Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND ADMINISTRATION OF JUSTICE
HOUSE OF REPRESENTATIVES

CONCERNING

BAIL REFORM

ON

FEBRUARY 25, 1982

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

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 deccline 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

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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

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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

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.

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