PREVENTIVE DETENTION: THE CONSTITUTION AND THE CONGRESS

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I. INTRODUCTION

The system of bail in the federal courts of the United States remained basically unchanged from its statutory origin in 1789 until the recent decade. Then, while reform by statute and judicial decision was pressing rapidly forward in other areas of federal criminal law enforcement, serious attention was also turned to the inadequacies of the federal bail system.

In 1963, after reviewing federal bail practices, the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice concluded:

[T]he bail system administered in the federal courts, relying primarily on financial inducements to secure the presence of the accused at the trial, results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of non-appearance by accused persons.3

This conclusion drew the immediate attention of bench, bar, law enforcement agencies, and the Congress to the problems in the federal bail system. Such widespread attention had not previously existed, although the findings of the Committee were not wholly new.

In 1954, Professor Caleb Foote directed a field study of the operation of the bail system in Philadelphia. Conducted by stu-

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1. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.
2. This Committee was appointed by Attorney General Robert Kennedy under the chairmanship of Professor Francis Allen, now Dean of the Michigan University Law School. The Committee was directed to make an extensive study of the federal criminal justice system, to consider the problems facing the indigent defendant, and to recommend solutions.
students of the University of Pennsylvania School of Law, the study determined that the money bail system permitted unnecessary and prolonged periods of pretrial detention and had serious effects on the administration of justice.4

Another study was conducted by the Vera Foundation. Established in 1961, the Foundation was directed to conduct research into the problems of indigency and the criminal law. As a first project, the Foundation sponsored the Manhattan Bail Project5 to study bail practices in New York City. Results of this research, published in 1963,6 showed that the money bail system resulted in widespread discrimination against the impoverished defendant.7

A concurrent study of bail in the District of Columbia was conducted by the Junior Bar Section of the District of Columbia Bar Association. Begun in 1962, this study led to the publication of a comprehensive report8 which prompted the Judicial Conference of the District of Columbia Circuit to initiate, in 1963, a local bail project, similar to the Manhattan Bail Project, which operated for three years.

Significantly, these early studies reached conclusions similar to that expressed by the 1963 Attorney General’s Commission Report. The dominant trait in the national bail pattern was readily discernible: when pretrial release depends entirely on the ability to pay a bondsman, those who cannot pay stay in jail.9

The public interest generated by these studies and the statistical groundwork they provided made congressional review propitious. The Senate Constitutional Rights Subcommittee, which had been studying federal bail since 1961, conducted extensive hearings after the Attorney General’s Commission Report was available. Between 1964 and 1966, two rounds of hearings were held in the Senate and one in the House of Representatives. Various bills were introduced to reform the bail system. Finally, the Senate Constitutional Rights Subcommittee prepared and introduced an omnibus

5. The Project was sponsored jointly by the Foundation, the New York University School of Law, and the Institute of Judicial Administration.
7. Id. at 79.
bill in the 89th Congress on March 5, 1965, and President Johnson signed the bill into law on June 22, 1966, as the Bail Reform Act.

The Bail Reform Act adopted as public policy the conclusion of the Attorney General's Commission Report. Its stated purpose is:

[T]o revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

Following passage of the Act, the Constitutional Rights Subcommittee continued its review of federal bail practices and gathered evidence showing that the purpose of the Act was not being wholly served. As the American Bar Association's Advisory Committee on Pretrial Proceedings revealed in its recent review of state and federal bail practices:

[M]any judges, when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release.

Other eminent bodies which studied the area of federal bail practices reached the same conclusion.

These disclosures led the Senate Constitutional Rights Subcommittee to hold hearings in 1969 on the gains made and the defects discovered in the Bail Reform Act of 1966. Many witnesses testified that the Act's purpose to discourage money bail was being largely ignored by the courts. Rather than used only as a last resort to prevent flight, high money bail was being commonly used to protect the community from possibly dangerous defendants, although

10. The bill was designated S. 1357 and sponsored by Senators Ervin and Hruska. Co-sponsors were Senators Bartlett, Bayh, Burdick, Dirksen, Dodd, Douglas, Fong, Hart, Inouye, Javits, Johnston, Kennedy (Mass.), Long (Mo.), Metcalf, Mondale, Ribicoff, Scott, Stennis, Tydings, and Williams (N.J.).


13. ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS, REPORT TO THE AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PRETRIAL RELEASE 6 (Approved Draft, 1968) (Hereinafter cited at ABA PRETRIAL RELEASE REPORT).


15. Hearings on Amendments to Bail Reform Act of 1966 Before the Constitutional Rights Subcommittee of the Senate Judiciary Committee, 91st
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ostensibly, to prevent flight.\(^6\) Obviously, this invisible system of preventive detention contravenes the purpose of the Bail Reform Act, subverts our system of justice by preventing judicial review in specific cases, casts doubt on the good faith and honesty of our judicial system, contradicts our due process notions of fair play, and prevents the development of objective standards of dangerousness.

Nevertheless, the judicial instinct to consider the possible danger of the defendant during pretrial release deserves our attention. If danger to persons or the community does exist from certain defendants and there is substantial reason to expect harm to occur, then serious consideration should be given to a system of preventive detention. Judges should be able to forthrightly protect the public from recidivist criminals by detaining them prior to trial. Danger from abuse of this judicial discretion can be limited by providing clear standards and procedural safeguards, including the right of review and appeal. Certainly this would be far superior to the invisible hand that now shadows the use of high money bond.

The foregoing view has gained broad bipartisan support in both Houses during this first Session of the 91st Congress. Five bills related to the problems of preventive detention have been introduced in the Senate\(^17\) and 22 bills in the House.\(^18\)


18. Bills introduced in the House during the 91st Congress, 1st Session (1969): H.R. 323 by Mr. Poff; H.R. 335 by Mr. Rogers (Fla.); H.R. 578 by Mr. Rogers (Fla.); H.R. 1033 by Mr. Cramer; H.R. 2781 by Messrs. McCulloch, Gerald R. Ford, Poff, Cahill, MacGregor, Hutchinson, McClory, Smith (N.Y.), Roth, Meskill, Sandman, Railsback, Biester, Wiggins, Taft, Conable, Cramer, Devine, Erlenborn, King, Wylie and Wyman; H.R. 4189 by Mr. Miller (Ohio) and Mr. Fish; H.R. 5213 by Mr. Michel; H.R. 5168 by Mr. Adair; H.R. 6253 by Mr. Mize; H.R. 6844 by Mr. Sebellius; H.R. 6744 by Mr. Collier; H.R. 7322 by Mr. Hunt; H.R. 7591 by Mr. Kleppe; H.R. 8194 by Mr. Steiger (Ariz.); H.R. 8616 by Mr. Meskill and Mr. Frey; H.R. 8782 by Mr. Gude; H.R. 10080 by Mr. Hogan; H.R. 10276 by Mr. Winn; H.R. 10083 by Mr. Hogan; H.R. 12628 by Mr. Collins; H.R. 12806 by Messrs. McCulloch, Gerald R. Ford, Anderson (Ill.), Poff, Cahill, MacGregor, Hutchinson, McClory, Smith (N.Y.), Meskill, Sandman, Railsback, Biester, Wiggins, Fish, Nelsen, Taft, Conable, Cramer, Devine, Erlenborn, King, Wylie, Wyman, and Roth; H.R. 13333 by Mr. Ruth.
In light of the growing interest in pretrial preventive detention, this article is written to review the relevant statutory and constitutional history of bail, to advance some notions of public policy, and to advocate the need for congressional action.

II. THE CONSTITUTION

Bail is an ancient custom. Its practice began in medieval England and evolved in a series of later English statutes including the English Bill of Rights of 1688 which specifically provided protection against excessive bail. Sheriffs of old England would release the defendant upon a third person's promise that the defendant would appear for trial. If the defendant did not appear, the third person, known as a surety, surrendered himself to suffer the penalty of the defendant. This early practice of bail was described by one study as follows:

In the period during the first thousand years A.D. in England, a bail system like the American system in use today began to develop, charted by the necessities of the times. Land was held in vast feudal baronies. Justice was administered by traveling judges whose visits to an area on the circuits of the realm were intermittent, often several years apart. The local sheriffs, who represented the Crown in their respective areas, were responsible for the custody of prisoners. Prison conditions were atrocious. Prison facilities were insecure and inadequate. They served no one, and they were a financial burden.

The sheriffs, executives for the administration of criminal justice until the judges arrived, were happy to have someone else assume the responsibility of maintaining custody of defendants. If someone would assume the personal responsibility of presenting a defendant for future trial, the sheriffs were happy to shift the responsibility to them. As the custodian of all those accused, sheriffs frequently relinquished defendants provisionally into the custody of a surety, usually a friend or relative of the accused.

Today in England, the system of bail continues to be based on the ancient concept of a surety relationship between the defendant and a third person, although the system has evolved to permit the surety to surrender a sum of money rather than himself when the defendant fails to appear. The English system has also retained a flexibility which permits the magistrate to deny bail when the

19. 1 W. & M.c. 2, § 10, at 68.
defendant appears likely to tamper with the evidence or commit new offenses if released.\textsuperscript{22}

Bail in the federal courts of the United States followed a somewhat different course than the English tradition, evolving from four basic sources: the Judiciary Act of 1789, the Eighth Amendment to the United States Constitution, the Fifth Amendment to the United States Constitution, and most recently the Bail Reform Act of 1966.

Enacted by the First Congress, the Judiciary Act of 1789 was the first break with English tradition and laid the groundwork for distinctly American bail institutions and for limited judicial discretion. That act provided that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . ." and made bail in capital cases discretionary, depending upon the "nature and circumstances of the offense, and of the evidence, and usages of law."\textsuperscript{23}

The House Judiciary Committee has described the American development of bail institutions as follows:

Since the Judiciary Act of 1789 . . . Congress has provided that persons shall be admitted to bail upon arrest in criminal cases except where the punishment may be death. It also provided that bail is discretionary in capital cases depending upon the nature and circumstances of the offense and of the evidence and usages of law. The practice of providing a private surety who would personally guarantee to produce a bailee proved inadequate. Eventually, the posting of bail became the function of a professional bondsman who in return for a money premium guaranteed the appearance of the defendant at the time of trial. It was also in this manner that the posting of bail bonds became a commercial venture.\textsuperscript{24}

Basis for the discretion of federal courts to deny bail in non-capital cases was regarded as nonexistent. This tradition in turn spawned the notion that the right to bail in noncapital cases was absolute in the federal system. Justice Vinson expressed this view quite clearly in \textit{Stack v. Boyle};\textsuperscript{25}

From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . federal law has unequivocally provided that a person arrested for a noncapital offense shall be admitted to bail. This traditional right to freedom before conviction permits

\begin{itemize}
\item 22. \textit{Bail and Bad Character}, \textit{106 The Law Journal} 22 (1956).
\item 23. \textit{Judiciary Act of 1789}, ch. 20, § 33, 1 Stat. 73, 91.
\item 25. 342 U.S. 1 (1951).
\end{itemize}
the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.26

Despite its statutory tradition of being absolute, the right to bail in noncapital cases must be considered in a constitutional context to determine what exceptions exist, and, if so, whether the Constitution might permit preventive detention in noncapital cases as well.

III. THE EIGHTH AMENDMENT

Following the Judiciary Act of 1789, the Bill of Rights was added to the Constitution in 1791.27 The Eighth Amendment specifically addresses the issue of bail by providing that "excessive bail shall not be required," but the Amendment does not explicitly guarantee a right to bail. Nor has the United States Supreme Court decided whether the Amendment confers an absolute right to bail. Since the Judiciary Act provided for that right in noncapital cases, the constitutional issue never had to be reached. Stack v. Boyle considered the meaning of the word "excessive" under the Eighth Amendment but did not determine the extent of the constitutional right to bail.28 It has been argued, however, that the history of bail and the language of the Eighth Amendment necessarily imply an absolute right to bail.

The historical argument is that the Bill of Rights was based without change on the 1776 Virginia Declaration of Rights, drafted by the distinguished scholar and public figure, George Mason. Regarding Mason's draftsmanship, Professor Caleb Foote has stated:

The bail language he included was taken from the second half of the English Bill of Rights of 1689, but whether from inadvertence, or from the fact that he did not have his references at hand when he wrote... or from the fact that he was not technically trained as a lawyer, he omitted critical language which is in the preamble of the English Bill of Rights, which clearly spells out the basic right to bail and makes the prohibition of excessive bail merely a dependent clause upon an existing nondiscretionary statutory right to bail. Thus, Mason's English source combined both the right to bail, drawn together from enactments which in England went back to 1275, and the protection against abusive denial of that right through the

26. Id. at 4.
27. 1 ANNALS OF CONGRESS 753 (1791).
28. 342 U.S. at 5; accord, separate opinion of Jackson, J. at 9.
judicial imposition of excessive bail. Unaccountably and apparently unnoticed by everybody, when this protection came into our Constitution, one of its essential two legs was missing.\textsuperscript{29}

Doubt exists as to whether the omission mentioned by Professor Foote was as critical or inadvertent as he suggests. Professor Foote himself admits that the omitted language was in the preamble of the English Bill of Rights and not part of the body.\textsuperscript{30} Also, the language of the preamble is not as clear as he contends. More importantly, the United States Supreme Court, when confronted with this historical source, stated in \textit{Carlson v. Landon}:\textsuperscript{31}

The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.\textsuperscript{32}

It is also argued that it would be meaningless to interpret the Eighth Amendment to forbid the judge to detain a defendant by setting unreasonably high bail, while still permitting the judge to deny bail altogether. This would allow the judge to do directly the very thing that he is forbidden to do indirectly. Also, as stated by Justice Black in dissent in \textit{Carlson v. Landon}, under this view, "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away."\textsuperscript{33}

Some federal courts have adopted the foregoing reasoning and declared the right to bail in noncapital cases to be an inviolable feature of our legal system.\textsuperscript{34} These cases are not conclusive, how-

\textsuperscript{29} See \textit{Hearings on Bail Reform Act Amendments}, supra note 15, at 358.
\textsuperscript{30} \textit{1 W. & M.c. 2, § 10, at 68}: "And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects."
\textsuperscript{31} 342 U.S. 524 (1952).
\textsuperscript{32} \textit{Id.} at 545-46 (footnotes omitted).
\textsuperscript{33} \textit{Id.} at 556. See \textit{Hearings on Bail Reform Act Amendments}, supra note 15, at 156.
ever, because they either refer to the right of bail as statutory in origin or rely upon other cases which were decided on the basis of the statutory right.

On the other hand, the courts have not decisively disposed of these arguments. Although the language in Carlson v. Landon appears to be final on the subject, the nature of the case raises questions. The case involved the denial of bail to alien communists pending deportation proceedings. Although the distinction today between civil and criminal proceedings has become increasingly obscured, it was considered a valid distinction in 1952, and the language of Carlson v. Landon seems to recognize the distinction.

Other valuable precedents exist that buttress the concept that right to bail, although secure from unreasonable denial, is not absolute. Discussing the application of the bail provision of the Eighth Amendment to states through the due process clause of the Fourteenth Amendment, the Eighth Circuit in Mastrian v. Hedman concluded that:

Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial.

Whether the Eighth Amendment applies to only federal criminal cases, or in addition to state criminal cases as well, the breadth of the right to bail thereunder would be the same. The Mastrian case, by clearly denying an absolute right to bail under the Eighth Amendment in state cases, carries equal weight as precedent on the extent of the right to bail in federal cases.

Equally compelling precedents exist in cases involving only federal rights unaided by the application of the Fourteenth Amend-

36. 342 U.S. at 537: "Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution."
38. 326 F.2d at 710.
ment to the states. Justice Douglas, sitting as Circuit Justice on an application for bail pending appeal, explained that:

In my view the safety of witnesses, should a new trial be ordered, has relevancy to the bail issue . . . . Keeping a defendant in custody during the trial "to render fruitless" any attempt to interfere with witnesses or jurors . . . may, in the extreme or unusual case, justify denial of bail.89

Justice Frankfurter, also sitting as Circuit Justice on an application for bail pending appeal, reached a similar conclusion:

The granting of bail certainly presupposes confidence that a defendant will respond to the demands of justice. In fixing the amount of bail, Rule 46 (c) explicitly advertst to the trustworthiness of a defendant . . . . Impliedly, the likelihood that bail within tolerable limits will not in¬sure this justifies denial of bail.40

No mention was made in either of these cases of any constitutional right to bail. Rather, the public policy of preserving the integrity of the trial process during an appeal, where the case may have to be retried, was the primary consideration.41 This could involve either protecting witnesses or insuring the presence of the defendant. Although bail on appeal can be distinguished from pre¬trial release,42 it would seem to be a meaningless distinction where the ends sought to be obtained are the same.

In addition to the judicial decisions denying a specific constitutional right to bail, other factors support the argument that Congress has the power to define categories of defendants for whom pretrial release may be denied based on certain judicial findings. These factors are: (1) present statutory exceptions of defendants who are denied pretrial release; (2) the changing nature of capital offenses; and (3) public policy needs.

41. These factors as well as public safety are grounds for discretionary denial of release pending appeal under the Bail Reform Act of 1966, 18 U.S.C. § 3148 (Supp. IV 1965-69). The constitutionality of this provision has not been seriously questioned. When adopted, it was a codification of the holdings of five federal circuit courts that other factors besides risk of flight could be considered in granting or denying bail: Rhodes v. United States, 275 F.2d 78 (4th Cir. 1960); United States v. Wilson, 257 F.2d 796 (2d Cir. 1958); United States v. Williams, 253 F.2d 144 (7th Cir. 1958); Esters v. United States, 255 F.2d 63 (8th Cir. 1958); Christoffel v. United States, 196 F.2d 560 (D.C. Cir. 1951).
42. In Pannell v. United States, 320 F.2d 698 (D.C. Cir. 1963), the circuit court remarked that: "[U]ntil appellant's conviction he was presumed innocent but that presumption is altered with guilty verdict and judgment."
A. Statutory Exceptions

Present statutory exceptions where the defendant has been denied an absolute right to pretrial release are: where the defendant is charged with a capital crime rather than noncapital crime; where the defendant is a deportable alien; and where the defendant is mentally incompetent.

A distinction between capital and noncapital cases is not drawn in the Eighth Amendment. Consequently, if there were an absolute right to bail under that Amendment, the right should extend to both types of cases. However, the Judiciary Act of 1789, the Federal Rules of Criminal Procedure, and the Bail Reform Act of 1966 recognize a difference: in noncapital cases the defendant has a right not to be detained but in capital cases the decision is left to the discretion of the judge. The federal courts have never found these statutes to be unconstitutional.

The deportation of aliens can reasonably be construed as another exception to the theory that the Eighth Amendment grants an absolute right to bail. Although deportation hearings have been considered as civil proceedings, alien defendants have the same essential rights to fair procedure as United States citizens. Although recognizing these rights, the Congress was not dissuaded from enacting the Internal Security Act of 1950 which gave the Attorney General discretion to retain an accused alien in custody or to release him on bail or conditional parole. Sustaining this power, the Supreme Court in Carlson v. Landon stated:

46. Ch. 20, § 33, 1 Stat. 73, at 91.
47. FED. R. CIV. P. 46(a) (1), (a) (2).
49. The Supreme Court has held that the Constitution assures the alien the right to invoke the writ of habeas corpus to protect his personal liberty (Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)); in criminal proceedings the alien must be accorded the protections of the Fifth and Sixth Amendments (Wong Wing v. United States, 163 U.S. 228, 238 (1896); Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922)). The Court in United States ex rel. Potash v. District Director, 169 F.2d 747, 752 (2d Cir. 1948), a case involving bail pending a deportation hearing, said: "If the Eighth Amendment to the Constitution is considered to have any bearing upon the right to bail in deportation proceedings, and this has been denied, it is our opinion that the provisions of that Amendment and any requirement of the due process provisions of the Fifth Amendment will be fully satisfied if the standards of fairness and reasonableness are observed."
The refusal of bail in these cases is not arbitrary or capricious or an abuse of power. There is no denial of the due process of the Fifth Amendment under circumstances where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government.\textsuperscript{51}

Mental incompetency is the third exception to the theory of bail as an absolute right. The Congress has provided that a defendant who is unable to understand the proceedings against him or to assist properly in his own defense may be subject to commitment at a suitable institution\textsuperscript{52} until he is mentally competent to stand trial or until the charges are disposed of according to law.\textsuperscript{53} In this instance the defendant is detained pending trial to preserve the integrity of the trial process by insuring the competence of the defendant to defend himself. This policy has been sustained by the Supreme Court.\textsuperscript{54}

B. CHANGING NATURE OF CAPITAL OFFENSES

The changing nature of capital offenses is another relevant factor which militates in favor of the legislative power to define categories of defendants for whom bail may be denied for reasons of public safety. The express right to bail in noncapital cases as found in the federal statutes, as well as in many state constitutional provisions, probably was based on the assumption that only capital offenses involved threats to public safety or strong risk of flight.\textsuperscript{55} The fact that neither the dangerousness nor the risk of flight of the noncapital defendant was considered can be readily explained. Almost all serious felonies in our early history were capital crimes for which bail could be denied.\textsuperscript{56} Consequently, the courts were not faced with a duty to grant possibly dangerous defendants, nor defendants with little to lose by flight, their freedom pending trial.

\begin{itemize}
\item[51.] 342 U.S. at 542.
\item[54.] Greenwood v. United States, 219 F.2d 376 (8th Cir. 1955), aff'd, 350 U.S. 366 (1956).
\item[55.] \textit{Bail in the United States}, supra note 9, at 2, 3 n.8.
\item[56.] \textit{Capital Punishment in the United States}, 8 \textit{The Law Reporter}, 481, 487 (1846). \textit{See} The Crimes Act of 1790, ch. 9, 1 Stat. 112. In 1790, federal crimes punishable by the death penalty included: (1) murder, (2) treason, (3) robbery, (4) stealing a ship, (5) a seaman laying violent hands on the commander of a ship, (6) revolt on a ship, (7) piracy or robbery under false colors, (8) accessory before the fact of piracy or robbery, and (9) forgery, counterfeiting or altering of a public United States security.
\end{itemize}
But, as the range of capital offenses has diminished for reasons unrelated to the seriousness of the offenses, and more defendants therefore have become eligible for pretrial release, the inability to protect public safety has increased. Where the public safety is seriously affected by felons on pretrial release, who in earlier years would have been detained on capital charges, the traditional distinction between capital and noncapital offenses, for purposes of bail, becomes less meaningful.

C. Public Policy

If the life of the law is experience, and not logic, as Justice Oliver Wendell Holmes once declared, then public policy is the expression of our experience. A consideration of the power of the Congress to deny bail in limited situations must recognize that in addition to the policy of preserving the integrity of the trial process, other public interests, such as public safety, may justify detention. As has been well stated:

Even the explicit guarantee of the right to free speech contained in the first amendment is subject to restriction when required by public necessity; the undefined right to bail implicit in the eighth amendment might also be subject to such restriction.\(^5\)

Public policy should be able to protect the public by denying pretrial release to dangerous felons, just as public policy has always insured the integrity of the judicial process by denying bail in capital cases to prevent flight.

IV. FIFTH AMENDMENT

Even though pretrial release cannot reasonably be considered an absolute right under the Eighth Amendment, pretrial detention must still comply with the notions of fair play and justice held in our society\(^5\) and embodied in the Fifth Amendment to the Constitution.\(^5\)

Pretrial detention of any person based on future criminal conduct violates the Fifth Amendment, it is argued, because: it denies the defendant the protection of the presumption of innocence.\(^6\)

\(^5\) 79 Harv. L. Rev. 1489, 1500 (1966).
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it discriminates against the defendant's opportunity to obtain a fair trial, and it assumes, prior to a final judicial judgment, that the defendant has committed a crime and will probably commit others if released.

A. PRESUMPTION OF INNOCENCE

The presumption of innocence, as a traditional notion of Anglo-Saxon criminal justice, has been claimed as the basic underpinning for pretrial release. This argument has been stated as follows:

[A]ny pretrial incarceration assumes the guilt of the accused and is, therefore, in conflict with the presumption of innocence; thus the presumption has no real vitality unless it is supported by the accused's liberty prior to trial.

According to another view, however, the presumption of innocence of an accused is a fundamental right which accrues at the time of trial but does not require that the accused be treated as innocent in every way prior to trial. Based on this theory, the presumption of innocence would not operate during the pretrial process or outside the courtroom in a criminal case. If this were not so, it is argued, persons could not be arrested and held for fingerprinting and questioning, nor indicted by grand juries for probable cause. As just another stage of pretrial procedure, preventive detention would not, under this theory, contravene the presumption of innocence. The fact that defendants have always been subject to detention during trial where there is strong risk of flight or a threat to the trial process supports this theory as does the denial of bail for capital offenses.

UMBIA, REPORT 520 (1966) (Hereinafter cited as PRESIDENT'S COMMISSION ON D.C. CRIME).

61. Id. at 523. See also 36 GEO. WASH. L. REV. 178, 184 (1967).
62. PRESIDENT'S COMMISSION ON D.C. CRIME, supra note 60, at 523. See also GEO. WASH. L. REV. 178, 184 (1967).
63. PRESIDENT'S COMMISSION ON D.C. CRIME, supra note 60, at 520 (footnote omitted).
64. 79 HARV. L. REV. 1489, 1501 (1966).
65. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 177 (1965); cf. TERRY v. OHIO, 392 U.S. 1, 26-27 (1968).
Moreover, nearly 75 years ago the Supreme Court pointed out that "[d]etention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense."[68]

Since our system of justice is based on the eliciting of truth through competent advocacy, the conviction of innocent men is abhorrent to the system. The presumption of innocence is most meaningful in this context as a trial measure. That is why the presumption of innocence, unlike other legal presumptions, requires more than prima facie evidence to be overcome and unanimous agreement of the jury that the evidence of guilt has been established beyond a reasonable doubt. If the presumption of innocence is respected during the trial process and honored by the jury in its finding, then it has served its purpose.[69]

B. DENIAL OF FAIR TRIAL

The possibility that the restriction of a detained person's opportunity to prepare for trial will result in a deprivation of due process of law is further argument for pretrial release. While being detained an accused may have difficulty communicating with his counsel and seeking witnesses and evidence for his defense, thereby jeopardizing his Sixth Amendment right to trial. Justice Jackson made this point in Stack v. Boyle:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.[70]

The test of due process, however, is one of reasonableness.[71] It will permit a balancing of an individual's freedom with the orderliness of society, so long as the essential elements of fair procedure are not abused.[72] Just because there is a risk of unconstitutionality surrounding the hard choices to be made in constructing a preven-

[68. Wong Wing v. United States, 163 U.S. 228, 235 (1896).
69. NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT 177 (1965).
70. 342 U.S. at 7-8.
tive detention system, the concept of preventive detention is not thereby rendered contrary to due process of law. Properly made and supported by an overriding public interest, the hard choices can stand the test of due process.

Chief Judge Bazelon, speaking for the United States Court of Appeals for the District of Columbia Circuit, recently expressed this view in an appeal from the dismissal of a habeas corpus petition:

It may be that in some circumstances preventive detention is in fact permissible. If so, such detention would have to be based on a record that clearly documented a high probability of serious harm, and circumscribed by procedural protections as comprehensive as those afforded criminal suspects.\(^7\)

The central issue would seem not to be whether pretrial preventive detention deprives a person temporarily of his liberty, but rather, whether the detention procedure is reasonable and justified and permits the defendant his full rights to a fair trial on the criminal charge against him.

To achieve the goal of a fair trial, the defendant who is detained should have, as nearly as possible, the same opportunities as the defendant who is at liberty. He should have every reasonable opportunity to communicate with his lawyer fully and to prepare his defense,\(^7\) even if it requires limited, though supervised, periods of release.\(^7\) When the defendant appears in court for trial, to prevent any prejudice in the minds of the jury, no evidence should be admitted which would indicate that the defendant had been detained and there should be no physical signs of detention such as prison uniform or handcuffs.\(^7\)

Moreover, there should be proper review and appeal procedures, so that the defendant has ample opportunity to seek relief if the preparation of his defense is being seriously impaired by his detention. Such evidence could reasonably justify a change in the detention order, and possibly, under unusual circumstances, could even permit strict conditions of limited release. The various conditions, or combinations of conditions, already available to judicial discretion under the Bail Reform Act of 1966 might presently pro-

\(^{75}\) See 79 HARV. L. REV. 1489, 1508 (1966).
\(^{76}\) See 36 GEO. WASH. L. REV. 178, 188 (1967).
vide the needed authority for a judge to act in such a case.  

C. DEPRIVATION OF LIBERTY

The idea that a person should not be deprived of liberty without due process of law derives from the English common law. Incorporated into our Bill of Rights in 1791, it has come to mean in our courts of law, that a defendant must not only have a fair trial, but, moreover, that he cannot be imprisoned until he is found guilty of committing a crime clearly defined by law. It is argued that preventive detention violates this latter concept because it causes the imprisonment of a person before a judgment of guilty has been rendered for the crime charged and is based on the prediction, and not certainty, that further criminal conduct would occur if the defendant were on pretrial release. The classic statement of this view was that of Justice Jackson, sitting as Circuit Judge:

Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

As previously suggested, however, due process is not a fixed notion. The need for flexibility to meet the changing demands of society was recently set forth by the Supreme Court of the United States:

[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.

The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction.

This inherent flexibility in due process is evident from the classes of persons presently deprived of freedom either prior to a final judicial judgment of guilty or, in other instances, even without a formal charge of crime against them. The federal system of criminal justice presently permits restraint on liberty prior to judicial

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78. President's Commission on Law Enforcement, supra note 58, at 125.
80. Williamson v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950).
81. 381 U.S. at 14 (footnote omitted).
judgment of guilty by permitting pretrial detention in capital cases, by permitting defendants to remain in jail who cannot meet the conditions of release, and by committing to suitable institutions those defendants who are mentally incompetent to stand trial.

A defendant need not even be charged with a crime, however, to be subject to detention. For example, a prisoner who is considered insane or mentally incompetent and who, if released when his sentence expires, will probably endanger the safety of the officers, property, or other interests of the United States, can be committed to a suitable institution after his term expires. A person who is mentally ill, and who because of his illness is likely to injure himself or others, may be confined without commission of a crime. Also, a defendant subject to deportation may be detained because of his potential danger. The latter cases are generally proceedings considered civil in nature, but since the essential features of the Fifth Amendment guarantee of due process apply to both civil and criminal proceedings, the distinction is not relevant.

In all of these instances, the defendant is detained because of his potential acts and not as punishment for his commission of a crime. Whether the potential act be flight from the jurisdiction of the court, commission of an additional crime, or behavior of a dangerous nature, the fact of detention is based on prediction. Such predictions are common, however, in other areas of our judicial system as well. Judges must make predictions of future behavior when they impose or suspend sentences, grant probation, order detention of defendants during trial, and even when they set bail. Also, parole boards make predictions of future behavior when they grant paroles.

The predictive nature of the preventive detention process will not, therefore, render such a process constitutionally unsound. The practice of predicting future behavior to make judgments about present liberty is too prevalent in the system to be wholly contrary to our legal traditions. The objection must, therefore, be made on relative grounds, asserting that prediction of future criminal con-

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88. See cases cited note 49 supra.
duct is so imprecise that adequate standards cannot be devised.89

Such a view is unduly pessimistic. Identifying persons who are risks to public safety should be no more difficult than identifying persons who may flee the jurisdiction of the court. Nor is such a broad condemnation meaningful without reference to a particular system of preventive detention. That prediction of future behavior requires clear standards cannot be denied, however.

One suggestion has been made that preventive detention hearings should be civil in nature with a more informal proceeding.90 This theory envisions that the only persons to be detained would be those so unresponsive to the deterrence provided by the threat of criminal sanctions that it would be unfair to deal with them through ordinary criminal law procedures. Due to some mental or emotional abnormality, detention of these persons would presumably be akin to the detention of mental incompetents. Certainly some of the defendants whom society would judge to be dangerous, if released prior to trial, are driven by compulsions. Could not a deeply embedded sense of alienation and hatred of society compel a defendant to inflict harm indiscriminately on society? Might not an acute sense of inferiority compel a defendant to seek recognition through violent crime? It is by no means clear, however, that all dangerous defendants would fit such molds. Furthermore, since there would be no secondary purposes to pretrial preventive detention, such as treatment or cure, it is highly doubtful that the Supreme Court would accord such proceedings the denomination of civil.91

When the public interest in community safety from dangerous defendants on pretrial release is substantial, the solution is not to refuse to take the constitutional risks of preventive detention or to obscure them through civil proceedings but rather to recognize and meet them with proper criminal procedures. It should be possible to devise a system which provides the necessary safeguards to assure a full judicial hearing and detains only persons who pose a serious risk to public safety.

89. Williamson v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950).
91. In Cross v. Harris, No. 22,420, at 22 (D.C. Cir. April 16, 1969), Judge Bazelon, speaking for the court, stated: "Non-criminal" commitments of so-called dangerous persons have long served as preventive detention, but this function has been either excused or obscured by the promise that, while detained, the potential offender will be rehabilitated by treatment. Notoriously, this promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits.
The hard test for preventive detention was well stated by the ABA Pretrial Release Report of the American Bar Association Project on Minimum Standards for Criminal Justice:

It seems more probable that the constitutional defects in preventive detention, if they in fact exist, lie in due process limitations on predicting future criminal conduct. At the heart of the problem is the inherent difficulty in making such predictions with sufficient accuracy. Where the consequences of a mistaken prediction is unwarranted detention, due process of law may be violated.  

To meet this test, all of the basic criminal law protections should be required of any preventive detention system. Detention proceedings, according to Chief Judge Bazelon, should be "circumscribed by procedural protections as comprehensive as those afforded criminal suspects." The basic rights of a defendant in a criminal proceeding, the right to counsel, to testify, and to present and cross-examine witnesses, should be provided at a minimum.

Next, the judge should be required to make findings as specific as possible to limit the exercise of discretion on the issue of dangerousness. Specific findings would strengthen a defendant's right of appeal and review and would reduce the opportunity for initial abuse of the detention power. The judicial instinct for predicting human behavior may in many cases be highly developed but such instinct alone would not be adequate to prevent abuses.

The judge should also be required to make his findings in writing with a statement of facts and reasons. The findings should be based on the weight of the evidence, certainly greater than probable cause on which a person may be arrested but less than beyond a reasonable doubt on which conviction must rest during trial.

Finally, in determining which defendants should be subject to detention, the Congress in enacting legislation, and the judge in considering defendants before him, must be guided by the evidence of greatest danger to society. If the risk posed by a category of defendants is great, that category should be clearly identified for

92. ABA Pre Trial Release Report, supra note 13, at 70.
95. See Bitter v. United States, 389 U.S. 15, 16 (1967).
97. President's Commission on D.C. Crime, supra note 60, at 527; see 79 Harv. L. Rev. 1489, 1506 (1966).
purposes of preventive detention. Evidences of such risk that have been suggested are prior pattern of vicious antisocial behavior, the nature of the offense charged, threats made against persons or property, and any compulsions to commit serious crime, such as serious drug addiction.98 Certain categories of defendants who pose a serious threat or danger to society may be more easily identified if they are considered from the standpoint of public policy objectives.

One major area in which preventive detention is currently practiced with clear legal sanction relates to the protection of the integrity of the trial process. Threats against witnesses, attempts to destroy evidence, and other disruptive practices can presently constitute grounds for revoking bail and detaining the defendant. Mr. Justice Harlan has stated:

... District Courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice.99

The public policy behind this theory is that our society has a system of law which presumes men to know the difference between right and wrong, and that when a person commits a crime in our society, he should be responsible for his act and be punished accordingly. This threat of punishment is expected to deter men from committing crime. Since this system cannot operate if the penalties are not imposed, and since the penalties can only be imposed after a trial and adjudication of guilt, the trial process must be protected and its integrity and effectiveness preserved.100

Preserving the integrity of the trial process is not the only concern, however, relevant to pretrial detention. Another is the protection of society. Persons who are not responsible for their acts, or who have clearly demonstrated their inability or unwillingness to consciously and consistently function on the basis of the norm of right and wrong as required by our criminal law, have rejected the system of law on which our social order is founded. A person charged with a serious crime, who is released, might not be expected to flee the jurisdiction because of his community ties.101 For the same reason, he might be expected to choose a lawful course of conduct in the hopes of early probation if convicted.

100. See 79 Harv. L. Rev. 1489, 1502 (1966).
But, if regardless of his community ties, there is strong evidence that the defendant poses a threat to the public safety and, therefore, refuses to be adopted back into society, society should not be needlessly exposed to his depredations pending trial.

The Eighth Circuit in discussing bail on appeal, expressed this same principle:

Bail should not be granted where the offense of which the defendant has been convicted is an atrocious one, and there is danger that if he is given his freedom he will commit another of like character.102

V. THE CONGRESS

The Congress of the United States has enacted only two basic statutes concerning the federal system of bail. The first statute was the Judiciary Act of 1789, which was previously discussed in detail. The second statute, coming 177 years later, was the Bail Reform Act of 1966.104

The Bail Reform Act was enacted to insure that no one would be needlessly detained in the federal law enforcement system pending trial because of his financial condition. Breaking through the unequal restraints of money bonds, the Act required release of all accused persons in noncapital cases on their own recognizance or upon certain nonfinancial restrictions when release on recognizance was not sufficient to deter flight. Money bail still remained but only as a last resort. Pretrial detention could be ordered under the Act but only in capital cases on grounds of risk of flight or danger of the defendant to the community. Prior to this Act, too many defendants, unable to post bond, languished in jail until tried; regardless of the seriousness of the charges against them and regardless of the risk of flight. Many of those defendants were subsequently acquitted of the charges.

The Senate Constitutional Rights Subcommittee held investigative hearings on the Bail Reform Act in January, 1969, to survey, fully and intensively, the gains made and the defects discovered in the operation of the Act. The hearings revealed the need for further legislative reform to permit the additional consideration of public safety in pretrial release proceedings.105

103. Ch. 20, § 33, 1 Stat. 73, 91.
105. See note 15 supra.
A. SUPPORT FOR REFORM

As previously discussed, a number of bills have been introduced in Congress which would amend the Bail Reform Act of 1966 by including, among other things, standards and safeguards for detention of certain categories of defendants prior to trial. Five bills are pending in the Senate Judiciary Committee before the Constitutional Rights Subcommittee,106 and 22 bills are pending before the House Judiciary Committee.107

Due to the number of House bills, only the Senate bills, found in appendix "B," will be discussed in this article.

The Senate bills do not deal solely with authority for preventive detention. Four of the proposed bills108 would also authorize federal judges to establish conditions of release based on public safety considerations as well as risk of flight; two would authorize revocation of release when conditions of release were violated;109 and two would impose mandatory penalties for the commission of a crime during pretrial release.110 Widespread support exists for these last three measures. Not only do these proposals have bipartisan support in the Congress, they also have received endorsement from the President's District of Columbia Crime Commission,111 the American Bar Association Pretrial Release Committee,112 a District of Columbia Judicial Council Committee,113 and many witnesses appearing before the Constitutional Rights Subcommittee.114

Although further hearings will be held by Congress115 and close examination will be given to the details of the varying proposals, the widespread agreement indicates that the constitutionality of the nonpreventive detention features of these proposals is

106. See note 17 supra.
107. See note 18 supra.
111. PRESIDENT'S COMMISSION ON D.C. CRIME, supra note 60, at 525-27.
112. ABA PRETRIAL RELEASE REPORT, supra note 13, at 65-74.
113. JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA, DISTRICT OF COLUMBIA CIRCUIT REPORT 16-17 (1969) (Hereinafter cited as JUDICIAL COUNCIL COMMITTEE REPORT).
114. Hearings on Bail Reform Act Amendments, supra note 15.
115. Hearings were held by the House Judiciary Committee on October 15 and 21, 1969.
probably not a major issue. However, when the question of preventive detention is reached, the agreement of the varying organizations and of the witnesses who appeared before the Constitutional Rights Subcommittee in January of 1969 quickly vanishes. Since much of the controversy surrounds the constitutionality of those sections of the Senate bills concerned with preventive detention, the analysis which follows in this article will focus attention on those provisions only. The minority view of the Judicial Council Committee Report clearly expresses the wide divergence of opinion in the Senate concerning the subject of preventive detention:

The Bail Reform Act enacted the theory, which has not yet been converted into fact, that defendants could be released into the community to await trial with an assurance of effective supervision. Last year we urged an amendment to allow for consideration of dangerousness in setting release conditions, and for revocation where conditions were violated. These procedures would fit into a fundamental pattern of American justice: no punishment without a finding of guilt. Preventive detention would totally violate that principle.

However, as the majority view of the Judicial Council Committee points out and as this article discussed in the Fifth Amendment section, preventive detention is a historically recognized principle and is not a novel method of protecting the interests of society. It is only necessary that the statute provide appropriate standards and adequate due process safeguards to be constitutional. The vital features which must be examined and refined by the Congress are: (1) the categories of defendants to be subject to detention; (2) the procedural safeguards; and (3) the flexibility to permit a detained person the opportunity to prepare his own defense.

B. Need for Reform

There are approximately 30,000 bail settings each year in all federal courts in the United States, of which 20,000 alone are in the District of Columbia. This high rate of bail settings in the District is due to the fact that all criminal violations there are federal crimes. Over 40 percent of all federal crimes are committed in the District. Also, more criminal cases are tried before federal courts in the District than in any other metropolitan federal jurisdic-

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116. Since S. 288 only involves the consideration of public safety in setting conditions of release, it will not be included in the analysis.
118. Hearings on Bail Reform Act Amendments, supra note 15, at 32.
Therefore, in considering categories of defendants to be subject to pretrial preventive detention, it must be remembered that the need is most critical in the District of Columbia. Under the four Senate bills, many of the violations which would subject the accused to detention are federal crimes only in the District of Columbia.

A number of studies have been conducted to determine the extent of crime committed by recidivist defendants while on pretrial release in the District. Each has a different statistical base and each reaches somewhat different results. Nevertheless, these studies, if not conclusive, are persuasive.

Although the figures vary, the studies have revealed, at the least, that there is a sufficient percentage of defendants charged with serious offenses while on bail or release who have records of committing previous serious offenses to be cause for public and official concern. In the District, estimates of defendants who allegedly commit additional crimes while on bail range from 6 percent to 70 percent. One reason for the disparity is, again, that different statistical bases are used to arrive at these figures. The Judicial Council Committee report considered the 6 percent figure to be very conservative. The considerations for this view are that many arrests do not result in indictments, indictments are never brought in misdemeanors, and many crimes go undetected. These factors must be given reasonable weight in judging the relevance of the reindictment figures.

For purposes of legislation, however, the categories of defendants must be carefully delineated. A general showing that a sizeable percentage of defendants commit additional crimes while on bail is not enough. It must also be determined whether defendants who commit certain types of felonies are more likely to commit additional crimes while on bail and what kinds of additional background information on a defendant will indicate a serious threat to public safety.

The nature of the alleged crime is a reasonable factor to consider. Crimes that involve serious harm or threat of harm to persons or property evidence a destructive attitude of the of-

122. The 6 percent figure results from use of rates of reindictment among persons on bail in all felony cases. The 70 percent figure results from use of rates of rearrest among persons indicted for robbery.
fender toward his society. Where there is a rejection of the fundamental norms of society by the commission of a serious crime, there is a greater likelihood that an offender will commit other depredations if free. Examples of such crimes might be murder, rape, arson, robbery, assault with a deadly weapon, and housebreaking. A Department of Justice study in 1967 supports this view.\textsuperscript{124} A sample day was chosen, November 25, 1966, to compile case studies of all defendants appearing on bail hearings before one judge in the District Court for the District of Columbia. The judge heard bail motions on behalf of 17 defendants in connection with 15 separate felony cases: 10 robberies, 2 homicides, 2 rapes, 1 concealed deadly weapon charge, 1 narcotics violation, and 1 forgery violation. In almost every case the defendants had extensive criminal arrest records, including several charges still pending at the time of arrest for the present offenses.\textsuperscript{125} These defendants had a total of 173 prior arrests against their records. Of the 17 defendants, 13 were released on varying conditions. After release and before trial, 8 of the 13 defendants were rearrested for 18 subsequent offenses, 8 of which were felonies.\textsuperscript{126} Other instances could be cited.\textsuperscript{127}

The President's District of Columbia Crime Commission found that accused felons tend to commit felonies of the same type as the original offense; in fact, more than 80 percent of those studied committed crimes on release as serious or more serious than the original offense.\textsuperscript{128} The more serious categories of crimes repeated while on bail were robbery, housebreaking, and narcotics offenses. The study also showed that murder charges against persons on bail who were originally charged with serious felonies were not uncommon.\textsuperscript{129} The high degree of repeat crime while on bail by robbers, housebreakers, auto thieves, and narcotics offenders was similarly documented through a study of the dockets and criminal case files of the United States District Court for the District of Columbia.\textsuperscript{130}

Other studies of repeat crime by accused felons during release support these findings. A study by the District of Columbia Metr-
politan Police Department determined that 31.6 percent of persons indicted for armed robbery in fiscal year 1967 were reindicted for subsequent offenses while on bail.  

The largest study, by the United States Attorney’s office in the District of Columbia, gathered data on persons indicted for robbery in calendar year 1968 in the United States District Court for the District of Columbia and measured the rearrests among those persons. It found that about 70 percent of the persons indicted for robbery and released on bail were rearrested.

Studies also show that narcotics addicts are likely to commit additional crimes if released on bail. The narcotic habit has become so costly for many addicts that it can only be supported by serious crime. A study by the United States Attorney’s office for the District of Columbia found reindictment among narcotic offenders to be the second highest category of offense. Also, testimony received during the Constitutional Rights Subcommittee hearings in 1969 supports the high probability of additional crime by narcotic addicts.

In addition to the nature of the offense committed, another important criterion for determining whether a defendant should be detained prior to trial is the defendant’s past record. The President’s District of Columbia Crime Commission found in its study of persons who allegedly committed offenses while on bail that 88 percent had adult arrest or conviction records before release on bail.

The Stanford Research Institute study showed that 81 percent of convicted felons had prior adult records. Studies made by the United States Attorney’s office for the District of Columbia similarly showed a substantially higher rate of prior convictions among persons who allegedly committed offenses while on bail.

The foregoing studies indicate that the commission of crime by the recidivist criminal is a problem of growing significance in our society. Preventive detention may offer a reasonable solution to that problem.

134. *Hearings on Bail Reform Act Amendments*, *supra* note 15, at 121.
135. *President’s Commission on D.C. Crime*, *supra* note 60, at 518.
VI. PROPOSED PREVENTIVE DETENTION LEGISLATION

A. CATEGORIES OF DEFENDANTS

As previously mentioned, the Senate is presently considering four pieces of legislation concerning preventive detention. Of the four, S. 2600 defines more specifically the categories of defendants who should be subject to pretrial detention where release conditions would not adequately protect the public safety. Due to the high recidivist rate shown by existing studies of dangerous crimes, S. 2600 makes a defendant charged with any one of the specified crimes subject to pretrial detention. In brief, these crimes are: robbery with the use of force or threat of force, burglary of premises used for dwelling or business, rape and related dangerous sex offenses, arson of premises used for dwelling or business, and sale of narcotic or depressant or stimulant drugs. The crimes included stress the danger element of the offense and are not tied to past conduct.

A second category of the bill, more broadly defined, includes the full range of violent offenses. Under these provisions the defendant must have allegedly committed at least two crimes of violence to be subject to pretrial detention. If he is charged with a crime of violence while on release, probation, or parole for committing such a crime, or if he is charged with a crime of violence and has a prior conviction of such a crime, he can be detained under the bill.

A third category covers narcotic addicts who are charged with a crime of violence. Under the bill's definition, an addict supporting his habit by petty larceny is excluded but when it appears he has graduated to serious crimes, he may be subject to detention. A final category covers those persons, who, irrespective of the offense charged, obstruct justice by threatening witnesses or jurors.

S. 289, the least specific of the Senate bills, would authorize detention of all defendants charged with crimes of violence who have previously been convicted of similar crimes.

S. 546 does not make a distinction between dangerous crimes and crimes of violence as does S. 2600 but is more specific than S. 289. It permits detention of persons who allegedly committed felonies while on release for prior felony charges or pending appeal of such charges. Also permitted under S. 546 is the detention of persons charged with felonies involving serious bodily harm or the threat of harm. However, the government must file an affidavit alleging that the defendant will harm another person or pose a substantial danger of harm to other persons or to the community due
to his prior pattern of antisocial behavior. Finally, persons charged with armed robbery or other similar crimes involving the use of force may be detained. In all categories of defendants under this bill, except that of armed robbery or other similar crimes, there must be evidence of past dangerous conduct by the defendant to justify his detention. Persons who threaten witnesses or jurors can be detained under this bill only if they qualify for detention on one of these separate grounds as well. Moreover, neither narcotic addicts involved in serious crime nor narcotic pushers are included under specific categories even though the evidence would appear to be substantial that these categories of defendants are clear threats to public safety. By comparison, any defendants who threaten witnesses or jurors, addicts involved in serious crime, and narcotic pushers can be detained under S. 2600.

S. 2920 is also more limited in the categories of defendants subject to detention than S. 2600. This bill would authorize detention of a person charged with or convicted of a felony who, during release on bail, probation, or parole is charged with a second felony of the same kind. Both charges must involve the use of a dangerous weapon or deadly physical force resulting in serious bodily injury to another. Therefore, persons without prior records who are charged with dangerous crimes cannot be detained under this bill whereas they can be under S. 2600 and S. 546. Thus, S. 2920 is similar to S. 289 in that both require a previous offense, although S. 289 requires conviction for that previous offense and S. 2920 only requires a pending charge. This class of defendants, with past records or pending charges, is much more fully covered under S. 2600 by its “crimes of violence” category.

The category most common to these bills is that which permits pretrial detention where the defendant has been charged with a serious offense while on release, probation, or parole. Both this category and the category which allows detention where there is a prior conviction of a violent crime are based on a similar theory. Where there is substantial evidence that if a person has established a continuing pattern of serious antisocial behavior, he will continue such behavior. Recidivism statutes are based on the same principle. This parallel was drawn by the Judicial Council Committee Report, which stated:

These [recidivism] statutes contain an element of an attempt to predict future conduct: namely, that the individual, if released, will probably commit another crime. These statutes also embody a judgment that balances the rights of the individual to be free against the rights of so-
ciety to be protected from probable criminal activity, and, under specified circumstances, permit deprivation of freedom based upon the individual's likelihood to commit criminal activity of some nature.138

Only S. 546 and S. 2600 extend their coverage to permit detention without requiring evidence of the individual's past criminal conviction or antisocial behavior. These additional categories are based on evidence from extensive studies that certain types of serious felons, regardless of past record, pose a serious danger to the community. Where there is strong evidence that a defendant is such a felon, it may be necessary to detain him pending trial to protect the public from the high probability of harm.

B. PROCEDURAL SAFEGUARDS

In order to protect the rights of the defendant and the integrity of the judicial process, a hearing must be held before any pretrial detention is ordered. During the hearing, the advocacy process can best be preserved and the defendant's rights to due process best protected if the defendant has the right to counsel, to testify, and to present and cross-examine witnesses. Three of the bills, S. 2600, S. 546, and S. 2920 specify such defendant rights.

To avoid undue judicial discretion on detention orders and to perfect the right of appeal of those orders, the judge's finding of fact and his reasons should be set forth in writing. Again S. 2600, S. 546, and S. 2920 permit appeal of such orders and also require that findings of fact and reasons be set forth by the judge.

S. 2600 requires a full pretrial detention hearing which may be held on the judge's own motion or on that of the government. The judicial officer must make the determination with differing quantums of proof for three issues. There must be clear and convincing evidence that the person has committed a dangerous crime, crime of violence, or an offense interfering with the administration of justice. Also, as provided in the bill, there must be reasonable evidence that conditional release will not protect the public and substantial probability that the person committed the offense for which he is charged. The last finding is an added protection for the defendant and prevents detention in weak cases.

S. 546 provides that a full evidentiary hearing be held on motion of the government. The judge is required to make a determination based upon clear and convincing evidence. Two findings must be made: that the defendant would, if released, interfere with the

138. JUDICIAL COUNCIL COMMITTEE REPORT, supra note 113, at 33.
administration of justice, harm a person, or commit a robbery or other serious crime; and that conditional release would not protect the public.

S. 289 adopts the existing hearing provision in the Bail Reform Act of 1966. That Act does not require a separate detention hearing nor does it provide any procedural standards. Therefore, detention under S. 289 would be a matter for judicial discretion at the time of defendant's initial appearance before the judge.

S. 2920 provides for a full evidentiary hearing upon motion of the government. The hearing is to be held before a three-judge panel of the district court and the determination must be based on clear and convincing evidence. Two primary findings are required: that the pretrial release of the defendant will pose a danger to any person or to the community; and that there is strong likelihood that the person charged committed the crime.

C. Fair Trial

As previously mentioned, in some cases, a defendant who is detained in jail pending trial may be effectively denied the assistance of counsel required by the Sixth Amendment to the Constitution because he cannot aid in the preparation of his defense. Detention might, it is argued, prevent him from seeking witnesses who may aid his defense or from gathering evidence. It has also been recognized that the simple problem of arranging meetings between a defendant and his lawyer may substantially interfere with the right to effective counsel. Neither S. 546 nor S. 289 addresses itself directly to this issue. However, S. 2600 and S. 2920 consider the implications of the Sixth Amendment and make provisions to accommodate them.

Under S. 2600, anyone who is detained would be able to effectively assist in the preparation of his case, consult with his lawyer, and even secure release, for good cause, for limited periods, to obtain evidence or witnesses. The defendant is also to be placed in separate facilities where practicable.

S. 2920 permits the defendant to be committed civilly rather than in a jail. Also, he must be given reasonable opportunity to consult with counsel, and he may, for good cause, be released under supervision to prepare his defense.

Three of the bills, S. 2600, S. 546, and S. 2920, also recognize that

139. See text at notes 70-77 supra.
the trial of the detained person should be expedited to lessen individual loss of freedom and to insure that the defendant does not lose his ability to defend himself due to any psychological pressures of detention while awaiting trial.\textsuperscript{141} Moreover, as the ABA Advisory Committee on the Criminal Trial in its 1967 Report on Standards Relating to Speedy Trial suggested, "[f]rom the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge . . . [and] to maximize the deterrent effect of prosecution and conviction . . . ."\textsuperscript{142}

Along with recommending speedy trials, three of the bills limit the actual period of detention. S. 546 provides for a 30-day limit; S. 2600 a 60-day limit; and S. 2920 a 30-day limit, with a possible 10-day extension for good cause shown.

If there is to be a reasonable relationship between the period of detention for a dangerous defendant and the time of his trial, the 60-day detention period is more appropriate. According to testimony at the Senate Constitutional Rights Subcommittee hearings in January, 1969, trial of serious felony cases cannot realistically begin until 45 to 60 days following arrest.\textsuperscript{143}

VII. CONCLUSION

In light of the appalling increase in the rate of crime since 1960\textsuperscript{144} and the growing evidence that recidivism among criminals is high,\textsuperscript{145} it is time for Congress to make some basic policy changes in our system of criminal law.

Extensive studies have been conducted concerning the problem of crime committed by persons accused of felonies while on bail for previous charges. It has been found that certain categories of defendants, such as those accused of armed robbery, show a high propensity to commit similar crimes while on bail. Since a number of robberies are being committed by defendants on bail for similar offenses, there is substantial reason to protect society from the depredations of such recidivist criminals, rather than releasing them pending their trial.

The judicial instinct to protect society from defendants who

\begin{itemize}
\item \textsuperscript{141} See 36 Geo. Wash. L. Rev. 178, 186 (1967).
\item \textsuperscript{142} Advisory Committee on the Criminal Trial, Report to the American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Speedy Trial 10-11 (1967).
\item \textsuperscript{143} Hearings on Bail Reform Act Amendments, supra note 15, at 10.
\item \textsuperscript{144} Federal Bureau of Investigation, Uniform Crime Reports for the United States-1968, at 4 (1969).
\item \textsuperscript{145} Judicial Council Committee Report, supra note 113, at 18.
\end{itemize}
pose an obvious danger cannot continue to operate without restraint. It can and must be channeled into constructive procedures which limit the range of the judge's discretion and protect the rights of the defendant.

The statutory and constitutional history of federal bail establishes that the Eighth Amendment of the Constitution does not guarantee an absolute right to bail. Too many exceptions exist which have stood the test of time and Supreme Court review. Just as bail has been traditionally denied in capital cases, so it can properly be denied in noncapital cases if the standards and guidelines of the Congress are carefully drawn.

Further, the Fifth Amendment's guarantee to due process of law can be adequately protected in detention hearings by providing procedural safeguards and the right to judicial review.

Based on this history and on the existing studies of defendants in the federal bail system, the reform of the federal bail system begun in 1966 can reasonably be extended to include the dangerousness of the defendant as a consideration in setting conditions of pretrial release and by providing for pretrial detention when the public safety demands it.

Such further reforms can serve the highest of public policy objectives: speeding the administration of justice, strengthening the deterrent effect of the criminal law system for serious crimes, aiding law enforcement, and protecting the public safety.

Preventive detention will continue to be a controversial issue in the Congress. The exact form of a bill which can be approved cannot be predicted with certainty. It will have to contain, however, the basic safeguards outlined in S. 2600 and some of the other pending legislation.

Congress is in a position to move ahead rapidly on this legislation. It is my hope that carefully drawn amendments to the Bail Reform Act of 1966 can be enacted before the close of the 91st Congress.
APPENDIX "A"

Senate bills S. 288, S. 289, S. 546, S. 2600, and S. 2920 (see Appendix "B" infra) would amend the following provisions of Title 18, Chapter 207 of the United States Code:

§ 3146. Release in noncapital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

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.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account 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.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.
(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: Provided, That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

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

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court."

§ 3147. Appeal from conditions of release.

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken 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 remand the
case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly."

"§ 3148. Release in capital cases or after conviction.

A person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 unless the court or judge has more 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, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained. The provisions of section 3147 shall not apply to persons described in this section: Provided, That other rights to judicial review of conditions of release or orders of detention shall not be affected."

"§ 3150. Penalties for failure to appear.

Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

"§ 3152. Definitions.

As used in sections 3146—3150 of this chapter—

(1) The term 'judicial officer' means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the District of Columbia Court of General Sessions; and

(2) The term 'offense' means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress."

APPENDIX "B"

The pertinent provisions of the Senate bills discussed in the preceding article are as follows:
"S. 288
A BILL

To amend section 3146 of title 18, United States Code, in order to provide greater discretion to judicial officers in connection with the release of certain individuals charged with noncapital offenses when their release would pose a danger to other persons or to a community.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That subsections (a) and (b) of section 3146 of title 18, United States Code, are amended to read as follows:

"(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release (1) will not reasonably assure the appearance of the person as required, or (2) will pose a danger to other persons or to the community. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or provide the necessary protection against such danger, as the case may be, or, if no single condition gives that assurance, any combination of the following conditions:

"(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 or to provide such protection, as required, including a condition requiring that the person return to custody after specified hours.

"(b) In determining which conditions of release will reasonably assure appearance or provide such protection, the judicial officer shall, on the basis of available information, take into account 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.'"

"S. 289
A BILL

To amend section 3148(1) of title 18, United States Code, in order to authorize the denial of bail to certain individuals who are charged with crimes of violence and who have previously been convicted of similar crimes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 3148(1) of title 18, United States Code, is amended to read as follows: "(1) (i) who is charged with an offense punishable by death or (ii) who is charged with a crime of violence other than an offense punishable by death and who previously was convicted by a court of competent jurisdiction of the United States or of any State of any crime of violence and such previous conviction has not been reversed or set aside, or"

(b) Such section is further amended by adding at the end thereof the following new sentence: "As used in this section, the term 'crime of violence' means voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary, housebreaking, extortion accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any felony, arson punishable as a felony, or an attempt to commit any of the foregoing.'"

"S. 546
A BILL

To amend the Bail Reform Act of 1966 to authorize the conditional release or commitment to custody of certain persons charged with the commission of an offense punishable as a felony, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 207 of title 18, United States Code, is amended by inserting immediately after section 3146 the following new section:

"§ 3146A. Conditional release or commitment to custody in certain felony cases?

(a) At the time of a person's appearance before a judicial officer for release in accordance with the provisions of section 3146 of this title or at any time after the person's release pursuant to section 3146 of this title, the Government may request a special evidentiary hearing for the purpose of imposing the conditions of release or commitment to custody provided for by subsection (e) of this section. The Government's application for such a hearing shall be granted only if (a) the person is charged with the commission of a felony involving the infliction of or threat to inflict serious bodily harm on another while released pending trial of a prior felony charge or pending appeal from a conviction of a felony; or (b) the person is charged with the commission of a felony involving
the infliction of or threat to inflict serious bodily harm on another and the Government, by affidavit, alleges that, if released, the person will inflict serious bodily harm on another or pose, because of his prior pattern of behavior, a substantial danger to other persons or to the community; or (c) the person is charged with the commission of the offense of armed robbery or an offense punishable under the provisions of chapter 103 of this title. If the Government's application is granted, the person shall be committed to custody until after the special hearing and appellate review thereof have been concluded.

“(b) If the judicial officer grants the Government’s motion for a special evidentiary hearing, such hearing shall be held within two days, unless the person or his attorney requests a delay of the hearing.

“(c) Upon granting the Government’s motion, the judicial officer shall notify the person and his attorney of the time and place of the hearing. If the person is without funds to provide for the assistance of counsel for the hearing, the judicial officer shall appoint counsel to represent the person at the expense of the United States.

“(d) In conducting a hearing under this section, the judicial officer shall receive and consider all relevant evidence and testimony which may be offered. The person shall have the right to present evidence, and present and cross-examine witnesses. No testimony of the person at this hearing shall be admissible in any other judicial proceeding, nor shall the person waive his privilege against self-incrimination in any future judicial proceeding by testifying at this hearing.

“(e) If the judicial officer conducting the hearing under this section determines that there is clear and convincing evidence that the person if released will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice, or cause the death of, or inflict serious bodily harm upon, another, or participate in the planning or commission of the offense of armed robbery or any offense punishable under the provisions of chapter 103 of this title, the judicial officer shall impose upon the person any condition or combination of conditions of release set forth in section 3146(a) of this title which will reasonably protect against the dangers set forth in this subsection. If the judicial officer finds that a conditional release of the person under section 3146 of this title would not provide the necessary protection against the dangers set forth in this subsection, the judicial officer shall order the person committed to custody for a period not to exceed thirty days prior to his trial. The judicial officer shall state on the record his reasons for imposing any order of commitment to custody or the conditions of release.

“(f) Any person committed to custody or conditionally released under subsection (e) of this section shall have the right of appeal as provided in section 3147 of this title and any other rights to judicial review as provided by law,
“(g) The judicial officer who conducts the special evidentiary hearing provided for in this section shall not sit in any trial of the person for the offense which was the basis for the hearing.

“(h) Any person committed to custody under subsection (e) of this section shall have his case placed on an expedited trial calendar and the handling of motions and other preliminary matters pertaining to the case shall also be expedited. Continuances shall be granted only upon a showing of extraordinary cause. If a continuance is granted upon motion of the defense or if the trial of the person has begun but not been completed before the expiration of thirty days after the order of commitment to custody of the person, the person shall remain subject to the commitment order until the conclusion of the trial.

“(i) Any hearing under the provisions of this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. A copy of the record of such a hearing shall be made available at the expense of the United States to a person who was the subject of the hearing and who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.’”

“S. 2600
A BILL

To amend the Bail Reform Act of 1966 to authorize consideration of danger to the community in setting conditions of release, to provide for pretrial detention of dangerous persons, 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 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.”;

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

“(b) In determining which conditions of release, if any, 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 such person, his family ties, employment, financial resources, character and mental conditions, 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.”
(d) by deleting the period at the end of subsection (c), and adding ", and shall warn such person of the penalties provided in section 3150A of this title."; and
(e) by adding a new subsection:

"(h) The following shall be applicable to any person detained pursuant to this chapter:

(1) The person shall be confined, to the extent practicable, in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal.

(2) The person 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 for other proper reasons.

Sec. 2. Chapter 207 of title 18, United States Code, is amended by adding after section 3146 the following new sections:

§ 3146A. Pretrial detention in certain noncapital cases

(a) Whenever a judicial officer determines that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community, he may, subject to the provisions of this section, order pretrial detention of a person charged with:

(1) a dangerous crime as defined in section 3152(3) of this title;

(2) a crime of violence, as defined in section 3152(4) of this title, allegedly committed while on bail or other release, or probation, parole or mandatory release pending completion of a sentence, if the prior charge is a crime of violence, or if the person has been convicted of a crime of violence within the ten-year period immediately preceding the alleged commission of the present offense; or

(3) an offense who, 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.

(b) No person described in subsection (a) of this section shall be ordered detained unless the judicial officer—

(1) holds a pretrial detention hearing in accordance with the provisions of subsection (c) of this section;

(2) finds that—

(A) there is clear and convincing evidence that the person is a person described in subsection (a) of this section;

(B) based on the factors set out in subsection (b) of section 3146 of this title, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

(C) except with respect to a person described in subparagraph (3) of subsection (a) of this section, on the basis
of information presented to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and

"(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

"(c) The following procedures shall apply to pretrial detention hearings held pursuant to this section:

"(1) Whenever the person is before a judicial officer, the hearing may be initiated on oral motion of the United States attorney.

"(2) Whenever the person has been released pursuant to section 3146 of this title and it subsequently appears that such person may be subject to pretrial detention, the United States attorney may initiate a pretrial detention hearing by ex parte written motion. Upon such motion the judicial officer may issue a warrant for the arrest of the person and such 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.

"(3) The pretrial detention hearing shall be held immediately upon the person being brought before the judicial officer for such hearing unless the person or the United States attorney moves for a continuance. A continuance granted on motion of the person shall not exceed five calendar days, in the absence of extenuating circumstances. A continuance on motion of the United States attorney shall be granted upon good cause shown and shall not exceed three calendar days. The person may be detained pending the hearing.

"(4) The person shall be entitled to representation by counsel and shall be entitled to present information, to testify, and to present and cross-examine witnesses.

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

"(6) Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but such testimony shall be admissible in proceedings pursuant to sections 3150, 3150A, and 3150B of this title, in perjury proceedings, and as impeachment in any subsequent proceedings.

"(7) Appeals from orders of detention may be taken pursuant to section 3147 of this title.

"(d) The following shall be applicable to persons detained pursuant to this section:

"(1) To the extent practicable, the person shall be given an expedited trial.

"(2) Any person detained shall be treated in accordance with section 3146 of this title—

"(A) upon the expiration of sixty calendar days, unless the trial is in progress or the trial has been delayed at the request of the person; or
“(B) whenever a judicial officer finds that a subsequent event has eliminated the basis for such detention.

“(3) The person shall be deemed detained pursuant to section 3148 of this title if he is convicted.

“(e) The judicial officer may detain for a period not to exceed five calendar days a person who comes before him for a bail determination charged with any offense, if it appears that such person is presently on probation, parole, or mandatory release pending completion of sentence for any offense under State or Federal law and that such person may flee or pose a danger to any other person or the community if released. During the five-day period, the United States attorney or the Corporation Counsel for the District of Columbia shall notify the appropriate State or Federal probation or parole officials. If such officials fail or decline to take the person into custody during such period, the person shall be treated in accordance with section 3146 of this title, unless he is subject to detention pursuant to this section. If the person is subsequently convicted of the offense charged, he shall receive credit toward service of sentence for the time he was detained pursuant to this subsection.”

“§ 3146B. Pretrial detention for certain persons addicted to narcotics

“(a) Whenever it appears that a person charged with a crime of violence, as defined in section 3152(4) of this title, may be an addict, as defined in section 3152(5) of this title, the judicial officer may, upon motion of the United States attorney, order such person detained in custody for a period not to exceed three calendar days, under medical supervision, to determine whether the person is an addict.

“(b) Upon or before the expiration of three calendar days, the person shall be brought before a judicial officer and the results of the determination shall be presented to such judicial officer. The judicial officer thereupon (1) shall treat the person in accordance with section 3146 of this title, or (2) upon motion of the United States attorney, may (A) hold a hearing pursuant to section 3146A of this title, or (B) hold a hearing pursuant to subsection (c) of this section.

“(c) A person who is an addict may be ordered detained in custody under medical supervision if the judicial officer:

“(1) holds a pretrial detention hearing in accordance with subsection (c) of section 3146A of this title;

“(2) finds that—

“(A) there is clear and convincing evidence that the person is an addict;

“(B) based on the factors set out in subsection (b) of section 3146 of this title, there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and
“(C) on the basis of information presented to the judicial officer, there is a substantial probability that the person committed the offense for which he is present before the judicial officer;

and

“(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

“(d) The provisions of subsection (d) of section 3146A of this title shall apply to this section.”

Sec. 3. Section 3147 of title 18, United States Code, is amended:

(a) by changing the title to read:

§ 3147. Appeals from conditions of release or orders of pretrial detention.

(b) by adding after the phrase “the offense charged,” in subsection (b) the phrase “or (3) a person 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”.

Sec. 4. Section 3148 of title 18, United States Code, is amended by striking out the last sentence and adding “The provisions of section 3147 shall apply to persons described in this section.”

Sec. 5. Section 3150 of title 18, United States Code, is amended:

(a) by adding the letter “(a)” before the word “Whoever”.

(b) by inserting the phrase “or prior to surrender to commence service of sentence” (1) after the word “chapter” and (2) after the word “certiorari”;

(c) by deleting the phrase “or imprisoned not more than five years” and inserting in lieu thereof the phrase “and imprisoned not less than one year and not more than five years”;

(d) by deleting the phrase “or imprisoned for not more than one year” and inserting in lieu thereof the phrase “and imprisoned not less than ninety days and not more than one year”; and

(e) by adding at the end thereof the following new subsections:

“(b) Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is willful. Whether the person was warned when released of the penalties for failure to appear shall be a factor in determining whether such failure to appear was willful, but the giving of such warning shall not be a prerequisite to conviction under this section.

“(c) The trier of facts may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made and (2) the defendant, by his own actions, has frustrated the receipt of actual notice.

“(d) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.”
Sec. 6. Chapter 207 of title 18, United States Code, is amended by adding after section 3150 the following new sections:

"§ 3150A. Added penalties for crimes committed while on release

"Any person convicted of an offense committed while released pursuant to section 3146 of this title shall be subject to the following penalties in addition to any other applicable penalties:

"(1) a term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while released; and

"(2) a term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while released.

"The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to conviction under this section.

"Any term of imprisonment pursuant to this section shall be consecutive to any other sentence of imprisonment.

"§ 3150B. Sanctions for violation of release conditions

"(a) A person who has been conditionally released pursuant to section 3146 of this title and who has violated a condition of release shall be subject to revocation of release and an order of detention 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 such 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 and detention shall be entered unless, after a hearing, the judicial officer finds that—

"(1) there is clear and convincing evidence that such person has violated a condition of his release; and

"(2) based on the factors set out in subsection (b) of section 3146 of this title there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

The provisions of subsections (c) and (d) of section 3146A of this title shall apply to this subsection.

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

"(d) Any warrant issued by a judge of the District of Colum-
bria Court of general sessions for violation of release conditions or for contempt of court, for failure to appear as required, or pursuant to subsection (c)(2) of section 3146A of this title, may be executed at any place within the jurisdiction of the United States. Such warrants shall be executed by a United States marshal or by any other officer authorized by law."

Sec. 7. Section 3152 of title 18, United States Code, is amended by adding the following new paragraphs:

“(3) The term ‘dangerous crime’ means (1) taking or attempting to take property from another by force or threat of force, (2) unlawfully breaking and entering or attempting to break and enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (3) arson or attempted arson of any premises adapted for overnight accommodation of persons or for carrying on business, (4) rape, carnal knowledge of a female under the age of sixteen, assault with intent to commit either of the foregoing offenses, or taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen years, or (5) unlawful sale or distribution of a narcotic or depressant or stimulant drug, as defined by any Act of Congress and if the offense is punishable by imprisonment for more than one year.

“(4) The term ‘crime of violence’ means murder, rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper or indecent liberties with a child under the age of sixteen years, mayhem, kidnaping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

“(5) The term ‘addict’ means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954, as amended, so as to endanger the public morals, health, safety, or welfare.”

SEVERABILITY

Sec. 8. If a provision of this Act is held invalid, all valid provisions which are severable shall remain in effect. If a provision of this Act is held invalid in one or more of its applications, the provision shall remain in effect in all its valid applications."

“S. 2920
A BILL

To amend the Bail Reform Act of 1966 to authorize consideration of danger to the community in setting conditions of release, to provide for pretrial detention of dangerous persons, 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—
(1) by deleting in subsection (a)(5) thereof the following: "including a condition requiring that the person return to custody after specified hours";
(2) by deleting the third and fourth sentences of subsection (d) thereof; and
(3) by deleting in subsection (e) thereof the following: "or in the release of the person on a condition requiring him to return to custody after specified hours".
Sec. 2. (a) Chapter 207 of title 18, United States Code, is amended by adding immediately after section 3146 thereof the following new sections:
§ 3146A. Pretrial detention in certain noncapital cases
"(a) Whoever, after having been admitted to bail on a felony offense involving the use of a dangerous weapon or deadly physical force resulting in serious bodily injury to another, or after having been placed on probation or parole following conviction of any such offense, is charged with another such offense committed subsequent thereto may be the subject of a pretrial detention order in accordance with the provisions of this section.
"(b) Upon motion of the United States attorney, the arraignment of any person described in subsection (a) of this section shall be referred to a three judge panel of the United States district court (hereinafter referred to as the 'court'), which shall make the determination required by section 3146 of this chapter, and shall hold a hearing in accordance with the provisions of subsection (c) of this section for the purpose of determining whether such person should be released conditionally or detained pending trial.
"(c) Any person may be ordered detained pending trial if it is determined by the court at a hearing that—
"(1) there is clear and convincing evidence that such person is a person described in subsection (a) of this section;
"(2) the pretrial release of such person will pose a danger to any person or to the community;
"(3) the nature and the circumstances of the offense charged dictate that conditional release pursuant to the provisions of subsection (d) of this section will not reasonably assure the safety of any other person or the community; and
"(4) there is clear and convincing evidence that the person charged committed the alleged offense.
"(d) (1) In lieu of pretrial detention as authorized by subsection (c) of this section, the court may impose any one or more of the following conditions on the release of such person—
"(A) a condition requiring that the person be placed in the custody of a designated person or organization agreeing to supervise him;
"(B) a condition placing restrictions on the travel, associations, activities, conduct, or place of abode of the person during the period of release;

"(C) a condition requiring that the person return to custody after hours; or

"(D) any other condition deemed reasonably necessary to assure that such person will, if released, not pose a danger to any other person or to the community.

"(2) A court in authorizing the release of a person under this subsection shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

"(e) Whenever it is determined that a person shall be detained pending trial pursuant to subsection (c) of this section, or detained during specified hours pursuant to subsection (d)(1)(C) of this section, the court shall issue an order of detention which shall provide that—

"(1) such person be committed civilly to such place, other than a State or Federal prison or local jail regularly used for the incarceration of convicted offenders, as the court may deem proper;

"(2) such order will expire on the thirtieth day following its issuance, unless the trial on the charge is in progress or the trial has been delayed at the request of the person charged, or upon motion of the United States attorney, for good cause shown, the court in its discretion extends the order for an additional ten days; and

"(3) the person charged shall be afforded reasonable opportunity for private consultation with counsel and, for good cause shown, shall be released, upon order of any judge of the United States district court, in the custody of the United States marshal, or other appropriate person for limited periods of time to prepare defenses, or for other proper reasons.

"(f) A pretrial detention hearing held pursuant to the provisions of subsection (c) of this section shall be conducted in accordance with procedures designed to guarantee that—

"(1) the person charged is represented by counsel and allowed to present evidence, to testify, and to present and cross-examine witnesses;

"(2) evidence may be received without regard to the rules governing its admissibility in a court of law; and

"(3) testimony of the person charged given during the hearing shall be admissible in proceedings pursuant to sections of this chapter, in perjury proceedings, and as impeachment in any subsequent proceedings.

"§ 3146B. Pretrial conditional release in certain noncapital cases

"(a) Whoever is charged with a felony offense involving the use of a dangerous weapon or deadly physical force resulting in
bodily injury to another shall, upon his initial appearance before a judicial officer, be subject to the provisions of subsection (b) of this section.

“(b) Whenever it is determined by a judicial officer that the pretrial release of a person described in subsection (a) may pose a danger to any person or to the community, the judicial officer may impose, for a period not to exceed sixty days, any or all of the following conditions upon the release of the person charged—

“(1) require that such person report to a probation or parole officer, to a United States marshal or to any other designated person, periodically, but not more than once in any twenty-four hour period, disclosing his activities, whereabouts, associations, conduct, travel, and place of abode during the pretrial period;

“(2) require that such person be placed in the custody of a designated person or organization agreeing to supervise him: Provided, That such custody shall not involve total restraint or detention unless the person charged agrees to the same;

“(3) impose restrictions on the travel, associations, activities, conduct, or place of abode of the person during the period of release.

“(c) A judicial officer authorizing the release of a person under this section shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.”.

(b) The analysis of chapter 207 of title 18, United States Code, is amended by adding immediately after “3146. Release in noncapital cases prior to trial.” the following new items:

“3146A. Pretrial detention in certain noncapital cases.

“3146B. Pretrial conditional release in certain noncapital cases.”.

Sec. 3. (a) Section 3147 of title 18, United States Code, is amended to read as follows:

“§ 3147. Appeals from pretrial detention and conditional release orders in lieu of bail and as an alleged dangerous offender

“(a) A person who is detained in lieu of bail after review of his application pursuant to section 3146(d) or section 3146(e), and a person who is determined to be an alleged dangerous offender and is released on a condition requiring him to return to custody after specified hours pursuant to section 3146A(d)(1)(C) of this chapter, by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

“(b) With respect to any person who is determined to be an alleged dangerous offender and is the subject of a pretrial de-
tention order pursuant to section 3146A of this chapter, and any person who is detained in lieu of bail after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. An order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a).”

(b) The analysis of chapter 207 of title 18, United States Code, is amended by deleting

“3147. Appeal from conditions of release.”

and inserting in lieu thereof

“3147. Appeals from pretrial detention and conditional release orders in lieu of bail and as an alleged dangerous offender.”.

Sec. 4. Section 3150 of title 18, United States Code, is amended to read as follows:

“§ 3150. Penalties for failure to appear

“(a) Whoever, having been released pursuant to this chapter or prior to surrender to commence service of sentence, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari or prior to surrender to commence service of sentence after conviction of any offense, be imprisoned not less than one year or more than five years, or (2) if he was released in connection with a charge of misdemeanor, be imprisoned for not less than ninety days or more than one year, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

“(b) Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is willful. Whether the person was warned when released of the penalties for failure to appear shall be a factor in determining whether such failure to appear was willful, but the giving of such warning shall not be a prerequisite to conviction under this section.

“(c) The trier of facts may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made and (2) the defendant, by his own actions, has frustrated the receipt of actual notice.

“(d) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment.”

Sec. 5. (a) Chapter 207 of title 18, United States Code, is
amended by adding immediately after section 3150 the following new sections:

"§ 3150A. Additional penalties for crimes committed while on release

"Any person convicted of an offense committed while released pursuant to sections 3146, 3146A or 3146B of this title shall be subject to the following penalties in addition to any other applicable penalties:

"(1) a term of imprisonment of not less than one year and not more than five years if convicted of a felony committed by such a person while released; and

"(2) a term of imprisonment of not less than ninety days and not more than one year if convicted of a misdemeanor committed by such person while released.

"The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to conviction under this section.

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

"§ 3150B. Sanctions for violation of release conditions

"(a) A person who has been conditionally released pursuant to sections 3146, 3146A or 3146B of this chapter and who has violated a condition of release shall be subject to revocation of release and an order of detention 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 such 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 and detention shall be entered unless, after a hearing, the judicial officer finds that—

"(1) there is clear and convincing evidence that such person has violated a condition of his release; and

"(2) based on the factors set out in subsection (b) of section 3146 of this chapter there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community.

"(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than $1,000, or both.
“(d) Any warrant issued by a judge of the District of Columbia court of general sessions for violation of release conditions or for contempt of court, or for failure to appear as required, may be executed at any place within the jurisdiction of the United States. Such warrant shall be executed by a United States marshal or by any other officer authorized by law.”

(b) The analysis of chapter 3 of title 18, United States Code, is amended by inserting immediately after
“3150. Penalties for failure to appear.”
the following new items:
“3150A. Additional penalties for crimes committed while on release.
“3150B. Sanctions for violation of release conditions.”

Sec. 6. Section 3152 of title 18, United States Code, is amended
(1) by deleting the word “and” following the semicolon in paragraph (1); (2) by deleting the period at the end of paragraph (2) and inserting in lieu thereof a semicolon; and (3) by adding at the end thereof the following new paragraphs:
“(3) the term ‘felony offense’ means any offense for which a sentence to a term of imprisonment in excess of one year may be imposed;
“(4) the term ‘dangerous weapon’ means any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a knife, or blackjack, or any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable or [sic] causing death or other serious physical injury;
“(5) the term ‘deadly physical force’ means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious bodily injury;
“(6) the term ‘serious bodily injury’ means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ; and
“(7) the term ‘bodily injury’ means impairment of physical condition or substantial pain.”.

Sec. 7. If any provision of an amendment made by this Act is held invalid, all provisions which are severable shall remain in effect. If a provision of any amendment made by this Act is held invalid in one or more of its applications, the provision shall remain in effect in all of its valid applications.”