

The Bail Reform Act of 1966: A Practitioner's Primer*

The Bail Reform Act of 1966 marks significant improvements in the administration of criminal justice. The authors explain the changes in the bail system by outlining the provisions of the act and by clarifying defense counsel's larger role in securing his client's pretrial release.

by Patricia M. Wald and Daniel J. Freed**

Enacted with a minimum of fanfare by a nearly unanimous Congress, the Bail Reform Act of 1966 seeks to assure that defendants "shall not needlessly be detained" prior to trial in federal criminal courts. Because it also applies to the whole range of common law crimes against person and property in the District of Columbia, the new statute may become the model for similar reform of state systems of criminal justice. Effective September 20, 1966, Public Law 89-465 marks the first major overhaul of federal bail law since 1789 when the First Congress adopted the Eighth Amendment to bar "excessive bail" and passed the Judiciary Act to confer a right to be "admitted to bail" in noncapital cases.

The Bail Reform Act goes far towards eliminating "bail" from the glossary of criminal procedure. It creates a presumption of release without payment of money before trial as well as pending appeal. It authorizes a new scale of "conditions of release" which may be imposed on defendants to assure their appearance. It requires judicial officers, in shaping release conditions appropriate to risk, to consider the accused's family, employment and community ties, in addition to his criminal record and history of nonappearance at trial. And it imposes severe penalties for failure to appear so that criminal prosecutions sup-

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plant bail bond forfeitures as the primary sanction against defendants who flee.

In two major respects the act falls short of completely revising the old bail system: it does not authorize courts to consider danger to the community in setting conditions of pretrial release in noncapital cases; and, while it subordinates, it fails to eliminate money as a condition which can cause the detention of persons unable to raise it. Detained defendants are, however, afforded a comprehensive and speedy review on a written record.

Traditionally, lawyers have played a minor role in the routine setting of bail. The new statute enlarges that role and elevates the standard for effective assistance of counsel in securing pretrial release. This article is intended as an introduction to the act and the new role it carves out for defense counsel.

Background Studies

The new act's partiality for pretrial release is designed to reverse the old system's pattern of pretrial detention.

Various studies disclosed the dismal picture of a system which trades freedom for money. Each year, in federal and state courts, thousands of persons were held in jail for weeks or months awaiting trial solely because they could not raise money to pay bondsmen. Even when low bail of \$500 or \$1,000 was set, a \$50 or \$100 bond premium was more than many defendants could afford. Left behind in the wake of detention were lost jobs, abandoned homes, families destitute and without support, lawyers hobbled in preparing for trial. The chances for acquittal, or for probation if convicted, diminished. Dead time in jail awaiting trial sometimes exceeded sentence after conviction, and often was ignored in computation of jail terms.

Beginning in the early 'sixties, several experimental bail projects were established to test the feasibility of releasing qualified defendants on personal bond or a promise to return for trial. Typically, the projects employed student investigators to interview each defendant about ties to the community that made it unlikely he would flee, *e.g.*, a job, close-knit family, absence of substantial criminal record, long-time residence in the area. After verifying his answers, an affirmative recommendation for release without bail was made to the court if the defendant appeared to be reliable, even where extremely serious charges were involved. This approach to selective release without money bail has worked well in New York City, Washing-

ton, D.C., Des Moines and nearly one hundred other communities. In a number of places, it has seriously cut the business of bondsmen and reduced detention by 50 per cent or more. The default rate for no-bail releasees regularly runs below that of bail bond defendants.

New System of Bail Procedure

Although the Bail Reform Act was inspired by the experience of these projects, it creates a system that goes beyond them in several important respects. Factual inquiry is required regardless of whether a neutral fact-finding agency exists. Release without money becomes the norm, not the exception; and the system's emphasis shifts from release of specially qualified defendants on personal bond to release of all defendants on conditions suited to their individual risks. Finally, defendants who are not released are entitled to a clear statement of reasons on which to base further review.

The radical changes made by the act in the bail system compel significant new responsibilities for defense counsel: (1) collecting information, (2) fashioning a plan for conditional release and (3) challenging detention.

Provisions of the Bail Reform Act

Conditions of Release. At the initial appearance before a United States commissioner or district judge, the Bail Reform Act provides that a noncapital defendant "shall . . . be ordered released pending trial on his personal recognizance" or on personal bond unless the judicial officer determines that these methods will not adequately assure his appearance. In that event, the officer must impose the first of the following conditions which he considers adequate or a combination if no single condition is sufficient:

- (1) place the person in the custody of a designated person or organization agreeing to supervise him;
- (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) require the execution of 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;
- (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Information. The judicial officer must determine conditions of release in each case on the basis of "available information", which need not conform to rules governing the admissibility of evidence. The factors to be considered are:

the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

Review of Detention. If the accused cannot meet the conditions imposed, he is entitled to a review of detention after twenty-four hours to determine whether the conditions should be amended. If the commissioner who imposed them does not amend his order, he is required to "set forth in writing the reasons for requiring the conditions imposed". The defendant may then move the district court to amend the order and have his motion "determined promptly". Denial of the motion entitles him to an expedited appeal. The standard for review is that the order "shall be affirmed if it is supported by the proceedings below". The same review rights may also be invoked by a person released on condition that he "return to custody after specified hours", since Congress considered such a release to be a form of detention. Other defendants released on conditions they consider unsatisfactory may seek to amend but are not entitled to a statement of reasons or an expedited appeal.

Capital and Postconviction Cases. The same release provisions apply to a person charged with an offense punishable by death or one who has been convicted and is awaiting sentence or appeal, unless the court has "reason to believe" that no conditions "will reasonably assure that the person will not flee or pose a danger to any other person or to the community". Should either of these risks exist, or the appeal be found frivolous or taken for delay, the court may order the person detained. Such detention orders may be challenged only through pre-existing avenues of judicial review.

Counsel's Responsibility To Furnish Information

The defense lawyer must develop techniques for the hasty assembling of relevant information. He must guard his client against incriminating responses to a bail questionnaire or the commissioner's inquiries. He must seek to counter adverse data supplied by other sources in order to maintain his client's statutory priority for release on recognizance or personal bond. In many cases he must be prepared to combat the prevalent notion that a serious charge automatically means a serious risk. Sometimes counsel will not enter the case until conditions have already been set. If the client has been detained or the conditions unduly restrict him, counsel may have to pursue the same fact-finding process before seeking the twenty-four hour review of detention or moving to amend the conditions of release.

For example, even though defendant Jones is a transient where arrested, his lawyer may be able to show a stable residence in another jurisdiction, a favorable history of court appearances and a reliable address where Jones will reside when released. The effect of unemployment may be diluted by showing other legitimate means of support. If Jones has a criminal record, his lawyer may be able to mitigate the impact of convictions which occurred long ago, or show that an intervening record of employment and stability justifies less restrictive release. If the crime charged is particularly serious or involves unrecovered loot, the lawyer might try to show that "the weight of the evidence" against Jones is very light, and that a low chance of conviction suggests little reason to flee. At every turn, counsel must search for facts to overcome inferences that a poor record and a criminal charge produce.

Counsel's Responsibility To Formulate Release Plan

When the absence of ties to the district of arrest makes release on personal bond unlikely, the lawyer will need to consider more restrictive conditions which his client can reasonably meet. Even if the defendant has money to spare for a cash deposit or professional bail bond, the act bars resort to this kind of condition if either the prosecutor or defense makes the case for nonfinancial release.

Third Party Custody. The bail system of the Middle Ages commonly allowed property owners and friends to stand surety for accused persons. Though largely forgotten since the rise of the bondsman, the technique of releasing a defendant "in the custody of a designated person or organization agreeing to

supervise him” has been restored by the Bail Reform Act of 1966 as the highest priority condition.

In today’s complex society, the lawyer’s search for reliable third parties can go far beyond owners of property: a friend, family member, employer, minister, teacher or the defense lawyer himself; or a church, school, union, fraternal group or community organization.

When a defendant needs medical or psychiatric treatment, counsel can explore placing him in the custody of a physician, hospital or public health facility. This type of arrangement could become critical in the case of an alcoholic, a narcotics addict or a mentally unstable defendant whose disability might otherwise bar assurance that he will return on time. If the risk of flight is particularly high, release may be made in the custody of a probation officer, a marshal or a court official. And when a youth charged with theft is arrested far from his native jurisdiction, the lawyer could explore the possibility of transferring the prosecution back home where supervision and community ties may be more readily available.

After locating a willing person or organization, defense counsel may have to show that the supervision will be active and conscientious. He may wish to draw up an instrument, signed by the accused and his custodian, detailing the nature of the supervision and the agreed restrictions on conduct, *e.g.*, curfew, no alcohol, fixed residence. The agreement might record the custodian’s duties to the court, *e.g.*, to report violations of any conditions as well as disappearance of the defendant. The lawyer should warn the accused of the penalties applicable to non-compliance: arrest, more stringent conditions of release, contempt of court and criminal prosecution in case of non-appearance in court. The custodian, in turn, must be told that he faces future disqualification, and conceivably contempt, if he neglects his duty.

Other Conditions. If no satisfactory custodian can be located, the defense lawyer must explore the second alternative: restrictions on travel, association or place of abode. These conditions suggest many possibilities. The accused can be confined to the limits of the district, the city or even to the vicinity of the courthouse. He may be required, as in many European countries, to agree to curfews or residence in some special facility. He may be ordered to stay away from old haunts or bad companions conducive to unreliability or flight. Or he may be re-

quired to surrender his driving license or passport or refrain from contacting particular witnesses.

While agreeing to imposition of reasonable conditions, the lawyer must guard against restrictions that unduly hamper the legitimate employment, family life or leisure time of his client. He may contest limitations which seem unrelated to the objective of assuring appearance, *e.g.*, agreement not to participate in strikes or demonstrations. Or he may oppose conditions which inhibit his client's aid in effective preparation for trial, *e.g.*, prohibitions against visiting the scene of the crime or talking to government witnesses. There may well be more circumscribed limits on the conditions which may be attached to liberty prior to trial than to those which can be applied after conviction.

The next two conditions permit several kinds of financial release. The newest and most preferred is the 10 per cent cash deposit, which enables an accused to post with the court the premium he would have paid to a bondsman. If he returns, his money will be refunded in full. While this condition must be considered in preference to a bail bond, neither can be invoked unless the judicial officer determines that money is essential, and nonfinancial terms will not suffice as an effective deterrent to flight.

The final category contains authority to set special conditions which may be useful in cases involving some of the more serious risks. A catchall provision allows "any other condition deemed reasonably necessary to assure appearance"; a second provision, suggested by the experience of daytime release programs for convicts, would require "return to custody after specified hours". The catchall offers unlimited opportunities to meet individual weaknesses of defendants by requiring abstinence from drugs or gambling, participation in a community work-training program, banking all pay checks. The "return to custody" provision might compel jail every night or each weekend, or authorize release of a habitual fugitive only when necessary to assist his counsel in searching for witnesses or preparing for trial.

Counsel's Responsibility To Prevent Detention

Despite counsel's best efforts to formulate an acceptable release plan, some defendants will still be detained. For example, assume that a 25-year-old unemployed addict is arrested at the scene of an armed bank robbery. He has no fixed address

or family and a long record of convictions involving violence. Under the old system, bail of \$10,000 to \$25,000 would almost certainly have been set. Assume further that a conscientious background investigation under the Bail Reform Act discloses a history of bail jumping which causes the commissioner to set \$100,000 bail as the condition of release. The defendant, an indigent, asks for appointment of counsel and demands the right to release on a condition he can meet. What can his lawyer do?

Factual Challenge. The first step is to take advantage of the client's right under the act to secure the commissioner's written reasons for insisting on bail. In an effort to compel re-examination of the high bail, counsel could request that the statement say why other measures, short of detention, will not assure against flight. If the commissioner persists, his statement of reasons can immediately be challenged and its factual and legal sufficiency tested in district court and appellate review. As an additional source of information for use on review, counsel may be able to cite the biweekly detention report filed by the United States Attorney. Required by new Rule 46(h) of the Federal Rules of Criminal Procedure, this report contains the prosecutor's list of all persons detained more than ten days and a statement as to each "why the defendant is still held in custody". Counsel can also use these periodic reports to argue that the length of his client's detention should be limited by either a speedy trial or revised conditions that enable release.

Legal Challenge. If counsel's attack on the factual justification for high bail fails, he might argue that the act categorically forbids pretrial detention. Under this theory, the new provision, entitled "Release in noncapital cases prior to trial", can be said to give the committing magistrate two alternatives: the accused shall either "be ordered released" on personal bond or have "conditions of release" set to assure his appearance. Only in a capital case or on appeal can a person be "ordered detained". In all other cases, the statutory mandate "to impose the first condition of release which will reasonably assure appearance" limits money bail to those defendants who can raise it and for whom it will serve as a deterrent to flight. But when an accused's poverty makes money bail a condition of detention rather than release, the next condition on the list must be invoked. And since condition (5) authorizes release from custody during specified hours and under whatever supervision may be necessary, it could hardly fail to assure appearance for even the

poorest risks. Putting a price tag on pretrial freedom can be said to flout the act's explicit purpose "to assure all persons, regardless of their financial status" against needless detention.

Defense counsel could cite legislative history to show an overriding concern about the prejudicial effects of pretrial detention on the outcome of trials and the severity of sentences. He could also invoke the excessive bail and due process clauses of the Bill of Rights to argue that the poor cannot constitutionally be denied the right to pretrial liberty available to their counterparts with money.

Defense counsel who argues that release is required should be prepared for a contrary argument by the prosecuting attorney: The act's statement of purpose assures only that persons are "not *needlessly* detained . . . when detention serves neither the ends of justice nor the public interest". Consistent with this, several provisions of the statute expressly contemplate detention of some persons resulting from "inability to meet the conditions of release". Otherwise, why have provisions for a twenty-four hour review of detention by the commissioner, for a motion to the district court to amend conditions that cannot be met, for an appeal to the court of appeals, with authority for it to affirm, and for credit against sentence for days spent in custody? The act intends only to assure release of reliable defendants who can be counted on to return for trial.

On balance it appears that the act neither authorizes pretrial detention nor guarantees that it will not occur. The ambiguity reflects recognition by many members of Congress that there was a need for detention in certain serious cases but no practical way yet to solve the constitutional and drafting problems in authorizing it. They lacked factual data on frequency and kinds of crime committed by persons on bail needed to devise predictive criteria to identify bad risks in advance. There was also inadequate knowledge about whether conditions short of detention could curtail criminal activity during periods of release.

Experience under the act should go far towards illuminating these questions. Appellate review will make clear what kinds of reasons will justify detention and how much control over released defendants is permissible. It should also determine the extent to which conditions for limiting the likelihood of flight can also serve to reduce the likelihood of crime. The success or failure of imaginative conditions to control "dangerous" persons may then be studied to ascertain whether and in what

form legislation is needed to authorize outright detention. In addition, the express authority in condition (5) for periodic "return to custody" provides, for the first time, a vehicle for challenging the constitutionality of legislation which openly allows detention prior to trial.

The Bail Reform Act is bound to produce significant changes in the criminal process. It requires lawyers to gather facts and shape imaginative conditions in order to gain pretrial release for their clients. It compels judges to hold hearings and give candid reasons whenever accused persons are detained. The act gives substance to its intended bias in favor of pretrial release by making the system simple when defendants are set free, but complex and troublesome when it keeps them in jail.

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