. We appreciate that. We have worked with Mr. Pauley for many years.

Mr. PAULEY. Thank you.

Mr. KASTENMEIER. Now I would like to call, representing the American Civil Liberties Union, both Mr. David Landau and Mr. Martin Michaelson, who have appeared many times before the Congress to offer their views on public issues of importance.

Mr. Michaelson, do you want to proceed first, sir, or Mr. Landau?

TESTIMONY OF DAVID LANDAU, AMERICAN CIVIL LIBERTIES UNION, AND MARTIN MICHAELSON, ATTORNEY AT LAW, WASHINGTON, D.C.

Mr. LANDAU. Mr. Chairman, the American Civil Liberties Union is, of course, pleased to once again appear before your subcommittee to present its views on a criminal law issue of significance.

The ACLU is a nonpartisan nationwide organization of 250,000 members which is dedicated to the enforcement of the Bill of Rights.

I bring apologies from Mr. Glasser, who unavoidably could not be here today, but we would like to have his statement read into the record.

Mr. KASTENMEIER. Without objection, his statement will be received and made a part of the record.

[The statement of Mr. Glasser follows:]

TESTIMONY OF IRA GLASSER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, AND MARTIN MICHAELSON, ESQ.

Mr. Chairman and Members of the Subcommittee:

The American Civil Liberties Union appreciates the opportunity to present its views on H.R. 3006 and H.R. 4264, which would amend the Bail Reform Act to provide for pre-trial detention of defendants who have been found dangerous to the community. The ACLU is a nationwide, nonpartisan organization which is dedicated to the preservation and enhancement of rights guaranteed by the Constitution.

In recent months, the issue of violent crime committed by persons awaiting trial has risen once again to the forefront of the debate on crime control. A number of bail reform proposals have been made in Congress, and the Attorney General's Task Force on Violent Crime has made recommendations in this area. Insofar as these proposals would authorize imprisonment of defendants believed likely to flee before trial, the ACLU does not object to the proposals because they are consistent with the Constitution and necessary to the administration of justice. Insofar as these proposals would curtail the abuses of the existing money-bail system, under which bail is sometimes set so high that only the wealthiest defendants can make it, the ACLU supports the

proposals as a major advance for civil liberties.[1/] Insofar as legislative proposals provide for speedy trials, the ACLU enthusiastically agrees that this is an efficient, effective and constitutionally appropriate method of dealing with the problem of crime committed by defendants on bail.

However, the proposals before this Subcommittee, H.R. 3006 and H.R. 4264, go beyond these desirable objectives. These bills would authorize judges to imprison untried persons not to ensure their appearance at trial, but to keep them off the streets. Proponents refer to this as "preventive detention."

For many years, the American Civil Liberties Union has opposed pre-trial imprisonment except where that sanction is required to ensure the defendant's appearance at trial. The ACLU policy is consistent with long-standing United States practice, and has roots in the presumption of innocence and the rights to due process of law, trial by jury and bail guaranteed by the Fifth, Sixth and Eighth Amendments to the Constitution. The ACLU believes

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1/ The Bail Reform Act of 1966 attempted to come to terms with the practice of imposing money bail for purposes beyond those permitted by the Constitution, i.e., for purposes other than ensuring appearance at trial. See generally, Foote, The Coming Constitutional Crisis in Bail, 113 U.PA.L.REV. 959 (1965). D. FREED and P. WALD, BAIL IN THE UNITED STATES (1964). There is a substantial body of evidence that the Bail Reform Act has not resulted in a decline in abuse of the money bail system. See P. Wald, The Right to Bail Revisited: A Decade of Promise Without Fulfillment, in S. NAGEL, THE RIGHTS OF THE ACCUSED (1972); P. WEISS, FREEDOM FOR SALE (1974). Thus, defendants who present no risk of flight are still detained for long periods of time prior to trial because of an inability to meet excessively high money bail.

that "preventive detention" is a misnomer. Instead of eliminating crime, "preventive detention" would add to it, by making hardened criminals of persons needlessly imprisoned before trial, as we show below. "Preventive detention" would also and necessarily deprive many innocent persons of freedom, the most cherished civil liberty.

The constitutionality of pre-trial detention has been debated among legal scholars for many years. In our judgment, H.R. 3006 and H.R. 4264 violate the well-established constitutional principles that the accused is presumed innocent until proven guilty at trial, and that freedom may not be lawfully restricted except by the least restrictive means required to assure appearance at trial. Jackson v. Indiana, 406 U.S. 715 (1972); Stack v. Boyle, 342 U.S. 1 (1951). As the Supreme Court has said, "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction...[U]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951).[2/] Giving government the power to imprison people without a trial and merely upon a judge's guess about future dangerousness stands these fundamental principles on their head. Imprisoning many of the innocent in the hope of imprisoning a few of the guilty is not in the American tradition.

2/ See Foote, supra; Meyer, Constitutionality of Pre-trial Detention, 60 GE.L.J. 1139 (1962); Tribe, An Ounce of Detention: Preventive Justice in The World of John Mitchell, 56 VA.L.REV. 371 (1970).

The pending "preventive detention" proposals would sharply curtail individual liberties without having any positive effect on crime. Studies have shown that only a small percentage of defendants commit crimes while on bail. A Harvard University study, for example, involved a random sample of 427 defendants in Boston who were released on bail. Of the 427, only 4 committed serious crimes during the first 60 days after they were released.[3/]

Another study, not yet public, conducted by the Lazar Institute for the United States Department of Justice, has found that, at best, "preventive detention" would cause a very slight decrease in the arrest rate of defendants awaiting trial.[4/] The Lazar Institute, Pre-trial Release: An Evaluation of Defendant Outcomes and Program Impact, Summary and Policy Analysis, U.S. Department of Justice, March, 1981 p. IX, (hereinafter Lazar Institute). According to that study, only 1.9% of all defendants released before trial are convicted of and imprisoned for serious

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3/ A. Angel, et al., Preventive Detention: An Empirical Analysis, 6 Harvard Civ.Lib.-Civ.Rts.L.Rev. 317, 360 (1971). Seven empirical studies cited at footnote 276 of the Angel article (pages 347-48) corroborate these findings.

4/ Convictions for pre-trial crime must be distinguished from pre-trial arrests. The pre-trial rearrest is not a reliable indicator of pre-trial crime. It is a commonly accepted police practice to consult lists of defendants who had been released on bail when investigating a crime. This method necessarily leads to a greater probability of false arrests for defendants who are awaiting trial than for other members of the community. The conviction rate, therefore, is a more reliable indicator of pre-trial crime.

crimes committed while on release.[5/] This strongly suggests that pre-trial release is not an important cause of serious crime, and that even if all defendants were detained while awaiting trial, no substantial reduction in the overall rate of serious crime would result. What would result from such a policy would be the needless and wasteful imprisonment without trial of massive numbers of people.

Of course, no one proposes to imprison all defendants awaiting trial. Everyone agrees that would be clearly unconstitutional. It would also be impossible, given the physical capacity of the existing prison system. For those reasons, "preventive detention" advocates endorse the detention of only those defendants who if released would be dangerous.

5/ The pre-trial arrest rate is somewhat higher. Of the 3,488 defendants in the eight-site sample of local jurisdictions studied by the Lazar Institute, 85% secured pre-trial release. Lazar Institute, p. 6. Of those individuals released, 84% were not subsequently arrested while awaiting trial. Id. p. 6. Therefore, only 16% of the total number of individuals released were arrested again while awaiting trial. Id. Moreover, what counts in law enforcement is not the number of arrests but the number of good arrests, that is, arrests that result in convictions. Measured by this standard, the Lazar Institute study is more significant. Less than half of those arrested -- 7.8% of all those released -- were convicted of crimes for which they were arrested while awaiting trial on the original charges. Id., p.227. Of those who were convicted, only 3.8% of all released defendants were ultimately imprisoned for crimes committed while awaiting trial on another charge. The study also found that one-half of those jail sentences were for less serious crimes such as prostitution, drunkenness, disorderly conduct and driving while intoxicated. Id. These are hardly the serious crimes involving personal violence that most people have in mind when they evaluate preventive detention as a possible remedy.

Is it possible to predict who among a given group of criminal defendants would, if released, commit a serious crime? If only 1.9% of released defendants are convicted of and imprisoned for a serious crime committed while awaiting trial, is it possible to tell in advance which individuals will constitute that 1.9%? The clear answer is no. Every study of this question demonstrates that neither psychiatrists nor judges can make such predictions with any reliability, and that in order to imprison a significant portion of that 1.9%, a dramatically large percentage of persons who will not commit crime if released would have to be imprisoned as well.[6/] Many innocent persons would have to be locked up in order to deter very few guilty ones.

The Lazar Institute study has confirmed findings of these studies that dangerousness is almost impossible to predict. Lazar

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6/ See American Psychiatric Association, Task Force Report on the Clinical Aspects of Violent Individuals, 28 (1974); Cummings and Monohan, Social Policy Implications of the Inability to Predict Violence, 31 Journal of Social Issues 153, 156 (1975); Kozol, Bourcher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime and Delinquency 371 (1972); Wenk, Robinson and Smith, Can Violence Be Predicted, 18 Crime and Delinquency 393 (1972); J.W. Locke, et al., Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: Pilot Study, Washington, D.C., National Bureau of Standards, U.S. Department of Commerce (1970); John Monohan, University of California, Irvine, Ethical Issues in the Prediction of Criminal Violence, a paper delivered at the Conference on Solutions to Ethical and Legal Dilemmas in Social Research, Washington, D.C., February 25, 1980, at 10; Rubin, Predictions of Dangerousness in Mentally Ill Criminals, 27 Arch. General Psychiatry, 392 (1972); Diamond, The Psychiatric Prediction of Dangerousness, 127 University of Pennsylvania Law Review, 439 (1974); Bruce J. Ennis and Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 California Law Review, 693 (1974).

Institute p. 247-53. To achieve even a slight reduction in the rearrest rate, and a negligible reduction in the re-conviction-and-imprisonment rate, would require the wholesale imprisonment of innocent persons and an unprecedented increase in pre-trial detention. As the Lazar Institute found, even the best state-of-the-art indicator of future criminality, applied to a control group by scientists with the benefit of hindsight, was wrong half of the time. Id. at p. 254.

> The conclusion of Wenk and his colleagues (1972) that "there has been no successful attempt to identify, within . . . offender groups, a subclass whose members have a greater than even chance of engaging again in an assaultive act" is true for both juveniles and for adults. It holds regardless of how well-trained the person making the prediction is -- or how well programmed the computer -- and how much information on the individual is provided. More money or more resources will not help. Our crystal balls are simply very murky, and no one knows how they can be polished. Monahan, Ethical Issues In The Prediction of Criminal Violence, supra, at 10.

Similarly, studies of psychiatrists' predictions of dangerousness show that they are wrong about 95% of the time. Ennis and Litwack, supra. Even when such predictions are based on a proven history of anti-social acts in the recent past they are still wrong two-thirds of the time. Id. There is thus no way to imprison people based on behavioral predictions except at the price of liberty of many who would not be dangerous and would not commit crime if released. We have attached as an appendix to this statement an article that explains this phenomenon in detail.

Furthermore, the defendant jailed before trial may suffer loss of employment, dissolution of ties to the community and disruption of family life. In addition, the jailed defendant is less able to prepare an adequate defense -- detention reduces access to potential witnesses and lawyers. Defendants jailed before trial are substantially more likely to be convicted and receive longer sentences than defendants released on bail.[7/]

The cost of pre-trial imprisonment is enormous. "The wastage of millions of dollars yearly in building and maintaining jails for persons needlessly detained before trial loses significance when measured against the vast wastage of human resources represented by defendants and their families and the resulting costs to the community in social values as well as dollars."[8/]

The proposed legislation, in our view, would increase crime. It is well known that pre-trial imprisonment contributes substantially to the creation of a class of hardened criminals. Prisoners who have not been found guilty are placed in institutions such as jails and detention centers which are "overcrowded, understaffed, poorly funded, oppressively regimented, [and] openly abusive of the fundamental human rights of prisoners....."[9/]

7/ See, Arthur R. Angel, et al., Preventive Detention: An Empirical Analysis, 6 Harvard Civil Rights - Civil Liberties Law Review 300, 347 (1971). Seven empirical studies, cited at footnote 276 of the Angel article (pages 347-48) corroborate these findings.

8/ Botein, Shifting the Center of Gravity of Probation quoted in Angel, et al., supra, at 351.

9/ Angel, et al., supra, at 351 (footnotes omitted).

> In many respects, persons detained in jail prior to trial are subjected to even worse conditions with less chance for rehabilitation. In a recent sampling of convicted prisoners, twelve of thirteen preferred the penitentiary to the jail in which they were held before trial. The indelible impact of this incarceration, the exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure, leave many defendants hardened, embittered, and more likely to recidivate once released, than they were before incarceration.
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> While this human toll is great by any measure, the effect of preventive detention is doubly tragic. Because many of the defendants are young, possibly balanced on a thin line between a life of crime and productive citizenship, the impact of incarceration on their subsequent criminality may be acute. Those found not guilty after 60 days of confinement are nonetheless inflicted with psychological harm and social stigma that many never be erased. [10/]

"Preventive detention" is therefore a highly misleading term. It will not prevent crime. To the contrary, it is more likely to contribute to crime by making hardened criminals out of prisoners who may have been guilty of nothing when sent to jail. In the words of Sam Ervin, "preventive detention legislation... is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem."[11/]

10/ Id. at 352-53 (footnotes omitted).

11/ Sam J. Ervin, Jr., Foreward: Preventive Detention - A Step Backward for Criminal Justice. Harvard Civil Rights - Civil Liberties Law Review, 291, 292 (1971).

What, then, can be done about crime committed by people awaiting trial? Certainly the ACLU does not advocate that such crime be ignored. We believe that speedy trials are an effective and constitutional alternative to "preventive detention." Speedy trials will reduce pre-trial crime while preserving individual rights. The ACLU strongly supported the Speedy Trial Act of 1975. This Act will not be fully implemented until 1983. It is therefore premature to consider the Draconian and ineffective device of preventive detention before other, less drastic remedies have been tried.

Many studies show that authorizing speedy trials would dramatically reduce the incidence of crimes committed by persons awaiting trial. For example, District of Columbia data show that "crime on pre-trial release in D.C. appears to be directly related to the number of man days [the defendant is] released."[12/] As the Harvard study cited above showed, only 4 of 427 defendants released on bail committed serious crimes during the first 60 days after they were released.[13/] Another study based on comparabl data, prepared by the Commerce Department, showed that "Persons classified as dangerous appear to exhibit a greater propensity to be rearrested the longer they are on release."[14/] Available

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12/ Locke, supra, at 189.

13/ Angel, et al., supra, at 317, 360.

14/ Locke, et al., supra, at 165.

evidence also suggests that the least likely times of rearrest are shortly after arrest and just prior to trial;[15/] thus, speedy trials are likely to be highly effective in reducing pre-trial crime. Indeed, one commentator has recently concluded that if the Speedy Trial Act of 1975, which will require trial within 70 days of indictment, is ever fully implemented, that change alone would cut pre-trial crime in half.[16/]

The empirical evidence that speedy trials reduce crime is consistent with the practical experience of federal judges. For example, Judge George L. Hart testified in Congress as follows:

> Every criminal trial, except for extraordinary circumstances, should be tried within 6 weeks to 2 months, and if this were done, I would seriously doubt that you would need to amend the Bail Reform Act to provide for preventive detention. [17/]

Judge Harold Greene testified to the same effect:

> If we could have trials in 6 weeks to 2 months, the entire problem of crimes while on bail would disappear, because not that many crimes are committed in the first 45 to 60 days. Also the mere fact that a speedy trial is available would be a much greater deterrent to crime than what we have now, when it takes a year to a year and a half to have a criminal case tried in the district court. The delay exacerbates also all the constitutional problems. [18/]

15/ Id.

16/ Steven Duke, Bail Reform for the Eighties: A Reply to Senator Kennedy, 49 Fordham Law Review, 40, 46 n. 40 (1980).

17/ Amendments to the Bail Reform Act of 1966, Hearings before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary 91st Cong., 1st Sess. (1969) at 10-11.

18/ Id. at 41.

In summary, it is both intolerable and unconstitutional to lock up the innocent with the guilty in the vain hope of preventing pre-trial crime. The power to imprison a person who has not been proven guilty, based on a "prediction" that he may commit a crime in the future, carries enormous dangers for civil liberties. Once established, such a power would lend itself to frequent abuse and would begin to undermine the presumption of innocence on which our criminal justice system is based.

Congress must also consider whether a pre-trial imprisonment policy, even if it withstood constitutional attack, would reduce crime. Because considerable violent crime may be the fruit of pre-trial imprisonment, "preventive detention" is more likely to exacerbate than to reduce the crime problem. Both in its sweeping application to the innocent as well as the guilty, and in its likely negative impact on the violent crime problem, a "preventive detention" policy would potentially victimize all Americans. Such a policy should be rejected as both unconstitutional and unwise. Examining ways to implement more effectively the constitutional requirement of a speedy trial would be a far better course to take.

Thank you for the opportunity to present our views. 19/

19/ David Landau, ACLU Legislative Counsel, and Ann McCambridge, Legislative Associate, ACLU Washington Office, participated with us in the research and preparation of this testimony.

Mr. KASTENMEIER. We regret you also were to have appeared one time before but for unavoidable reasons apparently your appearance was not made. We had no quorum that day, as I recall.

We are very pleased to have you here, and to accept Mr. Glasser's statement, Mr. Landau.

Mr. LANDAU. Mr. Michaelson, who is an attorney in private practice in Washington, and an expert in criminal law matters, will deliver the first portion of the statement and I would like to make a concluding comment, after which we would be prepared to answer any questions on any of the bills pending before the subcommittee.

Mr. KASTENMEIER. Mr. Michaelson.

Mr. MICHAELSON. Thank you, Mr. Chairman.

I will, if it's acceptable, not rehearse our prepared statement in detail, but I would like to convey the gist of our position to you, and of course answer questions you may have.

In thinking over yesterday and last evening how best to present the ACLU's position, I decided to express this in rather personal terms, because I confess that when I began to examine the question of pretrial detention in a systematic way a couple of years ago, I was personally predisposed toward the type of analysis which has been presented by Mr. Harris and his colleagues from the Justice Department.

At that time, I did view the problem as it is described in their prepared statement that was given the committee this morning, as a balancing between the rights of the defendant on the one hand and the rights of society on the other, I no longer believe that analysis to be accurate.

I came to the problem as an individual who has had a rather sobering experience that I hope no member of this committee or, indeed, none of our colleagues from the Justice Department have had.

Having been a victim of a violent crime myself, and, in particular, at the receiving end of a 45-caliber automatic pistol in the course of an armed robbery in which I was pistol-whipped and bound hand and foot and left in a ditch.

I also came to the problem from the point of view of a resident of the District of Columbia who has two kids and a wife who are out on the streets of this city, in which we know there is a very considerable amount of violent crime, unfortunately, happening hourly. So I am not approaching this by any means as one whose is insensitive to the very valid concerns that Congressman Sawyer expressed a few minutes ago; namely, the right of the public to be protected from the violent crime which we know goes on every day.

When I got into an analysis of the literature on the subject of preventive detention, however, I rather shortly concluded that there was a lot more to this problem than meets the eye, and that really what we are confronting here is a set of conclusions draw from assumptions that I believe are false, the principal false assumption is that it is within the capacity of the criminal justice system to identify, within limits that any of us would consider tolerable, those individuals released before trial who are going to commit serious crimes while on release.

There have been a significant number of studies done on this subject, and while my own area is not social science and I don't

pretend to be able to evaluate the methodology used in those studies, I can, as members of this committee can, and others can, read the reports, including reports commissioned by the Justice Department and other prosecutorial groups.

As I read the reports, their conclusions are in almost all respects consistent and unanimous, or virtually unanimous, and the bottom line is this:

We have no method as a matter of social science, judicial prediction making, crystal ball reading or other techniques, psychiatry, psychology, penology, et cetera, to ascertain which individuals released before trial are likely to commit serious crimes.

The Harvard study, which I found to be a particularly interesting one, and which is cited in our prepared statement, was a study of some 427, I believe, defendants who were released in Boston before trial, and the study attempted, and was a rather extensive study, to correlate the commission of crimes by that population during the period of release.

They did find that there was a correlation in this sense, that if you leave an individual for a long period of time out on the street before he is tried, there is a relationship between that period of time and the probability that he will commit a crime. The relationship, as the study concluded, at least in those numbers, was this, that of the 427 released before trial, 4 committed serious crimes during the first 60 days they were out, and as the period became longer, after 2 months, into the 4-, 5-, and 6-month range, the probability somewhat increased; which together with other like findings brought us in our analysis of this problem to the view that the answer here is not a wholesale incarceration of individuals who, as our colleagues from the Justice Department have stated, there is no room for them in the prisons anyway.

The answer is try them, speediness, and there is on the books, as this committee is well aware, a progressive, useful, attractive mechanism for doing that in the course of the Speedy Trial Act, a piece of legislation, the results of which have not been tested as of yet, have not been studied by the social scientists and on which we really don't have the full results.

Mr. KASTENMEIER. Mr. Michaelson, may I interrupt just since you have reached this point that the preceding witness made.

The preceding witness made very clear he does not support wholesale detention, but very selective pretrial detention.

Second, on the point you just made before about predictability, he also said actually avoiding flight is not very predictable either and yet we do that. There is an argument for throwing out detention to avoid flight too; really, what is your comment to that?

Mr. MICHAELSON. I think those issues are at the heart of the controversy. I agree that it is proper for us to spend considerable attention on those points.

The fact is, and I think this is demonstrable, that it would be possible to wholly eliminate the commission of crime by individuals who have been arrested for other crimes by putting them in jail. No one argues with that.

The question is whether we have a mechanism to target this particularly heinous individual that all of us are concerned about.

The studies show, and this is not something that we are hypothesizing, these are the results of actual studies that have been made, that even where you have an individual who has been previously convicted of other crimes, has a history of repeated serious offenses, efforts to target, efforts to put that type of individual in jail while he is awaiting trial are wrong two out of three times.

I am talking about that sub, subpopulation of the recidivist, violent, serious criminal offender. So even as to those people you are likely to be wrong, according to the studies that have been done, some two-thirds of the time, and that as a general proposition in the prediction of who will commit the serious crimes, as I appreciate the studies on it, you are likely to be wrong some 95 percent of the time.

A principal analysis of this is the article by Messrs. Luttwack and Ennis, a version of which by Mr. Ennis we have appended to our statement, which characterizes the process of identifying these people as considerably less reliable than coin flipping.

So the real question for the committee in examining the assumptions on which legislation of the type presented by H.R. 3006, H.R. 4264, and H.R. 4362, the real question is are you willing to flip those coins? Do we believe in coin-flipping as a basis on which to incarcerate people?

Again, I bring to this a certain personal attitude which I will disclose, and it is an attitude formed in my own days as a staffer here on the Hill, working for a Member who was a Member of the Judiciary Committee and having occasion at that time to spend some time inside Federal penitentiaries examining the conditions in those facilities and being, as I am sure anyone is who has done that, horrified to see what we are confronted with in the insides of those facilities, and taking from those experiences and other reading I have done in the area, a firm belief that if you put innocent people in that context and keep them there for a period of months, you will being criminals out of there.

So, when you flip those coins, which we believe to be inevitable in the process of ascertaining who should be detained before trial, you are not merely saying or making social judgments well, we are willing to put some innocent folks inside jails or prisons in hopes of keeping some guilty ones in there, you are, according to our belief and analysis, making a decision, the effect of which is to add to the crime problem, because you are taking people who are not guilty of crimes, putting them in the definitive, ultimate, milieu of crime, and what we know from penology tells us you are bringing criminals out of the system who were not criminals going into a system.

That is, if there is a balancing, that is the balance that is to be made. Is the net effect to add to crime or is the net effect to subtract from crime? We believe it to be the former.

There is a lot to be done in the area of speedy trial. It is desirable to have criminals tried sooner rather than later. That is a legitimate focus of the Congress. If the committee concludes in its analysis of the problem, as we do, that predictions of dangerousness are likely to be wrong 95 percent of the time, if the committee places against the hard reality of those studies the assertion of the Justice Department this morning at page 8 of the Justice Department's study, which I think is one of the most remarkable things

in the Justice Department's statement this morning, a statement of 32 pages in length, replete with footnotes and facts, and they make the statement here:

> It is clear that the presence of certain combinations of offense and offender characteristics have a strong positive relationship to the probability that the defendant will commit a new offense while on release.

There is no citation to that proposition. There is no support that we are aware of for that proposition. The central factual premise of the Justice Department's statement is, in our judgment, false. Until the committee concludes that that premise is true, or gathers some support for that premise, and I would respectfully refer the committee's attention to the numerous contrary studies that we cite, we suggest to the committee, with all respect, that addressing the methods for preventive detention and the elimination of the preventive detention idea is not the focus.

The proper focus should be the Justice Department's assumption itself that we can, by using preventive detention, reduce and not increase crime.

I would like in the balance of the time, if the committee wil indulge us, to turn the floor to my colleague, David Landau.

Mr. LANDAU. Just one concuding remark. It goes again to the concept of the balancing test between the rights of the public and the rights of the defendant. The ACLU is concerned about that kind of analysis because it implies somehow that law enforcement must be inconsistent with the rights of the defendant; that somehow there is an inconsistenty there and, therefore, we have to have a tradeoff.

We believe that that is a false balancing test. In the end we believe that what is effective is also constitutional, and that ineffective law enforcement as we hope we have demonstrated in our statement, such as preventive detention, also happens to be legislation which is constitutionally defective. But there are effective programs, and you could, we can make an argument that speedy trial itself is constitutionally required; the Speedy Trial Act itself is constitutionally required.

There are other programs, pretrial services, better such services. The Lazor Institute study lists a number of programs which could be used to reduce pretrial crime, all of which would be consistent with the Constitution and effective.

So, the thought I would like to leave you with is we can devise these effective programs and the ACLU would like to work with the committee in looking into these programs and trying to evaluate those programs, and legislating where necessary. And we will be happy to answer any questions.

Mr. KASTENMEIER. Thank you.

I will yield to my friend from Michigan. I have a few questions which I will ask after the gentleman from Michigan.

Mr. SAWYER. Thank you, Mr. Chairman.

First, let me ask as just kind of a general question, have either of you gentlemen ever had any specific amount of experience either defending or prosecuting criminal cases?

Mr. MICHAELSON. I have never been a prosecutor, Congressman, but I have been a defendant's attorney in the criminal context, yes, sir.

Mr. SAWYER. To any extent?

Mr. MICHAELSON. Well, sir, I wouldn't want to lay my credentials out for you, but I think I have some knowledge of how the criminal justice system works. My own practice tends to be more in the white collar crime area. I do not generally represent violent criminals, but I am conscious of the area.

Mr. SAWYER. Mr. Landau.

Mr. LANDAU. I have had some limited experience in the criminal trial area.

Mr. SAWYER. The reason I ask is really not to be at all challenging on it, but I just have an opinion of my own that you know I kind of think is pretty valid, and I have done a lot of criminal defense work and some prosecutorial work.

I would think if you used this sparingly, which is I think all that it is intended to be used, that I would be very surprised if you wouldn't be close to 100 percent correct in your judgments.

I have dealt with criminals on both sides, and noncriminals, you know, accused, although they are a little harder to come by. But I think almost everybody in law enforcement, at least in an urban environment, becomes convinced after a period of time, and I think correctly so, that the great bulk of the crime in an area is attributable to a relatively small population of people that you get very familiar when you are in prosecutor work.

You get so you know most of them by name, and you will know by name those that they refer to as witnesses or people that were there or that they dealt with. If you were using it sparingly, these are about the only kinds of people you would be dealing with and you would almost never be wrong.

Statistically, if let us say only 5 percent of the people that are released, even in the category I am talking about, commit a crime while they are out, statistically we have to remember that only 8 percent of all those that commit crimes are ever apprehended, so if 8 percent of those out are caught committing a crime, because that is the only way we ever know statistically whether they can or cannot--they are not coming in and confessing—that means 100 percent of them did if we are going statistically.

So, it just seems to me that this characterization that you lock everybody up is really not what was intended and not what will happen. I would think certainly you are not going to lock up any first offender. Nobody is going to ask a first offender be locked up, and if you did it wouldn't avail you anything. You could not make any other kind of showing by whatever scheme, and perhaps a second offender if it wasn't just highly repetitive.

But the guy that just is doing this day in and day out, and you have to assume based on statistics that he is doing a heck of a lot more than he has been caught for, and he probably got a rap sheet looking like a laundry list, I just would think the chance of error would really be less in that regard than as in INSLAW study showed on the question of their appearance for trial.

Some of these guys don't mind nearly so much appearing for trial and going to prison. They are very accustomed to that and

sometimes you get to thinking they kind of prefer the environment to kind of a faring for themselves. But to stop some of the crime while they are out would be a pretty hard request.

Mr. MICHAELSON. I think those are clearly the right questions to focus on, and I will give a response to both of those.

We have not addressed here the constitutional aspect. We have put that in the paper, but just looking at it from a purely pragmatic viewpoint, I have to tell you that that is exactly where I started thinking about this problem.

Mr. SAWYER. You should have stayed there.

Mr. MICHAELSON. The problem is I then made a mistake of looking into it a little more carefully and I started reading about it.

Mr. SAWYER. Had you not been going to appear here would you take a position you took before you started looking?

Mr. MICHAELSON. No, sir; absolutely not. I approached it just as a citizen and a person and not as a lawyer for the ACLU or even as a lawyer, just as a person who is concerned, as we all are, about these issues.

I read what Professor Wilson and Professor Wolfgang and others have said: That there is a cohort of hardened criminals and they are the source of the problem, and there is a lot of evidence for that.

There are two points I understand you to have made. First that preventive detention should be used sparingly and it would be with a rifle rather than shotgun type of approach.

Second, that the number of those convicted of a serious crime while on release is not a good index of those who commit the crimes.

I disagree with the conclusions for these reasons. First of all, it can't be used sparingly. Our anectodal experience or "seat of the pants reaction" walking through courthouses does not conform to the actual studies that have been done. This is not something I have dreamed up or anyone has dreamed up.

There are perhaps 20 or 30 studies on this point and they are not just consistent with "our seat of the pants feeling" about this. There is an organization called Pretrial Detention Resources Center. They have published papers on this.

The Lazor study reaches it; a number of studies reach it, and just say the opposite. You cannot use it sparingly in the hope of aiming at a particular bad guy and locking him up. It just does not work that way.

Mr. SAWYER. Let me just interrupt and ask how, and I am not familiar with the studies, but how do they make a valid study on this when apparently somewhat the admitted statistics are only about 8 percent of those that commit crime get apprehended in the first place? Therefore, how do they make a study that has any validity, given that?

Mr. MICHAELSON. That is the point I am about to turn to. It is true that there are a whole lot of people committing crimes for which they are not apprehended, but if you look at the population of prospective criminal defendants most likely to be apprehended and arrested, it is those who are already in the clutches, if you will, of the criminal justice system.

It's those who have already been arrested and been released and that is why when we see statistics to the effect as those which the woman from the Justice Department cited a few minutes ago, that 4 percent or 8 percent are rearrested, it is exactly because police and prosecutors are most highly conscious of folks who have already been brought up, arrested, and released.

So I suggest, Congressman Sawyer, that the general proposition that there is an enormous amount of crime being committed which does not lead to arrest is unlikely to be true in a significant way with respect to the population of those on release before trial. These are people who are under the supervision of the criminal justice system; indeed, awaiting trial on another offense, and I just have not seen evidence that that is true in that case.

If there were evidence on it, I think that would be material. There isn't such evidence.

Mr. SAWYER. I don't know that you can limit it down to that, because I don't know statistically either. I just know, apparently, based on all of the statistics I have seen, an arrest is made in only about 1 out of 12 crimes that are committed.

So now I would guess perhaps that the percent would be higher as to the group you are talking about because they have already evidence their lack of adeptness at it enough to have gotten caught for one, you know, so probably they are the most more exposed to arrest group for a number of reasons.

But, obviously, whatever that percent might be as applied to that particular group, it would be very surprising if it weren't a minority of cases they caught when they commit the crime.

Mr. MICHAELSON. I would put the rhetorical question to the committee and this is a question of fact. If your analysis of the evidence brought you to the same conclusion that our analysis of the evidence brought to us, namely, that there is no way to sparingly, with a rifle-like approach target the particular heinous criminal for pretrial detention, that is where we come out, there is no method on hand to do that——

Mr. SAWYER. This is where we disagree right at the beginning. As I said, I would be very surprised if a competent urban prosecutor and/or judge would not be sufficiently familiar with a great bulk of that constant in and out population that they could not, assuming they were not just doing it with everybody that came up, that they wouldn't have a tremendously high batting average and probably, and as the INSLAW study shows more accurately than they can now predict the thing they are permitted to predict; namely: The likelihood to appear for trial.

Mr. MICHAELSON. I too was very surprised, but that is the fact, and the INSLAW study's conclusion, which you refer to, Congressman Sawyer, I suggest is a little bit wide of the mark. The question is not whether there is a greater improbability of finding X than the improbability of finding Y, but where you do there is a probability of finding Y.

Mr. SAWYER. It's your view we ought not to ever incarcerate anybody whether they are likely to appear or not?

Mr. MICHAELSON. No; no.

Mr. SAWYER. If that is not what you are saying, then why do we allow them to predicate that decision on the likelihood to appear

for trial and not allow them on a more predictable thing; namely, the danger to the community.

Mr. MICHAELSON. Because, and I think the answer to this is quite clear, we place an exceptionally high value on subjecting accused persons to the crucible of trial and are willing to make very substantial sacrifices to see to it that people are tried, and if fully convicted, and if innocent, freed.

Mr. SAWYER. Some of us are equally at least concerned about the safety of citizens as to the pleasure of trying something.

Mr. MICHAELSON. And I will yield to no member of this committee or Congress in my concern about that issue. But I suggest to you that what you will do is not protect people's safety but put an enormous number of innocent people and a very small number of guilty ones in jail; and you will be running the functional equivalent of a crime factory by processing innocent folks through the prison system of this country.

That is not rhetoric. That is an analysis. The citations for it are in our paper, we rest on them. But I do point out the pretty dramatic contrast. There are authorities in support of each of those propositions. They are cited in our presentation.

The Justice Department makes the bold statements contrary to its own study that you can do this. They don't cite anything in support of the statements they make, no reference in their oral presentation or evidence in support of the statement. I am confident that if the committee weighs the evidence in those respects, that you will come to the conclusion that we have, just as I did.

Mr. SAWYER. I will yield back, Mr. Chairman.

Mr. KASTENMEIER. Other than talking about giving effect to the Speedy Trial Act, you have no legislative recommendations for changes to recommend in the Bail Act of 1966.

Mr. LANDAU. Mr. Chairman, I think we all recognize there are abuses in the Bail Act of 1966. It has not, in fact, worked out the way it was designed.

There are some changes, including trying to correct the abuse of using bail as a method of incarcerating people, or bail as is being used as a method of incarcerating people who have no ability to pay at all.

It seems to us we could amend the Bail Act to look into the defendant's ability to pay so that bail is not only available to organized crime figures or white collar crime figures who have substantial financial resources, but for defendants who have even a slight bail to make who cannot possibly meet that. Those are some reforms.

It also seems to us appropriate that conditional release, different kinds of conditions ought to be explored by this committee other than detention, of course, but conditions such as some of the conditions outlined in Mr. Sawyer's bill. There are conditions in there we might want to set forth in the statute.

We might want to tell judges a procedure by which each condition or each step would be taken and what order to consider these conditions and set up a procedure for what happens when those conditions are violated and which conditions are substantial and which are insubstantial and what happens at that point.

Finally, the question I think is also resources. The Pretrial Services Resource Center has disseminated information and analysis about the pilot programs Congress enacted in test jurisdiction for better pretrial supervision and those programs ought to be expanded nationwide.

Those kinds of conditions, better supervision, seems to us to be the direction to go in addition to examining the Speedy Trial Act and its impact.

I think a very important point, is that the Speedy Trial Act is in effect. The statutory deadline is 1983. But the Justice Department seems to be ahead in phasing it in. We need to see what the effect of this is on pretrial crime.

The Lazor study suggests that the speedy trial will be helpful. It won't be the sole solution, we know that. We could cut pretrial crime as much as one-half with speedy trial, but it won't solve the whole problem. But we need to see the full impact of the Speedy Trial Act to determine that.

Of course, Mr. Chairman, you asked the most appropriate question. The Lazor Institute study is of eight local jurisdictions; it is not a study of the Federal system itself and I think we need to be very careful in looking at the Federal system, how many violent crimes are even prosecuted on the Federal level. Less than 5 percent of all people in Federal prisons are for significant violent felonies against a person.

We need to look at the rearrest rate and the reconviction rate, and all of the statistics Lazor looked at with regard to local jurisdictions.

Mr. MICHAELSON. Mr. Chairman, if I may add one comment to that, there was one statement made by Mr. Harris this morning that I thought was a very provocative one, and I don't understand its implication, but I believe they probably are very serious.

As I understand his testimony, it was that the effect of passage of preventive detention legislation would be to add to the number of people incarcerated in the Federal system. But that while we would be adding to the number of people added to the Federal system there is no more room in the Federal system, and, therefore, as I believe he understood the term, the mix would change.

What does this mean? Does this mean that individuals who are presently imprisoned in the Federal prison system won't be so we can incarcerate others who have not yet been tried? Are we going to be releasing dangerous criminals onto the streets to make room for people we don't know yet are innocent or guilty?

I suggest that given the overcrowding problem in the Federal prison system that some enlightenment on that from the Justice Department would be extremely interesting and important for the committee.

Mr. KASTENMEIER. What data exist which might indicate the number of crimes committed by Federal defendants prior to trial? Are you aware of any?

Mr. LANDAU. I am not aware of any study that is a comprehensive study such as the Lazor study that has been done on the Federal level.

Mr. MICHAELSON. I made an effort to systematically survey the literature and I am not aware of any such study.

Mr. KASTENMEIER. Is there any legislation you can support on the subject? The American Bar Association has suggested conditional releases under which, if the terms are violated, the defendant forfeits his release prior to trial. What about that? Is that plausible?

Mr. LANDAU. I have several comments about that approach.

First of all, I think the point needs to be made that the American Bar Association approach should be examined very carefully. I think it's food for thought here and we need to really look at it closely. In our preliminary review I think one thing that the bar association proposal would still maintain is a prediction of dangerousness.

Even though it's only for the conditional release, it still is this prediction. If, for example, you wanted to create a class of offenders who have already been convicted of a violent felony, and, therefore, have been proven a danger to the community, and then if they are somehow rearrested, they have special procedures for their conditions.

That is one thing. But if that person comes before the court and says they have been convicted of a violent felony and we are going to make a prediction they may go out and commit other crimes, that is the point where we would disagree.

So I think we would urge the committee in examining that proposal to look into past conduct. If there is a way to make a prediction or finding of dangerousness based on past conduct rather than future predictions of future conduct, that is certainly a preferable exercise.

Mr. KASTENMEIER. We have that in law already. We have the Organized Crime Control Act with a definition of dangerous offender predicated on prior arrest, prior conviction records.

Mr. MICHAELSON. I have had some litigation in that area, and it too is a thorny one. I hope we won't get into the details of that, it is complex. But my own view, in answer to your question, is that the ABA approach is a thoughtful, interesting and important approach. It does still grapple with predictions of dangerousness morarys which is a problem, but I would consider the ABA approach to be a thoughtful and very intersting approach to be looked at very seriously.

Mr. LANDAU. We would be happy to work with the committee in making more specific comments. I think the procedures need to be looked at and examined more closely, where the burdens of proof lie, who makes the motion, what kinds of due processes are afforded a defendant, appellant rights, those kinds of issues.

Also, one final issue is what kinds of conditions actually caused detention. The bill states that any violation of a condition triggers a detention hearing. What if they came in at 10:30 instead of 10 and they had a curfew and that was a condition? I think we have to look at the conditions that actually go to the issue of danger rather than simply forgetting to call your probation officer or whatever.

Mr. KASTENMEIER. I realize one of the problems of this whole equation, the difficulty is one could, I suppose, determine, not withstanding your reservations, a degree of dangerousness insofar as certain elements are concerned. But if you infuse enough due process, what you actually get into is something that may reasonably not only pass constitutional muster but will reasonably achieve what at least some have in mind. But the difficulty in terms of due process is so great in terms of the orders of proof and procedures that most prosecutors won't avail themselves of it.

Mr. LANDAU. That is the District of Columbia.

Mr. KASTENMEIER. Because they say, "well, we are going to try this guy anyway 45 days from now. Why try to make all of these proofs for a court at this time to qualify him for dangerousness or something else?" Therefore, they will decline to do so.

In respect to this, I suspect when the matter came up many years ago either you or your colleagues as members of the ACLU or the National Capital Chapter of the ACLU must have testified against the Preventive Detention Act for the District of Columbia.

Have your fears been borne out with respect to that? Have there really been that many detentions that qualified as being "an enormous number" or "wholesale", to quote a couple of terms used by Mr. Michaelson, or anything else; has experience really been that bad with respect to the D.C. Detention Act?

Mr. MICHAELSON. There has not been a wholesale use of that provision, and to the extent that a fear was expressed that there would be a wholesale use, that fear on that extent turned out to be unfounded. Of course, you could argue from that fact a very different result as well.

In light of the urgent need of the prosecutors back then for this provision that they have not seen fit to apply but infrequently over the last decade or so, query why the Attorney General, his task force, and the Department of Justice now feel it necessary to act in this area where, as the chairman has pointed out, there is at best a dubious at least need in any event.

There were a number of comments made in Congress back in connection with the Organized Crime Control Act of 1970, I believe, including a statement made by former Senator Ervin which is quoted at page 9 of our paper, and he summed up the political situation as he saw it in saying:

> Preventive detention legislation . . . is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem.

That was at least his conclusion after having gone through the Senate version of this exercise. But I think it would not be fair to say there has been a wholesale application of the District statute.

The only other point I would have in that connection is this: To the extent that prosecutors and defense lawyers get sidetracked on those very elaborate preventive detention procedures and litigation about their constitutionality, and other controversies and so on in particular cases, the effect is to defer the trial. And I think that is something that everybody is against.

I know in coming in here and discussing this informally with the Justice Department representatives we said, well, at least there is one thing we can agree on with you; we would like speedy trials. So I would imagine that to be also an important consideration; are we doing something which in application will at least in some cases tend to defer trials or not?

Mr. LANDAU. There are a couple of interesting aspects of the D.C. statute which I think lend themselves to its infrequent use and one is the automatic release provision. For example, if the person is incarcerated for so long, and then there is no trial, they are automatically released. That is an important consideration in the prosecutor's thinking, whether to move for preventive detention, because they can't try that person within that framework, then the defendant will be released in any event.

Certainly, if it was beyond 45 or 60 days I don't think anyone would like to see a defendant sit in jail, even in a preventive definition situation for several months, because obviously those people need to be tried first as a priority.

I think even one of the bills mentions that as a specific provision, that there would be priority to be given to people incarcerated under these provisions of the bill.

I think ultimately what has happened in the District of Columbia is the comment you made, Mr. Chairman, that the due process considerations, most prosecutors take the logical route, which is, well, if we are going to go through all of these procedures and to make all kinds of proof of substantial probability that the crime was committed, let's just try the person; let's just try the defendant, have it over with and have the ultimate determination of guilt or innocence so the person will not go to jail several days if the person is guilty but for several years if it's a violent crime.

Mr. SAWYER. If the Chairman would yield, the reason they don't like to use it is not quite that. If you have been in prosecution you would understand the reason. That is, generally speaking, and given you have to generalize, you are dealing with a group of people that have no great concern about perjury or making up stories or doing anything else, certainly as a group as opposed to the average civil litigant, and you don't want to lay all of the details of your case out for them on a trial run to give them a chance to reconsider every other story they want to make, or to intimidate witnesses or do other things.

That is really their concern; it's not that they have to do it twice; it's the fact they do it once as a trial run for the benefit of the defendant and then when the chips are really on the table the defendant has been through a free exercise. That is their real objection to the D.C. Act.

Mr. KASTENMEIER. I think that is a correct interpretation of what Charlie Ruff said, that part of it is the tactical problem for them in presenting their case too early.

Mr. MICHAELSON. Of course, the reason they feel constrained to lay it out is they read the Constitution as requiring them to do that, and if the Constitution does require them to do that, then we are back to square 1; again is it a good idea?

Mr. KASTENMEIER. That is why the act was upheld. That is part of the difficult equation of trying to achieve something and yet at the same time balancing off against other requirements frustrating those who sought the invocation of this law in the first place.

Mr. MICHAELSON. It is very interesting, if I may be permitted one last comment on that. There is a case pending in the Supreme Court involving the constitutionality of a Nebraska preventive detention or some such statute.

It is my understanding, although I did not attend the argument of that case, that it was represented to the Supreme Court in connection with that case that of 20 applications of that statute, that is to say 20 detentions of individuals before trial, 19 had not resulted in a conviction at trial. That is a rather remarkable statistic.

I have not made any independent examination of it, but it was said by a member of the Supreme Court Bar to that court. Again, it's a pretty sobering fact.

Mr. KASTENMEIER. On the other hand, we have just the opposite at the D.C. level where virtually everyone was, in fact, convicted who was detained.

Mr. SAWYER. I would be very surprised at that statistic. It would seem unbelievable that they would be asking for pretrial detention and 19 out of 20 were aquitted. I think you know of those that are tried just generally on criminal charges the conviction rate is really quite high, even if you discount the pleas of guilty. Certainly the average prosecutor would be pretty embarrassed if he was getting less than 70 percent or 75 percent or 80 percent conviction on those that actually came to trial, and up in the high 90's or middle 90's overall, including pleas.

Mr. LANDAU. Part of the reason for the statistics is that statute applies only in rape cases and basically if you are arrested for rape in the State of Nebraska you are detained period. There is really not much of any decision that goes into that.

Mr. SAWYER. That would be somewhat different.

Mr. KASTENMEIER. Let me just make a concluding comment.

Quite apart from the merits of Mr. Harris' case and your case, well presented this morning, of all of the problems there is still one thing I think this committee and Congress have to deal with, and that is the public perception that we are not coping with crime effectively.

I think there is not only a frustration but an impatience on the part of the public in this connection. Whatever causes crime aside, whatever is effective in dealing with crime aside, one of the elements that has surfaced for some years has been the commission of crime by persons on release. Possibly more newspaper coverage or more media coverage of this accounts for it; so that the perception of people is greatly exaggerated in these terms. But it is that perception and the perception itself is a reality which this committee must deal with.

Of course, we are held accountable for justice under the Constitution of this country, but also that perception is a reality and whether it's right or wrong, people who feel that are extremely intolerant of the situation where people on release seem to be committing crimes or are believed to be committing crime.

I think they feel that there are various jurisdictions, including the Congress itself, that should devote itself to this question, and that is the reason we are here today.

I want to thank you, Mr. Michaelson and Mr. Landau. We may have occasion to call on you on this question again in the very near future.

Mr. MICHAELSON. We are available.

Thank you very much.

Mr. KASTENMEIER. This will actually conclude our hearings.

I gather the American Bar Association will not ask to appear in behalf of its draft it has offered, which constitutes its proposal.

So, that being the case, this will conclude hearings on this question, and the Chair will announce dates for considering the various pieces of legislation before us. There may be several pieces of legislation before us and the subcommittee can work its will on this question.

Until that time, the committee stands adjourned.

[Whereupon, at 12 noon the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary adjourned.]

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