BAIL REFORM AND NARCOTICS CASES

HEARING

BEFORE THE

SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

FIRST SESSION

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WEDNESDAY, JULY 22, 1981

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL,
Washington, D.C.

The select committee met, pursuant to call, at 9:45 a.m., in room 2337, Rayburn House Office Building, Hon. Leo C. Zeferetti (chairman of the select committee) presiding.

Present: Representatives Leo C. Zeferetti, Charles B. Rangel, Tom Railsback, Benjamin A. Gilman, Lawrence Coughlin, Robert K. Dornan, E. Clay Shaw, Jr., and Robert L. Livingston.

Staff present: Patrick L. Carpentier, chief counsel; Roscoe B. Starek III, minority counsel; Edward Jurith, staff counsel; George Gilbert, staff counsel; and Jennifer A. Salisbury, assistant minority counsel.

Mr. ZEFERETTI. Good morning, ladies and gentlemen.

Today, the Select Committee on Narcotics Abuse and Control will conduct a hearing on the question of bail reform with a particular emphasis on the issue of bail as it relates to narcotics traffickers. This hearing was prompted by the fact that there have been countless reported instances of major narcotics traffickers posting large amkujts of money bail and then failing to appear in court, despite pleas by prosecutors during arraignment that these offenders would not reappear.

The issue of bail reform has been of foremost concern this session of Congress. Both the Chief Justice of the United States and the Attorney General have spoken out for the need for revision of the Federal bail laws to insure that persons who present a danger to the community, including drug traffickers, not be permitted to be released on bail a.d commit further crimes.

Figures compiled by the select committee show that in the 10 demonstration districts within the pretrial services agencies of the U.S. courts, over the last 5 years, 53 percent of the bail violators still at large were originally charged with narcotics violations. Even more shocking is the fact that in the southern district of Florida, which includes Miami, the major entry point of drug traffickers, approximately 62 percent of the Federal defendants who failed to appear in court were charged with drug offenses.

These figures clearly confirm that major narcotics offenders cannot be considered safe bail risks. These offenders have the ability to place themselves beyond the reach of law enforcement officers, the ability to flaunt our judicial system, and the ability to continue their illegal trafficking alternatives.

The Select Committee on Narcotics Abuse and Control has a responsibility to the Congress and to the Nation to investigate the

present bail system which allows narcotics offenders to easily evade justice.

This morning, we will hear a broad range of testimony from individuals who have dealt with the issue of bail within the criminal justice system.

Before we begin testimony today, I invite my colleague, Mr. Railsback, to make an opening statement.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I want to join with you in welcoming our very distinguished guests, and to commend you for conducting what I believe is a very timely hearing to really reexamine the statutory criteria used by the judicial officers in granting bail. Our current Federal bail laws are a cause of concern, I think, to those who serve both in our judiciary as well as the law enforcement community.

The Congress has not seriously studied the bail issue since 1966 when the Bail Reform Act was passed. The act established procedures which would eliminate those discriminatory situations in which pretrial release would be denied to indigent defendants simply because he or she was incapable of posting bail through a surety.

However, Mr. Chairman, in 1966, narcotics trafficking was not an overwhelming problem in this country, and the drafters of the original Bail Reform Act could not have foreseen that some of the features of the act would lose their significance for insuring that major narcotics traffickers would appear at trial.

During the course of my tenure on the select committee, I have heard numerous law enforcement officials complain that drug smugglers consider bail to be part of the cost of doing business. Apparently, many smugglers prefer to forfeit the bail posted and flee the jurisdiction rather than risk conviction and a long prison sentence.

I hope that the witnesses will share with us their opinions on the adequacy or inadequacy of our present bail statutes and provide us with specific proposals on how the Congress can amend the laws to insure that narcotics traffickers will go to trial once they are apprehended.

Again, Mr. Chairman, I want to commend you for holding hearings on this very important subject.

I would just say that I am delighted that our first two witnesses are members of the House Judiciary Committee, of which I am a member. I think that that is the kind of cooperation that we need to solve many of our drug enforcement problems.

Mr. ZEFERETTI. Thank you, Mr. Railsback.

Our first panel this morning has two colleagues who will have opening statements and testimony, the Honorable William J. Hughes, who is the chairman of the House Judiciary Subcommittee on Crime; and the Honorable Harold S. Sawyer, who is the ranking minority member of the same subcommittee.

I would ask Mr. Sawyer to come up, please.

Mr. Hughes, I understand, is on his way. Hopefully, you can start off this hearing this morning. And then Bill, as soon as he gets in, we will ask him to sit and join you at the table.

I welcome you this morning, and I thank you. I thank you not only for being our opening witnesses, but in having the kind of

expertise and concern in this area that I think can make an impact on the overall problem. I welcome your testimony.

TESTIMONY OF HON. HAROLD S. SAWYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. SAWYER. Thank you, Mr. Chairman, and thank you for the opportunity to appear before the select committee.

Bill Hughes and I see eye to eye on the subject of bail reform and have been working recently on it. We are on the Crime Subcommittee, he is chairman and I am ranking. We have general jurisdiction with oversight of DEA and are deeply concerned about drug-related crimes.

I may say that both Bill Hughes and I were former urban prosecutors, so we have had some firsthand experience; Bill for some 10 years as a first assistant, myself as the prosecutor for 2 years. Both of us were in urban areas that have drug problems along with all the other problems that a community of 500,000 can have.

I may say that I have spent some 30 years practicing law full time. Congress has been rather a second and new career for me. I like to say, and not totally in jest, that I may be the only attorney in the country who has both defended and prosecuted 10 first-degree murder cases, 5 on the prosecution side and 5 on the defense. So I have had a little bit of both. I may say it is about the only kind of case I never lost. So I have had some firsthand knowledge of criminal law.

Our subcommittee has also held hearings down in the Miami area concerning bail reform, and we actually processed a bill up to the full committee which concerned pretrial service agencies. The bill was really designed to give a judge a better feel and more information in making the determination whether or not a person ought to be allowed bail.

I attempted to add an amendment which ran into a germaneness problem, but which, in effect, would change the Bail Reform Act because I was concerned with exactly the same problem your chairman has mentioned: jumping bail has become just a method of doing business, a normal business overhead for people in the drug trade. Horrendous percentages of those who have jumped bail are for drug-related charges. Drug dealers think, apparently, very little of jumping a $1 million cash bail and then just writing it off to the cost of doing business.

As a matter of fact, we talked to Peter Bensinger, the former head of the DEA, when he testified before our Crime Subcommittee. A Federal judge had just put a $23 million cash bail on a drug defendant. We asked Mr. Bensinger did he think that was enough, and he said, very frankly, he wasn't sure, that drug racketeers were perfectly prepared to walk away from sums of money that are that significant.

Drugs are now the biggest business in the whole State of Florida, even eclipsing the tourist business, so that it is estimated to be around $7 billion annually and approximately $65 billion nationally. Perhaps illegal narcotics is our biggest business nationally.

You can see how something other than just allowing drug dealers out on the posting of cash bail ought to be the routine.

I have a bill in before the Crime Subcommittee which will create a rebuttable presumption that any assets that are owned by a drug trafficker and which came from illegal profits in drugs are subject to forfeiture. This, in effect, uses the IRS procedure to put the burden over the dealer to prove that the assets came from some legitimate source. Otherwise the presumption will prevail. Walking out on large bail postings has become almost standard procedure and I am concerned about it.

I feel, and I believe the chairman of our subcommittee, Bill Hughes, feels, too, that we have to allow the courts to take into consideration more even than just the defendant's likelihood to appear. Drug dealers, like burglars, are the two types who do this regularly. They go out and earn their legal fees by pursuing their drug dealing or burglarizing during the period that they are released on bail and until they come up for trial.

It seems to me ridiculous to require the Federal judges to close their eyes to that fact, and not to be able to legitimately take into account the danger to the community that these people pose.

In our subcommittee we interviewed a number of the judges and, in fact, many of them do take that into account. But the judges have to do it in a backhanded way. Their official language focuses only on the defendant's likelihood or unlikelihood to appear.

It strikes me that there is no point in making judges develop fictitious reasons when the real reason, and I think a very legitimate consideration, is the danger that the person poses to the community.

There is only one case, a sixth circuit court of appeals case, *Wind* v. *United States,* which is ambivalent and indicates that a judge can, in sort of a vague way, take into account either danger or threats to witnesses and/or danger to the community, but the case is not clear. This is the only case that has recognized that judges can take into account, under the Bail Reform Act, anything except likelihood to appear.

It further strikes me that in light of the history we have had with drug-related crimes and bail jumping, that if a defendant is charged with major drug dealing, that fact in and of itself should constitute grounds for doubting the likelihood to appear. Certainly the statistics bear that out.

I yield my time.

Mr. ZEFERETTI. Before we go further, Mr. Sawyer, I want to include into the record, without objection, your written statement, to make it part of the record.

[The prepared statement of Mr. Sawyer follows:]

PREPARED STATEMENT OF HON. HAROLD S. SAWYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, Mr. Railsback, and Members of the Select Committee on Narcotics, I am pleased to appear before you today to address an issue which captured my concern early in the Crime Subcommittee's investigation into the drug problem in this country. In preparing for our first hearing, I came across an article in a national news magazine which discussed the need for bail reform in this country. In that article, one United States Marshal in the South Florida region observed that of the 365 escapees for whom he was searching, 350 had been charged with drug-related crimes. That's 96 percent!

At the hearing, the then-Administrator of the DEA, Peter Bensinger, highlighted the problem when he estimated that for every three arrests, there is one fugitive.

He also pointed out that drug dealers can easily post million-dollar bonds. When our Subcommittee visited Miami last month, we heard similar testimony.

Clearly, the "life's blood" of the drug trade is cold, hard cash. That presents us with two alternatives in the area of bail reform: We can deal with the drug traffickers in their chosen medium, or we can face the problem head-on by acknowledging that in certain cases, individuals who present this sort of danger to the community should be incarcerated prior to trial. My study of bail reform during the last six months leads me to conclude that the latter is not only the most practical choice that we can make, but the most just.

Let me explain at the outset why merely increasing the amount of bail does not solve our problems. The Eighth Amendment says that "excessive bail shall not be required." I do not subscribe to the school of constitutional thought that there is a constitutional right to bail under any and all circumstances. Certainly, in the time of the Founding Fathers, many of the crimes for which we think preventive detention might be appropriate, such as certain murders, would have been non-bailable offenses because they were punishable by death. Some people have argued that this was not due to any concern for the safety of the community, but the result of an assumption that a person who was charged with a crime punishable by death would most likely flee. I simply cannot believe that the Founding Fathers, after charging us with the protection of innocent citizens, intended to prevent us from legislating in this area. Seven of the nine members of the District of Columbia Court of Appeals recently held that we had that power in *U.S.* v. *Edwards.* Of course, the Founding Fathers, in their relative innocence, never contemplated the kind of danger that a drug trafficker might pose to the community.

Although the Eighth Amendment does not prevent us from legislating, it does express a feeling that we all share—that absent egregious circumstances, no one should be denied his freedom pending trial, for purely financial reasons, since he is innocent until proven guilty and must be given every necessary opportunity to prepare his defense. Considering some of the bail amounts that drug traffickers have been able to pay in recent times, I sometimes wonder if any amount is beyond their reach.

This leaves us with the second alternative: facing up to the problem and acknowledging, somewhat reluctantly perhaps, that under certain conditions, we must detain individuals prior to trial or while they are awaiting sentencing and appeal. This approach enjoys several advantages. First, we are being honest with ourselves. Similarly, judges can openly acknowledge the factors behind their decisions to incarcerate individuals prior to trial. The Subcommittee on Crime received countless testimony from decent, conscientious, and well-meaning judges who, under the present situation where they are not permitted to consider danger to the community, set money bail at a high rate allegedly because the defendant might fail to appear. The real reason, of course, is that the defendant would pose a danger to the community and to release him would be an affront to common sense. This sort of situation fosters disrespect for the law and should be corrected immediately.

Once we openly acknowledge preventive detention, we can specify procedural safeguards to insure that no individual will be incarcerated without due process. In the District of Columbia, for instance, these safeguards have resulted in the incarceration of only 55 individuals in a period of 11 years. Thus, we do not envision a situation where thousands of persons presumed innocent will be incarcerated.

Mr. Chairman, I firmly believe that bail reform is as imperative in 1981 as it was in 1966. To that end, I am hopeful that our Subcommittee will soon consider and act on federal bail laws in the context of drug-related crime and pretrial services.

Mr. ZEFERETTI. At this time I welcome the chairman of the Subcommittee on Crime, Mr. Hughes. Thank you for coming this morning, and thank you for adding your expertise in this area. I know you have held hearings down in Florida on this whole issue. So we welcome the knowledge that you bring to this committee.

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

Mr. HUGHES. Thank you, Mr. Chairman. Let me commend you and your colleagues on this very important Select Committee on Narcotics Abuse and Control for the work that they have done. You have provided a great deal of leadership. We are deeply indebted to you for your work.

I have a statement which I would appreciate the committee receiving into the record.

Mr. ZEFERETTI. Without objection, it will be made a part of the record.

[The prepared statement of Mr. Hughes follows:]

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

Mr. Chairman, I thank you for the opportunity to appear before you this morning. I commend your committee for its efforts to control the drug epidemic in this country, and for its wisdom in realizing that the drug problem is intimately connected with the functioning of the Bail Reform Act of 1966.

It has become quite clear that Congress needs to take a close look at how the pretrial release system is operating. While in 1966, when the Bail Reform Act was enacted, the critical issue was discrimination against the poor, in 1981, the critical issues are twofold. First, we must ensure that the act is sufficient to prevent defendants from fleeing prosecution. Second, we must protect society from defendants who may present no flight risk, but who present great risk that while on pretrial release, they will endanger the public. While the issue of bail reform is not directly before the Subcommittee on Crime, which I chair, the subcommittee has considered several areas, such as the operations of the Drug Enforcement Administration, and the pretrial services agencies, where the issue of flight risk and crime on bail cannot be avoided. The subcommittee, in a variety of hearings, has heard from a number of witnesses who contend that the Bail Reform Act must be amended to permit courts to consider the issue of danger when deciding whether to release a defendant pretrial. I have personally spoken with a number of judges who decry their lack of authority to consider this issue, and who quite candidly tell me that, in various indirect ways, they do so anyway. There are those who say that the present system is hypocritical and unfair to the public, just as in 1966 the system was unfair to the poor.

The factual situation is complex. In the Federal system, the 10 pretrial services demonstration districts provide the only accurate statistics on flight risk and pretrial rearrests. For the latest most complete reporting period, 2.3 percent of all defendants fled prosecution, and 4.6 percent of all defendants were rearrested pretrial. The majority of defendants who are rearrested pretrial are those originally charged with property crimes, as opposed to violent crimes. While these figures may seem low, in the view of judges and other officers of the court, there are Federal defendants who are released pretrial only to be arrested again for dangerous crimes. If the courts were permitted to consider dangerousness, these defendants would not be released to prey on society again.

The flight problem is more serious in some areas of the country than in others. The most prominent example is Florida, where the rate of prosecutions for narcotics offenses and the number of defendants who flee from narcotics prosecutions is astounding. As I have already noted, 2.3 percent of all defendants nationally jump bond; of this number, half are defendants charged with narcotics offenses. In Florida, the figures are 12.6 percent who flee, 60 percent of which are drug defendants. In other words, the rate of drug defendants in Florida who flee is 6 times the national average. These figures may exaggerate the problem somewhat, since 40 percent of the Florida drug defendants have only been charged, but never arrested. Some of them may not be aware that there are charges pending against them. But even excluding most of these defendants, it is clear that drug-related crimes are causing tremendous problems in Florida, and are representative of problems in other areas nationwide.

These figures show that there are two different problems one must consider in relation to the Bail Reform Act: flight risk and risk of danger. The Bail Reform Act provides judges with the necessary authority to impose conditions and even pretrial custody on those defendants who present a risk of flight. The problem in this regard seems to be that judges do not always exercise that authority. To a narcotics defendant, a money bond of $1.5 million may be easy to post, and no great loss to forfeit in exchange for avoiding prosecution. Courts must begin to set money bonds that are commensurate with the net worth of the defendants and Congress must make sure that they do. This committee might also consider codifying the right of the courts or the Government to refuse to accept a bond if the money for it comes from criminal activities. This right has already been granted the Government in a second circuit case. *U.S.* v. *Nebbia.*

There are a number of available alternatives that would help to reduce the risk of flight and danger to the community. The pretrial services agencies are the most outstanding example of one alternative. The Subcommittee on Crime held extensive hearings on these agencies, and found that the 10 demonstration districts have made remarkable progress in reducing rates of crime on bail and risk of flight. Pretrial supervision while on release has played a large part in these reductions, and the testimony before the subcommittee indicated that expansion of pretrial services would extend the success of the agencies throughout the country. Mr. Sawyer, the ranking minority member of the subcommittee, and I have therefore introduced H.R. 3481, to extend pretrial services to every Federal judicial district where the courts think it is necessary. Perhaps the condition set forth in 18 U.S.C. 3146(a)(1), which authorizes the court to place the defendant in the pretrial custody, and under the supervision, of a designated person or organization, should be made more explicit, and should provide for more extensive supervision by pretrial services organizations. Expansion of other conditions over a defendant released pretrial, and required urinalysis testing for defendants who are narcotics users, should also be considered. The subcommittee has recently held hearings on the operation of drug-testing facilities used by the courts, and I intend to introduce a bill to extend the authorization of these operations. Consecutive sentences for defendants convicted of committing crimes while on pretrial release is another possibility. We cannot allow defendants to violate the conditions of their release with impunity, and leave them free to prey on society because there are no consequences for their transgressions.

There is only one preventive detention statute in the country, and that is in the District of Columbia. Its constitutionality has recently been upheld by the District of Columbia Court of Appeals in *U.S.* v. *Edwards.* While a few States permit the courts to consider dangerousness in deciding what conditions to impose on a released defendant, only in the District of Columbia are courts permitted to detain a defendant pretrial. The advantage of a statute such as the District's is that it sets forth stringent procedures with which the Government and the court must comply before the defendant can be detained. We must and do recognize that the loss of liberty pretrial is a great hardship, and should be used only when clearly appropriate, and with safeguards to insure that the process is fair. This is why I am going to introduce a bill that will incorporate these provisions, procedures, and safeguards, into title 18 of the United States Code.

Mr. Chairman, the Bail Reform Act needs to be amended to deal with a number of problems, and I have touched on only some of them here this morning. As this committee has recognized, one of the most serious of these problems is presented by defendants charged with narcotics offenses. I commend this committee for conducting this hearing and I offer the services of my subcommittee to assist you in any way in this critical effort. Thank you for permitting me to address you.

Mr. HUGHES. My colleague, the ranking minority member of our subcommittee, I think, did a good job of outlining some of the things that we are doing in the Subcommittee on Crime.

I, likewise, share his enthusiasm for modifying the Bail Reform Act so that the courts may consider whether a defendant is a danger to the community. I think it is essential that we do that. The Subcommittee on Crime does not have direct jurisdiction over the Bail Reform Act or else I have no doubt we would have included some bail reform provisions in the Pretrial Services Act.

As you know, the pretrial services bill is before the Rules Committee at this point, held up because of arguments over its failure to address danger to the community. I intend to testify sometime next week before Bob Kastenmeier's subcommittee on that issue. I support a modified version of the D.C. preventive detention strategy which I think has had a very positive impact, although it hasn't been utilized as much as it perhaps could have been over the years because the courts have used monetary bail as the way of addressing this problem.

It seems to me that the protections in the D.C. law are ones that we can use as a guide in trying to develop the type of law that we need to permit judges to address the danger to the community.

It seems to me that we have got to make judges honest in that regard. Many of them that have appeared before our subcommittee acknowledge that indirectly they do address the problem of danger to the community. They do that when they consider light risk.

Well, in essence, they don't have the authority to do that. We think they should have the authority. And we think that trying to address it indirectly in that fashion where the law doesn't permit it is rather hypocritical. It undercuts what we are trying to do in improving our standards of justice, and particularly how people perceive the administration of justice.

So modifying the Bail Reform Act to permit judges to consider danger to the community, as well as the possibility of flight, is essential.

The pretrial services bill is another piece of legislation which we believe is very, very important in endeavoring to understand a lot more about defendants as they enter the criminal justice system. That bill, as you know, will enable us to provide that kind of information early on, when a defendant is first apprehended, so that the court can be made aware of as much information as possible about that defendant.

It also provides some degree of supervision during the time from a defendant's entry into the system until he or she appears before the court, either for trial or sentencing. It doesn't make sense to actually release a defendant on bail, as we have done in the past, and not really have contact with that defendant until he or she appears in court.

This system will also enable courts to have a lot more information if and when that defendant is convicted and before the bar for sentencing, so it can make a more intelligent judgment as to whether the defendant is a good risk for probation or whether or not the interests of justice require incarceration.

We received testimony last week on the subject of aftercare, a program of urinalysis for parolees and probation defendants. It is a system that enables us, where there is some indication that the defendant has had a history of drug abuse, to maintain some post-release supervision to determine whether or not he or she is back on heroin or other narcotic substances again.

That is important because we know that if in fact the defendant has started using drugs again, he or she is a very poor risk, and that information can be communicated to the court immediately. The court can then deal with the matter before we get into the area of rearrests or other problems with that particular defendant.

It is important that we consider a codification of the right of the court to refuse a bond in those instances where it appears the money comes from illicit sources. The courts already have that right under the case of *U.S.* v. *Nebbia.* But we think that it is important that we look at the need to codify that authority.

In the area of sentencing, we have a lot of work to do. The sentences right now for narcotics offenders, particularly class I violators, are ridiculously low. It is important, I think, that we review these penal sanctions and approach them from the standpoint of a comprehensive approach to sentencing. It seems to me that we ought to take into account such things as what type of a

violator do we have? Is the defendant a heavy trafficker in narcotics? That should be taken into account by the court.

We ought to have sanctions that will in fact be equal to the type of violator that we are dealing with.

It seems to me that we ought to be doing something about rearrests during the time that a defendant is free on bail. This committee will, I hope, look at the possibility of requiring consecutive sentences where a defendant is free on bail and gets convicted of another offense, particularly if it is a serious offense such as a narcotics offense.

Mr. Chairman, in essence, what I am saying is that I think that there are a lot of things that we can do to address the problems of narcotics offenders. Of all the problems facing this country in the crime area, I don't think any are as important at this point, at this time in our history, as narcotics offenses. I think that we have to give substance to the suggestion that we are going to war on crime. We can do that if we set ourselves realistic goals and fund our programs realistically.

I know the chairman and others are aware of the fact that just yesterday, we marked up a major anticrime bill, H.R. 3359. It has not been reported out. We are waiting for the task force on violent crime to report back.

But the bill, in my judgment, is an important one, perhaps one of the more important measures to move through the Congress in the area of crime. Title I of the bill provides for some 14 categories of successful LEAA programs. I know we have heard a lot of complaints about LEAA and, frankly, I join with the critics, because we spent a lot of money and it often was spent very foolishly.

But out of LEAA came some real success stories, such as the career criminal program, as I know the chairman is aware. It has been an immense help to the law enforcement community, and the Sting operations, and TASC and the community anticrime programs, such as Street Watch, and other programs in the community have been very successful.

We have taken those programs and put them into title I and provided a 50–50 matching grant program for the States. We have eliminated the redtape. We have insured that communities are going to be serious about the crime program when they apply for funds because they are going to be spending 50 percent of their own funds.

In title II of the bill, we have taken some suggestions that I have heard for years in my own travels in the law enforcement community. We have developed an emergency response provision to deal with situations like Atlanta, where the community finds that its crime problem is beyond its capability to handle, so that that community can petition for aid, just like a community can petition for hurricane aid or drought assistance, when it has an emergency. It can request formalized assistance of the Attorney General, whether it be task force assistance or resources. It is funded at a $20 million level.

We think it is important for us to bring to bear all the resources of the Federal Government in a formalized fashion. The Atlanta experience was a sad one in many respects, not the least of which was that the community's request for assistance bounced around

from agency to department to individual for several months before we finally provided assistance. That is because there was no clear-cut authority to provide aid.

In fact, when it was determined that we should assist with Federal funds, the Federal Government had difficulty finding a place to actually tap funds. We have taken care of that as well in title II of the bill.

So we think H.R. 3359 is a good anticrime package. It brings together the resources of the Federal Government in a true partnership with local and State governments. We think that this is important to the Nation if we really want to get serious about combating crime.

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

Mr. ZEFERETTI. I want to thank the two of you for really comprehensive statements, and also for giving us your insights as to what you think are some of the things that are necessary to have an impact on this whole problem.

One of the things I want to touch on is the pretrial sentences bill itself. I hope you work the jurisdictional problem out. I sat up in the Rules Committee when you came up with the bill. And I know, Mr. Sawyer, we had that problem with the germaneness of your committee having the jurisdiction to put that ingredient which I thought was so very, very important, to give the judge the tools to do his job properly, to determine whether or not a person, the offender, was a threat to the community, a threat to possibly a witness, or other problems that he might have.

I hope you will work that out. I hope in the committee process that you are about to get that germaneness of that amendment into the other subcommittee so that they could address that problem, and they could bring it before us as an instrument to fight this whole problem.

Mr. HUGHES. Let me just say that the matter is moving ahead in the subcommittee. It is not a matter over which the Subcommittee on Crime has direct jurisdiction over. I am satisfied that Bob Kastenmeier is moving ahead expeditiously. My colleague, Hal Sawyer, serves on that particular subcommittee.

I think it is important, however, since we are moving on the issue of danger to the community as a component of bail reform, that we free up the pretrial services bill, because even though there is some connection, they are different pieces of legislation, addressing somewhat different problems.

The pretrial service experience has been an excellent one. As you know, the 10 demonstration districts that we set up a few years ago have reported back, and their experience has shown very clearly that pretrial services works. It saves money in the final analysis. It has cut back on the number of rearrests. The number of people that are appearing for court appearances has increased. So it has only been successful from the standpoint of the supervision that has been provided, but it also has been successful in saving us resources.

Mr. ZEFERETTI. I don't want to get into that whole controversy. I would just hope, though, before we do anything with a bill, we have

the ingredients that give the judge the opportunity to do what he thinks is best.

Let me touch on just one area there. How do you feel about preventive detention? Aren't there some cases—and I know there is a constitutional question. People will argue one way or the other. But I feel there are times when a person has to be held without bail. I think that pretrial examination is the determining factor to make that determination whether or not that person is a danger or is about to become a dangerous person for the community or for whomever, or for whatever reason.

I think that is why it is so important that we hone in on that area, because to just give you a bill and just say, "OK, let it stand the way it is," I don't think we are doing anything to fight off that kind of person that is going to be a detriment to the community to anyone else.

I just think that if we are going to have a bill, the bill should have all the ingredients to make the judge's life a little bit easier.

We are very quick to take potshots at judges and say they are all kinds of things. But we don't give them the opportunity to have the tools in order for them to do their job. I am a believer that if we are going to have a piece of legislation, we should have it unique in the sense that it gives the opportunity to the magistrate or to the judge to do his job properly.

I just feel that, before we go further—and I think that is what you ran across in the Rules Committee, that there were those of us who felt very strongly that we thought that Mr. Sawyer's amendment did have the kinds of ingredients in it that would make the judge's job a little bit easier.

Mr. HUGHES. The problem, Mr. Chairman, is that we do not have jurisdiction over the Bail Reform Act. That is why the germaneness question was raised.

In our pretrial services bill, however, we do require that any danger to the community be reported to the judge, either at the time the defendant first appears before the court or anytime during the period when he or she is being supervised.

So I can tell you that our subcommittee feels that that is important. But you know how jurisdiction is around here.

Mr. ZEFERETTI. I know.

Mr. HUGHES. Some of these issues cut across many subcommittee jurisdictions. We are working at this point to address the danger to the community issue. I quite agree with you.

I think there are situations where pretrial detention is essential. If the defendant is a missile, a danger to the community, he or she shouldn't be out on bail.

As I say, I think that the D.C. Code has done a pretty decent job of crafting protections for the defendant, and yet still addresses the needs of society in protecting itself against people who should not be free on bail.

Mr. ZEFERETTI. The same thing with these guys who can put up $500,000 in bail. It doesn't mean anything. It is kind of dollar factory, really.

Mr. HUGHES. The court can already deal with that. If in fact you are dealing with a narcotics offender, let us say, in Florida, with an alien who happens to come into the country and who is busted, and

who looks like he is a class I violator—the court can deal with that. There is no reason for a judge to be setting a $200,000 or $500,000 bond. If in fact you are dealing with somebody who appears to be a very poor risk, that person can be incarcerated. The judges are just not doing it.

Mr. SAWYER. Further, preventive detention, is kind of a bad word. At least it has been gradually accepted as kind of a bad word. But I think when you take into account danger to community, you might just as well face it head-on and be very frank about just what you are doing. This is preventive detention. You can call it by any name you want.

The District of Columbia has what I think is a very good preventive detention bail law. It has a jury hearing, and all kinds of backstops for protection against arbitrary incarceration. In fact, in over 11 years, only 55 people have been held under it. Recently it was tested in the Court of Appeals for the District, and it is now, as I understand it, headed for the Supreme Court. But it passed constitutional muster there on a 7-to-2 vote with the full Court of Appeals for the District. I frankly think it has all the protections that any court could possibly ask.

I think the District of Columbia has sparingly used it, 55 people over the law in selected cases, but I think there are certain cases where it should be used.

In fact, there was some serious argument that the gentleman who tried to assassinate President Reagan was going to have to be allowed out on bail because he had not committed a capital offense. And under the current Bail Reform Law, he is mandatorily admissible to bail. You know, that kind of a thing, just to my mind, doesn't make a lot of sense, and I think we ought to face it directly.

Mr. GILMAN. Would the gentleman yield?

Mr. ZEFERETTI. Yes, I yield.

Mr. GILMAN. I thank the gentleman for yielding.

Mr. Sawyer, is preventive detention prescribed in any other jurisdiction besides the D.C. Code?

Mr. SAWYER. Well, that depends exactly in just how you are interpreting it. For example, the laws of many States, including Michigan where we have never had capital punishment, bail is almost routinely denied on any charge of first degree murder.

That is not so in a number of other jurisdictions, but you could call that preventive detention.

Mr. GILMAN. That is not by statute, that is——

Mr. SAWYER. That is by the State constitution, really. But it is authorized.

Many States have a very crazy provision in their constitution. I don't know where they all got it from. But it says, in substance, bail will be permitted or all persons are entitled to bail except in cases of treason or murder where the proof is strong or the presumption great. They all say substantially that, where the proof is strong or the presumption is great, or the proof is great or the presumption is strong. Of course, there is never a presumption. But the States, nevertheless, picked up that language somewhere and they construe it differently. But many States, including my State, have what amounts to preventive detention.

As far as a statutory preventive detention, there may well be other jurisdictions other than Washington, D.C. It just so happens that I became familiar with the Washington, D.C. statute, and I really didn't look to find out if there are other ones around.

Mr. GILMAN. If the gentleman will yield further, what I am seeking, has the issue been tried in the Supreme Court at all?

Mr. SAWYER. No; but I understand that the cert is being sought from the Court of Appeals of the District of Columbia where there was a 7-to-2 vote upholding of the statute, to the U.S. Supreme Court.

So we may well have a definitive opinion soon.

Mr. HUGHES. I might just say that the District of Columbia is the only jurisdiction in the country that has a pretrial detention statute.

Mr. GILMAN. Does the legislation that has proposed before the Judiciary Committee address to having preventive detention?

Mr. HUGHES. Yes, it follows the pattern set forth by the District of Columbia Code. With a couple of minor modifications, I support that approach, as does my colleague from Michigan.

Mr. GILMAN. What legislation is that?

Mr. HUGHES. I don't have the number, but——

Mr. GILMAN. Whose bill is that?

Mr. HUGHES. I have introduced a bill which I suspect will be referred to Bob Kastenmeier's subcommittee.

Mr. GILMAN. Thank you very much.

Mr. ZEFERETTI. Mr. Railsback?

Mr. RAILSBACK. Thank you, Mr. Chairman.

I happen to be a member of that subcommittee, as well as Mr. Sawyer. I have been very interested in what you have had to say.

I also agree very much with your reference to what the career criminal program has done. You know, in our zeal to budget cut, it is certainly my hope that we don't get rid of many of the good things that have clearly established a real benefit.

It seems to me that the career criminal program, which has been employed among other jurisdictions and the District of Columbia, can work hand-in-hand with some kind of a bail reform measure. In other words, targeting and identifying somebody that is a bad actor, based on his record, can be a real problem for the community.

I had forgotten that you had included that as part of your other programs.

Mr. HUGHES. We have taken it one step beyond that. We have a separate section now dealing with juvenile offenders, because, as my colleague well knows, juvenile offenders often become our career criminals when they get to the adult category.

So there is no reason why we should not be targeting career juvenile offenders. The section of H.R. 3359 which deals with juvenile offenders is doing the same thing that we have done with career criminals, by targeting that group.

Mr. RAILSBACK. Yes. I really have no further questions. I do want to commend the two of you. I happen to be very much aware of your own previous experience, and I think the two of you can be a real help to the rest of us based on your experience.

Thank you very much.

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Mr. ZEFERETTI. Mr. Gilman?

Mr. GILMAN. Thank you.

We have a few of the bills that have been introduced. I was just wondering if both Mr. Sawyer and Mr. Hughes might just tick off for us the bills that they are familiar with that can be helpful to the work of this committee so that we can be supportive of those efforts that are pending with regard to bail reform?

Mr. HUGHES. I would be very happy to furnish to the committee the bill number once I ascertain it. It is essentially the District of Columbia Code bill, which hopefully will be referred by Bob Kastenmeier's subcommittee in time for the subcommittee to use it in connection with its hearings which begin next week.

The pretrial services bill—I know my colleague is aware of that. That is extremely important from the standpoint of learning a lot more about a defendant when he or she first appears before the court. That bill is before the Rules Committee right now.

I am in the process of introducing—I am not sure whether it has been introduced yet—legislation that would extend the urinalysis program in the Federal system. That program enables us to provide aftercare for probationers and parolees where they have had some history, or there is some suggestion, of narcotics abuse. That enables us to provide direct supervision. It begins with a 6-month period of urinalysis tests, examinations to determine whether there are any traces of heroin or other narcotic substances, and if, in fact, they find that the defendant is still using drugs, that is reported to the court.

That has been a very successful program. It has reduced immensely the incidence of narcotics abuse for defendants who are presently on parole or probation.

We have not as yet begun taking testimony on a bill that Hal Sawyer is interested in, which would change the presumption for the fruits of illicit trafficking in drugs. Maybe Hal knows the bill number for that. But that is something that we ought to take a serious look at, because it seems to me that we ought to be directing our attention a lot more to the billions of dollars that are being made by drug traffickers. That is where we can really hurt them, in the pocketbook. That is an important piece of legislation.

Mr. GILMAN. That is a presumption for what now?

Mr. HUGHES. It is a rebuttable presumption—right now, when a defendant is convicted of a drug-related offense, the Government has to show that his or her assets, the apartment houses, the hotels, and the shopping centers, were related to the narcotics business. This will change the presumption, and make the defendant come forward and show that indeed, once he or she is convicted, he or she has earned those assets either through inheritance or through other productive means, and has filed tax returns to reflect those assets.

Mr. GILMAN. That is for seizure of assets, right?

Mr. HUGHES. That is correct.

Mr. SAWYER. Let me just interject. We can seize now, but the assets have to be actively used, for example, the automobile, the yacht, or the airplane transporting the drugs.

But if the drug racketeer owns a big estate up on the Thousand Islands which is worth $1 million, unless you can show that the

estate was in some way being used in connection with the drugs, which probably you could not, there is no way you can approach that type of asset.

Since illegal narcotics is basically a money business, it is not a business of passion, it is a crime not related to anything but pure money. It strikes me that the most appropriate way to counteract is to attack the money part of the business and do the same thing the IRS does. If the IRS comes in and does a net worth study on a person, and the person has a net worth far in excess of anything that their tax returns indicate, the IRS switches the burden to the taxpayers to prove just where this money came from, from an inheritance or a stash or a hoard or something else.

But the presumption is changed and the burden of proof is shifted. That is what I feel we should do with these drug cases, with all the assets of the drug dealers.

Mr. GILMAN. It certainly sounds worthy. I hope you will take a look at the Gilman bill that suggested that when we do seize, we provide some of those funds for our law enforcement.

Mr. SAWYER. That is exactly what this bill provides. It says the money then goes to State, local, and Federal—you see, great minds run along the same way. My bill happens to be number H.R 2646.

Mr. GILMAN. We are inclined to be supportive of that statement.

Mr. HUGHES. I just might say that the other legislation that would be very important to this select committee is H.R. 3359, which is the anticrime package I discussed before. It targets, as I mentioned, career criminal and a number of the other successful programs of LEAA.

It also has title II, providing an emergency response mechanism to deal with problems such as we have in Dade County right now because of the drug traffic.

Mr. GILMAN. Then, essentially, just to review, you are talking about the District of Columbia Code bill, the pretrial services measures, the aftercare urinalysis program, rebuttable presumption for seizure of assets, and this crime package measure, H.R. 3359.

Mr. HUGHES. Of course; and, finally, I want to thank you and the chairman and other members of the committee for their assistance in attempting to modify the posse comitatus law, which we did last week. We feel this is also a very important component of the overall effort to address the drug problem.

Mr. GILMAN. We thank you for your leadership in that measure, and we hope that we will see that signed into law very quickly.

Now, are all of these before the Judiciary Committee? And, of course, while our committee does not have jurisdiction with regard to legislation, we want to be as supportive as we can, and we hope that you would keep our committee informed so that we can be of help on the floor and in whatever manner possible to see that this legislation is adopted at the earliest possible date.

Mr. HUGHES. One issue I neglected to mention, that we are also going to be taking up, hopefully when we come back in September, is witness intimidation, which is becoming an increasing problem. We have some blind spots in our code at the present time. We are hopefully going to address that so we can plug those holes.

Witness intimidation, particularly in the drug area, has become a great problem throughout the country, particularly the Southeast.

Mr. GILMAN. I want to thank both of you gentlemen for your concern in these areas, and if somehow you could give us a little closer communication on the status of legislation, we certainly want to try to be of help to you.

Mr. HUGHES. We would be happy to.

Mr. ZEFERETTI. Before we go vote, I would hope that we could get through with these two gentlemen so that they could get back to the floor, too.

Mr. LIVINGSTON. Mr. Chairman, in deference to the time squeeze, I will yield my questions.

Mr. ZEFERETTI. OK.

Mr. Coughlin?

Mr. COUGHLIN. Mr. Chairman, just let me say that I really appreciate the great expertise that both of our colleagues bring to this committee on this subject. We certainly want to do everything, this Member does, too, do everything possible to cooperate with you and expedite this legislation.

Mr. HUGHES. We appreciate it.

Mr. ZEFERETTI. I want to thank you again. I want to tell you also, Mr. Sawyer, I hope you will look for H.R. 4110, which is my forfeiture bill.

We are going to take a 15-minute recess to go down and vote.

Mr. HUGHES. Thank you, Mr. Chairman.

Mr. SAWYER. Thank you, Mr. Chairman.

[Recess.]

Mr. ZEFERETTI. The committee will come to order.

Mr. Mullen, please proceed in any manner you want. If there is a written statement, we will include it as part of the record. Feel free to handle it any way you want.

TESTIMONY OF FRANCES M. MULLEN, JR., ACTING ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, ACCOMPANIED BY MARION HAMBRICK, ASSISTANT ADMINISTRATOR FOR OPERATIONS, DRUG ENFORCEMENT ADMINISTRATION

Mr. MULLEN. What I would like to do, Mr. Chairman, is to enter the statement for the record and then hit some high points in a very brief statement.

Mr. ZEFERETTI. Fine.

Mr. MULLEN. Mr. Chairman, as Acting Administrator for the Drug Enforcement Administration, I am here today as their spokesman and as a representative of the Department of Justice. My perspectives are drawn from my career in Federal law enforcement, and are thus more generally applicable to the entire spectrum of criminal law violations.

Congress passed the Bail Reform Act of 1966, and it was the first basic change in the Federal bail law since 1789. It deemphasized the use of money bonds which were perceived as unfair to poorer defendants. The principal feature of the act is that personal recognizance or release on unsecured bond shall be the presumptive determination in all cases.

Other conditions cannot be imposed unless the bail-setting judicial officer determines that such release will not reasonably assure the defendant's appearance.

There is no provision in the law which specifically authorizes danger to the general community as a consideration. At present, the function of bail is to provide reasonable assurances of the appearance of the accused; it is not a demand for absolute certainty of appearance.

It has been determined that many defendants who are released on bail commit further crimes. Even when apprehended a second time, the defendant is often released on the existing bail posted in the first instance.

A case in point recently occurred up in Wilmington, Del. I have some documentation furnished to me as early as this morning. Just this month, DEA agents of the Wilmington resident office and local authorities arrested an individual and seized 35,000 methaqualone tablets. It turned out the subject had been released 26 hours earlier on $25,000 bail. In this case, the judge did see the light and set the second bail at $1.5 million, so I am relatively sure that the defendant was held in custody.

It is a good case in point that when some do get out on bail, they continue their illegal activities.

Already limited resources are stretched even thinner as agents investigate crimes being committed by those out on bail, and we are required to conduct fugitive investigations to locate those who fail to appear.

I think the most significant recent example is with the case of "Operation Grouper," a 2-year DEA undercover operation involving 13 narcotic trafficking organizations and the eventual arrest of 146 individuals. Jose Antonio Fernandez had assets estimated at $40 million. It was believed that his boatloads of marihuana, some of which totaled 20 tons, may have netted him $250,000 to $500,000 per month.

Initially, his bail was set at $21 million, $20 million in New Orleans and $1 million in Florida. The bail was reduced to $10 million, and later to $500,000, over the objections of the U.S. Attorney. Fernandez put up $250,000 worth of property and a $250,000 surety bond to make the reduced bail, although earlier he had told the U.S. magistrate that he was worth $4,000.

Fernandez failed to appear, and is now believed to be out of the country. As Attorney General William French Smith noted, all of the work was undone "in one stroke of a judge's pen."

Another consideration regarding the current bail situation has less to do with readily apparent transgressions of the law and more to do with the general public's perceptions and indignations. The practice of granting bail to defendants after conviction, particularly during the course of lengthy appeals, undermines the deterrent effect of conviction and erodes the public confidence in the judicial system.

As I have indicated, the primary purpose of the Bail Reform Act was to deemphasize the use of money bonds in the Federal courts, a practice which was perceived as resulting in disproportionate and unnecessary pretrial incarceration of poor defendants, and to provide a range of alternative forms of release.

DEA and the Department of Justice believe that the following matters should be considered in any bail reform measure:

First, the courts should be permitted to consider the issue of the danger the defendant may pose to a particular person or the community in making pretrial release decisions.

Second, the authority of the courts to detain defendants for whom no conditions of release are adequate to assure appearance at trial, which is recognized in case law should be codified.

Third, the present standard presumptively favoring release of convicted persons awaiting execution of sentence or appealing convictions should be reversed.

Other changes which we believe should be incorporated would make clear the authority of the courts to inquire into the source of money used to post bond, provide the Government with the right to appeal bail and release decisions analogous to the appellate rights now afforded defendants; require defendants to refrain from criminal activity as a mandatory condition of release. I know that the average citizen would presume that he would not have to be told not to engage in criminal activity, but it is a fact of life that some people have to be told; make the penalties for bail jumping more closely proportionate to the penalties for the offense with which the defendant was originally charged. For example, the current penalty for bail jumping is 5 years imprisonment, whereas a substantive charge may be a 20-year prison sentence.

In summary, the Drug Enforcement Administration supports amending the Bail Reform Act of 1966 to restore to judicial officers the discretion to determine and fix the amount and conditions of bail which can be imposed upon persons charged with Federal criminal offenses. The courts need to be able to consider the issue of dangerousness of the defendant, as well as his likelihood of flight.

That is my brief statement, Mr. Chairman, and I am prepared to answer any questions that you may have.

Mr. ZEFERETTI. Thank you very much, Mr. Mullen. Of course, your entire statement will be made part of the record.

[The prepared statement of Mr. Mullen follows:]

PREPARED STATEMENT OF FRANCIS M. MULLEN, JR., ACTING ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE

Chairman Zeferetti, Members of the Select Committee on Narcotics Abuse and Control: Today's examination by this Committee of the effectiveness of and problems with the current Federal bail statutes is most timely. In February, Chief Justice Burger, speaking before the American Bar Association, called for greater flexibility in our bail laws. Recently, the Vice President and Attorney General have urged the courts and the Congress to stiffen bail procedures, particularly for drug law violators. Judging from the number of bills introduced in past and current legislative sessions, the Congress, too, in representing the people, is acknowledging the need for amending the Bail Reform Act of 1966.

As Acting Administrator of the Drug Enforcement Administration, I am here today as their spokesman and a representative of the Department of Justice. My perspectives are drawn from my career in Federal law enforcement and are thus more generally applicable to the entire spectrum of criminal law violations.

I believe it is important to spend a moment retracing the development and intent of the Bail Reform Act of 1966 in order to place the critical issues now before us in their proper context.

The Eighth Amendment to the Federal Constitution forbids the imposition of excessive bail, but makes no explicit reference to a "right to bail." It is acknowledged that there is no absolute entitlement to freedom from incarceration pending trial, but rather there is an overriding limitation which permits imposition of

conditions deemed necessary to ensure a defendant's appearance for trial and sentencing. Over time, the practice of imposing money-bail developed and became firmly established, the theory being that the requirement of a financial deterrent to flight would adequately protect the viability of the system.

Money-bail and the general conduct of the bail system became the subject of considerable criticism as a prime example of a traditional practice fraught with discrimination. In response to this climate, the Congress passed the Bail Reform Act of 1966—the first basic change in the Federal bail law since 1789. It was greeted with great enthusiasm and hailed as a progressive measure. On June 24, 1966 the Bail Reform Act (18 U.S.C. 3146 et seq.) became effective and continues today.

The principal feature of the Act is that personal recognizance or release on an unsecured bond shall be the presumptive determination in all cases. Other conditions cannot be imposed unless the bail-setting judicial officer determines that such release will not reasonably assure the defendant's appearance. If such a determination is made, the official must then consider each of the prescribed conditions in the order of priority listed in the statute; a combination of conditions may be imposed if one is considered insufficient.

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

There is no provision in the statute specificially authorizing denial of bail for noncapital offenses. Nor is there a provision in the law which specifically authorizes danger to the general community as a consideration in the determination as to whether or not to release an individual on bail. At present, the function of bail is to provide reasonable assurances of the appearance of the accused; it is not a demand for absolute certainty of appearance.

It is now apparent that the 1966 reform effort designed to ensure fairness for the suspect has upset the delicate balance between concern for the protection of society in general and the desire to guarantee the maximum freedom for the individual.

From the community's perspective several major interrelated problems have become manifestly evident. According to a contract study done several years ago for DEA, many defendants who are released on bail commit further crimes. DEA files are replete with examples of upper-echelon drug traffickers who are released on bail and then continue their illicit trafficking activities with impunity. And even when apprehended the second time, the defendant is often released on the existing bail posted in the first instance. Although specific data has not been developed, the impact on the enforcement effort is clear—already limited resources are stretched even thinner, as the agents are drawn away from other investigative endeavors.

Second, a preliminary random sampling study conducted in DEA indicates that a high number of defendants released on bail fail to appear before the court. These "failures to appear" occur at several stages of the criminal process: many suspects are charged, but not arrested (unexecuted warrants); the majority of "failure to appear" defendants are arrested, released on bail, but flee prior to trial; far lesser numbers flee after ajudication prior to sentencing or during pendency of appeal following sentencing. A preliminary, limited study conducted by the Administrative Office of the United States Courts showed that of the total number of defendants whose "failure to appear" cases were analyzed, 31 percent were charged with narcotics violations.

Enforcement resources needed elsewhere are consumed by this fugitive problem. It is extremely frustrating for law enforcement officers to develop lengthy investigations and to take the risks inherent in their profession in order to arrest significant violators, only to see these criminals flee the jurisdiction of the court—and perhaps renew their illegal activities. This problem is all too vividly illustrated by the following case which took place several months ago as a result of "Operation Grouper," a milestone case DEA developed over a two-year period in cooperation with 21 other Federal, State and local agencies, as well as a foreign government. Fourteen drug smuggling operations were immobilized as 155 individuals were indicted for smuggling multi-million dollar quantities of marihuana and methaqualone. One of the most important defendants in the case was Jose Antonio Fernandez. DEA estimated that his assets were worth approximately $40 million. It was believed that his boatloads of marihuana, some of which totaled about 20 tons, may have netted him $250,000 to $500,000 a month. Initially, Fernandez's bail was set at $21 millon ($20 million in New Orleans and $1 million in Florida). Bail was first reduced to $10 million and then later to $500,000—over the objections of the U.S. Attorney. Fernandez put up $250,000 worth of property and a $250,000 surety bond to make the reduced bail (earlier he had told a U.S. Magistrate that he was worth

$4,000). Fernandez is now believed to be out of the country. As Attorney General William French Smith noted, all the work was undone "in one stroke of a Judge's pen."

A third consideration regarding the current bail situation has less to do with readily-apparent transgressions of the law and more to do with general public perceptions and indignation.

The presumption of granting bail to defendants after conviction, particularly during the course of lengthy appeals, undermines the deterrent effect of conviction and erodes the public confidence in the criminal justice system.

In that same vein, the consideration of dangerousness in the pretrial release determination would represent a more honest way of dealing with the issue of misconduct by those released pending trial. Under the present system there are many judges who will concede privately that they set high bonds to detain suspects they believe to be dangerous, even though they believe the defendants pose little risk of flight. This phenomenon casts serious doubts about the fairness of Federal release practices and undermines the public trust in the judicial system.

The experiences of the past 15 years lead me to believe that the current bail system requires alteration. I think it is incumbent upon both the Executive and Legislative branches to work towards the development of a more rational policy that will enable us to distinguish who should be released on bail, when, and under what conditions or restrictions. Toward that goal, I believe that amendments to the current bail law should address the following major premises.

As the Chief Justice noted, it is vitally important that judges be permitted to consider the issue of a defendant's dangerousness while making pretrial release determinations. Permitting the consideration of the potential danger to the community in the pretrial release decision has received wide-ranging support. The nature of drug law offenses and the potential effects of the resulting drug abuse problem make the dangerousness concept one of extreme importance from my perspective at DEA.

Proposals regarding dangerousness generally have fallen into two categories. One approach permits consideration of dangerousness in the fashioning of appropriate release conditions. Misconduct by persons released pending trial is too serious a problem to be ignored by the law; the judiciary should be permitted to deal directly with this issue.

The second approach goes beyond considerations of dangerousness in the release decision itself, by providing for pretrial detention of defendants who pose such a danger to the safety of particular persons or the community that no restrictions on release can assure that they will not harm others while released awaiting trial. While pretrial detention does raise serious constitutional issues, we believe that a carefully drafted pretrial detention statute that provided stringent procedural safeguards would pass constitutional muster. Indeed, the constitutionality of the District of Columbia's pretrial detention statute, which was passed by the Congress in 1970 and which we believe would serve as an appropriate model for a Federal pretrial detention provision, was recently upheld by the District of Columbia Court of Appeals in *United States* v. *Edwards* (decided May 13, 1981).

There is already case law which defines certain situations in which pretrial detention may be ordered. Therefore, it seems appropriate to incorporate these principles into the bail statute, providing the judicial officer with the discretion to enter an order of pretrial detention when appropriate.

There is general acceptance in the enforcement community that the current presumption favoring release of *convicted* persons awaiting sentencing or appealing a conviction needs to be reversed. This presumption may be appropriate prior to trial when the defendant is still cloaked with the presumption of innocence; however, it is clearly inappropriate upon conviction, i.e., once guilt is established beyond a reasonable doubt.

Additionally, a comprehensive bail reform proposal needs to consider and recognize that vast sums of money are available to organized crime figures and drug law violators. For individuals like Jose Antonio Fernandez, or Alfredo Gutierrez, who last year posted $1 million bail within 15 minutes and then disappeared, money is no object. Unfortunately, "Nebbia hearings," in which the source of the bail collateral is made known to the court, are utilized all too infrequently. Perhaps this case law might be better addressed statutorily in order to clarify this provision. The source of the collateral is important; it can be an excellent indicator of the defendant's likelihood to appear again before the court if released before trial.

Lastly, I think that the government should be afforded the opportunity to appeal bail decisions, particularly bail reduction decisions. As with the Fernandez example, often times there is information available to the government which may not be known to the court that would clearly demonstrate the defendant's likelihood of

failure to appear or dangerousness to the community. In the interest of balancing the community's right to protection with the individual's guarantee to the maximum amount of freedom consistent with his rights, I believe that the government should be able to appeal release decisions.

In sum, the Drug Enforcement Administration supports amending the Bail Reform Act of 1966 to restore to judicial officers the discretion to determine and fix the amount and conditions of bail which can be imposed on persons charged with Federal criminal offenses. The Bail Reform Act of 1966 has imposed an inflexible mandatory personal recognizance provision based on factors which do not fully and properly bear on the likelihood of an offender's appearance at trial or that effectively acts as a deterrent to continued criminal activity while on pretrial release. The court needs to be able to consider the issue of dangerousness of the defendant, as well as his likelihood of flight.

The situations I have described today present the rationale for changing the 1966 Bail Reform Act. The entire Federal criminal justice system, including DEA, would benefit. Restricting reforms, such as those described above, to drug law violations ignores the larger problem and may also unnecessarily make such proposals more vulnerable to constitutional attack.

The Department of Justice is presently developing legislative proposals which will encompass amendments to the Bail Reform Act of 1966. Optimally, this would best be accomplished with the revision of the Federal Criminal Code. However, because we believe this matter to be of the utmost importance, it may be more appropriate to advance the bail reform sections as separate legislation.

Mr. Chairman, the Select Committee's attention to this grave problem is most welcome. This Administration is clearly committed to reducing violent crime, street-level crime, and the devastating effects of drug-related crime and abuse. I hope that the Congress will respond in kind so that we may implement the important agenda before us.

Mr. ZEFERETTI. We have been trying to discern the actual number of narcotics cases of defendants who in fact jump bail and fail to appear. There apparently are no real numbers that are meaningful. Many of the numbers that are tossed around that we have, often cannot be substantiated. As a matter of fact, your agency, DEA, informed us that it does not keep that or doesn't have a statistical system putting those numbers into some real meaningful order.

Have you got any ideas of what we might do to find out who these people are, how many of them are out there? Beyond that, what role actually does DEA play once that individual jumps bail? Do you play a role in the effort to go and apprehend them? How is that done?

Mr. MULLEN. We do have some idea of how many individuals have jumped bail. We determine that from the number of fugitives that we are seeking, which currently is 2,960. A recent study based on a random sample of DEA fugitives indicates that 44 percent are bail jumpers. So then, we can correlate from this study and get a figure of around 1,400 fugitives who may have jumped bail.

We are currently revamping our statistical-gathering system in order to be able to identify in the future, the individuals who jumped bail, when they jumped, the amount of bail, and get a better handle on exactly how widespread the problem is.

Does that answer your question?

Mr. ZEFERETTI. That is good.

The only role you play, then, is once the label is fugitive——

Mr. MULLEN. Then we seek the fugitive.

The problem with that is that it does take the agents away from other investigations. We currently have 2,960 fugitive investigations which do require agent time. We actively seek to locate the individuals who have jumped bail. We do know that many have

fled the country and we do not pursue those as actively as we would U.S. citizens who are still in the country.

But we do work with other agencies, such as Immigration and Naturalization and the U.S. Marshals, to locate these fugitives.

Our role does not end once they are declared a bail jumper. We then have to seek the individuals.

Mr. ZEFERETTI. I see.

Actually it is a manpower problem for you, too, if in fact you are talking about those numbers increasing. You have to shift your priorities as to where you are going.

Mr. MULLEN. That is correct. Already limited resources are drawn away from actual drug investigations in an effort to locate fugitives.

Mr. ZEFERETTI. Are you finding most of your efforts are in the Southeastern part of the country? Is that the biggest area of where you find these people jumping bail?

Mr. MULLEN. Yes; we are finding that especially in Miami and New Orleans. That is because of the heavy marihuana traffic in that area, and many of the individuals involved are from other countries, and once out on bail, they often leave the country.

The problem is not only in the Southeast, but in the Southwestern part of the United States.

Mr. ZEFERETTI. In your testimony, too, you made mention of the pretrial examination and the danger to community, or danger to the person, really, as an integral test for the judge to make on the defendant himself.

We all have a concern, I think, when we talk about those kinds of people that could be a danger to the community or to a person. And yet everybody has been so apprehensive about creating a piece of legislation or some kind of avenue that will lead us toward pretrial detention.

I am glad that you focused in on that in your testimony a little bit, that you gave us your feeling of this.

Again, I don't know, if tested, whether or not we could stand up under the constitutional effort that would be made to overturn such a law. But I really feel that something in the nature of pretrial nature, detention has to be set if we are going to do anything with the large sums of money that these people have and able to flee. And beyond that, as you say, the threat that could be put forward against anyone, even a witness that wants to testify against these people.

Mr. MULLEN. That is true, Mr. Chairman, and I think we can safely conclude that narcotic peddlers and users are a danger to the community.

For example, in Miami during 1980, we had 303 murders recorded. One-third of those, 101, are narcotic related. In many cases, narcotics dealers murder other dealers over money, they steal either their money or their drugs. In many cases witnesses are being murdered.

We currently have an ongoing case that has not yet come to trial, and several witnesses have disappeared or have been murdered.

It is not only the actual crimes being committed by these individuals, but if they are allowed to be free and to continue their trade,

the drugs they are dispensing are causing other crimes. So they are related crime problems. We believe that narcotics traffickers belong in the category of a danger to the community.

Mr. ZEFERETTI. I would like to touch on one or two other areas, if I might. I hope I am not creating a hardship for you, because I know you have only had the responsibility for a very, very short time as the Acting Administrator.

Mr. MULLEN. I have not yet learned to pronounce the names of the drugs.

Mr. ZEFERETTI. I am very appreciative, really, that you have taken the time now to come here and appear before this committee.

The two areas that concern me: One, I am wondering whether or not anybody in your office has looked over the pending budget that we have and the kinds of cuts that are going to be coming down the road, and whether or not you feel that your agency will be effective in terms of the kinds of dollars that we are going to be spending in the future. We have all had to tighten our belts. This is one area of concern that we all have.

Your area is one that I feel is so desperately necessary to get that kind of effort in there so that the tools are—I use the word "tools"—as an instrument for getting your job done.

Along with that, whether as a result of the types of budgetary considerations we are going through, or otherwise whether there is a real possibility of your integrating your agency with the FBI?

Those are the two areas of concern that I have. For the benefit of this committee, I would like you to at least comment on those two areas.

Mr. MULLEN. Yes, Mr. Chairman, I understand that $3 million to $4 million has been restored to the DEA budget by the Congress, which we appreciate. Like all agencies, we are in a period of tightening the belt. I have not yet had an opportunity to closely examine the budget. We will be doing this in the first week in August when all of the division heads within DEA will sit down with me and go over their needs and we will see whether we have to shift priorities or budget areas.

With regard to the FBI–DEA relationship, we are still in a period of study in that regard. As you are probably aware, there is a departmental committee headed up by Mr. Giuliani, and it includes members such as Judge Webster, Director of the FBI; former Administrator Bensinger; and myself. These are the very areas we will be looking into, where we could redirect DEA resources, where we could use FBI resources in drug-related investigations.

So, I would be reluctant to make a comment at this time regarding the budget until we see just how much the FBI is going to be able to do, and what DEA and FBI combined resources will be able to do, or how even other agencies such as Customs will be able to assist in the drug effort.

Mr. ZEFERETTI. Well, we are very much concerned because of the dollar amounts that are going to be sent out to the various agencies that have the responsibility. We find ourselves with Customs being cut severely. There again, too, they are doing the same thing. It is a question of priority and where they are going to shift personnel.

But I would hope that we find a means. And if it is a question of integration, if that is going to be the best possible tool to fight this drug trafficking and the like, then we want to examine that very carefully.

One of the things that upset me was, during the appropriation process of a supplemental bill in the Rules Committee on which I sit, we had to take money, for 1981 anyway, we had to take money out of capital construction dollars for the Bureau of Prisons to give to DEA for the ability to pay salaries and to take care of some of the hardware that DEA had and needed to fulfill their obligations for the year.

That is the kind of thing that I am trying to avoid. That is not in the best interests of anybody, because Corrections have got their own problems, and DEA is unique in its own sense that it needs its own priorities. I mean priority is a very, very important word. If we are going to do anything to have an impact on the overall drug problem, you have got to reach out for those priorities and make sure that the agencies are well taken care of.

Mr. MULLEN. We need some place to put them once we apprehend them.

Mr. ZEFERETTI. That is right. I come out of that system. I put in better than 20 years in that system. And we have been talking priority in the corrections areas for 20 years and we haven't gotten anywhere, so it is a very delicate word. And the agencies that have that jurisdiction should get that kind of assistance if necessary.

Mr. MULLEN. I might add, Mr. Chairman, that no definitive decision has been made with regard to the future of DEA and the FBI. There are several options. One could be the status quo. Another could be an autonomous agency under the Director of the FBI, another could be an outright merger. No final decision has been made, and the committee has determined that they will be consulting with the Congress, seeking your input in any future decision that is made.

Mr. ZEFERETTI. That is very, very important for us. I would hope that when that time comes and an evaluation is made, whatever determinations are going to be forthcoming as a result of that, that I would hope that they would consult with us, at least to get an input from us as to what we feel that priorities might be and in what direction we should be going.

If, in fact, we are ever to create a Federal strategy to make that impact possible, that is the only way I think it is going to work effectively.

Mr. Livingston?

Mr. LIVINGSTON. Thank you, Mr. Chairman.

First of all, I want to join with you in welcoming Mr. Mullen to this committee and also, I guess, to the DEA. Mr. Mullen served as special agent in charge of the New Orleans office of the FBI. New Orleans, of course, is my district. I knew him then, he did a great job down there in New Orleans, he has done a great job while he has been the No. 2 man in the FBI. Now I know that we can expect great things from him in his new position.

There is no doubt that narcotics traffic is a national tragedy for us. It threatens our children, threatens American family life at all levels. Although we have had some victories, some of which have

been touched upon by you, Mr. Mullen, in your opening statement, the Grouper case where many arrests of major drug traffickers were made, we still haven't, I guess, made significant progress in the fight or the war against drug trafficking.

So, I particularly want to welcome you in your new position, wish you well, and offer my assistance to you in any way that I might be utilized. I would hope that we can just try harder and do a little bit better against this terrible problem that confronts this Nation.

Mr. MULLEN. I appreciate that, Congressman, very much.

Mr. LIVINGSTON. If I could just delve into some of the questions of the chairman, I would like to inquire a little bit further. You have perhaps been there only long enough to make some first impressions. I would like to ask you if you could comment on those impressions and if you could see any advantages. I know you haven't had a chance to formulate the budget or make concrete plans for the agency, but do you see any benefits in the potential merger of the FBI and DEA?

One thing that you said struck out at me. You said that some of your agents are currently chasing fugitives. I know that one of the functions of the FBI is to pursue what is called the UFAP cases, the unlawful flight to avoid prosecution. It was my impression that the FBI agents were delegated to chase fugitives. But evidently that is not the case.

Are there not some major procedural changes that could be undertaken which could more enable DEA to be more effective in the future?

Mr. MULLEN. Yes, Mr. Congressman.

First, I would like to say that although I have been there but 1½ weeks, that is at DEA, I have found it a very professional organization. I do see limited resources, as I see in many Federal investigative agencies, and I believe that a closer working relationship between the FBI and DEA can be most beneficial.

You mentioned the fugitives. There is discussion within the Attorney General's task force on violent crime regarding assigning all fugitive matters to one organization, one Federal organization, making the investigations easier to coordinate. And I do know the FBI has put forth a proposal asking to handle fugitive matters at a Federal level.

We are talking already with the FBI about asking that organization to seek the DEA fugitives, that we would consider referring all of these fugitive matters over to the FBI, thereby releasing DEA resources to investigate drug matters. That is something that we would like to do very early on, developing closer relationships.

I have already seen a positive benefit of the agencies working closer together. For example, in one area we had separate undercover operations directed at the same targets. Since discovering this, we have been able to put DEA agents in the FBI operation and vice-versa; and we are able to key off of each other, and, I think, do a much better job in combating the drug problem in that particular area.

In another case, we had organized crime figures involved. DEA had the responsibility and would normally seek to identify the drugs. Working more closely with the FBI, we carried the investi-

gation further, identified the top organized crime figures involved in the case, and we hope that that will have a lasting permanent effect as a result of the operation in this case.

Mr. LIVINGSTON. I certainly wish you well.

How about other agencies? I know that—at least it is my recollection that in the Grouper case, the Coast Guard, the Customs Office were also involved with DEA in that case. How will DEA relate to not only the Coast Guard and Customs, but also perhaps Immigration and the Border Patrol?

Mr. MULLEN. Very closely. Customs, of course, would like to do much more in the drug battle, and we would like them to do much more. Where we have to be very careful is, you have to have somebody in charge. You cannot have several agencies with the responsibility. I believe that agency should be DEA.

We welcome the help of other agencies, especially the Coast Guard and especially Customs. But we believe that DEA has to be in control—has to be in command to insure—that we are not all working at cross purposes or working on the same targets.

I have already entered into some discussion with John Walker, the new Under Secretary of Enforcement at the Treasury, in an effort to develop a memorandum of understanding bringing them more into the drug battle.

The Coast Guard has been very cooperative, and I can say the same about INS in their efforts in the drug traffic.

I will also be working and perhaps enhancing the joint Federal, State, and local task forces where the local police work with DEA agents in drug cases. We do not intend to abandon that program or weaken it. We, in fact, hope to strengthen that program.

Mr. LIVINGSTON. How about manpower of DEA? I guess that will be discussed when you look over the budget. But is the manpower expected to remain about the same or change to any degree?

Mr. MULLEN. In fact, we are in a period right now where it is being reduced slightly. We have a target level by the end of the fiscal year, and we are about 40 personnel over that.

I can't comment at this time as to whether or not it is adequate until I do have a look at the budget and see if we can redirect some resources, perhaps with help of other agencies such as the FBI.

Mr. LIVINGSTON. Finally, on the subject at hand, I recall in your statement you mentioned the case of a judge which reduced the bail from $20 million to $500,000. I think it is in the Constitution that bail should not be excessive. But when talking about a guy with assets of some $40 million, it is hard to determine what is excessive. Evidentally $500,000 was not excessive enough, since he did indeed jump bail.

But how do you delineate that? How legislatively do we cope with that problem?

Mr. MULLEN. I think, legislatively you could set some thresholds, some parameters, the nature of the offense, of course, and as I have indicated, a danger to the community.

But when you are dealing with drug traffickers, they consider the paying of a bond or paying bail to be one of the expenses in connection with their operation.

Mr. LIVINGSTON. It is like the bar association dues, right?

Mr. MULLEN. That is right. It is just dues or the expense of doing business. They have actually set aside funds to pay this because they know someday they are going to be caught.

I think, again, a danger to the community must be considered in setting bail, and what a drug trafficker means in terms of danger to the community ought to be the primary consideration.

Mr. LIVINGSTON. I thank you, and I certainly wish you well in your new position.

Mr. MULLEN. Thank you.

Mr. ZEFERETTI. Thank you, Mr. Livingston.

If I could digress for just a second, I would hope that if we are fortunate enough, this past week we just passed a posse comitatus amendment to a massive armed services bill. I would hope that if that becomes law that there would be an effort by your agency to put into effect the recommendations that are necessary to get you additional intelligence, and surveillance equipment that you might see necessary. I would hope that somebody would be working toward that end.

Mr. Rangel?

Mr. RANGEL. Thank you, Mr. Chairman. Let me thank you, Mr. Mullen, for agreeing to come before your position has been firmed up.

I don't know what the testimony is, but you don't know about any decision for the mergers, so, as of now, you are acting as the head of the Drug Enforcement Administration.

Mr. MULLEN. That is right, Mr. Congressman. I also serve on the Attorney General's committee, headed by Associate Attorney General Giuliani. This committee hopes to make a decision by October 1 as to the future course of action for DEA. I mentioned to the chairman that at the initial meeting it was determined that we will be consulting with the Congress as to the course of action that will be taken.

Mr. RANGEL. OK. There was a civil rights action pending against the Drug Enforcement Administration, originating out of the New York City area; are you familiar with that?

Mr. MULLEN. I am not.

Are you familiar, Marion?

Mr. RANGEL. Some of the agents, the courts found, were denied promotion opportunities based on——

Mr. MULLEN. Oh, that I am familiar with, yes, sir.

Mr. RANGEL. And where is that case now? Is that over, or was the DEA into some mandate and would a merger have any effect on that at all?

Mr. MULLEN. It will not. I intend, as one of my programs, to look closely at the EEO program within DEA. By court order, the No. 2 man, the Deputy Regional Director in New York, Mr. Jackson, has been reinstated in that position.

I intend to make EEO one of my priorities. I think I bring good credentials. Just last week, I was awarded the Attorney General's Award for equal employment opportunity within the FBI for my efforts in the past year.

I intend to examine this case. I have not done so yet, but I do intend to speak with the principals and with our EEO officer and insure that we do have an effective program—not only for recruit-

ing, DEA has not had a problem recruiting. I understand the concerns are the promotions once they have been recruited into the agency.

Mr. RANGEL. That is right.

Well, I am certainly glad to hear that you got the award. That way I can talk with you without being oversensitive of you not understanding the problem, especially from the FBI perspective. Of course, just because you are not old enough to have been involved in it, for a long time we just never thought we could ever break through the FBI. I assume, if you got an award, some progress has been made there.

Mr. MULLEN. I think great progress. I went through training school in the FBI in 1962. In the class behind me were the first black special agents, the first ones to go through the training school. So I am aware of the problem.

The award was specifically for bringing 11 minority employees to headquarters.

Mr. RANGEL. Very good. Well, anything I can do to work with you, especially as it related to New York, I would be glad to.

One of the major problems that Members of Congress have had with any administration, and more specifically with the last and the one that preceded that, is not being able to identify to ourselves or to our constituents a national policy. Some of us believe that if it was not for the select committee, at least to bring people together from time to time, that it would be difficult to explain that we are aware, as a Nation, we have a problem that is a threat to really our national security.

Being a former Federal prosecutor and recognizing the jurisdictional problems and the competition between the Bureau of Narcotics and the Customs, and even today the battle which is existing as to whether or not DEA should be merged with the FBI or who would really be in charge.

It seems to me that if you could bring to that committee that you sit on, before you start making your decision as to what the lines of organizations are going to be, the fact that we have got to have a national commitment. The President talks about drug addicts and rehabilitation programs, Mrs. Reagan is visiting them, which is an extension of the Carter program. It seems to me that with the top-notch professional people that are available, the civil servants and the dedicated career people, that Treasury and IRS, the State Department, the FBI, Customs, DEA, should have some kind of meeting where the country and the Congress would know what we are working with.

I am lucky that I am a member of this committee to be working with you. But shifting musical chairs, and some of us being critical about it, is not going to help the situation at all. I do hope that you can give us some timetable, and not necessarily October 1, where you are a part of hammering out a cooperative effort to deal with this problem.

When President Nixon was here, there wasn't an agency or department that didn't know his commitment to combat drugs domestically and internationally.

Of course, it would be offensive to even talk about this with Secretary Kissinger because it was far below his priority items. But

it just seems to me that we are concerned as a country and that we ought to have a national policy. I hope that you would make that contribution to that committee that you spoke about.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. Thank you.

Mr. Gilman?

Mr. GILMAN. Thank you, Mr. Chairman.

I, too, want to welcome Mr. Mullen to the battlefield and wish him well in his new endeavors. We looked forward to having an opportunity to meet with him. I hope he will take advantage of the opportunity in meeting with members of the committee, I think it would be helpful to all of us to have a little closer relationship with what you are doing in your new office. We recognize the problems.

I want to join with my colleague from New York, Mr. Rangel, who, along with many of us, has been trying to urge and prod a national strategy into being. As you know, this committee has been assigned that responsibility in this session of the Congress to try to make certain that a proper national strategy is evolved. I hope that we will see that come forward at a new date, and hope that we are going to have the opportunity to make some input. We certainly will make certain that we have that opportunity.

Can I ask you, where did the proposal for the merger come from? It sort of came upon all of us pretty much as a surprise. I don't think that this committee had heard too much about it until we started reading about it in the papers.

Mr. MULLEN. We attribute the proposal to Attorney General William French Smith. My first knowledge of it came from Associate Attorney General Rudy Giuliani. He inquired of Director Webster as to what his thoughts were in the matter.

The FBI had its own problems 3 or 4 years ago, as you are well aware, I am sure. Perhaps such an idea couldn't have even been discussed, let alone implemented at that time.

Director Webster, when approached by Mr. Giuliani, was receptive. The Attorney General requested that an FBI executive go to DEA as acting administrator until a decision, a final determination was made.

So, as far as to where it came from, I would have to say the Attorney General of the United States.

Mr. GILMAN. Can you tell us a little bit about the rationale or why a proposed merger?

Mr. MULLEN. Yes. I think it is an effort to bring the 8,000 agents of the FBI into the battle along with the almost 2,000 agents of the DEA.

Mr. GILMAN. Mr. Mullen, if I might interrupt, I always have trouble reconciling these sort of long-arm relationships, distant relationships between the agencies in Government that are involved in law enforcement as though we are dealing with foreign nations.

When you mention for the first time there is a closer relationship, why do we have the estranged relationships between the agencies? Aren't we all trying to do the same thing? We are talking about the same department also.

Mr. MULLEN. Yes, we are. But it is just a fact of life. You have this jurisdictional concern, I don't know whether you want to say

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institutional insecurity, to protect your agency, protect your jurisdiction. That is a fact of life also.

I think bringing all the resources under one commander, when you can impose conditions, would alleviate those problems.

Some years ago, the FBI and DEA tried joint task forces around the country. They met with mixed success. It seemed when you forced the agencies to get out there and say, "Now, you two go work together," it just didn't work out. The two agencies, agents from both agencies, were concerned about their own violations.

However, in many areas, we had ad hoc joint operations, where they came together in a common cause, and they are very successful. The only joint task force still operating that was formerly set up is in Los Angeles. We had about six, I believe, New York, Miami, Chicago.

Mr. GILMAN. Well is that truly a valid reason? You have got the Coast Guard, you got the Border Patrol, you have Customs, you have any number of law enforcement agencies. They don't all have to wear the same uniform and be under the same commander to work cooperatively in this effort, do they?

Mr. MULLEN. No; they don't have to have the same uniform or the same commander, but somebody has to coordinate.

Mr. GILMAN. Wasn't there a working group that worked quite effectively in the past? It is my impression that at the top level it was a working group that met weekly, Mr. Bensinger, the State Department representative, the Customs, the Coast Guard, the Border Patrol people, and they sat and worked over these national problems.

Mr. MULLEN. That's true. But then, Congressman, you have a difference in philosophy. DEA is concerned with interdicting the narcotics—"Let's get the narcotics off the street." The FBI may be concerned with a long-term investigation—"Let's get to the top people in organized crime." Somehow we have got to merge those two philosophies, serve the needs of the drug enforcement, get the drugs off the street, and get to the top organized crime figures. And I believe we can do that by working more closely together.

Mr. GILMAN. I think all of us would agree on the close cooperation that is needed. I don't think we all agree about the merger. And I hope that in this process of reviewing it that you do solicit input from the Congress because I think there is a great deal of concern in the Congress today about whether that is the right direction to pursue.

I would not like to be consulted after the fact but while this is being considered and so far my opinion has not been sought. I don't think the opinion of this committee has been sought with regard to the proposed merger. I would hope that whoever is in the policy role will reach out and try to solicit that opinion while it is still being considered and before the fact is accomplished, because I think there is a great deal to be reviewed and a great deal that the Congress can offer.

I think you will have to come back eventually for some legislation, if I am not mistaken, in order to accomplish that merger. And I think you better start taking a look at getting your ducks in order now before it is much too late. I would hope you would pass that on to the policy people.

Mr. MULLEN. I can only say, in my earlier testimony I advised the chairman that the decision has already been made within the committee to seek the guidance and input of the Congress. That is a firm, formal decision that has been made and you will be consulted.

Mr. GILMAN. I am pleased to hear that.

Incidentally, is the working group still at work? Do you meet weekly with your other agencies?

Mr. MULLEN. I have only been there for 1 week. I have not met with them. I have scheduled individual meetings with the State Department, with Treasury, and military people, U.S. Coast Guard.

Marion, do you——

Mr. GILMAN. I can't hear the response. Would you identify yourself, sir?

Mr. HAMBRICK. Marion Hambrick, Drug Enforcement Administration, Assistant Administrator.

Yes, sir, Mr. Gilman, the group still meets. It has been meeting on an every other week basis rather than a weekly basis lately. They were waiting for the additional members to have congressional approval from the White House to work with the policy aspects. But the law enforcement agencies have continued to meet so that there would be no breakdown in the ongoing coordination that exists today.

Mr. GILMAN. I would hope that you would be able to continue that effort. It sounded like the most successful effort of cooperation that had been undertaken in the past, at least to have some cohesion and some cooperation.

Mr. MULLEN. We will certainly continue that, and one of the areas we will be looking at, is the degree of cooperation. And this is an effort to enhance drug enforcement, not to reduce our effort.

Mr. GILMAN. Earlier this morning our colleagues on the Judiciary Committee recited several bills with regard to bail forfeiture and regard to reforms in the bail system. They cited a measure that would take into account many of the provisions in the D.C. Code bill that would pretty much be preventive detention, some pretrial services reforms, aftercare urinalysis program with the possibility of detention in the event of not following after care and the rebuttable presumption seizure of assets.

Have you had an opportunity, Mr. Mullen, to take a look at any of that legislation and, if you have, we would welcome your comments.

Mr. MULLEN. By my count, I see about nine bills now pending in the Congress dealing with bail reform and I have read a synopsis of these bills rather than the entire bills. And I saw nothing in there that was not beneficial to law enforcement.

I am sure there will be much discussion, much debate before they pass. I believe it was about six in the Senate and three in the House and all the bills seemed to, some repetitiously, have the same clauses in there such as limiting the bail or minimum bail in drug-related cases and so forth.

We do support the thrust of those bills and I made known in my statement exactly what we do support.

With regard to the pretrial services, I am not totally familiar with that. I understand it has been effective where utilized in the

court districts and has reduced the bail jumping problem by as much as 50 percent.

I would like to familiarize myself with it more before commenting specifically, but from what I do know it sounds like it is an effective system.

Mr. GILMAN. Thank you.

Mr. ZEFERETTI. We are happy to have you join us, Mr. Rudd.

Mr. RUDD. Mr. Chairman, thank you for the courtesy of letting me sit in this morning on this very important meeting. I had heard some rumbles about a merger, but wasn't quite sure that this would ever take place because there have been rumbles and rumors about this for many, many years.

I do appreciate you letting me sit in and I would like to congratulate you, Mr. Mullen, on your appointment. I know how serious this problem is. It is so widespread that it has gotten into the very roots of our life here at home in America, down to the baby level, almost. It is absolutely ludicrous, what has happened as a result of the drug traffic and it will destroy our Nation if we don't do something about it.

I am very well aware personally of the diligence that this committee and members of the committee have exercised in pursuing this problem, very especially the diligence of my good friend and colleague Congressman Gilman from New York, because I personally know of the activities he has engaged in and, to a lesser extent, my good friend Mr. Rangel from New York also.

I would like to go on record as very much opposing any merger of the narcotics agency with the FBI and let me just explain why. I know that you have had a career with the FBI and I, too, had one, a full career of 20 years before I retired from the FBI, and most of it spent in Latin America, abroad on diplomatic assignment. So I had a chance to observe in a peripheral way the actions of narcotics agencies and police agencies engaged in that work both at home and abroad.

I think it would not be a good thing to merge the narcotics agency with the FBI and let me explain why, Mr. Chairman.

The Federal Bureau of Investigation for many years was directed by a strong personality, a very good personality, John Edgar Hoover and, because of the expertise that he brought to the agency and his complete dedication to the agency, he built that agency from a nondescript agency into probably the finest—not probably, it was the finest investigative organization the world has ever seen, in not my words, but in the words of some distinguished people who have had occasion to make observation. And he did so because he was able to raise the standard of actions by personnel of that agency and by all police agencies across the land, to give them some self-respect in the work that they were doing, and to provide an admiration of the public themselves, for all law enforcement, in every category, everywhere in our Nation.

He was able to do that because when scandals arose, they were promptly aired and resolved in a very preemptory way, in order to reassure the public, and the citizens of our country that the work was being done properly.

Because of that, the Congress of the United States, at least at the time I left the Bureau, had imposed something like 185 different

categories or laws for investigation, and for prosecution, or aid, in presenting a prosecution to the FBI, which made it a much larger agency than was ever envisioned.

Because of that, and because of narcotics traffic, the violations of laws frequently got into narcotics, at least in my time. Not so frequently as they do today. And it was a peripheral responsibility of the Federal Bureau of Investigation, to investigate narcotics actions where they were a part of some of the 180 or 185 violations of laws, with which the Bureau was charged to investigate and enforce.

But it would be a mistake to merge these two agencies for a number of reasons, but you mentioned philosophy, Mr. Mullen, and you Mr. Gilman had some questions about that. Such a merger would be like trying to merge the Navy and the Army or trying to merge the Coast Guard with the Navy.

It is not only a matter of philosophy, it is a matter of mission and it is a matter of growth of esprit de corps which is absolutely vital for any investigative agency in order to successfully pursue their responsibilities in the mission assigned to the people of our country.

The narcotics agents that I was privileged to know and encounter both at home and abroad were of a really different stripe, so to speak, than the agents or people who were engaged in law enforcement of a different mission. They were completely and totally and must be dedicated to the proposition of investigating this type of action.

Sometimes to other people's view they may waste hours, days, and months engaging in such an investigation because it is a slow process. Infiltration is a word I might use in order to discover where the object of the investigation is, or espionage, if you will, whatever you want to call it, both at home and abroad, in order to do the job right.

Consequently these so dedicated people involved in these types of investigations haven't got time to change their narrow assignments, so to speak, to engage in a different type of investigation than the one that they are engaged in.

In the Bureau, in the FBI, the agent personnel were of the very highest quality but, at the same time, they might have a covey of anywhere from 40 to 60 cases assigned for investigation. Each one of those would have a different objective, or maybe an objective to investigate a different type of violation of laws. And not only in criminal activities, but in security activities for the internal security of our Nation. It takes a certain sort of accommodation for a mind to be able to jump from one type of investigation to another and it is almost impossible to do so in the narrow investigative field dealing with narcotics only.

If you are investigating an internal security type violation then you have to sort of live with the type of people that you are engaged in there. People who have a bent for espionage, people who have a bent for subversion, or who have a bent for terrorist activities. You have to sort of crawl into their skin and see where they are going to go, and how they are going to get there, in order to be successful in that type of investigation.

The same thing holds true for a stolen car case, or a white slave traffic act case, whatever you may have to do. It is true, that you might have a peripheral complaint along with that type of investigation, which would deal with narcotics, and that can always be taken care of through cooperation between agencies.

So in this type of case, where narcotics is something a little bit apart from all other types of violations of laws, because of the various types of people involved in it, and the great quantities of money that are involved in this type of activity, an investigative agent or investigative personnel dedicated to this proposition, in my opinion, and I think it is well founded, cannot jump from different types of violations of laws and back into narcotics or, when he is pursuing a type of case over a period of hours, weeks, months, at the same time be detracted or distracted into some other type of investigation.

I would hope that any such proposal will not meet with success although I don't have any preparation of documentation to submit. I would be happy to appear again before the committee as a witness if this is to be pursued in this way.

Mr. ZEFERETTI. Mr. Rudd, let me interject here at this time that we are having hearings today on bail reform, and through the good auspices of Mr. Mullen, who has been gracious enough through his candor to talk about the various aspects of what could happen in the future, as far as the integration between the two agencies, and along with that, some of the things he has found in this 1 week that he has had the responsibility of acting administrator, I am sure that there will be hearings forthcoming in the future, if and when that determination is made, that there will be an integration of the two agencies, and I am sure at that time your statements will be forthcoming in that particular hearing room where the jurisdictional body will be taking testimony.

So we welcome your statement here this morning, but I think we have gone far off the target and, again, I want to thank you for having the diligence and the patience to go through this.

Mr. GILMAN. If the gentleman will yield.

Mr. ZEFERETTI. Yes.

Mr. GILMAN. I think it is quite appropriate that Mr. Mullen hear our views at this early stage while they are in the throes of this decision. I would hope, Mr. Chairman, that this committee would conduct such a hearing before the final decision is made.

Mr. ZEFERETTI. What was indicated by Mr. Mullen prior to your coming into the room was that we would have that opportunity to at least discuss, go over, and sit down with those parties that are involved in that recommendation when it comes.

I just don't want to go that far afield. We have other witnesses who are waiting. I would rather lend ourselves to the bail reform hearing that we are having here today. I don't want to go that far into a subject when there has been no decision made at this particular time.

Mr. RUDD. Mr. Chairman, I appreciate your courtesy in letting me be here this morning. I understood about a minute before I came in that this was the object of the meeting and that is why I——

Mr. ZEFERETTI. That is quite all right.

Mr. RUDD. I appreciate that very much and I am not a bit sorry that I got my words in here.

Mr. ZEFERETTI. We welcome your statement because it is—as Mr. Gilman says, it is a concern for all of us and I don't think there should be anyone left out when it comes time to make a kind of statement that is either pro or con toward the whole proposal. There hasn't been one yet.

Mr. GILMAN. If I may, I have only one question for Mr. Mullen, that I am not quite certain about.

Will your jurisdiction take you abroad? Will you have some sort of jurisdiction abroad?

Mr. MULLEN. Well, you are talking an accomplished fact. No decision has been made regarding a merger or a future course of action. The target date, Congressman Gilman, is around October 1, and there are several directions.

Mr. GILMAN. You are talking if there is a merger?

Mr. MULLEN. No, no.

Mr. GILMAN. Oh, will we be looking abroad?

Mr. MULLEN. Yes, we will. Definitely. We have teams scheduled to go abroad early in August, not only FBI–DEA teams, but Justice Department teams. And I do understand that Congressman Hughes is planning a trip to Southeast Asia and we will be seeking his input.

Mr. RUDD. May I make just one more statement, Mr. Chairman? I hope I am not abusing your time. But you talked about estranged relationships between agencies and I really don't believe that we have estranged relationships between agencies.

I think that what we have is we have to have a cooperative attitude between the agencies and we always have, but it depends on personnel really between the agencies.

This has to be done and it always has been done, and there are hangups from time to time, but it is part of the esprit de corps like it is between the Navy and the Army. But when the chips are down they will get together and do the job. And that isn't a good reason to merge agencies.

I thank you again very much.

Mr. ZEFERETTI. I thank you.

Mr. Shaw?

Mr. SHAW. I would like to add my welcome, Mr. Mullen. Of course, being from Florida, you can readily understand my sensitivity to the problem that we have.

I, too, have a number of questions and comments with regard to a merger which I will restrain myself from going into at this particular point.

I would like, however, to say this, and I recognize that the purpose of these hearings are to hear from you, not from us, but I think that we in the Congress have been very anxious to get to you and comment to you on various things that are affecting us in our minds.

But I do and I would like to amplify again that what we are going to have to have in this administration is a new commitment. I think it was made clear by Congressman Rangel, but I would like to repeat it, that we have not had such a commitment since President Nixon, that since this country, from a drug situation, has

been going to hell in a bucket. I don't think there is any question about that.

I think that what we need is comments from the administration and we do need a national commitment stated as that.

One of the things that concern me when we talk about possible mergers and things of this nature is concern that we may be going backward. This Congress, through the number of bills that have been filed this year, such as bail reform, such as the use of paraquat, such as the posse comitatus that will be going to committee this week to reconcile between the House and the Senate side I think has set its priority, the national priority. And if the Congress as representative of the people is any indication of what the people are thinking, I think that this country is ready to set this as a high priority.

I congratulate you on your new position. You are going to be in the hot seat. You are going to be setting the tone, I think, for all of us, as to the commitment that we hope you will be able to follow through on.

Perhaps my question is redundant, but have we seen the direction as far as the high level officials and Cabinet or in regard to the administration, is going to be assigned to the task to oversee as far as the representative of the President in this effort?

Mr. MULLEN. Have we sensed his direction? I don't know.

Mr. SHAW. Or his identity?

Mr. MULLEN. Let Mr. Hambrick, who is assistant administrator for operations, answer that question.

Mr. HAMBRICK. Carlton Turner has been nominated by the President to head the Office of Drug Abuse Policy, or at least that is what it was called under the previous administration. I am not really sure what the name of the particular office will be. But he is familiar with drugs. He has a good drug background. And I think we will see good administration direction coming from the staff.

Mr. SHAW. Who will he report to?

Mr. HAMBRICK. I am not sure, Mr. Shaw. I wouldn't know the reporting structure that they would set up under this administration. I would imagine that it would report very high because we all feel that the Reagan administration will place drugs in a very high priority.

Mr. MULLEN. If I could elaborate just a bit, I also believe we need a national thrust, a national priority, perhaps something along the lines of the Executive order dealing with fraud, waste, and abuse. There has to be national effort and that will be one of my goals.

Mr. ZEFERETTI. This is No. 1, waste of lives.

Mr. MULLEN. Right, of our most precious resource. And my goal will be to bring all agencies which are capable and able to help into the drug battle. And some initiatives, which I am not able to disclose publicly, have already been undertaken. I think we will have a positive impact on the flow of drugs into this country.

I would be happy to brief the members of this committee in a closed session on those initiatives. I believe we have the same goal in mind, and it is just now shaping up. The effort of closer relationship between the FBI and DEA is an effort to further that goal.

Mr. SHAW. One further question. The FBI, aren't they prohibited in some fashion from doing certain things outside of this country that the DEA does engage in?

Mr. MULLEN. Yes, we have—I have a split personality here. I have to remember who I am with when I am talking—the FBI has legal attachés around the world in friendly countries and these legal attachés act as liaison agents with foreign police forces, exchanging information and so forth.

I believe the DEA is somewhat more operational. I have not yet determined the degree to which they are operational, but they seem to work more closely with the foreign police agencies in the area of drug investigations.

Mr. ZEFERETTI. Thank you and, again, thank you, Mr. Mullen. I guess you can see that there is a relationship that needs to be really enhanced in some way between us, because there are so many things that I think we have mutual concerns. We just want to help in that effort, and we want to be part of that effort, because, again, as has been indicated by every member here, unless there is a national strategy and effort put forth, we are never going to make any impact on this overall problem. So we welcome you and we wish you much luck and feel free to call upon us at any given time. And we may take you up on that briefing you were talking about.

Mr. MULLEN. I appreciate the concerns of the committee members, of all the Members of the Congress, because it is a very serious problem.

Mr. ZEFERETTI. Thank you so very much.

I would like to call to the witness table Magistrate Peter Palermo and Magistrate Frederic Smalkin. Magistrate Palermo is from the U.S. District Court, Southern District of Florida, and Magistrate Smalkin is from the District Court of Maryland. I welcome you gentlemen and thank you for taking the time to join us and feel free to follow any procedure you like. If you have written statements we will accept them as part of the record but, again, feel free to proceed in any manner you feel comfortable with.

TESTIMONY OF MAGISTRATE FREDERIC N. SMALKIN, U.S. DISTRICT COURT, DISTRICT OF MARYLAND

Mr. SMALKIN. Thank you, Mr. Chairman.

We of the third branch, of course, appreciate the opportunity to come over here to make our views known to Congress and I might say personally, and I am sure I speak on behalf of Pete and other magistrates, we are seriously interested in the legislative process and we are glad that the committee, this committee, has delved into the problem to the extent that it has.

It has been obvious to me sitting here that you all have familiarized yourselves with the provisions of current law and bills that are pending to perhaps change it.

The comment about making judges honest, I hope we are to begin with, but the drift of my thoughts on the issue, and I am sure those of Pete as well, is that we would welcome some amendment to the current law which is the Bail Reform Act of 1966, to make more explicit some additional conditions at least, and some

additional considerations that we would be empowered to take into account in fixing bond.

I have prepared a statement for the committee which I will not read to you at this time, but to make a brief summary of it, the current law which is codified at 18 U.S. Code 3146 and following sets up a hierarchy of conditions that goes in reverse from the least stringent to the most stringent. The judicial officer is obligated to release on the minimal conditions that in his or her judgment will assure the further appearance of the individual in court.

That is the touchstone. We have got to consider only, under existing law, in noncapital offenses, the likelihood of the individual to appear again in court.

Of course, there are a number of considerations listed, including the nature and circumstances of the offense, the weight of the evidence against the accused and the accused's family ties.

Oftentimes you will find people who are involved in serious offenses, but whose ties to the community are extremely strong. They have been born in the community, and have lived there all their lives, and have their family, and maybe a wife and three or four children, and the surface appearance at least of likelihood to appear for trial is very strong.

In that circumstance a decision to detain the individual could be construed to go against current law. Current law, of course, provides that the only factor that is salient is the likelihood of the individual to appear again for trial. And if the statute were amended, we prefer, or at least I prefer, to see a broader amendment, not just aimed at narcotics cases.

I think that it is not a good idea to set up different criteria of release by category of offense. If these concerns are valid concerns, they should apply, I think, across the board for Federal criminal offenses. But yet the flexibility that is built into some of the bills pending, Congressman Bennett's bill and Congressman Pursell's bill in particular, we would appreciate—also Senator Bumper's bill. I think that is a good bill as well.

Danger to the community, of course, is the other way of saying preventive detention. The law enforcement agencies, of course, are very much in favor of that. And as previous witnesses have pointed out, there are some essential constitutional problems with it, but as far as I know it has stood muster here in the District of Columbia and I think a bill could be drafted that would stand constitutional muster. But I, of course, cannot speak for the courts that eventually will have to rule on it.

The likelihood of commission of further offenses, I think, falls within that general rubric of danger to the community and I would think that the language "danger to the community" perhaps is not as broad as it could be if the Congress intends to have us take into account the likelihood of commission of further offenses. I think that that should be a specific factor delineated if in fact it is the will of Congress to have preventive detention at all.

The threats to witnesses, of course, poses a very valid concern and under current law are not germane. Under the Bail Reform Act it is not a factor. We are simply to look at likelihood of reappearance in court.

This person might have every kind of conceivable tie to the community, but yet as soon as he walks out the door, might go and threaten to stuff a shoe in the witness' mouth, and dump him in the river or some such thing, which has occurred, and consequently if we are to again consider that kind of thing, that is intimidation of witnesses or potential obstruction of justice, I would like at least to see it made statutorily explicit.

There are some cases, and we have one in our circuit which unfortunately is unpublished, and the unpublished appellate cases are not to be relied upon by us as precedent, not to be cited at least as precedent. And the unpublished case in our circuit, does say that the court has it within its inherent power to protect the processes of justice by denying bail altogether, where there is an indication that an individual has threatened witnesses, and otherwise has obstructed the processes of justice.

Of course, there is no mechanism, you see, for doing it under current statute law. And one of the provisions of the bills that I have looked at, that I like, is the provision that provides a procedure for the bail revocation process, and would give standards of proof to be met and otherwise make it explicit, codify the procedure. And I think that is a good point as well.

One of the things that I want to bring out is that while I favor broadening the standards that are currently in force, to let us take into account a couple of other things, I do not favor the provisions of some of these bills, particularly Senator Kassebaum's bill, that really straitjackets us with regard to the recognizance release.

There are many cases that are appropriate for recognizance release.

Let me just illustrate. In the typical narcotics case that is indicted, at least in our district, it is somewhat parallel to a military organization. You have—in fact, this is the way the prosecutors would characterize it—you have the general, or captain, or admiral, or whatever rank you want to give him, and then the lieutenants, and then the soldiers are running around, and oftentimes the soldiers are those who have been seen to make one deal, or two deals, people who are only minimally involved, sort of, if you have a wheel-and-spoke-type conspiracy, way out at the end of the rim of the wheel, and these people I feel often are candidates for a recognizance release, or some kind of minimal release; a property bond, for example, posted by their parents.

I have met many desperate individuals in the course of doing this job for 5 years but, as I have said before, I have rarely met one that would forfeit his mother's house. And this kind of property bond is one that can be often posted, but yet it is not a very strong kind of detention factor.

So I think that I would like at least to see us keep open the option of recognizance release or unsecured bond release in a particular case, and let the decision that we make turn only on the facts of the case, but give us the maneuver room in the legislation that we would like to have.

I must say that with regard to statistics, I had asked our U.S. attorney and our chief of pretrial services to put together some statistics, and at least in our district, the absolute numbers, and also percentages of the bail jumpers, no shows, is rather small. It

does not appear to be statistically an appreciable problem in our district. And I feel in all candor I must report that to you.

Statistically it is small, and just in talking to Pete here this morning, I think that is also the case in Miami.

One of the problems of course is that the ones that don't show tend to be the big ticket items, the guy that is the chief of the chiefs of the conspiracy and for whom the bail of $5 million or $10 million or whatever it is often is not going to keep them. There is just no amount of money until you get into the astronomical provisions and, without statutory authorization that lets us take into account anything other than likelihood of appear, query whether you cross a certain threshold even in the case of a major narcotics trafficker when you set bond that you absolutely know cannot be reached, $100 million, or $50 million, or even $10 million or $1 million, because the Constitution does say that excessive bail shall not be required.

So the money bail is, although it is a good tool, not really applicable to all the situations that we have to deal with.

The last thing I wanted to say by way of summary of my prepared remarks is that if the Congress does see fit to provide for increased levels of pretrial detention, it is absolutely essential that we be given the funding—not we, the Department of Justice—be given the funding for personnel and the capital construction for places to put people.

I have pointed out in my prepared statement that the marshal in our district is essentially without any place to store prisoners and it had gotten so bad a couple of months ago—and here the absolute numbers are small, 50 or 60 prisoners, maybe 70 prisoners—that we were housing prisoners in the metropolitan correctional center in New York City, which means that the two marshals would have to go up to New York, leaving Baltimore maybe at 3 or 4 o'clock in the morning, go get the prisoner, load him in the car and drive him to Baltimore to have him in court.

Now, these are pretrial detainees, not convicted prisoners.

We have also kept them in the FCI at Petersburg, Va., again meaning a long car trip and security risks attendant on that, the potential ambush situation and what have you. Our jails in Maryland are overcrowded, the State prisons are overcrowded, and the city jails, and county jails are terribly overcrowded, and we just don't have any place to put people, and there would seem to me to be not much point in passing a law that calls for increased detention without any place to put them.

I mean literally we would have to handcuff them to the radiators in the courthouse. This is not appropriate. We do need—I am not here to make a pitch for public works, I guess, but we do need——

Mr. ZEFERETTI. No, but you can look at my bill, 658.

Mr. SMALKIN. I would love to. We do need metropolitan correctional centers. The ones that are already built are already overcrowded, I think. In Maryland we desperately—we need something. Money is not the answer in contract funds. We pay the city jail enough to make it worthwhile for them to take prisoners, in contract funds. The problem is they just don't have any place to put them. They are under order from our court to reduce their population, so it puts us in a rather difficult posture, as you can see, to

say well, here are some more Federal prisoners that we would like you to hold on to.

And one last and personal comment that I will have is that I get to see practically—not every day, as much of my work is in the civil area—but when I do do criminal work, I get to see the end product of the narcotics distribution chain, and it is usually a young man who is 19, 20, 21, 22, unemployed, has been taking it since he was 13 or 14, with no hope for anything, usually having just been brought in from robbing a bank or stealing social security checks from the mail, or being in possession of stolen checks or stolen food stamps or what have you.

The reason, of course, is to get money to buy more drugs. And there is no place that we can treat these people effectively and I often see these individuals who do not have necessarily a serious prior record; they have juvenile records, certainly no Federal involvement until they robbed a bank, and I know that for them it is the beginning of the end in most cases, or it is the middle of the end. Whatever it is, it is the end of the road and the impact of the narcotics trade is not just in things like Operation Grouper and the money that is to be made, but in the human tragedy that ensues and everything that the Congress can do to help stem the tide here is worthwhile.

We appreciate the opportunity to come over here.

[The prepared statement of Frederic N. Smalkin follows:]

PREPARED STATEMENT OF FREDERIC N. SMALKIN, U.S. MAGISTRATE FOR THE DISTRICT OF MARYLAND

I sincerely appreciate being given the opportunity to comment on the effectiveness of present federal bail statutes regarding narcotics traffickers. The statutes enacted by Congress that bear on this problem must be implemented, in the first instance, by United States Magistrates, who are the "front-line troops" of the federal judiciary. A magistrate is the first judicial officer before whom an arrested or indicted person appears. The magistrate is responsible for determining and imposing conditions of release on an individual who has been charged with a crime, in order to insure the reappearance of that individual at future court proceedings, including arraignment and trial.

Under current law, The Bail Reform Act of 1966 (18 U.S.C. § 3146, et seq.), all offenses, except capital offenses, are treated alike. That is, release on recognizance (or on an unsecured bond) is the preferred method, and the magistrate is directed to resort to other, more restrictive conditions of release only upon a determination that recognizance or unsecured bond will not reasonably assure the appearance of the person as required. If such be the case, there is a hierarchy of further restrictive conditions, ranging from third-party custody to corporate bail bond to part-time secured custody. In addition, current law provides a list of criteria to be taken into account in determining the appropriate conditions of release. These criteria, which I have characterized as touchstones for assessing the moral reliability of the individual, include the nature and circumstances of the offense, the weight of the evidence, and personal data pertaining to the accused such as his family ties, employment, financial resources, character and mental condition, length of residence in the community and his record of convictions and of failures to appear. Although current law does not discriminate among offenses, I believe that the magistrate is clearly entitled to consider the severity of the charged offense, as well as the degree of violence and/or moral opprobrium associated with it, under the rubric of "nature and circumstances of the offense charged."

The District of Maryland, like many other metropolitan areas of the country, is experiencing a tidal wave of crime flowing both directly and indirectly from the burgeoning illicit trade in narcotics. Maryland has been the home of numerous narcotics distribution conspiracies, with three to five major conspiracies broken per year by the DEA and other law enforcement agencies. Like some other metropolitan areas, Baltimore is a port city and is also the dominant city in an area having literally thousands of miles of ocean and bay coastline. Thus, in addition to narcot-

ics distribution conspiracies, our District is a point of entry for a significant amount of smuggled narcotics.

Not being a criminologist or a law enforcement officer, I cannot intelligently speculate on the ratio of drug conspiracies uncovered in a year versus those that go undetected. However, based on anecdotal reports and conversations I have had with law enforcement officers, I estimate the ratio is very low. Many times, key arrests are made simply by luck. In other cases, thousands of man-hours of work are required to develop a case. Unfortunately, law enforcement resources of that magnitude are scarce. In addition, based on my experience as a United States Magistrate for almost five years, I can assure the Committee that there is a significant relationship between the use of narcotics and the commission of federal criminal offenses, such as bank robbery, not directly involving narcotics. In fact, according to statistics I have received from the United States Marshal for the District of Maryland, Baltimore ranks eighth in bank robberies, many of which are committed by young males in their 20's who are addicted to heroin. Such persons are also those most likely to steal from the mails or to be in possession of stolen social security checks.

As I understand the focus of this Committee's inquiry, it is to determine whether provisions of current law relating to pretrial release are adequate to deal with narcotics traffickers. In practice, this must be viewed as a question of whether any kind of bail release that is tied to the posting of money, either as a deposit with the court or in payment of a bail bondsman's fee, is adequate to insure the appearance of narcotics traffickers. In addition, the Committee is concerned with the conduct of criminal narcotics enterprises by released defendants while free on bond pending trial, which, despite the Speedy Trial Act, can still be a lengthy interval. Also, the Committee is interested in protecting society from dangerous and violent offenders who may be involved in the narcotics trade.

It is my view that, although current law provides the flexibility for the imposition of significantly stringent conditions of release, it is not flexible enough to be fully effective in dealing with narcotics traffickers and other dangerous offenders. It is true that, under current law, language such as "nature and circumstances of the offense charged" and "character and mental condition [of the accused]" can be stretched to accommodate a number of concerns such as those currently before this Committee, e.g., danger to witnesses and moral opprobrium connected with the offense. Nonetheless, the court is still powerless to deny money bail in toto for non-capital offenses. Since narcotics offenses are not punishable by death, they are, of course, non-capital offenses and fit within this category. Additionally, current law favors release upon minimally restrictive conditions, which, it seems to me, may not be appropriate in the case of many persons involved in narcotics trafficking. Even though, by simple application of current criteria, such individuals often have a likelihood of reappearance in court, they may continue to operate nefarious enterprises while on release and may be able to substantially to intimidate potential witnesses in prospective trial proceedings. In such cases, the court does not have specific authority under the Bail Reform Act to take appropriate measures.

I have been informed by the United States Attorney for Maryland, Mr. Herbert Better, that a recent, informal survey of his assistants, covering the past three or four years, identified four instances of released narcotics offenders who were charged with additional crimes committed while they were released on bond. One of these additional crimes was a bank robbery, but the other three arose from continuing drug enterprises. In one recent case, the prosecutors obtained a tape recording of a released defendant discussing a large cocaine transaction, which had been arranged after his release on bond, with a co-conspirator. In another, a pusher sold more drugs to an undercover agent after her release on bond. Furthermore, prosecutors estimate that more than 50 percent of released drug defendants continue to deal in narcotics until they are finally jailed, although, of course, relatively few are caught in the act.

Turning to the problem of violent acts committed by released defendants, although there are cases holding that bail may be altogether revoked when a released defendant intimidates witnesses, e.g., *United States* v. *Phillips,* No. 77–1731 (4th Cir. June 10, 1977) (unpublished), it would be desirable to have specific statutory authority to revoke bail or withhold bail from one who threatens witnesses or who presents an extraordinary risk of danger to an identifiable segment of the community. In this regard, I recall the case of the most nefarious defendant I have ever dealt with. He was a "hit man" for a heroin distribution ring, who was able to post an $100,000 corporate surety bond almost immediately after his arrest. One of the conditions of release imposed on him was a prohibition of possession of weapons. Within days of his release, he was found in possession of a loaded revolver. I ordered him into custody and imposed a higher bond, which he was unable to post. He is

now serving a long series of federal and state sentences. In his case, the initial $100,000 bond was, I am convinced, merely a cost of doing business.

Through the courtesy of Mr. Jurith of the Committee staff, I have been furnished copies of Senator Bumpers' bill (S. 482), Senator Kassebaum's bill (S. 440), Representative Sensenbrenner's bill (H.R. 3006), Congressman Bennett's bill (H.R. 3883), and Representative Pursell's bill (H.R. 2213). Although there are many provisions of the latter two bills (H.R. 2213 and H.R. 3883) that seem to me to be well drafted and entirely sensible, as well as constitutionally sound in the due process sense, I would prefer to see a general amendment of current bail law, rather than new provisions dealing only with drug cases. Of course, there is no reason why special emphasis on drug offenders and offenses cannot be written into a general reform of the bail laws. Thus, many provisions of H.R. 3883, such as considerations of safety of the community in general and of particular persons in it (including witnesses), and consideration of the illegal alien status of an accused, of possession of stolen or forged identity documents, and of previous narcotics convictions, could be incorporated in a general redrafting of current law.

Turning to the more general legislative proposals for bail reform, I favor the provisions of Representative Sensenbrenner's bill (H.R. 3006) setting forth specific procedures to be used in revoking bond or recognizance release, and establishing grounds therefor. Of the two Senate bills, I believe that Senator Kassebaum's bill (S. 440) is too restrictive in its conjunctive listing of criteria that a defendant must satisfy by clear and convincing evidence before being entitled to release on recognizance. In that bail is ordinarily set at the defendant's initial appearance before a judicial officer, the defendant would not normally be in a position to bring forward any competent evidence regarding the many factors listed in Senator Kassebaum's bill as preconditions or recognizance release. I would prefer to allow recognizance release to remain within the magistrate's discretion.

Of all the bills that I have reviewed, I most favor Senator Bumpers' bill (S. 482), which does not attempt to limit its operation only to narcotics or other specific offenses. That bill allows the court to consider danger to the community and a defendant's use of alcohol or illegal drugs. In addition, I would welcome the statutory adoption of a number of special conditions of release, including that the defendant remain employed, report to a designated agency, and/or undergo necessary medical or psychological treatment. If Senator Bumpers' bill were amended to incorporate some of the substantive and procedural ideas in Congressmen Bennett's and Pursell's bills (H.R. 3883 and H.R. 2213), especially to allow consideration of prevention of similar offenses in the future, so much the better.

Thanks to the excellent work done by our Pretrial Services Office, we have not had, in Maryland, a large number of drug defendants who have failed to appear for trial. Statistics furnished me by Mr. Morris Street, our Chief of Pretrial Services, indicate that only six narcotics defendants have failed to appear since January, 1976. I believe, though, from anecdotal evidence, that our numbers in Maryland are not representative of those in other major metropolitan areas, such as Miami and New York. Our statistics do show, however, that 27 narcotics defendants were charged, during the same time period, with additional offenses while on release. Additionally, the statistics indicate that, at any one time, more than 50 percent of all federal fugitives (including both released defendants and those who have never been apprehended) are narcotics offenders. Thus, there is a basis for giving special attention to narcotics offenders, and a general revision of the bail laws, or a special provision relating to narcotics traffickers, if Congress is so inclined, could be of great value. Narcotics offenders, because of the huge amounts of money that are available to many of them, often view bail simply as a cost of continuing to do business or of fleeing prosecution. So long as the current scheme of bail release remains intact, it seems to me that this attitude is unlikely to change. In other words, I believe that judicial officers should be given more flexibility to prevent narcotics traffickers from further evading the processes of justice.

I cannot conclude without remarking on a very practical aspect of increased pretrial detention. Should the Congress amend the law in such a fashion as to permit or encourage an increase in the number of persons detained in federal custody awaiting trial, there simply must be provisions made for the allocation of funds and manpower for housing and transporting these prisoners. Jails and prisons are in a state of crisis nationwide. In Maryland, several components of the state's prison system are under orders from United States district judges to reduce their inmate populations and to maintain them at a low level. One result of these orders has been to cause a back-up of sentenced state prisoners in local, city, and county jails. Since the United States Marshal for this District does not have a federal confinement facility, he is forced to lodge prisoners in the Baltimore City Jail and in several county jails. All of them are overcrowded. The Baltimore City Jail, which is

the only facility convenient to our courthouse, and which thus offers the lowest risk of escape during transportation, is under court order to maintain its population at a reduced level. Obviously, there is a limit to the number of federal prisoners that can be accommodated under contract in such circumstances. Another major facility utilized by the United States Marshal, the Prince George's County Jail, is also under severe population pressure. In recent months, the United States Marshal for our District has been forced to lodge unsentenced prisoners as far away as Petersburg, Virginia and New York City. This has, of course, resulted in increased personnel and transportation costs, as well as an increased risk of escape en route. Furthermore, it has been extremely difficult for these prisoners to consult with their attorneys, most of whom are court appointed. Consequently, if we are to detain even more prisoners pending trial, it is absolutely essential that the United States Marshal be given a place and personnel to keep them, preferably in a new metropolitan correctional center. Any new statutes enacted in the bail area will be of little effect if they cannot be implemented simply for a lack of a place to put the prisoners. Thus, I urge this Committee to give earnest consideration to recommending adequate funding and staffing to care for prisoners who are detained pending trial, especially in the event that current law is amended to provide for increased levels of pretrial detention.

I wish again to thank the Committee for giving me the opportunity to present these views, and I hope that they will be useful.

Mr. ZEFERETTI. Thank you.

Judge Palermo?

TESTIMONY OF MAGISTRATE PETER PALERMO, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

Mr. PALERMO. I would preface my remarks by saying that I guess we're in the trenches. I know that I am. We have bulletproof benches, closed-circuit TV in the halls, briefcases are checked by the guards electronically at the door. We have one judge now that had for months 24-hour security with two marshals. Recently there was actual threats being made against judges. So when I say trenches—and he was in jail trying to make a contract to kill District Judge Payne and Judge Kyle and so on.

I know one of the reasons that my next remark is prefaced is because I am impressed with being in the trenches with the feel that your committee and Mr. Sawyer and Mr. Wallace has. I was amazed, frankly, if I may be candid—I have listened to their remarks and to yours, Mr. Chairman, and some of the remarks of your committee. You have done your homework, if I may put it that way. Basically, I get the distinct feeling that you have the feel.

I think our value maybe here this morning, at least mine from 10 years in the southern district, would be a "nuts and bolts" thing, a brief statement. You fire away at me and maybe we can get a feeling and I can be of some help.

I regretted to hear Mr. Mullen's statement. He has only been there a week and a half, and when you're on the hot seat and sit down on it, you yell. You don't learn to control it.

Mr. Bensinger in all his dedication at times has made the same mistake. I'm sorry they left before I made this remark. It does not help to make a statement "with the stroke of a pen a judge let the man out with a $500,000 bond." I was in charge of, supervised, and handled just about all the arrests on Grouper, Black Tuna, or all the other ones. There was many, many bond hearings there. You're not hearing about the one that maybe I let out on a $25,000 bond. He was an offloader. It was recommended $2 million. He probably reported.

Now, these were people coming in in the northern district of Florida, the southern district of Florida, the district in Louisiana and in Georgia. We had most of the arrests in Miami. I had previously had notice of it and set up the operation, to have three courts available so they could be processed.

The DEA and all the agents there did a tremendous job. At that hearing, because it was coordinated, we had an agent there at the bond hearing to say, "I was an undercover man, and that is the man and this was his particular participation," at least preliminarily. So when they make statements like that—I have heard the statements from you all saying that a national policy is needed, that's right; coordination is needed, that's right. But people are needed. This is a total effort, not a critical one. I can't criticize you or you criticize me, or this or that department. It's not going to get there.

One of the most difficult things there is as a judicial officer, in my opinion, is to set a bond. It is one of the most emotional. A man is arrested and he is entitled to a quick hearing, and we feel strongly about it. I think all of us do. They are brought before us.

A severe handicap has been the fifth circuit's decision, saying that the testimony they give at a bond hearing can be used against them at trial. In one of your bills that is covered, it's proposed. That's horrible. He invokes one constitutional right and he loses another one.

How can I say to a man who comes before me, "I'm going to put you under oath, and whatever you say can be used against you"? And then if he doesn't have a lawyer and still wants a bond hearing—although we caution them severely, "wait until you get a lawyer"; and he'll say, "No, I want a hearing. I understand it."

It is still not right to put him under oath. That's where we're going to get most of our information, from the defendant. What he says can be used against him. That is a great handicap to us in the questioning at a bond hearing initially. I would suggest in that bill that that be one of the suggestions.

The danger to the community, we have all covered that. Certainly we need that. Violation of another crime while out on bond, I feel strongly about. But discretionary. Don't try to tie us down. Give us the tools, give us the discretion. Don't restrict it to just drugs because we're going to have more hearings, more appeals, to slow us up more than ever if you do that. Give us those specific tools. I think we know what to do with them. We discuss them, we eyeball with them. We have had experience.

The person who is out and has committed 25 different crimes, and has appeared every time, it is like a credit check. It goes to his advantage. I'm not saying it shouldn't. But we should also have the discretion to consider it the other way. Discretion under certain circumstances.

I have made that point to certain civic associations. "How did that man get out?" Well, he has the credit. He has a $50,000 home and children in school, in business, so would you give him credit? Yes. If he's an itinerant and never been to work, would you give him credit? No. Well, basically that is what you have placed us under. A man who has committed 25 crimes and made all his appearances, his lawyer comes in and says, "Judge, you cannot say

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he won't appear." Basically, that's right. But on the other hand it is not right.

I have heard one of your comments which gives us the feel, that within our oath we have tried to stretch some of these things to fit. A violation, for instance, I consider sometimes the commission of another crime as a violation of conditions, the written conditions we have not to commit another crime or do certain acts while they are out. But it's stretching it. We need more specific authority on that basis.

My statement is in the record and basically covers the same things that we lost.

The last thing is, I would like to specifically—and we do this under the *Nebbia* case, but it's a vague one—we should have the discretion to go behind money put up on the bond. I will state categorically that I do not have any evidence, but I have a distinct feeling, a strong feeling, that the narcotics people are either controlling or own some of the agencies, and even the bonding companies. We get strong rumors they're on retainers and this kind of thing, good rumors, and there is a strong likelihood that it's so.

We need to go beyond—*Nebbia* is a vague case, really. One court determined it and we have stretched it to the limit. We should be able to go behind the collateral, even if it's cash. That would tell us more on whether we are doing the right thing in setting a bond.

Now, over the weekend I compiled some statistics. They're just brief, but interesting, from 1980. These were compiled from the U.S. Marshal and the U.S. Attorney. I went through it myself. They're not exact, but they're close.

In 1980, there was 3,300 defendants that went through our district. So that you are not particularly impressed with that, they are not all the type of defendant you're talking about. Many were removals to other districts, probation or parole. But that's the statistic I got from the marshal.

These will compare with what Joel Hirschhorn will give you this afternoon, and you can differentiate because his are from the clerk and are only talking about local indictments. The statistics I am giving you are total, including prior to indictment, magistrate complaints and so on.

The total defendants, out of 3,300, who defaulted bond were 52. The bond amounts, one was over a million, one over $500,000 but under a million, 15 over $100,000 and under $500,000. Of these 52, 42 of the 52 were narcotics defendants. Most of them, 36, were from South America, and out of that, I would think 33 or 34 were from Colombia. But of those 52 people who jumped bond, 2 were recaptured, 1 conviction was set aside—and this is the last point on it—9 were released from custody due to the Speedy Trial Act, 9 out of 52.

We knew they were a risk. We held them in jail for the 90 days, and under that we had to release them on some sort of recognizance bond because they just couldn't, under the circumstances, get to it.

That has been a deterrent to us in the narcotics fight. We are pushing—we have months of trials, the district judge and so on—I'm not going into that; it's not for this committee. But because of that, it was 9 of 52. So the percentages actually are 1.5 percent

possibly. It might be higher. I would suspect from experience and past investigations that our bond jumping totals will be 5 percent or under, which is lower than normal.

I would say 90 percent of our "trade" as I call it is transient; that is, from out of our district, out of our State, out of our country, which makes it very difficult for us to set bonds, because we can't get on the phone, or have a pretrial detention, to get on the phone like I could with my family in Pittsburgh, or somebody from Idaho, and call up, and find out from the principal of the grade school, or the high school, in 30 minutes, his record or work record. We can't do that.

One other thing I would like to suggest to you. In one of the bills it is stated that we should then have the findings of fact and conclusions of law and recommendations in writing. In our district, that would be an impossibility. I had 42 the other day, for instance, in one morning. They were add-ons, incidentally. That was just the policemen's case, plus another marihuana bust in the Keys.

I am very much in favor, and it would be feasible and practical—and I believe Mr. Smalkin would agree with me—that we should put our reasons on the record. That's fine, either with a court reporter or on a recorded record, because then when it goes to the district judge or the appellate court, they have the tape or the transcripts as to our reasons.

But to require a written report, I couldn't get to it for 90 days at least from just that 1 day's work. It would put a burden on us. But definitely yes, to state your reasons. I am very much for that, your reasons for doing something, so that the court above knows why you did it and can either reverse you or affirm you.

With that, I would not like to go into any more and would be happy to fire away at any questions, nuts and bolts like, that you would wish and maybe we can get a feeling.

[The prepared statement of Mr. Palermo follows:]

PREPARED STATEMENT OF PETER R. PALMERO, U.S. MAGISTRATE FOR THE SOUTHERN DISTRICT OF FLORIDA

One of the most difficult duties that a judicial officer faces in my opinion, is the setting of a fair and just bail that will also guarantee the defendant appearing when ordered by the court. I say difficult because the defendants when arrested are brought before a Judicial Officer as soon as possible generally within hours of their arrest. This does not give the defendant a chance to converse with an attorney nor does it give the government time to fully investigate the background of the defendant so as to be able to present evidence to the court.

In the Southern District of Florida a large percentage of defendants appearing before us are what we call "Transients", that is from outside our district, state, or even out of the United States compounding bail hearing problems.

We feel strongly that a defendant should be presented to the court as soon as possible and have a reasonable bond set. We have a requirement in our District that requires the agent who takes anyone into custody to immediately contact the duty United States Attorney not only for authorization for the arrest but to furnish the U.S. Attorney with information relative to bond. The U.S. Attorney then must contact the duty Magistrate to set a bond. The U.S. Attorney presents any background that they may have and a bond is set and the defendant is then qualified to be released upon the putting up the bail. Generally these bonds are higher because of the lack of information relating to the defendant at that time.

The defandant is brought before a Magistrate the next day for his initial appearance and if he has not already made bail, the court will afford him a full bond hearing with all witnesses testifying under oath. If the defendant does not have an attorney present, the court advises him of his rights and cautions the defendant that it might be advisable to wait until an attorney is present to advise and counsel with him. In our opinion the only fair method of setting a bond is to have the

defendant before the court so as to judge the persons creditability, demeanor and so on.

We also find it a handicap as to the position the government finds themselves at this stage of the proceedings due to the fact that the agents do not wish to reveal information to the court as it may jeopardize prosecution in their opinion and yet the court cannot rely upon just the governments bare statement that this case requires a high bond.

A further handicap at the bond hearing is that the testimony the defendant gives at the bond hearing can be used against him at any future court hearing or trial and this keeps the court from taking of testimony from the defendant . . . especially if he is not represented by an attorney at the time.

Having reviewed several of the proposed bills that have been introduced in Congress by various members, it appears that somewhere in all of the bills there is the suggested improvements on the bond reform act that we feel will improve it greatly so as to benefit all parties.

Our opinion is that if broader jurisdiction is provided, the courts can accomplish most of the improvements suggested in the proposed bills. We strongly feel that any change that differentiates between drug charges and other crimes will not be beneficial to the system. Even if the change would be held constitutional at some later date it could still make for more opportunities for the defense attorneys to delay the actions of court and make for more hearings, motions and appeals which will delay the speedy trial of the defendant and do an injustice both to the guilty, the innocent and the public. The changes made should apply to all crimes and with the Congress giving to the courts more leeway in the setting of bonds, we could then accomplish what you are trying to accomplish with a more effective bond act.

Basically the present bond reform act is good and as I said earlier most of the improvements are contained in the proposed bills presently introduced but not all in the same bill.

We feel that the court should be specifically authorized to consider the following:

1. Danger to the community that the release of the defendant might cause.
2. The previous arrest and convictions of the defendant. As it now happens, the more arrests that the defendant had previously is to his credit if he made all appearances required by the court.
3. The commission of another crime while out on bond on a previous charge from any jurisdiction.
4. Last but not least the court should be given more discretion as to the tracing the source of the money or the background as to the collateral given to a surety company and cash put up by the defendant or any other person.

In this respect we do not at this time have concrete evidence but many of our judges have a distinct feeling that some bonding agencies if not companies may now be owned or influenced by the criminal element.

Our court has tried to explore this matter through "Nebbia" hearings wherein the court has said that under certain circumstances we can go into the collateral matter but it would be of great aid to the court for Congress to set forth this specifically in its Act.

I don't have to call to your attention the great amounts of money that is being made by the drug dealers and it can only be described by saying that it is mind boggling to see the money being thrown away and spent in our area.

Bonds in the amount of $100,000 use to be rare and now we are setting bonds in the millions and many times the defendant is able to put up the bail within hours. Hundreds of thousands of dollars have been abandoned in cars and suitcases and no one comes forth to claim the money . . . obviously because they don't want questions asked. And yet for a "mule" a high bond is exorbitant and not a fair bond. With the jurisdiction to go behind the collateral . . . we feel that the court then can be fair to all parties.

I strongly feel that too stringent guidelines set by Congress in drug cases may hinder the court rather than help it as well as be unfair and unjust to some defendants. An example may be where a police officer of many years is accused of being involved with drug defendants and the main witnesses would be drug dealers who have made agreements with the governments for more lenient sentencing for information. The police officer has children in school, is buying a home, has never been arrested, has an excellent record prior to this charge and has known of the probability of his being charged by the government for more than a year and when the charges are filed voluntarily surrenders. The government asks for a high bond and yet does not have any evidence to authorize the court in the setting of such a bond. I have asked the government at times if they have even a good rumor that the defendant will flee if admitted to bond and the answer is none. It would be unfair for a defendant under these circumstances to be placed under a high bond and yet

the charges are involving drugs and the evidence against him may be strong, at least it appears that way at the bond stage of the proceedings.

As to the designated types of bond in the present bond reform act we feel that as the act is written now that basically it is good but might suggest that there specifically be a designation of recognizance bond and a personal surety bond. The difference being that in the own recognizance bond the defendant just promises to appear, but in the personal surety bond a monetary amount is set and if the defendant does not appear then the government can proceed to collect the amount specified. This is often collateralized by real property owned by the defendant or his family. If the defendant makes all of his appearances then the placing of bond does not cost him any money.

In H.R. 2213 Page (18)(C)(3) the bill would require the court to issue an order denying release accompanied by written findings of fact and reasons for its entry.

Certainly we feel the courts reasons should be placed on the record but to require the above in our district would place an intolerable burden upon the court especially because Magistrates are not provided court reporters for this type of hearing. The hearings are electronically recorded only unless the defendant brings a court reporter.

When there is an appeal from a bond setting, a written memo is provided to the District Court Judge and either a transcript made from the recording or the tape itself is furnished to the District Court for review.

We feel a requirement for the court to place its reasons for the denying of a bond or setting of a high bond to set forth its reasons in the record would accomplish the purpose without placing an additional burden upon the courts.

As a representative of the Court of the Southern District of Florida I wish to thank you for the opportunity to present our views.

Mr. ZEFERETTI. I thank you both for your testimony. Of course, your entire testimony will be put into the record.

Let me say, too, at the outset—I don't know whether you were in the room when Mr. Hughes and Mr. Sawyer were testifying earlier—that in the Rules Committee we held up their pretrial sentence legislation because we felt it didn't have all the ingredients necessary for the judges to make a real evaluation of who the people were that came before them. We just felt that that one instrument alone, whether or not he is going to return, wasn't the ingredient necessary for really the judge to do justice to that pre-trial examination. So that is going to be worked on, and as they indicated, it is being worked on right now.

Mr. PALERMO. Theoretically, Congressman, that would be great. But you haven't the time. You're going to delay somebody in jail 2 or 3 days sometimes while they are digging up the information.

Mr. ZEFERETTI. I think we would want to know, regardless of whether it's a drug case or not—and I must say to you that we weren't talking just about drug cases, but we were talking in general—I think you would want to know if, in fact, he was a threat to the community, if in fact he was a threat to a person, if in fact he had a history to create more mayhem in the community. I think those are things that can be done quickly. I think you can get some cooperation within the criminal justice system to give you that information in a quick way.

I don't think we are hindering the ability to give him justice and due process. I think it would be less than that if we are saying to you or blaming you for letting him get out to commit another more serious crime.

Mr. PALERMO. Well, we're thick-skinned. That's what we get paid for. I know they don't——

Mr. ZEFERETTI. You might be thick-skinned, but whether or not it is correct or right is something else.

Mr. PALERMO. We try to be correct.

But we have another problem, and it is this: The agents and the prosecutors, of course, when they present their case to us, don't want to give away any more information than they have to, sometimes justifiably so and sometimes by playing "footsies", they don't want to give us the information they have. They just want to say he is a known narcotics dealer and we want a $5 million bond.

I have even asked them, "Do you have a good rumor that he will flee?" They'll say no, but they want a $5 million bond. This is intolerable and against our oath. But they're playing "footsies" sometimes, and sometimes the investigation is still ongoing and they don't want to give us any information.

Mr. ZEFERETTI. That's why we feel the law should be specific, to give you, as we use the expression, "tools" for you to do your job.

Mr. PALERMO. Oh, I heard that this morning. I was very impressed. I heard the testimony and the questions and remarks made by you all. I'm not going any further on it, but I was impressed.

Mr. ZEFERETTI. I want to touch on one other facet of the criminal justice system which Judge Smalkin brought up, and that is the correctional side of it.

Unfortunately, we don't look at criminal justice as one entity. Everybody is talking about separate parts and what priorities should be given along those lines. But at the very time that we have all of these troubles in correctional systems throughout the country, we find the Federal courts have put some mandates on local government and the various agencies, telling them what types of standards they must comply with in order for them to have any place for incarceration, whether it be in a detention area or a sentence institution. So we have created a different kind of atmosphere at the same time we want to create some kind of laws that are going to give us the ability to take people off the street to protect society, because that really is the prerequisite of what it's all about. So we really have not gone into the priority that is so necessary if we're talking about the system as an entity within itself.

There are bills, I might tell you, that are pending here in Congress that lend themselves toward giving local government a share and a helping hand in meeting those capital construction requirements that are necessary to meet the minimum standards. So I would like, if you have the opportunity, for you to look at some of them, too. I think you might find them worthwhile.

Mr. SMALKIN. I would be glad to.

As you might or might not know, Federal prisoners can only be housed in local institutions that meet criteria promulgated by the DOJ, the Bureau of Prisons in the DOJ. The criteria rather, shall we say, favor the institutions that are more on the model of Allenwood—not necessarily the minimal security, but nevertheless ones that are modern and meet all of the sanitation requirements. They're drafted for an ideal world, and unfortunately this is not an ideal world.

Right now there is an effort made to house Federal prisoners only in institutions that meet the DOJ criteria. But the problem really stems from a domino effect that comes from the fact that the State system just cannot handle its prisoners. The Federal courts,

as you have pointed out, have been—I will admit this—the Federal courts have been the ones that have put the State courts under pressure. But this goes into questions of federalism and comity and other issues, constitutional issues, that are so far beyond the range of this hearing that I wouldn't want to get into it unless you want to open it up.

Mr. ZEFERETTI. No, I don't want to go that far afield.

I would just like to ask one question and then I'm going to turn it over to my colleagues.

If we have a person that is out on bail and he commits another crime, in your opinion, should we reinstate bail again on that second offense?

Mr. PALERMO. We should have the discretion, depending on the weight of what happened. Sometimes it is very flimsy. It depends on——

Mr. ZEFERETTI. What do you mean by "flimsy"? I don't understand. If he has committed another crime—I'm talking about someone that is out on bail——

Mr. PALERMO. He hasn't been tried yet.

Mr. ZEFERETTI. I understand. I understand that under the law he is innocent until proven guilty. But he has committed or has been indicted for another crime.

Mr. SMALKIN. It might also be a crime over which, Mr. Chairman, the Federal court just doesn't have jurisdiction. Then the question is should the Federal bond be revoked. For example, he might have been caught carrying a handgun, which is a State offense, after having been released on a Federal offense. Should the Federal bond be revoked? I think that some of the bills that have been proposed would allow us to take that into account.

But again, the philosophical issue that has got to be addressed by Congress—and I think this is within the Legislative Branch's sole discretion—is should we, as a nation, entertain the notion of preventive detention for Federal offenses. And if you say that's the case, then it seems to me there is pretty strong a priori evidence that the individual poses a danger to the community if he is arrested while out on release. So then that seems to me to be something we should rightfully take into account in deciding whether to continue the person on Federal bond.

Where he has committed another Federal offense while on release from Federal bond, then you can, of course, even under current law, say that the likelihood of reappearance is less strong because of the fact that the individual is now facing heightened penalties and under current law you probably could, although again sort of sub rosa, take it into account. If the present law were amended to specifically make these considerations pertinent, then it would be an easier thing to do.

Mr. LIVINGSTON. Mr. Chairman, would you yield on that point?

Judge, both of you, I followed you pretty well until this last point. I get a little concerned when we start talking about the distinction between the Federal and the State jurisdictions. Certainly if he gets arrested for double parking or jaywalking or something like that, you're not going to be inclined to revoke his bond.

But suppose he is picked up for suspicion of murder while he is out on a Federal bond? There are tons of State offenses over which you won't have any jurisdiction. But, my goodness, I would certainly hope that you would seriously consider and revoke his bond without turning it aside on the basis of Federal jurisdiction.

Mr. SMALKIN. I should think that in many cases, Congressman Livingston, the offense would be serious enough that he wouldn't be released on bond for the State offense. If the individual should be released on bond from the State offense, at least in our district the pretrial services agency would bring this to our attention and a hearing would be held immediately to reconsider the terms of release.

But again, under current law, the only relevant consideration is likelihood of reappearance. That is why an amendment, if any, or if the Congress wishes to address a problem, an amendment to current law has got to be enacted.

Mr. LIVINGSTON. Do you mean to tell me that if a drug agent came to you and said, "We can't prove it; he hasn't been picked up on a State offense. But we think he just knocked off one of the key witnesses in another case," perhaps a State case, unrelated to your own case, that you wouldn't be able to arbitrarily revoke his bond?

Mr. SMALKIN. Well, I should hope it wouldn't be arbitrary in any case. But I would think that under that circumstance, again we do not have the specific authority to do that under existing law.

Mr. LIVINGSTON. That's frightening.

Mr. PALERMO. If I may, sir, I personally wouldn't make any distinction between whether it's a State or Federal crime. But how in the world can we have an agent come to us—he is ex parte so it's not in open court——

Mr. SMALKIN. You have to have a hearing before you——

Mr. PALERMO. And tell us this information. If they want to bring it to us through the U.S. Attorney and present it in open court, or even in chambers on the record, I would hear it. But we are not prosecution. We are not defense. And for me to take an agent in my chambers and he wants to give me information, especially of that type, I would be violating my oath. He would be ex parte-ing me.

We have great sympathy for them. We work in the middle of the night when we know they're working at night, to be available to give them search warrants or complaints. We don't like it but we do it. We don't have to, but certainly it's our duty. We understand their position, but we have to —I say, personally, I would see any crime and let us be the judge as to whether it is serious, whether it's a shooting or whatnot, whether it is State or Federal. I wouldn't make a distinction on that basis. But for somebody to come in—many times they tell us this in open court. And when the facts are out, it is something altogether different.

Mr. SMALKIN. The only authority, Congressman Livingston, that I now know of that would permit us to take into account the threat that the individual poses would be a threat to the administration of Federal justice, and this comes under, in our circuit, the unpublished *Phillips* decision. It is not even a published case that we can cite as precedent. Under the rules of our circuit, it is not supposed to be cited as precedent in open court. So we are acting in entirely

uncharted waters, at least legislatively, if I were to revoke someone's bond in light of the commission of a State offense or a threat to someone who is not involved in the Federal process of justice.

Mr. LIVINGSTON. Gentlemen, I thank you for responding.

Mr. Chairman, I thank you for yielding. But I can envision any number of circumstances under which that would be a gaping loophole and it concerns me greatly, that you might have very dangerous people walking out on the streets under Federal bond committing some very serious offenses which apparently these gentlemen can't take judicial notice of.

Mr. ZEFERETTI. This is why we sort of held up that pretrial sentencing bill, until they did some work on it, because we felt that their hands were tied in this whole procedure.

Mr. Rangel.

Mr. RANGEL. I don't envy the position that you judges find yourselves in, because we'll give you all the discretion—at least they will—once it appears as though you made a mistake, and you can bet your life that "thick skin" is going to be tested.

Now, I can't for the life of me see why you really need more authority with the discretion that you have. I can tell, Judge Smalkin, that you're almost asking for this legislative change without saying it. But it would appear to me that in the situations presented to you in the hypothetical by the chairman and Mr. Livingston you do have discretion to consider that in view of these other offenses, alleged crimes, that the propensity for someone to flee the jurisdiction is increased by the new charges.

As a former prosecutor, it could be the whole case may not want to be exposed at that time, but I always thought that even the quantity of the drugs involved—we didn't have calculators then, but you would be able to tell the judge how much money was involved in the transaction——

Mr. PALERMO. We take that into consideration.

Mr. RANGEL. You can take so much now into account, that you don't have to convict the man or woman right then. It just seems to me that the more you ask for legislative assistance, and the more you ask for legislative tools, the more you're going to be messing with the Constitution. It just seems to me that it is really bad when you are going to have to decide who is dangerous to society, because someone said they're dangerous to society.

I hope no one on this committee is asking that you explain this to the judge in his chambers. There's a record there. You bring the man into court and you say exactly what he is charged with. It seems to me that the serious nature of the charges—of course, there are other factors that you have—would be enough for you to detain people sometimes without bail, no matter how good his past track record or credit record was, if in fact it's a serious crime.

We have problems with those cases in New York where somebody—and it's not Federal, really—but in narcotics cases where clearly—and I'll never understand why the judges do it. The fellow has half a dozen mansions, two or three Cadillacs. His workers are wealthy. And he comes into court with a battery of lawyers, and they set bail at $10,000.

Mr. PALERMO. That's practical thinking. I sometimes ask the lawyer—and he doesn't have to answer it—"are you paid?"

Mr. RANGEL. Of course.

Mr. PALERMO. If he is paid, it is less likely that he is going to flee. Now, he will put up a bond and flee, but you don't pay a lawyer $100,000 and then flee. [Laughter.]

Mr. RANGEL. Especially when you know the lawyers and you know what their fees are, right?

Mr. PALERMO. I don't have to ask him how much. I know the lawyer. We're acquainted with them.

Mr. RANGEL. My question really is, Do you need more tools as relates to bail? I fully appreciate your dilemma as to where do you put them.

Mr. SMALKIN. I don't want to overstate the case, and I think the system, Congressman Rangel, has been working very well——

Mr. RANGEL. We have the tools anyway, to get reelected. But I want to make it very clear, do you need any more tools?

Mr. SMALKIN. As the statistics point out, as far as insuring likelihood of appearance, I think the present law has been working. I am an advocate of the "if it ain't broke, don't fix it" school, especially in legislation. I sure don't want more legislation than is necessary.

Mr. RANGEL. That's what we're talking about, you know, Judge.

Mr. SMALKIN. Then the question is what is the necessity for it, and obviously I think there is a perceived necessity on the part of members of this committee and Members of Congress and the public as well.

Mr. RANGEL. It is perceived that they report the case that you make a mistake and they don't report the day-by-day tensions and——

Mr. SMALKIN. That's always the case.

Mr. RANGEL [continuing]. And what you're doing, because it's subjective and you have to make these decisions one after the other.

Mr. SMALKIN. Nobody pays any attention to it when it works.

Mr. RANGEL. People can't get to your court. They get to us in the districts, and we say we have a piece of legislation that will mandate those judges to take these people off the street. That's what we're doing.

Mr. SMALKIN. All of the considerations that you mention can be taken into account under the broad language of 3146(b). There is no question about that.

The point is, though, that if you set a bond you know the individual cannot meet, then are you faithfully executing your duty to enforce the Bail Reform Act as it is now written. Because the Bail Reform Act, as it is now written, directs us to set a bond that is the least restrictive bond that we can under the circumstances to assure reappearance. I get very upset when I'm operating in the interstitial areas where there isn't clear legislative guidance, especially in an area like this, which is so fundamental to the individual's constitutional liberty rights.

I think the Congress would not be overburdening the legislative roster by just increasing our discretion a little bit. I don't favor some of the bills, like for example Senator Kassebaum's bill, which I think is way too restrictive. But I do favor something like Senator Bumper's bill that does let us take into account the likelihood of

the individual to commit other offenses, especially against witnesses and other members of the community who are identifiable.

Mr. SHAW. Would the gentleman yield on that point for just a moment? I would like to expand on that.

Based upon what you just said, and in certain situations where you know that you have or certainly think that you have a defendant who will flee if he gets out, regardless of what that bail is, or that he could cause harm to himself or to the other members of the community if he's let out, in that instance don't you think it is your duty to either refuse bail or to set bail so high that you know he will never be able to put it up?

Mr. SMALKIN. If the likelihood of flight is so strong and the access to resources is so strong, then we have a duty to set a high bond, yes, Congressman Shaw, that's correct. But under the reading of again current law, the entire notion is to find the very least restrictive condition that will assure appearance. In many cases a bond which is very high in dollar terms, which seems under the hurried conditions of the bond-setting process which occurs sometimes an hour or two after arrest, will set what appears to be a high bond and in walks a bondsman 10 minutes later to post it. It is quite obvious this is not a deterrent to the individuals being out on the street.

Mr. RANGEL. Well, I wonder whether it should be a deterrent—and I don't want to get involved in preventive detention. But you're stuck with the Constitution, no matter what we try to do with it, and if we mandate that you, with all of the factors, with all of the information that's available, or how little is available, you determine whether or not you believe the defendant is going to be in that court when you tell him to be in that court. So don't act like you're pained because you set bond and he got out.

Mr. SMALKIN. This would be only in a situation, Congressman Rangel, where the individual doesn't show up afterwards. That's where the pain would come.

Mr. RANGEL. Of course. But you don't run around excited because you set bail and the fellow couldn't make it. Of course, these things happen, and mistakes have to happen. It doesn't mean that because he made bail he is not coming back.

Mr. SMALKIN. Oh, no, of course not.

Mr. RANGEL. Bail is a deterrent so that he doesn't forfeit his mother's house, that he can't go to different places now, wherever he borrowed the money, because he owes the money.

I am concerned that when you start thinking about how to keep him in jail, I'm worried about you.

Mr. SMALKIN. Only in the circumstances where there is a high likelihood of flight. In all other circumstances, if the individual makes bond, that's fine.

Mr. RANGEL. But even with the likelihood of flight, you are supposed to think of creative ways to deter that flight, and jail is just one of them.

Mr. SMALKIN. The one that I have found the most effective is a property bond that is posted by family or friends. That is the one that I favor personally.

Mr. RANGEL. Exactly.

So again, I am saying that we are here to give you tools, but I hope you don't get carried away with the flavor of this committee and ask us to get involved in what traditionally has worked, as you put it. It is broad discretion, and we will be critical when a mistake is made. But that's just a part of the game.

Mr. SMALKIN. In fact, the system I think in practice does work fairly well. Most of the time, even in the narcotics cases, I will set a bond that can be secured by property. We in Maryland don't have the problem with transients as much as Magistrate Palermo. But there are many cases where I will set a bond in terms of money that I thought was high enough to assure reappearance, where it has become obvious that that's not the case. The individual has posted it and fled.

Mr. RANGEL. I think you're doing an extraordinary job and it is too bad you can't get some press people out there to talk about all the people that are in jail——

Mr. PALERMO. Congressman, we're not worried about the publicity. Just raise our salary. [Laughter.]

We are concerned, like you are, and very much so. We are asking possibly suggesting refinements, not major changes.

It is mind boggling. To set a $5 million bond on the one person who I, in all the years I have been there, really felt was biggie, biggie, biggie, they come in every day with that. Two hours and he was trying to make it. We found a New York charge and another minor charge and held him, and due to other reasons he was not released. The jury let him off. Truly one of the biggest ones.

We know—I felt confident that the two couriers we caught leaving the country with $1.6 million—incidentally, mixed up in a monopoly game—the agents thought they had bad information at first. Another courier with over $1 million in hundred dollar bills, within 2 weeks. In this case the agent says, "We have good information that he had 27 million dollars' worth of business in 1 month wholesale," wholesale prices on cocaine. There's a big difference between wholesale and retail. In this case the judges upheld it. But he was ready to make it.

Where do you go? I mean, $100,000 used to be a big bond.

Mr. ZEFERETTI. It is frightening.

Mr. PALERMO. It is frightening, it is mind boggling. Where do we go? It is just every case decision——

Mr. SMALKIN. I don't want to leave the wrong impression. I am certainly glad when somebody is able to make the bond or post bond and get out and be at liberty pending trial, and the person shows up.

The ones that pain me are the ones that I have tried as hard as I could to do what I thought was right and mandated under law, and it just has not worked out. Those are the painful ones.

There is nothing you all can do, I think, to ease that pain. But you can broaden the law just a little bit.

Mr. PALERMO. Nobody is perfect. We are just trying.

Mr. ZEFERETTI. Mr. Gilman?

Mr. GILMAN. Thank you, Mr. Chairman. I will try to be brief because our time is running.

I want to thank both Judge Smalkin and Palermo for giving their time to the committee and taking us down into the trenches

with them. I think it is important to this committee to recognize some of the problems you are confronted with.

Am I getting the proper impression from you that you feel the law is all right, that you don't want to be mandated? You want to change it a little bit. I want to make certain what that little bit is that you feel is important to you. Is it preventive detention?

Mr. PALERMO. Not for me, necessarily. I personally worry about—hysteria bothers me. I can never forget our American Japanese citizens, what happened to them in hysteria, and it upsets me.

Mr. GILMAN. Well, we are not dealing with the hysterical motional. When you said $27 million in 1 month that this man was trafficking in——

Mr. PALERMO. Yes, sir.

Mr. GILMAN. That is not hysteria.

Mr. PALERMO. No, sir. We tried to handle it from that basis. And he didn't get out of jail until—of course, the jury found him not guilty on the major charge.

Mr. GILMAN. My point is, this is a distinctive type of crime. We are dealing with big business here. How do we handle it? How do we keep them off the streets?

Mr. PALERMO. Well, basically, we evidentally must be doing something right with the percentages we have. We still should do better. We are trying to do better. We could use a refinement.

On my statement, that I didn't read, I said that basically the law that is before us is good, and it has been working. I feel that definite authority on letting us go behind the collateral would help. We are doing it now, but in a little bit roundabout way, where we feel it. In the *Nebbia* hearing I know that Judge Kyle, the judge in Congressman Shaw's area, does that quite a bit, and I have been working with her quite a bit on that.

Mr. GILMAN. To go behind the collateral to see the sources?

Mr. PALERMO. Collateral, yes.

Mr. GILMAN. What will that accomplish for you?

Mr. PALERMO. Well, if we can get behind and find out that they have an interest in the bonding agency, for instance, or that they are a mule and the man is putting up the money for them, that, to me, would say, if it is a mule case, he wants to get him out of town or he wants to get him out of the country, or get him out to kill him.

This man doesn't have the money. Yet, somebody comes in with a $100,000 bond. If you just say, "Well, some friend came in and put it up," what can I say? The bond is up.

But if it is a mule——

Mr. GILMAN. Are you prevented, Judge, from pursuing that kind of questioning at the present time?

Mr. PALERMO. It is a question, and I am afraid, when it is appealed, it is going to happen. But with just a slight refinement we would have that authority. We do it under this *Nebbia* case, which was there was an interest brought in the bonding company, as I understand, and they said, yes, you can go behind the bond. And we use that to death on cases where we want to get behind the collateral.

Mr. GILMAN. Isn't that sufficient authority right now for you to pursue until that——

Mr. PALERMO. We are using that. But we are getting backfired on it. It would help if we had a specific refinement in the law saying so.

Mr. GILMAN. Taking the *Nebbia* decision, putting it into statute?

Mr. PALERMO. Or close to it.

You know, when they go down and pay a lawyer $500,000, $300,000 or more, that lawyer is not going to miss anything. And he has got all the funds to do these things. And, God bless them, many of them are fine and honorable men. But when you get those kinds of fees, they are not going to pass up any possible appeal or whatever.

They are not all—we have some fine, upright lawyers down there who I respect highly. Some, of course, when you practice law as long as I did and have been around, they are on the borderline and participating. You can't prove it, but we know it. Some of them have been shot down there, two of them, lawyers.

Mr. GILMAN. Besides the *Nebbia* language of allowing you to inquire further into the source of the bond money, what other area do you feel must be——

Mr. PALERMO. Danger to the community.

Mr. GILMAN. How do we take care of the danger to the community? Should it be written into this statute? Should it be a mandate upon you?

Mr. PALERMO. We should be given the discretion where, in their opinion, a man would be a danger to the community, broadly.

Mr. GILMAN. Do you think that that is a sufficient definition, just those words, "danger to the community"?

Mr. PALERMO. Yes, sir. The only danger to the community that we have now, that I feel from the cases in law, is where it is an obstruction of justice, where they are going to interfere in that particular case, we can take danger to community.

Mr. GILMAN. Let us take a major trafficker like you suggested. Would you consider him to be within the realm of that definition if we provided it by statute?

Mr. PALERMO. I would if he had a silencer, an automatic gun in the trunk of his car. I do that now.

Mr. GILMAN. Suppose there isn't the silencer? Just the fact that he is a $27 million trafficker, is he considered to be a danger to the community?

Mr. PALERMO. That is an allegation at our stage of the game. It might be very flimsy. These policemen we had last week, nine of them, they may be guilty, I don't know. But they come in and say, "I want a high bail bond on each of them." They have never been in trouble. They have an excellent record. They have a family with kids in school. They are charged with a narcotics offense.

Who are the witnesses probably against them at this stage in the game? It looks great, the evidence. The weight of the evidence is great. The witnesses against them are going to be the bums and the narcotics dealers that the Government has made deals with. You give them lenient sentences to testify against them.

Mr. GILMAN. That is what I am troubled with.

Mr. PALERMO. Right.

Mr. GILMAN. Do we define it just as a danger to the community? Or must we go a step further?

Mr. PALERMO. I wouldn't go too far and try to define it. It would be my suggestion to let us have the discretion.

If a man is caught with a gun, to me, that is something to be considered as a danger to the community. But not every time.

Mr. GILMAN. Do you think that should be built into 3146(b) then? Is that what you are saying, to put danger to the community as an inclusion to Title——

Mr. PALERMO. Yes. Everyone I have talked to would like that discretion.

Mr. GILMAN. Do you agree to that?

Mr. SMALKIN. Well, I would perhaps word it, Congressman, as likelihood of commission of further offenses of a serious nature while on release. Perhaps that would be a way to word it.

Again, this is not a judicial decision, a decision whether to institute a program of preventive detention. It is not a decision which is essentially judicial, it is a legislative decision. It is up to you all to decide whether this is going to be the policy of the country.

Mr. RANGEL. We don't need any judges or prosecutors with that type of legislation. You can walk the street and determine whether somebody may commit a crime and jail them.

Mr. SMALKIN. Well, I don't think that is the case, Congressman Rangel.

Mr. RANGEL. I mean, that language, if you as a lawyer and a judge can adopt that language, which is great politically, then I could extend it and say, "On the way home from the courts, if you see anybody in the street that you can look at that looks like they are going to cause a problem, and we will put them aside until"——

Mr. SMALKIN. I think that every rule of law can be extended——

Mr. RANGEL. You are going to let this Congress give you such broad discretion, and if you make a mistake then, then they are going to take your robes, because there won't be any way for you——

Mr. SMALKIN. They will probably have to stand in line behind lots of others.

Mr. RANGEL. And what happens to judges less courageous than you who come down here to help us is that the thing to do, then, is not to make a mistake and put everybody in jail. You know that. And this guy will be less likely to make a mistake than you in weighing the evidence.

I am sorry, but we have to give them more tools.

Mr. PALERMO. I would say this, that I have, and most of the magistrates that I know of have the same feeling that there goes with the grace of God me or my kids. I don't want my daughter or my son thrown into jail to be raped or whatever, unless it is necessary.

I strongly feel that way. I look across there and I will say it, "There would go by the grace of God me or my kids." I am not anointed or anything else. I didn't even take a judge's test.

We try, and our record is good. I am with you philosophically. I don't want to legislate and getting into the—I don't want the courts getting in the legislature.

Mr. SMALKIN. No. That is why I would disfavor, for example, Congressman Rangel, provisions such as Senator Kassebaum's bill

which says that the defendant has the burden of proving by clear and convincing evidence that he, for example, has family ties in the district. What are you going to do with the orphan or the transient, or whatever? Unless the defendant proved those by clearing and convincing evidence, we couldn't release him on recognizance.

I have had 10 percenters, you know, racetrack people that cash your winning tickets in at the track to avoid taxes for you. These people haven't had families since they were born, practically. And many of them are transients, and alcoholics and what have you. You know they are going to show up, because you can find them at any racetrack.

Mr. RANGEL. That specific language that you are adopting, specific language that you can live with—I interrupted, but you said you could live with it.

Mr. SMALKIN. Well, I said I could live with it if Congress wishes to make the determination as a matter of the policy, the national policy of the country that we are going to balance—this is the way the balance is going to be struck between the safety of the community in general and the prevention of further offenses, and the liberty interests on the other hand. I should hope that we would be able to exercise our discretion wisely so as not to work an injustice.

Mr. GILMAN. Of course, the statute I am suggesting is in all the proposed legislation. It is in capital punishment cases, but it is not in any narcotic cases.

Mr. SMALKIN. It is also in posttrial release.

Mr. GILMAN. Yes.

Just one other question, and my time is gone already, I am very much concerned about the shortage of prison space. Is that predominant in every metropolitan region around the country, Federal prison space?

Mr. SMALKIN. Desperately. It is an absolutely horrible situation when we have to take a car with two marshals in it to go up to the middle of New York City in the middle of the night to get prisoners. They can't have interviews with their lawyers, not that there is anything wrong with going to New York City.

Mr. ZEFERETTI. I am glad you clarified that.

Mr. SMALKIN. It is a lovely place, but——

Mr. ZEFERETTI. It is a nice place to live, too.

Mr. GILMAN. What is happening in Florida——

Mr. SMALKIN. If you are a prisoner, it is probably better than the Baltimore City Jail.

Mr. PALERMO. We, frankly, in a minor case, I try to avoid putting a man in jail because the marshal doesn't have anywhere to put him.

Mr. GILMAN. This becomes a predominant consideration in your mind.

Mr. PALERMO. Right. And these are pretrial, not——

Mr. SMALKIN. It's like stuffing a sausage. As you push people in one end, they come out the other. The problem is that we are just feeding the input. We do have to take into account, as a practical problem, jail space. We might as well add that as a practical concern to the list of criteria in 3146(b).

Mr. PALERMO. And it is getting worse.

What has been recommended and what has replaced the surety system is an option which permits the defendant to post 10 percent of the bond amount with the court. Consider that the defendant who posts such a bond has a real stake in his own appearance since all or most of the money posted will be returned upon completion of the case. It only makes sense that the elimination of the surety option and the substitution of the 10 percent option will result in a better appearance rate for the simple reason that the defendant owns an interest in his appearance.

In conclusion, it is my belief that if the Act is amended to permit judges to protect the safety of the community by imposing conditions designed to accomplish that, we can virtually eliminate the need for surety and other financial conditions.

THE ROLE OF THE PRETRIAL SERVICES AGENCY

At the time that the Bail Reform Act was being designed and debated, a parallel bill creating the D.C. Bail Agency was also being debated. Since the District of Columbia was a federal jurisdiction to which the Bail Reform Act would apply, and since the District of Columbia federal courts had jurisdiction over crimes that would have been state crimes in other jurisdictions, testimony was overwhelming that an agency should be created to assist in the implementation of the Bail Reform Act. As a matter of history, the Bail Reform Act and the D.C. Bail Agency Act became effective in September of 1966.

Between 1966 and 1970, the Act as it was implemented in the District received careful scrutiny as did the Agency created to assist in its implementation. As the result of this scrutiny, in 1971 the size of the Agency was tripled, its budget was tripled, and its functions were expanded to permit a number of services not mandated in the original law. Those services are provided today and are similar to the services described in Title II of the Speedy Trial Act of 1974.

Prior to 1971, most of the D.C. Bail Agency's work took place in the United States District Court for the District of Columbia. During the five years between 1966 and 1971, the system witnessed a drastic change in the release practices of the courts. The proportion of people released on personal recognizance increased from only 5 percent in 1966 to nearly 60 percent in 1971. The overall release rate jumped from 45 percent to 70 percent. The pretrial detention population in the D.C. Jail diminished despite an overall increase in the number of cases coming into the criminal justice system. In addition, failure to appear rates and rearrest rates were studied. Because of the difficulty of obtaining sufficient data no one could really say whether these rates increased or decreased. At the same time, there was a "feeling" that the rearrest rate was climbing although the failure to appear rate seemed to be constant.

Since 1971, we have continued to serve the Federal courts in the District of Columbia. The value of this Agency's work can best be described by reference to the fact that better than 90 percent of the defendants charged in the United States District Court are released and more than 95 percent appear as required. At the local level, the Agency's workload in Superior Court for the District of Columbia, while higher in terms of actual numbers of cases processed, has about the same results.

The D.C. Pretrial Services Agency has a staff of 44, a budget of slightly over one million dollars, utilizes a fully automated system, employs law students and graduate students as its main professional work force, conducts more than 24,000 interviews a year, supervises more than 14,000 conditions of release (an average of 3 conditions for the nearly 4,500 people on release at any given time), prepares reports in every case prior to the setting of bail by the Magistrates, generates 35,000 notification letters, records 76,000 "check-in" calls from releasees, records 16,000 "check-in's" by people who appear in person, and submits information for use in the presentence reports of all defendants convicted for whom presentence reports are prepared. In 1980, the National Institute of Justice of the United States Department of Justice cited the work of the Agency as "exemplary" and declared it an Exemplary Program worthy of emulation.

Under the terms of the speedy Trial Act of 1974, experimental agencies were created to assist the other Federal Circuits in implementing the Bail Reform Act. These agencies were to interview, verify, and present reports concerning those charged with crime to assist bail setters. They were also to provide social services directly or referrals to community based agencies that could provide those services, provide information at sentencing, monitor conditions or release, and perform other functions as designated. It is obvious that these services were mandated so that as many people as possible could be released pretrial with conditions that would insure their appearance (and protect the community, although this purpose is illegal under the present law). How an agency approaches these tasks can dramatically affect its impact on the ultimate implementation of the Bail Reform Act. If, for example, an

Mr. GILMAN. Thank you.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. Thank you again, Mr. Beaudin. Thank you so very much. We will get together.

Mr. BEAUDIN. Thank you.

[The prepared statement of Mr. Beaudin follows:]

PREPARED STATEMENT OF BRUCE D. BEAUDIN, ESQ., DIRECTOR, DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY

It is a privilege to be invited to testify before this Committee concerning title 18 of the United States Code, section 3146 et seq., (Bail Reform Act of 1966) and I appreciate the opportunity to be here.

As Director of this Agency since 1968, Director of the Public Defender Service and Staff Attorney with that office from 1964 until 1968, as a member of the original staff of the D.C. Bail Project, as founder and Chairman of the Board of Trustees of the Pretrial Services Resource Center, as founder, first President, and Co-Chairman of the Advisory Board of the National Association of Pretrial Services Agencies, and as a person concerned with the problems posed by the release of certain defendants, I hope that my experiences of the past 17 years can be of benefit to the deliberations of this Committee.

Recognizing that the primary purpose of my testimony today is to provide information that will assist in the very important decision of whether to amend the Bail Reform Act with respect to the special problems posed by those charged with narcotics abuse, I find that I must first address some of the basic issues that remain unanswered in the Bail Reform Act.

BACKGROUND AND HISTORY

In 1966, Congress passed the Federal Bail Reform Act. This law was the culmination of many studies of the overwhelmingly complex problems posed by the release of people charged with crime pending trial. Because many people were indigent and because the bail system that had grown up in the United States usually required access to fairly large sums of money in order to secure release, many people were detained solely because of inability to raise the necessary funds.

The original purpose of the Bail Reform Act was to eliminate discrimination between rich and poor and to provide less restrictive methods of release for persons awaiting trial than the traditional option of posting bail through a surety. Without recounting the evils of the surety system and the inherent difficulties in using financial conditions to address the specific problems posed, suffice to say that the main goal of the Act was to effect the safe release of more people and to change the release methods from financial to less restrictive, nonfinancial means.

Unfortunately, during hearings on the bills, the issue of community safety, although addressed in testimony, was never mentioned in the law. The sole criterion that was established for determining which release conditions were appropriate was, "Will the condition imposed reasonably assure the appearance of the defendant as required?"

As mentioned, the initial purpose of the Bail Reform Act was to provide alternatives to the surety system to permit the release of more people pending trial and, at the same time, to eliminate discriminatory practices based on financial ability to "pay out." The Act did not address the practice of setting bail not so much to assure appearance as to protect society. The issue of community safety was subsumed into risk of flight considerations. Many bail setters used, and continue to use, high bail to detain dangerous persons. They justify the high bail on risk of flight grounds, however. Unless the issue of safety is addressed in the open and on the record, the bail process will continue to be criticized for its apparent inefficiency.

We need a new approach to the bailing of the criminal suspect. But an understanding of where we are and the course bail reform should take, first requires an examination of the myths and realities of current bail practices:

Myth No. 1.—Current bail laws assure that the bail decision is limited to a single issue: whether the suspect is likely to appear for trial. This noble constitutional principle is honored in the breach today. Most suspects detained in jail pending trial are unlikely threats to flee. The possibility of flight is all too often used as a pretext to detain suspects perceived by the court to be dangerous to the community if released. A pervasive hypocrisy infects the bail process as sub rosa considerations of community safety lie at the heart of the bail decision while judges make public pronouncements about the likelihood of flight.

Myth No. 2.—Preventive detention statutes are one surefire way to protect the community from an increase in "bail crime." The hard evidence points to the opposite conclusion. Preventive detention, where it exists, is rarely invoked today, not only because prosecutors are unwilling to seek preventive detention because of due process prerequisites and expedited trial schedules but because such a measure is unnecessary. Instead, at the prosecutor's request, judges simply impose extraordinarily high bail—which the defendant cannot raise—on the phony ground that the suspect is likely to flee the jurisdiction.

Myth No. 3.—The more serious the crime, the more likely the possibility that an offender, if bailed, will flee. This is the most pervasive of the prevailing myths. Recent data confirms an opposite conclusion—that motivation to flee does *not* increase in direct proportion to the seriousness of the offense. The poorest bail risks—those most likely to flee rather than appear at trial—are not those charged with murder, rape and robbery, but, rather, suspects charged with relatively minor offenses such as larceny and prostitution.

Myth No. 4.—The setting of a financial bond is an effective way to guarantee a suspect's appearance at trial. Study after study demonstrates that the setting of a bail bond discriminates against the poor and that a simple promise to appear is as effective as the use of the bail bondsman in assuring appearance at trial. At the same time, it is clear that many who post bail (accused alien smugglers and narcotics traffickers, for example) can post even high bail, consider it a business expense, and fail to appear despite the substantial investment.

Those of us who are a part of the existing bail system continue to witness firsthand the evils traceable to these prevailing myths. The hypocrisy of the current system is responsible for the pretrial detention of thousands of suspects. It is time to recognize that considerations of community safety should candidly and publicly be taken into account by judges in attempting to fashion appropriate bail conditions.

There have been a number of proposals introduced that would amend the Bail Reform Act to permit the open consideration of community safety. The best of the bills first requires the court to make a bail release decision based solely on the likelihood of the defendant's future appearance at trial. Once a decision is made to bail the suspect, however, the court is given new authority to take into consideration community safety in setting release conditions designed solely to protect the community. The bill thus requires that the issues of appearance and community safety be treated separately and openly. And the bill also prohibits the use of high money bail as a vehicle to jail defendants perceived to be dangerous.

We all have a concern for community safety. Since recent data demonstrates that those charged with serious offenses are among the most likely to appear at trial, we can no longer continue to justify their pretrial detention on some appearance-based rationale. Rather, we should fashion bail release conditions designed to protect the community while, at the same time, assuring the release of those who have not yet been convicted of the crime charged. We can conclude from experience and from confessions made by bail setting magistrates that the issue of flight is neither the first nor the most important consideration at the bail hearing.

THE SURETY CONDITION: AN OUTMODED ALTERNATIVE

The American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National Association of Pretrial Services Agencies, and the States of Wisconsin, Kentucky, Oregon, and Illinois have all concluded that the surety option of release serves absolutely no purpose. Both associations have recommended abolition of surety for profit. In the states named, the surety option has been eliminated and data reveal that neither recidivism, as measured by rearrest, nor failures to appear have increased while the percentage of people who have been able to secure release has increased. In fact, the commonwealth of Kentucky has made it a crime to post bond for profit and the Kentucky Supreme Court has upheld the validity of that law.

The surety bondsman has existed in our criminal justice society as an independent business person who exists to make a profit. In most cases, a surety charges 10 percent of the bond set as his fee for effecting release. That fee, once paid, is nonrefundable. We have permitted this enterprise on the theory that the bondsman, having substantial monetary stake in the defendant's appearance (he may be liable for the face amount of the bond if the defendant fails to appear) will insure the appearance of his bailees. Again, data being collected by various pretrial services agencies, courts, and independent organizations is revealing. Most defendants who fail to appear are brought back into the system by law enforcement officers executing warrants not by bondsmen. In addition, where forfeitures are offered, they are seldom, if ever, collected.

1980 and 1981 use of it in the District of Columbia. It is following roughly the same pattern, although the use is about twice as much as U.S. Attorney Ruff has announced that he intends to use the statute more often.

My point is, though, that the Government is very careful about deciding what cases he is going to ask for detention hearing in, because they know darn well that they have got to do something more than just say that this guy's dangerous. They have got to be accountable.

Mr. ZEFERETTI. I think that the bottom line there, too, is—and what you said earlier also, is the definition of what dangerous is. If you want to make an analogy of what we are talking about and the high-money angle of what drugs are all about, if we can make that definition as part of the overall dangerous to the community concept, then we might have somewhere to go.

Our biggest problem is to get judges to recognize that that is also a dangerous threat to the community when you have that ability to pump drug paraphernalia into the area.

Mr. BEAUDIN. In the Senate bill, you will notice that the definition of violence is, I think, too wishy-washy. But one of the things they do say, in the narcotics area, is under the Controlled Substance Act, the penalty, if convicted, would be more than 10 years, then that acts as a triggering mechanism and says this case is one that would qualify for a hearing. So that you have got an initial triggering mechanism.

But then there is going to be a decision by the prosecutor as to whether or not he is going to set an even higher standard. And then the court will be able to decide whether there is in fact enough justification.

But you open the door in certain cases to require people to look at things they haven't looked at. And that is as much a need as anything else that exists.

I have sat in Judge Brownstein's court in Brooklyn many days and watched how he has handled these things. And it is really tough for a judge who is trying to follow the law and follow the presumptions laid out in the statute for release to set a bail that he knows is beyond the capacity of somebody to make. And he has to think: "Do I want this guy in the street molesting my wife?" And they make those judgments. But they are all made with no accountability and no process by which defense can challenge it.

The flip side of the coin is that if they set a $2 million bond it may seem to satisfy the community's need but if the bond is posted by an organized crime racketeer, he is free to ply his trade.

Mr. ZEFERETTI. Mr. Gilman, have you any questions?

Mr. GILMAN. Just one question I would like to ask: You talk about the concern of the high bail bond not accomplishing what you are seeking to accomplish.

Mr. BEAUDIN. Sure.

Mr. GILMAN. I assume that you feel that the Pretrial Services can take care of any of the problems that we have been encountering?

Mr. BEAUDIN. Yes; they can, Mr. Gilman. The existence of a Pretrial Services agency, and I will say that the experimental ones in the Federal districts were patterned on the one that I have been

Director of since 1968 in the District of Columbia, has enabled judges to set conditions that are pretty restrictive on the release of the defendants, and we can report violations. Violation of a condition is a crime. That is something that should happen in the Federal law.

If someone violates a condition of release, it should be a crime. If I report a violation of conditions, a judge can hold a defendant in contempt and sentence him summarily for contempt of a court order.

There are a lot of things that can be done with the existence of an agency to be a reporting mechanism or a factfinding mechanism for the judges that cannot be done now.

Mr. GILMAN. I regret that I was late in getting back to hear the opening part of the testimony. But we talk about the danger to the community, community safety. The problem we confronted this morning in earlier testimony was how do you put the limits on that definition? What criteria do you use?

Mr. BEAUDIN. Mr. Gilman, I did address that to some degree. There is a bill that will be introduced in the Senate that I think does a very good job of it, in addition to the D.C. detention bill. I would be very happy to work with you or any staff member you would delegate. I am here in Washington, and I would provide you with at least my notions on how it can be done, and I think it can.

I don't think we can predict danger. None of us can. But we really can't predict flight either.

Mr. GILMAN. You may have been here this morning when Mr. Rangel raised the issue of how far do we take this. Do you go out on the street then, and anyone that looks like he could impose a danger on the community, is he then subject to detention?

Mr. BEAUDIN. What the bill does is create a triggering process. That is just the first step, a triggering process that says this man may be considered. But that doesn't mean you must put him in. It means you may consider doing something in this case. Now, if you choose to do something, you must follow these guidelines. It is a two-pronged process.

You just can't go out on the street and take a guy who is charged with a securities violation and subject him to a detention hearing. But you can take somebody that you spot on the street who has been charged, for example, with perhaps a bank robbery or some crime that has violence associated with it and say, "We are going to subject you to a hearing in which we will explore the Government's case."

Mr. GILMAN. Which is the bill that is being submitted to the Senate?

Mr. BEAUDIN. It is an interesting one. It is unnumbered yet because——

Mr. GILMAN. Whose bill?

Mr. ZEFERETTI. We have it here.

Mr. BEAUDIN. But it has an interesting group backing it, Thurman, Kennedy, Hatch and Laxalt. I don't think Metzenbaum has been convinced yet. But at the moment, there is what I would consider both liberal and conservative philosophy at work in agreeing on a way to eliminate what I call hypocrisy of the present bail system.

would give these judges the opportunity to make the kinds of decisions they are required to make and do it in a way that will protect both the community and the safety issue, the defendant and his rights, but more important, it will be more cost effective than what we are doing now.

One of the things that bill has in it is the total elimination of money bail. That is going to shock probably everybody in the Congress, because we have all been taught in civics classes and in the environment in which we have grown up to believe that when you are charged with a crime, you make a money bail or you don't make a money bail.

Money bail is probably the worst alternative release condition that has ever been designed. It had bred more corruption within the criminal justice system than any other single process. The examples of surety conspiracies, surety bondsmen and what they have done, there are examples in every State of misuse and abuse of the surety bail system.

Mr. ZEFERETTI. Who owns them?

Mr. BEAUDIN. Well, that is another piece of it, Mr. Chairman. That is another piece of it.

But the point I am making is that we, as a society, can control through the bail process, if that is what we decide we should be doing, the release conditions of everybody coming before the courts in a far better way if we can eliminate money, because then we don't have to form two judgments.

You first have to decide as a judge, do I want this guy in or out? That is what they do. They will tell you—I wish Palermo and Smalkin were still here—they will tell you that the first thing I do is get into my gut and decide whether this guy is going to be in route. Then I decide how I am going to accomplish it.

If you have to use money, you have got to do another jump, because you have got to know what kind of resources are available. You heard the description of the Nebbia hearing and why we should take Nebbia and legislate it, as opposed to just having a case that exists. I think that would be a drastic mistake, because there is never going to be a resource available that will give you accurate information on what the source of the money that is to be posted is.

If a family member comes forward and says, "I have this money. I am putting it up." How in the hell are you going to go investigate that in the 30 seconds, or even the day or 2 days that it takes. There is nobody that is going to be able to go behind that.

So that to require a two-pronged process—reaching a decision as to whether the defendant should be in or out, and what amount of bail will accomplish that—is truly beyond our capacity and resources. But the existence of a series of alternatives—I decide if he is in or out, and then I decide how I will protect the community if I let him out, or under what conditions I will let him out to see that he will appear—permits me to not confuse myself with using money to accomplish that.

It took a long time, believe me, to sell this thing over on the other side. And I think it would take a long time to sell it anywhere else because of the inertia of dealing with the system the way that it is. But believe me, it will provide an accountability in

the bail-setting process which we do not have now, and it will eliminate the hypocritical manner by which the jails are full of people who can't make bail who maybe aren't intended to be there.

One of the judges described this process to me this way: He said it is kind of like bowling. He said: "Picture yourself throwing a bowling ball down the alley, and then somebody spins you around quickly. You hear pins fall, but you don't know what went down." A judge that sets bail doesn't always know who gets out and who doesn't. He sets a bail and, generally speaking, does not get the results of whether that person made bail or not, unless that defendant who did not make bail has a damn good lawyer who comes back if the guy is still in jail and says he wants to move to reduce the bail.

So, he said, "What I do is, I hear the pins fall, somebody told me some fell, and they turn me around and I bowl the ball the same way. I don't know whether I am being effective or not."

But you will know whether you are being effective or not if you decide whether to put somebody in or out and set conditions to control that.

Mr. ZEFERETTI. Mr. Dornan?

Mr. DORNAN. I have no questions, Mr. Chairman. But I certainly appreciate your vigorous testimony. Thank you.

Mr. ZEFERETTI. I can assure you that we are going to look at this. We are going to give it some examination. There are hearings scheduled before Kastenmeier's committee on this whole subject. We are hoping to play a role in that one, too.

I would like to keep our avenue of communication open. If I need some help along the way, I would like to reach out.

Mr. BEAUDIN. As you probably know, Mr. Chairman, my office is right here in Washington and I am available to you or to any other of the committee members to counsel if they wish any additional information.

Interestingly enough, there will be people who will say: "We must oppose the notion of pretrial detention." As you know, we have had a statute on the books in the District of Columbia since 1971. In 1980—let me give you—this will only take a second.

Mr. ZEFERETTI. Go right ahead.

Mr. BEAUDIN. In 1980, there were 12 requests by the United States for a pretrial detention hearing. In other words, the guy comes in for bail, the prosecutor can ask then for a detention hearing. They asked for it in 12 cases in 1980. Five were murder—these were the charges—five were murder, one was armed rape, three were armed robbery, one was an armed rape and an armed robbery, one was a rape, and one was assault with intent to rob.

In one of the armed robbery cases and in the assault with attempt to rob case, the Government did not have enough evidence to get by the request, a $5,000 bail was set, and the defendants were released.

In the other 10 cases, the defendants were convicted within 60 days, which is the statutory prescription in the D.C. law. The defendants were convicted of the crimes charged, and all of them were sentenced, 100-percent conviction rate.

So the critics who say it will be overused, it will fill the jails, the detention law is a bad thing to have, ought to take a look at the

might wish to do. But he strongly recommends, as do I, and I see you have the bill, that you look at this bill, because the concept that Judge Palermo and Judge Smalkin talked about, "the tools," the concept isn't as simple as what I believe Mr. Gilman was trying to get at when he asked, "What language can we introduce as amending the Bail Reform Act that will let us give you these tools that you are looking for?"

It isn't as simple as a one-sentence amendment to a provision of [18 U.S.C.] 3146, 3147, or any other thing. It is a very complex process, because our bail system presently is built on the assumption that what we are interested in is having a defendant appear for trial.

In practice, what we deal with is community safety. Community safety is not addressed openly, Mr. Chairman. In any piece of that legislation, bail could be denied pending appeal, bail could be denied after conviction, and bail could be denied in a capital case. And you could say that that is a community protection device. But it is constantly phrased in appearance terms.

That is why there must be discretion given judges, to be able to consider community protection in deciding not only that a defendant might be detained without bail, but that a defendant released can have conditions that would be imposed on his release that would be community protective conditions.

You can't do that. *Kramer* v. *United States* in 1971 said that any time a judge sets a condition that would be a community protection condition in the Federal system where that condition does not relate to whether the defendant will appear, and in that case it was a young man charged with possession of marihuana who was told, "Stay away from these confederates of yours, get your head together young man, go to job counseling, do not carry a gun," those conditions have absolutely nothing to do with whether he would appear. The fifth circuit said since they have nothing to do with whether he will appear, you cannot impose those conditions. They have been illegally imposed.

So no court, even wishing to release somebody and protect the community, can do it legally in the Federal system unless and until they are allowed to consider danger in citing conditions of release. That is No. 1.

No. 2, this thing about pretrial detention. We have got it. It is rampant. It exists in the State system and it exists in the Federal system. It is accomplished by setting a bail that cannot be met.

The only way to eliminate that is to force a magistrate to decide whether this person should be in or out, and make him accountable for that decision on the record. It is difficult to define danger. It is difficult to write a legislative prescription of what will be dangerous and what will not.

What I will submit to you is that this bill provides a triggering mechanism that screens out most cases then permits a more in-depth treatment of the dangerous issue. A magistrate can then explore in a full hearing the issues of danger and safety in which the community as well as the defendant will be protected. Thus, an allegation alone by a policeman that this fellow has 17 pending cases and will present 17 more to the grand jury won't be sufficient. An allegation by a defense lawyer, "My client can't make a

$2,000 bond, your Honor, therefore you have got to set one at $1,500 because that would be reasonable," that allegation wouldn't stand alone.

Mr. ZEFERETTI. Do you know what frightens me in that, the part that confuses me in that, we work out of a funnel or out a tunnel of a centralized court system, especially in New York City, anyway. And everything comes out of that one tunnel. There is no classification of cases. Everything has gone before that court, and he rules, as you said, maybe 1 minute at a time, and he makes an evaluation of what he is going to deal with.

It is almost unconscionable to think that he has got that kind of responsibility. You are really putting quite a bit of responsibility on his back. And you are also sharpshooting him when there is a mistake made.

But, at the same time, you never hear about all of those that he has had to take care of in any particular day.

What frightens me a little bit is that 1 minute that you are giving each individual case and how you really make a determination whether you are protecting the community or protecting an individual. That is the part of it, you know——

Mr. BEAUDIN. I think you raise an excellent issue, and it really distinguishes the Federal system from the District of Columbia system in which I work. The street crimes that we deal with in Washington, robbery, rape, homicide, are not going to be the main cases that are going to be considered under the Federal statutes.

I am urging Congressman Hughes and this body to provide a leadership role for the States. There is no question but that the States will follow the Federal lead.

When the Bail Reform Act passed this Congress, every State followed with an amendment to its bail statutes to track the Bail Reform Act.

If Congress doesn't stand out in front and set a tone for what should happen in bail reform, what the States are going to do, and they are already doing it, is pass by resolution, they are passing by referendum, laws that are specifically addressed to the latest crime that was written about in the newspaper. And there is no thought going into it, and the people are being misled.

If we focus on a specific crime—I understand that you are concerned here with narcotics crimes—there is a danger that we will ignore other crimes that are equally as dangerous.

The provisions in this bill, for example, would trigger in certain narcotics cases the right of the prosecutor to ask the judge for a more lengthy hearing than that 30-second hearing because the prosecution has evidence that there is something here that is more than the normal case.

I would, I guess, close, at least in the summary that I have, by very strongly recommending that the staff work up for you folks on the committee an analysis of this Senate bill. It has got some holes in it. There is no question about that. I would argue about time limits. I would argue about definitions and things like that. They should take the time to present you with those arguments.

But there is no doubt in my mind that the Bail Reform Act needs massive overhaul, and that the overhaul that is proposed in this bill would be something, I think, that the country could use. It

My background as a lawyer is that, for a very short time, I was the Director of the Public Defender's Office here in Washington. After that, in 1968, I started working with bail. I have done nothing in the last 15 years but work with the problems of bail in the Federal system and the States.

I am used in many jurisdictions. I testify before State legislatures, working with the construction of bills in those legislatures that will address danger provisions that you are discussing here. I have worked for many years with Ken Feinberg and the Judiciary Committee on the Senate side, and with Congressman Mazzoli here on the District Committee when it considered the detention bills.

So I have spent my whole life dealing strictly with bail and its problems as a professional and as a lawyer. I have been very much concerned by the notion expressed by Congressman Rangel about the tools that should be provided to a judge to do this very difficult thing that they have to do.

If you have been in the courts, you know that a judge imposing a sentence will spend hours, and that the investigation that goes into a report for that sentence will take weeks by professional investigators, so that when that sentence is imposed, there will be as balanced a decision as possible. Contrast that sentence process with a typical bail proceeding which may take one-half a minute or 1 minute. The results, that is, incarceration because of inability to make the conditions set, are the same. Yet, little or no information has been presented. So we have a jail overcrowding problem in the United States that exceeds what we as a country should tolerate.

The reason I bring this up is that one of the very tools that is missing is the ability of a judge to consider danger in the bail-setting process as a community safety factor. You asked the question, or one of the other Congressmen asked the question this morning: "Is there any jurisdiction other than the District of Columbia in which danger and community protection are a legitimate concern?"

The answer to that question is that there are jurisdictions in which danger can be considered, but only insofar as it bears on whether a defendant will appear. In other words, I cannot set a condition that will protect the safety of the community on a danger proposition. But what I can do as a judge is say: "You're so dangerous that you're liable not to appear. Therefore, I can set a condition to insure your appearance taking into consideration community safety and rehabilitation."

Community safety is considered; in most places it cannot legally be considered; and therein lies the hypocrisy in the present bail process. I think that this committee, this House, and this Congress should change this situation and enact legislation which would permit consideration of these factors. This would eliminate the hypocritical process of justifying detention or high-money bail on the basis that somebody will fail to appear, when all the facts and data we have show that people don't fail to appear as much as we are concerned about protecting the safety of the community.

Mr. ZEFERETTI. If I can just interrupt you at this juncture, that is exactly what we were inquiring of Mr. Hughes and Mr. Sawyer this morning.

Mr. BEAUDIN. Yes, sir.

Mr. ZEFERETTI. They were in the process of bringing a bill before us that went along with status quo. We, as members of the Rules Committee, sort of targeted that particular pretrial services legislation and prevented it from going forward until they went back and did some turnaround in the direction of that bail examination. Because it is so imperative, we feel, using that word "tool" again, that judge—if we are going to criticize him along the way, I think, at the same time, we should give him the instruments to do his job.

Mr. BEAUDIN. I think you are absolutely right. Although the pretrial services bill that came out of Mr. Hughes' subcommittee—and I worked very closely with staff and with Congressman Hughes on that bill—and by the way, there is a drastic need in the Federal system to have that pretrial services agency available, should have been rejected because there was an attempt to amend the Bail Reform Act itself contained in that bill.

As you know, there are 10 districts in which these are experimental agencies. Evaluation shows the services provided by these agencies are very drastically needed. They must be continued. And the likelihood is that there will be no more agencies unless there is an authorization by Congress to continue those agencies. They are presently under the aegis of the administrative office.

But I thought you were absolutely correct, because there was an attempt by the subcommittee to introduce the notion of danger and amending the Bail Reform Act as a piece of the continuation of the services agency. And I think that you are absolutely correct in seeing to it that those issues were maintained as separate issues.

Nevertheless, if I could urge you to do anything, if it were to come before this subcommittee or the House or the Rules Committee, it would be to keep that danger provision out, to address the Bail Reform Act as you are doing here and the danger provisions there, and keep that Pretrial Services agency alive. That is what I am. That is what I get paid for doing, really, I direct the Pretrial Services agency in the District of Columbia that is the model upon which those 10 were designed.

Mr. ZEFERETTI. In all candor, what we did was light a fire under the subcommittee of jurisdiction in order for them to have the hearings to make that a separate entity and to provide us with a kind of tools necessary——

This is Congressman Kastenmeier's?

Mr. ZEFERETTI. Yes; that is what we did. That is why we sent the whole package back.

Mr. BEAUDIN. Let me sum two things up for you, Mr. Chairman. One, there will be, I think—I don't know if I am breaching confidences or not, but it will help this committee, I think. There will be introduced, I believe, next week in the Senate a bill that will be cosponsored by an interesting group of people, Thurmond, Laxalt, Kennedy, Hatch——

Mr. ZEFERETTI. That is quite a mix.

Mr. BEAUDIN. It is. And the bill is going to be called a no money bail bill. I have been working on it for a long time, and I worked on it with Senator Kennedy when he was chairman of the Judiciary Committee. Ken Feinberg, who was to be here to testify, he has asked me to represent to you on his behalf that he will work with you and this committee at any time that you wish on whatever you

(d) Notwithstanding the order of detention, any defendant detained pursuant to standard 10–5.9(b) (iii) (A) shall be released whenever the defendant meets the original monetary conditions set upon release.

(e) Pretrial detention hearings shall meet the following criteria:

(i) The pretrial hearing should be held within five days of the events outlined in standards 10–5.4, 10–5.7(a)(ii), 10–5.8, or 10–5.9(a)(ii). No continuance of the pretrial detention hearing should be permitted except with the consent of the defendant in hearings held pursuant to standards 10–5.4, 10–5.7(a)(ii), and 10–5.8 or the consent of the prosecutor in hearings held pursuant to standard 10–5.9(a)(ii).

(ii) In order to provide adequate information to both sides in their preparation for a pretrial detention hearing, discovery prior to the hearing should be as full and free as possible, consistent with the standards in the chapter on Discovery and Procedure Before Trial.

(iii) The burden of going forward at the pretrial detention hearing should be on the prosecution. The defendant should be entitled to be represented by counsel, to present witnesses and evidence on his or her own behalf, and to cross-examine witnesses testifying against him or her.

(iv) No testimony of a defendant given during a pretrial detention hearing should be admissible against the defendant in any other judicial proceedings other than prosecutions against the defendant for perjury.

(v) Rules respecting the presentation and admissibility of evidence at the pretrial detention hearing should be the same as those governing other preliminary proceedings, except that when the defendant's detention is premised upon the commission of a new criminal offense, the rules respecting the presentation and admissibility of evidence should be the same as those governing criminal trials.

(f) A pretrial detention order should:

(i) Be based solely upon evidence adduced at the pretrial detention hearing;

(ii) Be in writing;

(iii) Be entered within twenty-four hours of the conclusion of the hearing;

(iv) Include the findings of fact and conclusions of law of the judicial officer with respect to the reasons for the order of detention and the reasons why the integrity of the judicial process, the safety of the community, and the presence of the defendant cannot be reasonably assured by advancing the date of trial or imposing additional conditions on release; and

(v) Include the date by which the detention must terminate pursuant to standard 10–5.10.

(g) Every pretrial detention order should be subject to expedited appellate review.

Standard 10–5.10. Accelerated trial for detained defendants

Every jurisdiction should adopt, by statute or court rule, a time limitation within which the defendant in custody pursuant to standard 10–5.9 must be tried which is shorter than the limitation applicable to defendants at liberty pending trial. The failure to try a defendant held in custody within the prescribed period should result in the defendant's immediate release from custody pending trial.

Standard 10–5.11. Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

Standard 10–5.12. Credit for pretrial detention

Every convicted defendant should be given credit, against both a maximum and minimum term, for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed, or as a result of the underlying conduct on which such a charge is based.

Standard 10–5.13. Release to prepare for trial

Upon a showing by a defendant detained pursuant to standard 10–5.9 that his or her temporary release is necessary in order adequately to prepare the defense, the judicial officer should order defendant's release in the custody of the defense attorney or, when this is inadequate to assure defendant's presence at trial and the safety of the community, a law enforcement officer. No such release shall be for a period longer than six consecutive hours.

Standard 10–5.14. Treatment of defendants detained pending trial.

A defendant who is detained prior to trial should be confined in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal, and any restrictions on the rights the defendant would have as a free citizen should be as minimal as institutional security and order require. The

rights and privileges of defendants detained pretrial in no instance should be more restricted than those of convicted defendants who are detained.

CHAPTER 21—CRIMINAL APPEALS

PART II. TRANSITION FROM TRIAL COURT TO APPELLATE COURT

Standard 21–2.5. Release pending appeal; stay of execution

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release may properly be placed on the appellant. The decision of the trial court should be subject to redetermination by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted if the court finds that there is substantial risk that the appellant will not appear to answer the judgement following conclusion of the appellate proceedings, or that the appellant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice. In deciding whether to release a convicted defendent pending appeal, the trial court should also take into account the nature of the crime and the length of sentence imposed, together with factors relevant to pretrial release.

(c) Execution of a death sentence should be stayed automatically when an appeal is instituted.

(d) Dilatory prosecution of an appeal through acts or omissions of appellant or appellant's counse' should be ground for termination of the release of appellant pending appeal.

(e) In a jurisdiction with an intermediate appellate court, when review in the highest court is sought by a defendent-appellant, the question of custody pending action by the highest court may be redetermined by the intermediate appellant court or a judge thereof. When review is sought by the prosecution, standards relevant to custody of defendents pending prosecution appeal from trial court decisions should be applied. Decisions concerning custody by the intermediate appellate court or judge thereof should be subject to review by the highest court.

Mr. ZEFERETTI. Mr. Bruce Beaudin, please. He is the Director of the District of Columbia Pretrial Services.

How are you?

Mr. BEAUDIN. Fine, thank you, Mr. Chairman.

Mr. ZEFERETTI. Welcome.

Mr. BEAUDIN. Welcome to you. Thank you very much.

Mr. ZEFERETTI. Greetings from an old friend——

Mr. BEAUDIN. Bobby Brownstein.

Mr. ZEFERETTI. Bobby Brownstein, that is right. And Phil Leshin, too, I might add.

Mr. BEAUDIN. I talked with Phil the day before yesterday and he told me that he had talked with you and was representing you at the time. He is an old friend and I have worked with him for many years.

Mr. ZEFERETTI. Great. And I welcome you.

I have your statement, and that will be made in its entirety as part of the record. You can proceed in whatever manner makes you comfortable.

TESTIMONY OF BRUCE BEAUDIN, DIRECTOR, DISTRICT OF COLUMBIA PRETRIAL SERVICES

Mr. BEAUDIN. Thank you, Mr. Chairman.

Recognizing the lateness of the hour and the fact that there are some other witnesses that I think will provide information that will be beneficial to this committee, there are just a couple of points that I would like to sum up and offer to you.

(c) Operate or contract for the operation of appropriate facilities for the custody or care of persons released, including, but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services;

(d) Promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released to its custody and under its supervision and recommend appropriate modifications of release conditions;

(e) Supervise other agencies which serve as custodians for released defendants and advise the court as to the eligibility, availability, and capacity of such agencies;

(f) Assist persons released prior to trial in securing any necessary employment and medical, legal, or social services;

(g) Remind persons released prior to trial of their court dates and assist them in getting to court.

Standard 10–5.4. Release on monetary conditions

(a) Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.

(b) The sole purpose of monetary conditions is to assure the defendant's appearance. Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct.

(c) A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense.

(d) Upon finding that a monetary condition should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) The execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) The execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to 10 percent of the face amount of the bond. The deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) The execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.

(e) Monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court. In setting the amount of bail, the judicial officer should take into account the defendant's financial ability to post the bond. The judicial officer should also take into account all facts relevant to the risk of willful nonappearance, including:

(i) The length and character of the defendant's residence in the community;

(ii) Defendant's employment status and history;

(iii) Defendant's family ties and relationships;

(iv) Defendant's reputation, character, and mental condition;

(v) Defendant's past history of response to legal process;

(vi) Defendant's prior criminal record;

(vii) The identity of responsible members of the community who would vouch for defendant's reliability;

(viii) The nature of the current charge, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(ix) Any other factors indicating defendant's roots in the community.

(f) Monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.

(g) Monetary conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

Standard 10–5.5. Compensated sureties

Compensated sureties should be abolished. Pending abolition, they should be licensed and carefully regulated. The amount which a compensated surety can charge for writing a bond should be set by law. No licensed surety should be permitted to reject an applicant willing to pay the statutory fee or to insist upon additional collateral other than specified by law.

Standard 10–5.6. Review of release decision

(a) Upon motion by either the defense or the prosecution alleging changed or additional circumstances, the court should promptly reexamine the release decision.

(b) Frequent and periodic reports should be made to the court as to each defendant who has failed to secure release within (two weeks) of arrest. The prosecuting attorney should be required to advise the court of the status of the case and why the defendant has not been released or tried.

Standard 10–5.7. Violation of conditions of release

(a) Upon sworn affidavit by the prosecuting attorney, a law enforcement officer, a representative of the pretrial services agency, or a licensed surety establishing probable cause to believe that a defendant has intentionally violated the conditions of release, a judicial officer may issue a warrant directing that the defendant be arrested and taken forthwith before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer shall either:

(i) Set new or additional conditions of release, or

(ii) Schedule a pretrial detention hearing within five calendar days pursuant to standard 10–5.9.

(b) A law enforcement officer having probable cause to believe that a released defendant has violated the conditions of release should be authorized, when it would be impracticable to secure a warrant, to arrest the defendant and take him or her forthwith before the judicial officer setting the condition of release.

Standard 10–5.8. Commission of crime while awaiting trial

When it is shown that a competent court or grand jury has found probable cause to believe that a defendant has committed a crime while released pending adjudication of a prior charge, or when the prosecution, a law enforcement officer, a representative of the pretrial release agency, or a surety presents the judicial officer with a sworn affidavit establishing probable cause to believe that the defendant committed such a crime, the judicial officer may issue a warrant directing that the defendant be arrested and taken before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer should schedule a pretrial detention hearing pursuant to standard 10–5.9 within five calendar days.

Standard 10–5.9. Pretrial detention

(a) A judicial officer shall convene a pretrial detention hearing whenever:

(i) A defendant has been detained for five days pursuant to standards 10–5.4, 10–5.7(a)(ii), or 10–5.8, or

(ii) The prosecutor, a law enforcement officer, or a representative of the pretrial services agency alleges, in a verified complaint, that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitute a danger to the community.

(b) At the conclusion of the pretrial detention hearing, the judicial officer should issue an order of detention if the officer finds in writing by clear and convincing evidence that:

(i) The defendant, for the purpose of interfering with or obstructing or attempting to interfere with or obstruct justice, has threatened, injured, or intimidated or attempted to threaten, injure, or intimidate any prospective witness, juror, prosecutor, or court officer, or:

(ii) The defendant constitutes a danger to the community because:

(A) The defendant has committed a criminal offense since release, or

(B) The defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the safety of the community; or

(iii) The defendant is likely to flee and:

(A) The defendant is presently detained because he or she cannot satisfy monetary conditions imposed pursuant to standard 10–5.4 and no less stringent conditions will reasonably assure defendant's reappearance, or

(B) The defendant has violated conditions of release designed to assure his or her presence at trial and no additional nonmonetary conditions or monetary conditions which the defendant can meet are reasonably likely to assure the defendant's presence at trial.

(c) The judicial officer shall not issue an order of detention unless the officer first finds that the safety of the community, the integrity of the judicial process, or the defendant's reappearance cannot be reasonably assured by advancing the date of trial or by imposing additional conditions on release. In lieu of an order of detention, the judicial officer may enter an order advancing the date of trial or imposing additional conditions on release.

defendant effectively of the defendant's rights and of the actions to be taken against him or her. The appearance should be conducted in such a way that other interested persons present may be informed of the proceedings.

(b) Upon the accused's first appearance, the judicial officer should inform the accused of the charge and the maximum possible penalty upon conviction. The judicial officer should also provide the accused with a copy of the charging document and take such steps as are reasonably necessary to ensure that the defendant is adequately advised of the following:

(i) That the defendant is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) That, if the defendant is as yet unrepresented, the defendant has a right to counsel and, if the defendant is financially unable to afford counsel and the nature of the charges so require, counsel forthwith will be appointed;

(iii) That the defendant has a right to communicate with counsel, family, and friends, and that, if necessary, reasonable means will be provided to enable defendant to do so; and

(iv) That, where applicable, defendant has a right to a preliminary examination.

(c) An appropriate record of the proceedings should be made. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(d) No further steps in the proceedings should be taken until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(e) In every case not finally disposed of at first appearance, and except in those cases in which the prosecuting attorney has stipulated that the defendant may be released on his or her own recognizance, the judicial officer should decide in accordance with the standards hereinafter set forth the question of the defendant's pretrial release.

(f) It should be the policy of prosecuting attorneys to encourage the release of defendants upon their own recognizance in compliance with these standards. Special efforts should be made to enter into stipulation to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.

Standard 10–4.3. Release of defendants without special inquiry

Defendants charged with misdemeanors or appearing pursuant to a summons or citation should be released by a judicial officer on their own recognizance without the special inquiry prescribed hereafter, unless a law enforcement official gives notice to the judicial officer that he or she intends to oppose such release. If such a notice is given, the inquiry should be conducted. No defendant appearing pursuant to a citation or summons should be detained unless the judicial officer states in writing new or newly discovered information unavailable to the official issuing the summons or citation which justifies more stringent conditions of release.

Standard 10–4.4. Pre-first-appearance inquiry

(a) In all cases in which the defendant is in custody and charged with a felony, an inquiry into the facts relevant to pretrial release should be conducted prior to or contemporaneous with the defendant's first appearance unless the prosecution advises that it does not oppose release on recognizance or the right to such an inquiry is waived by the defendant after consultation with counsel.

(b) The inquiry should be undertaken by the pretrial services agency established pursuant to standard 10–5.3.

(c) In appropriate cases, the inquiry may be conducted in open court. Inquiry of the defendant should carefully exclude questions concerning the details of the current charge.

(d) The inquiry should be exploratory and should include such factors as:

(i) Defendant's employment status and history and the assets available to defendant to meet any monetary condition upon release;

(ii) The nature and extent of defendant's family relationships;

(iii) Defendant's past and present residence;

(iv) Defendant's character and reputation;

(v) Names of persons who agree to assist defendant in attending court at the proper time;

(vi) Defendant's prior criminal record, if any, and, if previously released pending trial, whether defendant appeared as required;

(vii) Any facts indicating the possibility of violations of law if defendant is released without restrictions; and

(viii) Any facts tending to indicate that defendant has strong ties to the community and is not likely to flee the jurisdiction.

(e) The inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The agency should formulate detailed guidelines to be utilized in making these recommendations, and, whenever possible, the recommendations should be supported by objective factors contained in the guidelines. The results of the inquiry and the recommendations should be made known to participants in the first appearance as soon as possible.

PART V. THE RELEASE DECISION

Standard 10–5.1. Release on defendant's own recognizance

(a) It should be presumed that the defendant is entitled to be released on his or her own recognizance. The presumption may be overcome by a finding that there is a substantial risk of nonappearance or a need for additional conditions as provided in standard 10–5.2.

(b) In determining whether there is a substantial risk of nonappearance, the judicial officer should take into account the following factors concerning the defendant:

(i) The length of residence in the community;

(ii) Employment status and history;

(iii) Family and relationships;

(iv) Reputation, character, and mental condition;

(v) Prior criminal record, including any record of appearance or nonappearance while on personal recognizance or bail;

(vi) The identity of responsible members of the community who would vouch for the defendant's reliability;

(vii) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of nonappearance; and

(viii) Any other factors pertaining to the defendant's ties to the community or bearing on the risk of intentional failure to appear.

(c) In evaluating these and any other factors, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge.

(d) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement of the reasons for this decision.

Standard 10–5.2. Conditions on release

Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous of the following conditions necessary to assure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

(a) release the defendant to the custody of a pretrial services agency established pursuant to standard 10–5.3;

(b) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, where appropriate, to accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court;

(c) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to certain geographical areas or premises;

(d) prohibit the defendant from possessing any dangerous weapons, engaging in certain described activities, or using intoxicating liquors or certain drugs; or

(e) impose any other reasonable restriction designed to assure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

Standard 10–5.3. Pretrial services agency

Every jurisdiction should provide a pretrial services agency or similar facility to monitor and assist defendants released prior to trial. The agency should:

(a) Conduct pre-first-appearance inquiries pursuant to standard 10–4.4;

(b) Provide intensive supervision for persons released into its custody pursuant to standard 10–5.2(a);

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(b) Constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

(c) Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably ensure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond. Compensated sureties should be abolished, and a defendant held on financial conditions should be released upon the deposit of cash or securities of not less than ten percent of the amount of the bail, to be returned, at the conclusion of the case.

Standard 10–1.4. Intentional failure to appear

Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense. Each jurisdiction should establish an adequate apprehension unit designed to apprehend defendants who have failed to appear or who have violated conditions of their release.

PART II. RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10–2.1. Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

Standard 10–2.2. Mandatory issuance of citation

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.

(b) Except as provided in paragraph (c), when an arrested person has been taken to a police station and a decision has been made to charge the person with a misdemeanor, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in paragraphs (a) and (b) need not apply and the defendant may be detained:

(i) When an accused subject to lawful arrest fails to identify himself or herself satisfactorily;

(ii) When an accused refuses to sign the citation after the officer explains to the accused that the citizen does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) When an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;

(iv) When the accused has no ties to the jurisdiction reasonably sufficient to assure accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or

(v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

(d) When an officer fails to issue a citation pursuant to paragraph (c), the officer should be required to indicate the reasons in writing.

Standard 10–2.3. Permissive authority to issue citations in all cases

(a) A law enforcement officer acting without a warrant who has probable cause to believe that a person has committed any offense for which the officer could legally arrest the person should be authorized by law to issue a citation in lieu of arrest or continued custody. The officer should be strongly encouraged to do so unless one or more of the circumstances described in standard 10–2.2(c)(i)–(v) are present. The statute authorizing such action should require that the appropriate judicial or administrative agency promulgate detailed rules of procedure governing the exercise of authority to issue citations.

(b) Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

Standard 10–2.4. Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

Standard 10–2.5. Persons in need of care

Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if the person appears mentally or physically unable to care for himself or herself.

PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

Standard 10–3.1. Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to prevent imminent bodily harm to the defendant or another, or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, no law enforcement officer may arrest the accused for that offense without obtaining a warrant.

Standard 10–3.2. Mandatory issuance of summons

The issuance of a summons rather than an arrest warrant should be mandatory in all misdemeanor cases unless the judicial officer finds that:

(a) the defendant previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation;

(b) the defendant has no ties to the community reasonably sufficient to assure appearance and there is a substantial likelihood that the defendant will refuse to respond to a summons;

(c) the whereabouts of the defendant are unknown and the issuance of an arrest warrant is a necessary step in order to subject the defendant to the jurisdiction of the court; or

(d) an otherwise lawful arrest is necessary to prevent imminent bodily harm to the defendant or to another.

Standard 10–3.3. Application for an arrest warrant or summons

(a) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require the applicant to produce such information as reasonable investigation would reveal concerning the defendant's: (i) residence, (ii) employment, (iii) family relationships, (iv) past history of response to legal process, and (v) past criminal record.

(b) The judicial officer should ordinarily issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

(c) In any case in which the judicial officer issues a warrant, the officer shall state the reasons in writing or on the record for failing to issue a summons.

Standard 10–3.4. Service of summons

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

Standard 10–4.1. Prompt first appearance

Unless the accused is released on citation or in some other lawful manner, the accused should be taken before a judicial officer without unnecessary delay. Except during nighttime hours, every accused should be presented no later than [six] hours after arrest. Judicial officers should be readily available to conduct first appearances within the time limits established by this standard. Under no circumstances should the accused's first appearance be delayed in order to conduct in-custody interrogation or other in-custody investigation. An accused who is not promptly presented shall be entitled to immediate release.

Standard 10–4.2. Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of that case. The proceedings should be conducted in clear and easily understandable language calculated to advise the

which says that the defendant has the burden of proving by clear and convincing evidence that he, for example, has family ties in the district. What are you going to do with the orphan or the transient, or whatever? Unless the defendant proved those by clearing and convincing evidence, we couldn't release him on recognizance.

I have had 10 percenters, you know, racetrack people that cash your winning tickets in at the track to avoid taxes for you. These people haven't had families since they were born, practically. And many of them are transients, and alcoholics and what have you. You know they are going to show up, because you can find them at any racetrack.

Mr. RANGEL. That specific language that you are adopting, specific language that you can live with—I interrupted, but you said you could live with it.

Mr. SMALKIN. Well, I said I could live with it if Congress wishes to make the determination as a matter of the policy, the national policy of the country that we are going to balance—this is the way the balance is going to be struck between the safety of the community in general and the prevention of further offenses, and the liberty interests on the other hand. I should hope that we would be able to exercise our discretion wisely so as not to work an injustice.

Mr. GILMAN. Of course, the statute I am suggesting is in all the proposed legislation. It is in capital punishment cases, but it is not in any narcotic cases.

Mr. SMALKIN. It is also in posttrial release.

Mr. GILMAN. Yes.

Just one other question, and my time is gone already, I am very much concerned about the shortage of prison space. Is that predominant in every metropolitan region around the country, Federal prison space?

Mr. SMALKIN. Desperately. It is an absolutely horrible situation when we have to take a car with two marshals in it to go up to the middle of New York City in the middle of the night to get prisoners. They can't have interviews with their lawyers, not that there is anything wrong with going to New York City.

Mr. ZEFERETTI. I am glad you clarified that.

Mr. SMALKIN. It is a lovely place, but——

Mr. ZEFERETTI. It is a nice place to live, too.

Mr. GILMAN. What is happening in Florida——

Mr. SMALKIN. If you are a prisoner, it is probably better than the Baltimore City Jail.

Mr. PALERMO. We, frankly, in a minor case, I try to avoid putting a man in jail because the marshal doesn't have anywhere to put him.

Mr. GILMAN. This becomes a predominant consideration in your mind.

Mr. PALERMO. Right. And these are pretrial, not——

Mr. SMALKIN. It's like stuffing a sausage. As you push people in one end, they come out the other. The problem is that we are just feeding the input. We do have to take into account, as a practical problem, jail space. We might as well add that as a practical concern to the list of criteria in 3146(b).

Mr. PALERMO. And it is getting worse.

Mr. GILMAN. What is the fee per day for Federal prisoners.

Mr. SMALKIN. I think it is $35 a day. I think, but I am not sure, that is for local jails.

Mr. PALERMO. But you see we have the judges telling the State courts what to do in the jail. And then they come back and say, "Look, you are the birds telling us to cut down the jail. Now you want us to take these men. Go away." You can't blame them, in a way.

Mr. SMALKIN. We are in a new courthouse that we moved into in November of 1976 which has good marshals facilities, but they are not suitable for overnight detention, because there are no showers and the no eating facilities.

Perhaps one thing that could be adopted, if there is no commitment to capital construction of new facilities, would be to try to upgrade some existing facilities. But that depends so much on the courthouse that you are dealing with. Our previous one was built in 1929, and it had a detention facility that you could get behind your dias there and that was it. There was no way you could upgrade that.

Mr. GILMAN. Again, I want to thank both Judge Palermo and Smalkin. My time has run——

Mr. SMALKIN. Mr. Gilman, before you—can I say one more thing about the things that I would like at least to see in the bill, which is a revision of 3146(e), so as to provide for due process and hearing in connection with the revocation of bail or the modification of bail.

I think that that is something that should definitely be taken into account. It should not be an ex parte proceeding if at all possible. And we should be given specific guidance as to the grounds for revoking or modifying bail.

Mr. GILMAN. That is presently an ex parte proceeding?

Mr. SMALKIN. Well, the statute doesn't say one way or the other. I try never to do anything ex parte, unless it is a dire emergency.

Mr. PALERMO. Absolutely not.

Mr. GILMAN. Thank you.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. We are going to move right along.

Mr. Shaw?

Mr. SHAW. Judge Palermo, you made reference to the Nebbia hearings, which I know have been used extensively in south Florida.

You might be interested to know that we have a bill so prepared which would codify the principles of Nebbia into a bill. I would invite anyone on this committee that wants to be an original cosponsor, based on your recommendations, to join with me in that.

How burdensome or how long do you find these hearings to be?

Mr. PALERMO. Oh, it is hard to say. I mean, it depends on the attorney, how many witnesses you have.

Mr. SHAW. The awkwardness we found in drawing the bills was the fact that in the cases that we would find within the bill the need for hearing, the need for the courtroom to actually use its time, the need for witnesses, and of course the fact that the defendant is going to be incarcerated until such time as he has his hearing.

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Mr. PALERMO. He is entitled to a quick hearing. When I say quick, I mean 24 hours, maybe 48 hours—I say reluctantly 48. If you are going to do it, it should be done, unless he requests, the defendant, requests more time, then it would be more just.

But as far as the Government asking for the hearing and us having a hearing, I feel it should be done in total no more than 48 hours.

Mr. SHAW. How long do you find these hearings go on?

Mr. PALERMO. Well, I would roughly, off the top of my head, say 1 hour to 1½ hours.

Mr. SMALKIN. It shouldn't go any more than a half hour to 1 hour.

Mr. SHAW. The next question I have then is, a mandate actually in the code requiring such a hearing under particular circumstances, how much is that going to infringe upon the already overburdened court time that we find that we have at this time?

Mr. PALERMO. Well, there is not going to be that many. From what I have seen, we are not going to try to abuse it. We are trying to get after where the major money comes in, or some question comes up such as the mule that doesn't have—he can hardly read or write and somebody puts up a $100,000 bond or $200,000 bond. We should then have the duty, or somebody call our attention, or we do, to look behind that.

We are not going to do it on every case. A man comes up with $5 million cash in 2 hours, I certainly would like to find out where he got it in a hurry. If he got it out of the bank, that is one thing.

Mr. ZEFERETTI. Thank you both, gentlemen. I really appreciate you having the ability to listen to us and to really give us the expertise that is necessary if we are going to provide the required legislation.

Mr. PALERMO. We appreciate being here, Congressman. I enjoyed the bout with Mr. Rangel. I would like to further talk with him at some future time.

Mr. ZEFERETTI. We agree.

We will be coming down your way in the fall.

Mr. PALERMO. We could have a great discussion.

Mr. ZEFERETTI. We will be recessed until 2:15 this afternoon.

[Whereupon, at 1:10 p.m., the committee recessed, to reconvene at 2:15 p.m., this same day.]

AFTERNOON SESSION

Mr. ZEFERETTI. I call the committee to order. I ask for Prof. James George and Richard Lynch.

Good afternoon, gentlemen.

Representing the American Bar Association is Prof. B. James George, Jr. Professor George is chairperson of the ABA's Standing Committee on Association Standards for Criminal Justice, and the former chairperson of the Association's Criminal Justice Section.

Accompanying Professor George is Richard P. Lynch, staff director of the Standing Committee on Association Standards for Criminal Justice.

Welcome, gentlemen.

TESTIMONY OF B. JAMES GEORGE, JR., CHAIRPERSON, STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. GEORGE. Thank you very much for the opportunity to appear. You have our prepared statement. Naturally I would not repeat what is in there.

Mr. ZEFERETTI. It will be made part of the record in its entirety.

Mr. GEORGE. Thank you.

I would stress that the black letter ABA standards for criminal justice do represent the official position of the American Bar Association and that they have been formally adopted by the ABA house of delegates. The black letter standards, as contrasted with the commentary thereto, do represent the official position of the American Bar Association.

It would seem, in looking over several of the bills that have been submitted and in looking over other matters which the select committee seems to be considering, that by and large the association standards do take approximately the same tack as these other official materials.

There is one primary difference, and that is, that it is the position of the association that money bail should not be used as a normal, ordinary way of controlling pretrial release. It is an exceptional sort of thing, and money bail, as contrasted with other devices, should never be used to control future criminal conduct. It should be tied only to the idea of reappearance in court.

However, the position of the standards is that any defendant should be subject to a restricted pretrial or preadjudication release with or without financial conditions or conditions of financial significance whenever these conditions are necessary to: Assure reappearance, protect the community, or to safeguard the orderly administration of criminal justice.

The ABA standards do not relate specifically to controlled substance offenses. The ABA standards are designed to provide guidelines for State as well as for Federal offenses. Also are designed to go over a broad array of dangerous matters. For example, to release an arsonist to the community, I suppose, imposes as much danger to innocent citizens as to put back on the streets a large-scale controlled substance trafficker.

Essentially, the association endorses the idea that conditions could be imposed after a suitable due process hearing which would control the conduct of individuals released into the community pending adjudication.

Our pretrial release standards focus on the person who is not under a present conviction, but who may pose a threat to the community or to the administration of justice. The ABA position is that such a person, after a due process complaint hearing, could be placed on conditional release. Then, if that person is believed by law enforcement officers to have violated those terms, the standards have provisions by which that released person could be returned to custody after a judicial hearing.

We also provide for a predetention hearing triggered by the prosecution or law enforcement authorities if there is a basis to

believe that the conditions have been violated or that the conditions are no longer satisfactory to protect the community.

The ABA would commend that basic policy to this committee that it is far better to use a conditioned release than it is to rely on the facade of a monetary bail release when the real objective is to achieve community protection.

Mr. ZEFERETTI. What you are saying, though, in essence, is that the defendant himself has to do something that would give you that reason for denial of release; is that the idea?

Mr. GEORGE. The premise on which the ABA standards rest is that freedom pending adjudication for those who have no extant conviction against them should be the norm and conditions placed on freedom should be the exception and should rest upon a specific showing in court.

We probably go somewhat further in our standards governing the procedures than the Supreme Court set as a minimum in *Gerstein* v. *Pugh*. But, nevertheless, we feel that there should be a burden placed on those who would detain or hold an accused under onerous conditions to establish on the record the basis for that holding and requiring the adjudicating officer, whether that be a magistrate or a judge, to make a reasoned decision based upon a record made in open court.

Mr. ZEFERETTI. If I might interrupt, were you in the audience when the two magistrates were testifying this morning?

Mr. GEORGE. Yes, sir, for much of their testimony.

Mr. ZEFERETTI. They both said the same thing, that they had difficulty in obtaining all the facts in a bail hearing, that it would jeopardize the case, that they weren't following judicial process of their oath.

Your standards would seem to prevent any kind of hearing before the magistrate also; is that not so?

Mr. GEORGE. No; we would, in effect, require a judicial hearing. It would not, under the ABA approach, be an ex parte proceeding. As I indicated, the constitutional minimum may be established through *Gerstein* v. *Pugh* suggesting that the Constitution is satisfied if it is ex parte. But there has to be some sort of a formal record made and a basis established for a judicial ruling on the matter and that seems to me, speaking in my private capacity, to be the clear requirement of *Gerstein* v. *Pugh*. Anything that cuts lower than the statements in that case would invite, I think, a judicial invalidation of the statute.

But if you look at ABA Standard 10–4.4, our pre-first appearance inquiry into the matter, that can be substantially ex parte. When one gets to an increase in the conditions or a withdrawal of conditions and a predetention confinement, which is the subject matter of ABA Standard 10–5.9, of the standards, then at that point, the matter becomes far more adversary. But that is toward the end of a transaction.

Mr. ZEFERETTI. But isn't it so that under the ABA standards you can't go into the facts of the case?

Mr. GEORGE. You say you can?

Mr. ZEFERETTI. You cannot.

Mr. GEORGE. No; under the ABA standards, you may. What we provide for is, in effect a *Simmons* v. *U.S.* type control. That is, the

prosecution should not be able at a later time to make constructive use in the prosecution's case in chief of any admissions which come from the defendant.

In other words, on the assumption that there is some basis in the Constitution, whether eighth amendment or due process pursuant to *Gerstein* v. *Pugh* for freedom unless a basis is established to revoke that freedom, then it is like the *Simmons* case, you recall, where in order to testify in a motion to suppress, the prosecution was saying that the privilege against self-incrimination would be waived. So in order to take the fourth, one was losing the protection of the fifth, or the converse. The U.S. Supreme Court said no, we take care of that dilemma by saying to defendants, you may testify freely and fully at the motion to suppress proceeding, but the State cannot use this information.

The U.S. Supreme Court also did about the same thing in a sixth amendment indigent inquiry setting, the *Kahan* case (415 U.S.C. 239 (1974)). So we are running on the assumption that since there probably is a constitutional right involved in pretrial release, that we should not put defendants in the dilemma of having to state certain things in order to try to insure their release pending adjudication, and then have those very statements used against them at a later time.

So we privilege those statements, but we do not forestall an inquiry into what one might call a historical fact of having committed other offenses or other dangerous acts or community-endangering acts during a time of conditioned preadjudication release.

Mr. ZEFERETTI. I am safe in saying, or in assuming that you would be opposed to legislation that would provide pretrial sentencing to be broadened to take in protection of the community or protection of the person?

Mr. GEORGE. No, quite to the contrary. The ABA standards are very clear that conditions are properly to be placed on release, conditions which do promote the protection of the community and the prevention of obstruction of justice.

The standards are very clear that preadjudication conditioned release may include these factors. In contrast, we say that money bail should not consider these factors. We ought to come forthrightly at the problem by saying the real dilemma for the judicial officer is to release without appreciable condition, to release with significant conditions going to the protection of the community or the safeguarding of the justice system, or in quite exceptional cases refusing absolutely to release pending adjudication because it is found that no other less onerous condition will safeguard the community and the justice system.

Mr. ZEFERETTI. Do you recommend some conditions that might fall under that?

Mr. GEORGE. Well, the position of the bar is that a legislative body probably cannot make a completely satisfactory list of specific factors that would bear on community safety and the safeguarding of the justice system, and that this is best left to individual magisterial determination.

Now, one might draw an analogy from, for example, the ABA Standards on Sentencing Alternatives and Procedures or what was being considered by the Congress in the Federal Criminal Code

revision. Just as we talked about the sentencing guidelines and sentencing standards, it might be possible to develop through the rulemaking power or through judicial administrative action a checklist or a set of significant factors which a judge might keep in mind as he or she heard a particular case. If those became automatic and routine schedule type factors, then the position of standards, at least in the setting of money bail, would be that you should never have this routine, automatic, totally objective, totally grouped determination. It should be ad hoc to the individual defendant based on a specific showing before the judge or magistrate.

Mr. ZEFERETTI. Mr. Lynch, would you like to add anything?

Mr. LYNCH. No; I have nothing to add, Mr. Chairman.

Mr. ZEFERETTI. One other thing: Do you feel that under the eighth amendment, when we are talking about preventive detention, do you feel there is an absolute right to bail and not just a prohibition on excessive bail?

Mr. GEORGE. Mr. Chairman, I would have to reply in an individual capacity because the ABA standards only say that constitutional conditions may be placed. It is my own personal belief that the Supreme Court of the United States has not, at this point, taken any position that makes it patently unconstitutional to talk about conditions of pretrial release for the protection of the community.

I think that language in *Gerstein* v. *Pugh* can be read as saying that it is the fourth amendment, coupled with due process, that is the only control on either pretrial detention or conditioned pretrial release.

I am inclined to think that if care is devoted to the procedural dimensions of a hearing which results in denying a citizen's freedom to be in the community pending adjudication and where the withdrawal of that privilege of being in the community is based on demonstrated dangerous acts, we probably have a situation consonant with the U.S. Constitution as it seems to be interpreted by the U.S. Supreme Court to date.

Mr. ZEFERETTI. I think that the fine line is what is constituted to be dangerous acts and how you make an analogy with our particular problem, which is drug trafficking and the amount of moneys which is involved in that.

Mr. GEORGE. Personally, I would be amazed if a majority of the U.S. Supreme Court would say that, in the face of specific legislation, no relationship can be found between large-scale controlled substances trafficking and protection of the community. I would be amazed at this time in our history if, on the surface of such legislation, there would be patent unconstitutionality.

I think, rather, the crunch would come in determining how any standards of dangerousness would be applied by Federal judges in concrete cases. I really think that the procedural concerns which are, by and large, reflected in the draft bills which you kindly provided, are due process oriented and probably are satisfactory. I would expect them to be sustained.

I would say that I think it is very important if the Congress wishes the Federal jurisdiction and judges in the Federal jurisdiction to have this sort of power that it must amend title 18 of the United States Code because the present Federal legislation cannot be invoked by any magistrate or judge as a basis for conditioned

pretrial release or the denial of release on the basis that the community needs protection.

Therefore, something like the District of Columbia Code, I think, is an absolute prerequisite.

Mr. ZEFERETTI. That is what we are in the process of looking into, and that is what we are trying to do. But as the magistrates have testified this morning, they want flexibility. They feel that flexibility with whatever is written has to be included as an ingredient, as a mix, in order to give them the individuals—or to protect the rights of the individuals so that they can look at each one as an individual case rather than, as you said earlier, to blanket everybody into one category in itself.

Mr. Dornan, would you like to ask some questions?

Mr. DORNAN. Yes. Mr. Chairman, the problem with coming late to one of the hearings, is that you run the danger of asking as your first question something that was discussed in depth.

I would like to discuss with Professor George and Mr. Lynch something that has been troubling me on this issue because of the high death toll and the billions of dollars that are circulating, particularly in the Miami area.

If a man came before a judge, and he was guilty of torturing to death 20 people, the societal protections are there, as far as bail is concerned. If the man is known to be a billionaire, he is not going to be bailed, period. Now, if you can torture people to death and remove yourself from the scene of the death, they writhe in agony, overdosed on drugs alone in some sleazy apartment, or people that you are funding hit a yacht on the high seas and blow away a family in retirement with their guests or children with shotguns and leave their ship like the *Flying Dutchman* floating around on the high seas, or take the ship and sneak it back into Fort Lauderdale, and they are not there at the scene of the crime, then the law has the problem because they are once removed from the scene of all this carnage.

What we are dealing with now is something unique in American history. I have thought of asking our overtaxed Library of Congress technicians to try to compare for me in dollars then, as opposed to dollars now, with inflation factored in, how much money Capone and O'Bannion were really dealing with in the illicit production of rotgut booze or—I guess, pretty good liquor, depending where it was coming from—and the money we are dealing with now in billions of dollars in the Southern United States. And how to extrapolate some sort of an agony figure to try and say what we are dealing with here are people who are really killing more people than were killed by Capone at his height.

That line was stunning to me on "60 Minutes," when Mike Wallace said, "More people are being gunned down in Dade County than were being gunned in the worst of the gang war days in Chicago." And then to say, with this money comparison, we are not dealing with millions where some punk says, "I get me the best Harvard-trained lawyer as a mouthpiece to get in and out fast," but we are dealing with, not millions, but billions of dollars.

So, as we have in all our written statements, what we are really talking about is that a tiny fraction of the cost of trafficking becomes the bail. And then, when this guy skips, he goes deeper

underground and says, "OK, I've already had one bust, now you go up front, so that when you get your one bust, we put up your million dollars bail just like that, and we won't have any problem with my lying undercover for a while. We always have some new face to surface for his first bail skip. I'll work out of Manus or Brazil or deep in Colombia or somewhere for a while, or I'll go to Europe for a year's vacation while the next guy steps up."

Given all of these unique peculiarities in money and death toll, don't you think it is possible for men and women of imagination to write, with the help of the ABA, to write this danger to the community in a straightforward but imaginative way to let the country know what we are dealing with? That when we capture a "Mr. Big," as they like to say on television or the movies, that he just isn't going to get bail. He is going to sit there, because his hands not the blood on them directly, but he is killing thousands of young Americans, thousands of young Europeans, at all age brackets, it is not a youth problem, a piracy on the high seas is caused by this man. And to him, $1 million or $2 million is spit in the bucket. He just doesn't care.

Could you just give me some of your thoughts on that?

Mr. GEORGE. I think that the thrust of the ABA Standards applied to the setting of large-scale Controlled Substances Act violation would come closer to addressing the problems you articulate than the traditional use of monetary bail.

After all, it has been reported in the last few weeks that there have been half-a-million-dollar bail defaults by drug traffickers who disappeared from the country. And it might be that the next ante will be three-quarters of a million dollars and the next $1 million, but granted the massive cash flow, I suppose that however high the amounts go, that there will be some people who will put that up front and then disappear.

The approach of the ABA Standards is that if you have people with no ties whatever to the community, ties which can be as broadly or narrowly defined as you wish on the face of it such persons are not likely to be around when trial proceedings are held. That is a basis under the Standards, and I think it is a basis under several of these draft bills, to deny pretrial release absolutely.

Now, if traffickers are apparent residents in the community—however one defines that—then one could examine the hallmarks of high-level participation in international domestic controlled substances manufacture and distribution schemes, and on the basis of a record before the judge or magistrate, make a prima facia showing that this particular individual is likely to be so involved in this dangerous system that other crimes will occur and that the protection of the community will be endangered, or that witnesses are being done away with or bribed or bought off or whatever: Under our standards these facts would enable the system to deal directly with the problem.

In contrast, as long as we rely on monetary bail no matter how high, we have got to deal with the problem indirectly. I think the forthright conditioned release, or in an appropriate case, the denial of release is the way to go at this problem.

Mr. DORNAN. Mr. Lynch, do you have any thoughts on that?

Mr. LYNCH. I concur with Professor George's comments.

Mr. DORNAN. You see the frustration of those of us on this committee, taking testimony from around the country and trying to come up with some reasonable approach to this. And every chart and graph that we look at, the numbers are going up, billions of dollars. So you hit it right on the head, it will be three-quarters of a million dollars in the next bail, and then we will see people skipping $1 million bail within the year, if it hasn't already happened.

Has it happened that high yet? Are these record bails now at $500,000?

Mr. ZEFERETTI. There are even some higher than that, I think, at this point.

I think one of the things, too, that we faced, especially in New York where you have the mandatory sentences as a result of the types or quantity of the drugs that are sold, that we find ourselves in a predicament, on those particular cases, where everybody wants to go to trial. Nobody is taking a plea, and everybody has created a clog in the criminal justice system beyond what we ever expected.

Those that are even the "small fry" in that organization of crime are standing pat, they are putting up the money, waiting a year to go on trial, to pick the jury and the like. There is all kinds of mayhem created as a result of that.

As I asked the magistrates this morning, just a personal reaction—I mean, I asked a question about a person out on bail who commits another crime, whether or not that bond should be revoked automatically and no bail should be provided as a result of the second crime.

Do you have any feelings on that?

Mr. GEORGE. In terms of revocation of the pretrial release on the first crime, then there probably should be a hearing as defined in ABA Standards.

However, in terms of the preliminary determination on release in the instance of the second trial, then it can be much more perfunctory, like *Gerstein* v. *Pugh* envisions, and the fact of the violation, if that were the case, of a condition of the earlier pretrial release, it would be a factor that the magistrate or judge most properly could take into account in reaching a decision.

That is, if you have tried release on condition, and if it were specifically aimed at protection of the community or preservation of the integrity of the criminal justice system, and that condition has obviously failed because this person on the basis of an ex parte showing, has committed another dangerous crime, then it may be that the expectations have been satisfied.

Such a defendant would be a person for whom no less restrictive alternative than denial of preadjudication freedom will work.

Mr. ZEFERETTI. Thank you. Thank you so very much.

Did you have anything else?

Mr. DORNAN. I have nothing else, Mr. Chairman.

Mr. ZEFERETTI. Thank you so very much for waiting, too. We got caught up this morning. We ran a little late. I really appreciate your being here and your testifying before the committee.

Mr. GEORGE. The American Bar Association appreciates the privilege. Thank you, sir.

CONTINUED

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Mr. ZEFERETTI. Thank you.
[The prepared statement of Mr. George follows:]

PREPARED STATEMENT OF PROF. B. JAMES GEORGE, JR., CHAIRPERSON, STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman, and Members of the Select Committee on Narcotics Abuse and Control, my name is B. James George, Jr., and I am a Professor of Law at the New York Law School. I chair the ABA's Standing Committee on Association Standards for Criminal Justice and I am a former Chairperson of the Association's Criminal Justice Section. I am pleased to be here today to represent the views of the American Bar Association as those views are articulated within the ABA Standards for Criminal Justice. The American Bar Association welcomes this opportunity to convey its views on issues regarding the imposition of pre-trial detention for drug offenders who present a danger to the community; the creation of special bail conditions for narcotics traffickers; the usefulness of bail hearings to set conditions and trace the source of bail collateral; and, the denial of bail pending appeal for convicted traffickers. The ABA Standards for Criminal Justice, Mr. Chairman, represent official American Bar Association policy and will provide the Select Committee with insight as to the collective, consensus judgment about bail issues of our 280,000 member Association.

I should note at the outset that we have not sought as an Association to address bail issues as they relate to particular offenses or particular classes of defendants such as narcotics traffickers. We have, however, developed very specific recommendations on the bail issue which can provide clear guidance in the area of drug offenses. I should also note that our Pretrial Release Standards have been drafted principally to serve as guidelines for the establishment of court rules and procedures rather than statutory law but that the Standards are adaptable to legislative enactment.

The issue of bail and the companion issue of crime committed by those released on bail pending trial are problems which have received the careful scrutiny of the American Bar Association. These are not new issues and the introduction to Chapter 10 of the ABA Standards for Criminal Justice acknowledges the melancholy history of bail reform:

"Unfortunately, the bail reform movement never accomplished all that was hoped for it. A decade later, our jails remain crowded with pretrial detainees, many judges continue to impose monetary conditions, compensated sureties still thrive in many jurisdictions, and pretrial crime and abscondence remain serious problems."

While the central thrust of the Association's 31 separate black letter standards dealing with Pretrial Release favors bail for persons accused of crime pending adjudication, our standards also recognize that "some restraints on the defendant's liberty may be crucial to allow the process to go forward * * *."

ABA Standard 10-5.9 deals specifically with pretrial detention and it provides a procedure for a pretrial detention hearing which may be triggered by:

A judicial determination that monetary bail is necessary coupled with defendant's failure to satisfy that condition;

A judicial determination that defendant has willfully violated a condition of release;

A judicial determination that there is probable cause to believe defendant has committed a crime while on pretrial release; or,

By formal complaint from a prosecutor, law enforcement officer or representative of the pretrial release agency that defendant is likely to flee, threaten or intimidate witnesses, or *constitutes a danger to the community* (emphasis added).

The fourth triggering event set forth above related to a defendant's "dangerousness." This Association is mindful of the fact that some defendants on bail pending trial do commit additional offenses and we share the concern over this problem expressed by both law enforcement agencies and the public. As lawyers we know that the denial of bail is a serious step which materially decreases a defendant's ability to assist counsel in preparing an adequate defense. In recognition of that fact our standards provide for the setting of "any reasonable restriction designed to ensure . . . the safety of the community" (Standard 10-5.2). The standards provide that violation of those conditions of release can subject the defendant to arrest and require either the setting of new conditions or the scheduling of a pretrial detention hearing within five calendar days (Standard 10-5.7). The standards also provide that where probable cause is shown to believe a released defendant has committed a new crime, a pretrial detention hearing should be scheduled within five calendar days (Standard 10-5.8). Finally, the standards provide for full pretrial detention hearings

(Standard 10-5.9) and for the accelerated trial of detained defendants (Standard 10-5.10).

Your Committee has expressed special interest in four distinct bail issues. Let me address, seriatim, the application of existing ABA policy to those issues.

PRETRIAL DETENTION FOR DRUG OFFENDERS WHO PRESENT A DANGER TO THE COMMUNITY

The American Bar Association Standards on Pretrial Release deal specifically (Standard 10-5.9) with the subject of pretrial detention. Notwithstanding the recent decision by the D.C. Court of Appeals which upheld the District of Columbia's pretrial detention statute (*U.S.* v. *Edwards,* D.C. Court of Appeals No. 80-294 and *Edwards* v. *U.S.,* D.C. Court of Appeals No. 80-401 decided May 8, 1981), the constitutionality of preventive detention remains to be tested by the Supreme Court.

Our standards, Mr. Chairman, provide a detailed mechanism for triggering a pretrial detention hearing based upon specific facts and not upon a generalized prediction of dangerousness. Under our standards a defendant may be determined to constitute a danger to the community because:

The defendant has committed a criminal offense since release;

The defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the community; or

The defendant is likely to flee; and

The defendant is presently detained because of inability to satisfy monetary conditions and no less stringent monetary conditions will reasonably assure reappearance; or

The defendant has violated a condition of release and no additional monetary or nonmonetary conditions will reasonably assure reappearance.

American Bar Association policy favors the release of defendants pending the determination of guilt or innocence. Notwithstanding that overriding predilection for release, our standards recognize and provide for pretrial detention where a defendant's inability to satisfy monetary conditions or a defendant's violation of release conditions require swift judicial action to insure the integrity of the criminal justice process. We require that the detention decision be based solely upon evidence adduced at a pretrial detention hearing. Further, we require that such evidence be "clear and convincing."

THE CREATION OF SPECIAL BAIL CONDITIONS FOR NARCOTICS TRAFFICKERS

The ABA Standards address specifically the issue of release conditions but neither define nor recommend special conditions for any particular class of charged defendants. Standard 10-5.2 does, however, state: "Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous . . . conditions necessary to assure the defendant's appearance in court, *protect the safety of the community,* (emphasis added) and prevent intimidation of witnesses and interference with the orderly administration of justice." Among the conditions then set forth are the following alternatives:

Release to custody of a pretrial services agency;

Release to the custody of a qualified person or organization;

Imposition of reasonable restrictions on activity, movement, etc.;

Prohibit defendant's possession of weapons, engaging in certain described activities, using intoxicating liquors or certain drugs; or

The imposition of any other reasonable restriction designed (inter alia) to protect the community.

Clearly, the American Bar Association statement recognizes and permits the setting of nonmonetary conditions designed in part to protect the community. Our standards recognize and favor the utility of *reasonable restriction designed to protect the community.* Standard 10-5.2 was designed to give the court flexibility in tailoring individualized release conditions which would reconcile a defendant's interest in pretrial freedom and a community's legitimate concern for its own safety. To that extent the reasonable imposition of nonmonetary creative, effective special conditions on release for narcotics traffickers would be in accord with the letter and spirit of our standards. Because our standards do take cognizance of community safety, the prevention of witness intimidation and the prevention of interference with the orderly administration of justice, they go beyond the provisions of the Federal Bail Reform Act (18 U.S.C. § 3146(a)), which provides for setting nonfinancial conditional solely to assure reappearance.

In Standard 10-5.3 we urge the creation of Pretrial Services Agencies and call for such agencies to monitor those released pending trial. The imposition of specific,

individualized release conditions can assist in effective monitoring and can expedite prompt additional judicial action where such conditions are violated.

THE USEFULNESS OF BAIL HEARINGS TO SET CONDITIONS AND TRACE THE SOURCE OF BAIL COLLATERAL

Our standards address indirectly the issues posed by this portion of the Committee's inquiry. ABA policy favors a "pre-first-appearance inquiry." That is, we provide that where a defendant charged with a felony is in custody, an inquiry into the facts relevant to pretrial release should be conducted prior to or contemporaneous with the defendant's first appearance unless the prosecutor does not oppose release on the defendant's own recognizance or the defendant waives such an inquiry after consultation with counsel. The inquiry we provide for (Standard 10–4.4) includes an exploration of the defendant's employment status and history and the assets available to the defendant to meet monetary release conditions.

This inquiry is to be conducted by a Pretrial Services Agency, which we believe should be established in each jurisdiction. Where appropriate, we indicate that the conduct of such an inquiry may be in open court. We provide that the Pretrial Services Agency should make recommendations to the judicial office concerning the conditions, if any, which should be imposed on the defendant's release. One of the factors which must be included in the inquiry relates to the assets available to the defendant. Our standards establish a process through which rational bail decisions may be arrived at by judicial officers.

We believe the agency should perform important prerelease screening as well as postrelease monitoring services. And because our standards call for careful pre-first-appearance inquiry recommendations, we favor the exploration of all facts pertinent to reappearance, community safety and the orderly administration of justice. American Bar Association policy favors the kind of inquiry which will bring to light complete and individualized factors upon the release decision. The source of bail collateral would be such a factor. While information regarding the source of assets available to meet monetary conditions would fall within the purview of Standard 10–4.4, we would point out that "Inquiry of the defendant should carefully exclude questions concerning the details of the current charge."

DENIAL OF BAIL PENDING APPEAL FOR CONVICTED TRAFFICKERS

This subject is addressed in Chapter 21 of the ABA Standards for Criminal Justice. Included within that Chapter on Criminal Appeals is a specific Standard on Release Pending Appeal (21–2.5). That Standard provides that "when an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final appeal should be reviewed and a fresh determination made by the trial court." Moreover, American Bar Association policy as enunciated in this Standard also provides that "Release should not be granted if the court finds that there is substantial risk that the appellant will not appear to answer the judgment following conclusion of the appellate proceedings, or that the appellant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice."

Our policy therefore recognizes that there are cases where release pending appeal is unwarranted. Indeed, we indicate in our Standard that judges should take into account the nature of the crime and the length of sentence imposed in arriving at a release decision. As indicated earlier, our standards do not address specific classes of defendants and hence we have no provisions which relate solely to narcotics traffickers. Instead, this Standard, like its counterparts in Chapter 10, provides general criteria applicable to all offenders. Certainly the risk factors we enunciate would apply to narcotics traffickers. American Bar Association policy unequivocally recognizes that there are instances in which release pending appeal should be denied.

CONCLUSION

This Association is fully aware of the ravages visited upon society by illicit traffic in narcotics and controlled substances. We are also aware that abscondence or "bail jumping" is a serious problem especially in those jurisdictions where vigorous narcotics enforcement has resulted in heavy arrest rates.

While we are dedicated to maintaining allegiance to our criminal law's fundamental precepts—the presumption of innocence—we must accept the fact that there are those who may well commit additional crime or abscond while they are on pretrial release. Nonetheless, those incidents can be minimized through a vigorous implementation of the ABA Standards on Pretrial Release as set forth in Chapter 10 of the ABA Standards for Criminal Justice, which afford adequate safeguards for the community's safety consistent with constitutional requirements. We emphasize that

full implementation of our Pretrial Release Standards will require close cooperation and communication between local pretrial release agencies, prosecutors, probation and parole agencies, police departments, courts and other appropriate law enforcement agencies. Furthermore, we urge the establishment in every jurisdiction of a Pretrial Services Agency which can assist law enforcement agencies in the effective monitoring and supervision of persons on bail. Such agencies can help prevent and control "pretrial crime" and many defendants on pretrial release, like convicted probationers, need to be effectively supervised. Implicit in our Pretrial Release Standards is the need for vigilant and effective monitoring and supervision of defendants released on bail. Moreover, our standards make clear that violations of conditions of pretrial release constitute grounds for a pretrial detention hearing.

We respectfully suggest that the American Bar Association Standards for Criminal Justice (Second Edition, 1980) can serve as a valuable resource to the Select Committee on Narcotics Abuse and Control as it proceeds to examine bail reform issues which are of import to all Americans. To assist the Committee in its endeavors, we have attached as an appendix the black letter ABA Standards pertinent to your current inquiry. We have appreciated this opportunity to describe American Bar Association policy on pretrial release and hope that our criminal justice standards will help foster more effective measures for deterring those who violate our laws.

[Appendix]

AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE—BLACK LETTER STANDARDS ON PRETRIAL RELEASE AND BLACK LETTER STANDARD 21–2.5 ON CRIMINAL APPEALS

CHAPTER 10—PRETRIAL RELEASE

PART I. GENERAL PRINCIPLES

Standard 10–1.1. Policy favoring release

The law favors the release of defendants pending determination of guilt or innocence. Deprivation of liberty pending trial is harsh and oppressive in that it subjects persons whose guilt has not been judicially established to economic and psychological hardship, interferes with their ability to defend themselves, and, in many cases, deprives their families of support. Moreover, the maintenance of jailed defendants and their families represents a major public expense.

Standard 10–1.2. Definitions

(a) Citation: a written order issued by a law enforcement officer requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time. The form should require the signature of the person to whom it is issued.

(b) Summons: an order issued by a court requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) Release on own recognizance (sometimes referred to as "personal recognizance"): the release of a defendant without bail but upon an order to appear at all appropriate times, to refrain from criminal law violations, and to refrain from threatening or otherwise interfering with potential witnesses. Release on own recognizance is not inconsistent with the imposition of other nonmonetary conditions reasonably necessary to secure the presence of the accused and to protect the safety of the community.

(d) Release on monetary conditions: the release of a defendant upon the execution of a bond, with or without sureties, which may or may not be secured by the pledge of money or property.

(e) First appearance: that proceeding at which a defendant initially is taken before a judicial officer after arrest.

Standard 10–1.3. Conditions on release

(a) Each jurisdiction should adopt procedures designed to maximize the number of defendants released on their own recognizance. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case. Methods for providing the appropriate judicial officer with a reliable statement of the facts relevant to the release decision should be developed.

(b) Constitutionally permissible nonmonetary conditions should be employed to assure the defendant's appearance at court and to prevent the commission of criminal violations while the defendant is at liberty pending adjudication.

(c) Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably ensure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance and with regard for the defendant's financial ability to post bond. Compensated sureties should be abolished, and a defendant held on financial conditions should be released upon the deposit of cash or securities of not less than ten percent of the amount of the bail, to be returned, at the conclusion of the case.

Standard 10-1.4. Intentional failure to appear

Intentional failure to appear in court without just cause after pretrial release should be made a criminal offense. Each jurisdiction should establish an adequate apprehension unit designed to apprehend defendants who have failed to appear or who have violated conditions of their release.

PART II. RELEASE BY LAW ENFORCEMENT OFFICER ACTING WITHOUT AN ARREST WARRANT

Standard 10-2.1. Policy favoring issuance of citations

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. This policy should be implemented by statutes of statewide applicability.

Standard 10-2.2. Mandatory issuance of citation

(a) Except as provided in paragraph (c), a police officer who has grounds to arrest a person for a misdemeanor should be required to issue a citation in lieu of arrest or, if an arrest has been made, to issue a citation in lieu of taking the accused to the police station or to court.

(b) Except as provided in paragraph (c), when an arrested person has been taken to a police station and a decision has been made to charge the person with a misdemeanor, the responsible officer should be required to issue a citation in lieu of continued custody.

(c) The requirement to issue a citation set forth in paragraphs (a) and (b) need not apply and the defendant may be detained:

(i) When an accused subject to lawful arrest fails to identify himself or herself satisfactorily;

(ii) When an accused refuses to sign the citation after the officer explains to the accused that the citizen does not constitute an admission of guilt and represents only the accused's promise to appear;

(iii) When an otherwise lawful arrest or detention is necessary to prevent imminent bodily harm to the accused or to another;

(iv) When the accused has no ties to the jurisdiction reasonably sufficient to assure accused's appearance and there is a substantial likelihood that the accused will refuse to respond to a citation; or

(v) when the accused previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation.

(d) When an officer fails to issue a citation pursuant to paragraph (c), the officer should be required to indicate the reasons in writing.

Standard 10-2.3. Permissive authority to issue citations in all cases

(a) A law enforcement officer acting without a warrant who has probable cause to believe that a person has committed any offense for which the officer could legally arrest the person should be authorized by law to issue a citation in lieu of arrest or continued custody. The officer should be strongly encouraged to do so unless one or more of the circumstances described in standard 10-2.2(c)(i)-(v) are present. The statute authorizing such action should require that the appropriate judicial or administrative agency promulgate detailed rules of procedure governing the exercise of authority to issue citations.

(b) Each law enforcement agency should promulgate regulations designed to increase the use of citations to the greatest degree consistent with public safety. Except when arrest or continued custody is patently necessary, the regulations should require such inquiry as is practicable into the accused's place and length of residence, family relationships, references, present and past employment, criminal record, and any other facts relevant to appearance in response to a citation.

Standard 10-2.4. Lawful searches

When an officer makes a lawful arrest, the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest.

Standard 10-2.5. Persons in need of care

Notwithstanding that a citation is issued, a law enforcement officer should be authorized to take a cited person to an appropriate medical facility if the person appears mentally or physically unable to care for himself or herself.

PART III. ISSUANCE OF SUMMONS IN LIEU OF ARREST WARRANT

Standard 10-3.1. Authority to issue summons

All judicial officers should be given statutory authority to issue a summons rather than an arrest warrant in all cases in which a complaint, information, or indictment is filed or returned against a person not already in custody. Judicial officers should liberally utilize this authority unless a warrant is necessary to prevent flight, to prevent imminent bodily harm to the defendant or another, or to subject a defendant to the jurisdiction of the court when the defendant's whereabouts are unknown. If a judicial officer issues a summons rather than an arrest warrant in connection with an offense, no law enforcement officer may arrest the accused for that offense without obtaining a warrant.

Standard 10-3.2. Mandatory issuance of summons

The issuance of a summons rather than an arrest warrant should be mandatory in all misdemeanor cases unless the judicial officer finds that:

(a) the defendant previously has intentionally failed to appear without just cause in response to a citation, summons, or other legal process for an offense other than a minor one, such as a parking violation;

(b) the defendant has no ties to the community reasonably sufficient to assure appearance and there is a substantial likelihood that the defendant will refuse to respond to a summons;

(c) the whereabouts of the defendant are unknown and the issuance of an arrest warrant is a necessary step in order to subject the defendant to the jurisdiction of the court; or

(d) an otherwise lawful arrest is necessary to prevent imminent bodily harm to the defendant or to another.

Standard 10-3.3. Application for an arrest warrant or summons

(a) At the time of the presentation of an application for an arrest warrant or summons, the judicial officer should require the applicant to produce such information as reasonable investigation would reveal concerning the defendant's: (i) residence, (ii) employment, (iii) family relationships, (iv) past history of response to legal process, and (v) past criminal record.

(b) The judicial officer should ordinarily issue a summons in lieu of an arrest warrant when the prosecuting attorney so requests.

(c) In any case in which the judicial officer issues a warrant, the officer shall state the reasons in writing or on the record for failing to issue a summons.

Standard 10-3.4. Service of summons

Statutes prescribing the methods of service of criminal process should include authority to serve a summons by certified mail.

PART IV. RELEASE BY JUDICIAL OFFICER AT FIRST APPEARANCE OR ARRAIGNMENT

Standard 10-4.1. Prompt first appearance

Unless the accused is released on citation or in some other lawful manner, the accused should be taken before a judicial officer without unnecessary delay. Except during nighttime hours, every accused should be presented no later than [six] hours after arrest. Judicial officers should be readily available to conduct first appearances within the time limits established by this standard. Under no circumstances should the accused's first appearance be delayed in order to conduct in-custody interrogation or other in-custody investigation. An accused who is not promptly presented shall be entitled to immediate release.

Standard 10-4.2. Nature of first appearance

(a) The first appearance before a judicial officer should take place in such physical surroundings and with such unhurried and quiet dignity as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of that case. The proceedings should be conducted in clear and easily understandable language calculated to advise the

defendant effectively of the defendant's rights and of the actions to be taken against him or her. The appearance should be conducted in such a way that other interested persons present may be informed of the proceedings.

(b) Upon the accused's first appearance, the judicial officer should inform the accused of the charge and the maximum possible penalty upon conviction. The judicial officer should also provide the accused with a copy of the charging document and take such steps as are reasonably necessary to ensure that the defendant is adequately advised of the following:

(i) That the defendant is not required to say anything, and that anything the defendant says may be used against him or her;

(ii) That, if the defendant is as yet unrepresented, the defendant has a right to counsel and, if the defendant is financially unable to afford counsel and the nature of the charges so require, counsel forthwith will be appointed;

(iii) That the defendant has a right to communicate with counsel, family, and friends, and that, if necessary, reasonable means will be provided to enable defendant to do so; and

(iv) That, where applicable, defendant has a right to a preliminary examination.

(c) An appropriate record of the proceedings should be made. The defendant also should be advised of the nature and approximate schedule of all further proceedings to be taken in the case.

(d) No further steps in the proceedings should be taken until the defendant and defense counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived the right to be represented by counsel.

(e) In every case not finally disposed of at first appearance, and except in those cases in which the prosecuting attorney has stipulated that the defendant may be released on his or her own recognizance, the judicial officer should decide in accordance with the standards hereinafter set forth the question of the defendant's pretrial release.

(f) It should be the policy of prosecuting attorneys to encourage the release of defendants upon their own recognizance in compliance with these standards. Special efforts should be made to enter into stipulation to that effect in order to avoid unnecessary pretrial release inquiries and to promote efficiency in the administration of justice.

Standard 10–4.3. Release of defendants without special inquiry

Defendants charged with misdemeanors or appearing pursuant to a summons or citation should be released by a judicial officer on their own recognizance without the special inquiry prescribed hereafter, unless a law enforcement official gives notice to the judicial officer that he or she intends to oppose such release. If such a notice is given, the inquiry should be conducted. No defendant appearing pursuant to a citation or summons should be detained unless the judicial officer states in writing new or newly discovered information unavailable to the official issuing the summons or citation which justifies more stringent conditions of release.

Standard 10–4.4. Pre-first-appearance inquiry

(a) In all cases in which the defendant is in custody and charged with a felony, an inquiry into the facts relevant to pretrial release should be conducted prior to or contemporaneous with the defendant's first appearance unless the prosecution advises that it does not oppose release on recognizance or the right to such an inquiry is waived by the defendant after consultation with counsel.

(b) The inquiry should be undertaken by the pretrial services agency established pursuant to standard 10–5.3.

(c) In appropriate cases, the inquiry may be conducted in open court. Inquiry of the defendant should carefully exclude questions concerning the details of the current charge.

(d) The inquiry should be exploratory and should include such factors as:

(i) Defendant's employment status and history and the assets available to defendant to meet any monetary condition upon release;

(ii) The nature and extent of defendant's family relationships;

(iii) Defendant's past and present residence;

(iv) Defendant's character and reputation;

(v) Names of persons who agree to assist defendant in attending court at the proper time;

(vi) Defendant's prior criminal record, if any, and, if previously released pending trial, whether defendant appeared as required;

(vii) Any facts indicating the possibility of violations of law if defendant is released without restrictions; and

(viii) Any facts tending to indicate that defendant has strong ties to the community and is not likely to flee the jurisdiction.

(e) The inquiring agency should make recommendations to the judicial officer concerning the conditions, if any, which should be imposed on the defendant's release. The agency should formulate detailed guidelines to be utilized in making these recommendations, and, whenever possible, the recommendations should be supported by objective factors contained in the guidelines. The results of the inquiry and the recommendations should be made known to participants in the first appearance as soon as possible.

PART V. THE RELEASE DECISION

Standard 10–5.1. Release on defendant's own recognizance

(a) It should be presumed that the defendant is entitled to be released on his or her own recognizance. The presumption may be overcome by a finding that there is a substantial risk of nonappearance or a need for additional conditions as provided in standard 10–5.2.

(b) In determining whether there is a substantial risk of nonappearance, the judicial officer should take into account the following factors concerning the defendant:

(i) The length of residence in the community;

(ii) Employment status and history;

(iii) Family and relationships;

(iv) Reputation, character, and mental condition;

(v) Prior criminal record, including any record of appearance or nonappearance while on personal recognizance or bail;

(vi) The identity of responsible members of the community who would vouch for the defendant's reliability;

(vii) The nature of the offense presently charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of nonappearance; and

(viii) Any other factors pertaining to the defendant's ties to the community or bearing on the risk of intentional failure to appear.

(c) In evaluating these and any other factors, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge.

(d) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement of the reasons for this decision.

Standard 10–5.2. Conditions on release

Upon a finding that release on the defendant's own recognizance is unwarranted, the judicial officer should impose the least onerous of the following conditions necessary to assure the defendant's appearance in court, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice:

(a) release the defendant to the custody of a pretrial services agency established pursuant to standard 10–5.3;

(b) release the defendant into the care of some other qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. Such supervisor should be expected to maintain close contact with the defendant, to assist the defendant in making arrangements to appear in court, and, where appropriate, to accompany the defendant to court. The supervisor should not be required to be financially responsible for the defendant, nor to forfeit money in the event the defendant fails to appear in court;

(c) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant, including prohibitions against the defendant approaching or communicating with particular persons or classes of persons and going to certain geographical areas or premises;

(d) prohibit the defendant from possessing any dangerous weapons, engaging in certain described activities, or using intoxicating liquors or certain drugs; or

(e) impose any other reasonable restriction designed to assure the defendant's appearance, protect the safety of the community, and prevent intimidation of witnesses and interference with the orderly administration of justice.

Standard 10–5.3. Pretrial services agency

Every jurisdiction should provide a pretrial services agency or similar facility to monitor and assist defendants released prior to trial. The agency should:

(a) Conduct pre-first-appearance inquiries pursuant to standard 10–4.4;

(b) Provide intensive supervision for persons released into its custody pursuant to standard 10–5.2(a);

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(c) Operate or contract for the operation of appropriate facilities for the custody or care of persons released, including, but not limited to, residential half-way houses, addict and alcoholic treatment centers, and counseling services;
(d) Promptly inform the court of all apparent violations of pretrial release conditions or arrests of persons released to its custody and under its supervision and recommend appropriate modifications of release conditions;
(e) Supervise other agencies which serve as custodians for released defendants and advise the court as to the eligibility, availability, and capacity of such agencies;
(f) Assist persons released prior to trial in securing any necessary employment and medical, legal, or social services;
(g) Remind persons released prior to trial of their court dates and assist them in getting to court.

Standard 10–5.4. Release on monetary conditions

(a) Monetary conditions should be set only when it is found that no other conditions on release will reasonably assure the defendant's appearance in court.
(b) The sole purpose of monetary conditions is to assure the defendant's appearance. Monetary conditions should not be set to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct.
(c) A judicial officer should never set monetary conditions unless the officer first determines, on the basis of proffers by the prosecution and defense, that there is probable cause to believe that the defendant has committed the charged offense.
(d) Upon finding that a monetary condition should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:
(i) The execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;
(ii) The execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to 10 percent of the face amount of the bond. The deposit should be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or
(iii) The execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated sureties.
(e) Monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court. In setting the amount of bail, the judicial officer should take into account the defendant's financial ability to post the bond. The judicial officer should also take into account all facts relevant to the risk of willful nonappearance, including:
(i) The length and character of the defendant's residence in the community;
(ii) Defendant's employment status and history;
(iii) Defendant's family ties and relationships;
(iv) Defendant's reputation, character, and mental condition;
(v) Defendant's past history of response to legal process;
(vi) Defendant's prior criminal record;
(vii) The identity of responsible members of the community who would vouch for defendant's reliability;
(viii) The nature of the current charge, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and
(ix) Any other factors indicating defendant's roots in the community.
(f) Monetary conditions should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge but should be the result of an individualized decision, taking into account the special circumstances of each defendant.
(g) Monetary conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance. This is in the nature of a stipulated fine and, where permitted, may be employed according to a predetermined schedule.

Standard 10–5.5. Compensated sureties

Compensated sureties should be abolished. Pending abolition, they should be licensed and carefully regulated. The amount which a compensated surety can charge for writing a bond should be set by law. No licensed surety should be permitted to reject an applicant willing to pay the statutory fee or to insist upon additional collateral other than specified by law.

Standard 10–5.6. Review of release decision

(a) Upon motion by either the defense or the prosecution alleging changed or additional circumstances, the court should promptly reexamine the release decision.
(b) Frequent and periodic reports should be made to the court as to each defendant who has failed to secure release within (two weeks) of arrest. The prosecuting attorney should be required to advise the court of the status of the case and why the defendant has not been released or tried.

Standard 10–5.7. Violation of conditions of release

(a) Upon sworn affidavit by the prosecuting attorney, a law enforcement officer, a representative of the pretrial services agency, or a licensed surety establishing probable cause to believe that a defendant has intentionally violated the conditions of release, a judicial officer may issue a warrant directing that the defendant be arrested and taken forthwith before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer shall either:
(i) Set new or additional conditions of release, or
(ii) Schedule a pretrial detention hearing within five calendar days pursuant to standard 10–5.9.
(b) A law enforcement officer having probable cause to believe that a released defendant has violated the conditions of release should be authorized, when it would be impracticable to secure a warrant, to arrest the defendant and take him or her forthwith before the judicial officer setting the condition of release.

Standard 10–5.8. Commission of crime while awaiting trial

When it is shown that a competent court or grand jury has found probable cause to believe that a defendant has committed a crime while released pending adjudication of a prior charge, or when the prosecution, a law enforcement officer, a representative of the pretrial release agency, or a surety presents the judicial officer with a sworn affidavit establishing probable cause to believe that the defendant committed such a crime, the judicial officer may issue a warrant directing that the defendant be arrested and taken before the judicial officer setting the conditions of release. After the defendant is taken into custody, the judicial officer should schedule a pretrial detention hearing pursuant to standard 10–5.9 within five calendar days.

Standard 10–5.9. Pretrial detention

(a) A judicial officer shall convene a pretrial detention hearing whenever:
(i) A defendant has been detained for five days pursuant to standards 10–5.4, 10–5.7(a)(ii), or 10–5.8, or
(ii) The prosecutor, a law enforcement officer, or a representative of the pretrial services agency alleges, in a verified complaint, that a released defendant is likely to flee, threaten or intimidate witnesses or court personnel, or constitute a danger to the community.
(b) At the conclusion of the pretrial detention hearing, the judicial officer should issue an order of detention if the officer finds in writing by clear and convincing evidence that:
(i) The defendant, for the purpose of interfering with or obstructing or attempting to interfere with or obstruct justice, has threatened, injured, or intimidated or attempted to threaten, injure, or intimidate any prospective witness, juror, prosecutor, or court officer, or:
(ii) The defendant constitutes a danger to the community because:
(A) The defendant has committed a criminal offense since release, or
(B) The defendant has violated conditions of release designed to protect the community and no additional conditions of release are sufficient to protect the safety of the community; or
(iii) The defendant is likely to flee and:
(A) The defendant is presently detained because he or she cannot satisfy monetary conditions imposed pursuant to standard 10–5.4 and no less stringent conditions will reasonably assure defendant's reappearance, or
(B) The defendant has violated conditions of release designed to assure his or her presence at trial and no additional nonmonetary conditions or monetary conditions which the defendant can meet are reasonably likely to assure the defendant's presence at trial.
(c) The judicial officer shall not issue an order of detention unless the officer first finds that the safety of the community, the integrity of the judicial process, or the defendant's reappearance cannot be reasonably assured by advancing the date of trial or by imposing additional conditions on release. In lieu of an order of detention, the judicial officer may enter an order advancing the date of trial or imposing additional conditions on release.

(d) Notwithstanding the order of detention, any defendant detained pursuant to standard 10–5.9(b) (iii) (A) shall be released whenever the defendant meets the original monetary conditions set upon release.

(e) Pretrial detention hearings shall meet the following criteria:

(i) The pretrial hearing should be held within five days of the events outlined in standards 10–5.4, 10–5.7(a)(ii), 10–5.8, or 10–5.9(a)(ii). No continuance of the pretrial detention hearing should be permitted except with the consent of the defendant in hearings held pursuant to standards 10–5.4, 10–5.7(a)(ii), and 10–5.8 or the consent of the prosecutor in hearings held pursuant to standard 10–5.9(a)(ii).

(ii) In order to provide adequate information to both sides in their preparation for a pretrial detention hearing, discovery prior to the hearing should be as full and free as possible, consistent with the standards in the chapter on Discovery and Procedure Before Trial.

(iii) The burden of going forward at the pretrial detention hearing should be on the prosecution. The defendant should be entitled to be represented by counsel, to present witnesses and evidence on his or her own behalf, and to cross-examine witnesses testifying against him or her.

(iv) No testimony of a defendant given during a pretrial detention hearing should be admissible against the defendant in any other judicial proceedings other than prosecutions against the defendant for perjury.

(v) Rules respecting the presentation and admissibility of evidence at the pretrial detention hearing should be the same as those governing other preliminary proceedings, except that when the defendant's detention is premised upon the commission of a new criminal offense, the rules respecting the presentation and admissibility of evidence should be the same as those governing criminal trials.

(f) A pretrial detention order should:

(i) Be based solely upon evidence adduced at the pretrial detention hearing;

(ii) Be in writing;

(iii) Be entered within twenty-four hours of the conclusion of the hearing;

(iv) Include the findings of fact and conclusions of law of the judicial officer with respect to the reasons for the order of detention and the reasons why the integrity of the judicial process, the safety of the community, and the presence of the defendant cannot be reasonably assured by advancing the date of trial or imposing additional conditions on release; and

(v) Include the date by which the detention must terminate pursuant to standard 10–5.10.

(g) Every pretrial detention order should be subject to expedited appellate review.

Standard 10–5.10. Accelerated trial for detained defendants

Every jurisdiction should adopt, by statute or court rule, a time limitation within which the defendant in custody pursuant to standard 10–5.9 must be tried which is shorter than the limitation applicable to defendants at liberty pending trial. The failure to try a defendant held in custody within the prescribed period should result in the defendant's immediate release from custody pending trial.

Standard 10–5.11. Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

Standard 10–5.12. Credit for pretrial detention

Every convicted defendant should be given credit, against both a maximum and minimum term, for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed, or as a result of the underlying conduct on which such a charge is based.

Standard 10–5.13. Release to prepare for trial

Upon a showing by a defendant detained pursuant to standard 10–5.9 that his or her temporary release is necessary in order adequately to prepare the defense, the judicial officer should order defendant's release in the custody of the defense attorney or, when this is inadequate to assure defendant's presence at trial and the safety of the community, a law enforcement officer. No such release shall be for a period longer than six consecutive hours.

Standard 10–5.14. Treatment of defendants detained pending trial.

A defendant who is detained prior to trial should be confined in facilities separate from convicted persons awaiting or serving sentences or being held in custody pending appeal, and any restrictions on the rights the defendant would have as a free citizen should be as minimal as institutional security and order require. The

rights and privileges of defendants detained pretrial in no instance should be more restricted than those of convicted defendants who are detained.

CHAPTER 21—CRIMINAL APPEALS

PART II. TRANSITION FROM TRIAL COURT TO APPELLATE COURT

Standard 21–2.5. Release pending appeal; stay of execution

(a) When an appeal has been instituted by a convicted defendant after a sentence of imprisonment has been imposed, the question of the appellant's custody pending final decision on appeal should be reviewed and a fresh determination made by the trial court. The burden of seeking a stay of execution and release may properly be placed on the appellant. The decision of the trial court should be subject to redetermination by an appellate judge or court on the initiative of either the prosecution or the defense.

(b) Release should not be granted if the court finds that there is substantial risk that the appellant will not appear to answer the judgement following conclusion of the appellate proceedings, or that the appellant is likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice. In deciding whether to release a convicted defendent pending appeal, the trial court should also take into account the nature of the crime and the length of sentence imposed, together with factors relevant to pretrial release.

(c) Execution of a death sentence should be stayed automatically when an appeal is instituted.

(d) Dilatory prosecution of an appeal through acts or omissions of appellant or appellant's counsel should be ground for termination of the release of appellant pending appeal.

(e) In a jurisdiction with an intermediate appellate court, when review in the highest court is sought by a defendent-appellant, the question of custody pending action by the highest court may be redetermined by the intermediate appellant court or a judge thereof. When review is sought by the prosecution, standards relevant to custody of defendents pending prosecution appeal from trial court decisions should be applied. Decisions concerning custody by the intermediate appellate court or judge thereof should be subject to review by the highest court.

Mr. ZEFERETTI. Mr. Bruce Beaudin, please. He is the Director of the District of Columbia Pretrial Services.

How are you?

Mr. BEAUDIN. Fine, thank you, Mr. Chairman.

Mr. ZEFERETTI. Welcome.

Mr. BEAUDIN. Welcome to you. Thank you very much.

Mr. ZEFERETTI. Greetings from an old friend——

Mr. BEAUDIN. Bobby Brownstein.

Mr. ZEFERETTI. Bobby Brownstein, that is right. And Phil Leshin, too, I might add.

Mr. BEAUDIN. I talked with Phil the day before yesterday and he told me that he had talked with you and was representing you at the time. He is an old friend and I have worked with him for many years.

Mr. ZEFERETTI. Great. And I welcome you.

I have your statement, and that will be made in its entirety as part of the record. You can proceed in whatever manner makes you comfortable.

TESTIMONY OF BRUCE BEAUDIN, DIRECTOR, DISTRICT OF COLUMBIA PRETRIAL SERVICES

Mr. BEAUDIN. Thank you, Mr. Chairman.

Recognizing the lateness of the hour and the fact that there are some other witnesses that I think will provide information that will be beneficial to this committee, there are just a couple of points that I would like to sum up and offer to you.

My background as a lawyer is that, for a very short time, I was the Director of the Public Defender's Office here in Washington. After that, in 1968, I started working with bail. I have done nothing in the last 15 years but work with the problems of bail in the Federal system and the States.

I am used in many jurisdictions. I testify before State legislatures, working with the construction of bills in those legislatures that will address danger provisions that you are discussing here. I have worked for many years with Ken Feinberg and the Judiciary Committee on the Senate side, and with Congressman Mazzoli here on the District Committee when it considered the detention bills.

So I have spent my whole life dealing strictly with bail and its problems as a professional and as a lawyer. I have been very much concerned by the notion expressed by Congressman Rangel about the tools that should be provided to a judge to do this very difficult thing that they have to do.

If you have been in the courts, you know that a judge imposing a sentence will spend hours, and that the investigation that goes into a report for that sentence will take weeks by professional investigators, so that when that sentence is imposed, there will be as balanced a decision as possible. Contrast that sentence process with a typical bail proceeding which may take one-half a minute or 1 minute. The results, that is, incarceration because of inability to make the conditions set, are the same. Yet, little or no information has been presented. So we have a jail overcrowding problem in the United States that exceeds what we as a country should tolerate.

The reason I bring this up is that one of the very tools that is missing is the ability of a judge to consider danger in the bail-setting process as a community safety factor. You asked the question, or one of the other Congressmen asked the question this morning: "Is there any jurisdiction other than the District of Columbia in which danger and community protection are a legitimate concern?"

The answer to that question is that there are jurisdictions in which danger can be considered, but only insofar as it bears on whether a defendant will appear. In other words, I cannot set a condition that will protect the safety of the community on a danger proposition. But what I can do as a judge is say: "You're so dangerous that you're liable not to appear. Therefore, I can set a condition to insure your appearance taking into consideration community safety and rehabilitation."

Community safety is considered; in most places it cannot legally be considered; and therein lies the hypocrisy in the present bail process. I think that this committee, this House, and this Congress should change this situation and enact legislation which would permit consideration of these factors. This would eliminate the hypocritical process of justifying detention or high-money bail on the basis that somebody will fail to appear, when all the facts and data we have show that people don't fail to appear as much as we are concerned about protecting the safety of the community.

Mr. ZEFERETTI. If I can just interrupt you at this juncture, that is exactly what we were inquiring of Mr. Hughes and Mr. Sawyer this morning.

Mr. BEAUDIN. Yes, sir.

Mr. ZEFERETTI. They were in the process of bringing a bill before us that went along with status quo. We, as members of the Rules Committee, sort of targeted that particular pretrial services legislation and prevented it from going forward until they went back and did some turnaround in the direction of that bail examination. Because it is so imperative, we feel, using that word "tool" again, that judge—if we are going to criticize him along the way, I think, at the same time, we should give him the instruments to do his job.

Mr. BEAUDIN. I think you are absolutely right. Although the pretrial services bill that came out of Mr. Hughes' subcommittee—and I worked very closely with staff and with Congressman Hughes on that bill—and by the way, there is a drastic need in the Federal system to have that pretrial services agency available, should have been rejected because there was an attempt to amend the Bail Reform Act itself contained in that bill.

As you know, there are 10 districts in which these are experimental agencies. Evaluation shows the services provided by these agencies are very drastically needed. They must be continued. And the likelihood is that there will be no more agencies unless there is an authorization by Congress to continue those agencies. They are presently under the aegis of the administrative office.

But I thought you were absolutely correct, because there was an attempt by the subcommittee to introduce the notion of danger and amending the Bail Reform Act as a piece of the continuation of the services agency. And I think that you are absolutely correct in seeing to it that those issues were maintained as separate issues.

Nevertheless, if I could urge you to do anything, if it were to come before this subcommittee or the House or the Rules Committee, it would be to keep that danger provision out, to address the Bail Reform Act as you are doing here and the danger provisions there, and keep that Pretrial Services agency alive. That is what I am. That is what I get paid for doing, really, I direct the Pretrial Services agency in the District of Columbia that is the model upon which those 10 were designed.

Mr. ZEFERETTI. In all candor, what we did was light a fire under the subcommittee of jurisdiction in order for them to have the hearings to make that a separate entity and to provide us with a kind of tools necessary——

This is Congressman Kastenmeier's?

Mr. ZEFERETTI. Yes; that is what we did. That is why we sent the whole package back.

Mr. BEAUDIN. Let me sum two things up for you, Mr. Chairman. One, there will be, I think—I don't know if I am breaching confidences or not, but it will help this committee, I think. There will be introduced, I believe, next week in the Senate a bill that will be cosponsored by an interesting group of people, Thurmond, Laxalt, Kennedy, Hatch——

Mr. ZEFERETTI. That is quite a mix.

Mr. BEAUDIN. It is. And the bill is going to be called a no money bail bill. I have been working on it for a long time, and I worked on it with Senator Kennedy when he was chairman of the Judiciary Committee. Ken Feinberg, who was to be here to testify, he has asked me to represent to you on his behalf that he will work with you and this committee at any time that you wish or whatever you

might wish to do. But he strongly recommends, as do I, and I see you have the bill, that you look at this bill, because the concept that Judge Palermo and Judge Smalkin talked about, "the tools," the concept isn't as simple as what I believe Mr. Gilman was trying to get at when he asked, "What language can we introduce as amending the Bail Reform Act that will let us give you these tools that you are looking for?"

It isn't as simple as a one-sentence amendment to a provision of [18 U.S.C.] 3146, 3147, or any other thing. It is a very complex process, because our bail system presently is built on the assumption that what we are interested in is having a defendant appear for trial.

In practice, what we deal with is community safety. Community safety is not addressed openly, Mr. Chairman. In any piece of that legislation, bail could be denied pending appeal, bail could be denied after conviction, and bail could be denied in a capital case. And you could say that that is a community protection device. But it is constantly phrased in appearance terms.

That is why there must be discretion given judges, to be able to consider community protection in deciding not only that a defendant might be detained without bail, but that a defendant released can have conditions that would be imposed on his release that would be community protective conditions.

You can't do that. *Kramer* v. *United States* in 1971 said that any time a judge sets a condition that would be a community protection condition in the Federal system where that condition does not relate to whether the defendant will appear, and in that case it was a young man charged with possession of marihuana who was told, "Stay away from these confederates of yours, get your head together young man, go to job counseling, do not carry a gun," those conditions have absolutely nothing to do with whether he would appear. The fifth circuit said since they have nothing to do with whether he will appear, you cannot impose those conditions. They have been illegally imposed.

So no court, even wishing to release somebody and protect the community, can do it legally in the Federal system unless and until they are allowed to consider danger in citing conditions of release. That is No. 1.

No. 2, this thing about pretrial detention. We have got it. It is rampant. It exists in the State system and it exists in the Federal system. It is accomplished by setting a bail that cannot be met.

The only way to eliminate that is to force a magistrate to decide whether this person should be in or out, and make him accountable for that decision on the record. It is difficult to define danger. It is difficult to write a legislative prescription of what will be dangerous and what will not.

What I will submit to you is that this bill provides a triggering mechanism that screens out most cases then permits a more in-depth treatment of the dangerous issue. A magistrate can then explore in a full hearing the issues of danger and safety in which the community as well as the defendant will be protected. Thus, an allegation alone by a policeman that this fellow has 17 pending cases and will present 17 more to the grand jury won't be sufficient. An allegation by a defense lawyer, "My client can't make a

$2,000 bond, your Honor, therefore you have got to set one at $1,500 because that would be reasonable," that allegation wouldn't stand alone.

Mr. ZEFERETTI. Do you know what frightens me in that, the part that confuses me in that, we work out of a funnel or out a tunnel of a centralized court system, especially in New York City, anyway. And everything comes out of that one tunnel. There is no classification of cases. Everything has gone before that court, and he rules, as you said, maybe 1 minute at a time, and he makes an evaluation of what he is going to deal with.

It is almost unconscionable to think that he has got that kind of responsibility. You are really putting quite a bit of responsibility on his back. And you are also sharpshooting him when there is a mistake made.

But, at the same time, you never hear about all of those that he has had to take care of in any particular day.

What frightens me a little bit is that 1 minute that you are giving each individual case and how you really make a determination whether you are protecting the community or protecting an individual. That is the part of it, you know——

Mr. BEAUDIN. I think you raise an excellent issue, and it really distinguishes the Federal system from the District of Columbia system in which I work. The street crimes that we deal with in Washington, robbery, rape, homicide, are not going to be the main cases that are going to be considered under the Federal statutes.

I am urging Congressman Hughes and this body to provide a leadership role for the States. There is no question but that the States will follow the Federal lead.

When the Bail Reform Act passed this Congress, every State followed with an amendment to its bail statutes to track the Bail Reform Act.

If Congress doesn't stand out in front and set a tone for what should happen in bail reform, what the States are going to do, and they are already doing it, is pass by resolution, they are passing by referendum, laws that are specifically addressed to the latest crime that was written about in the newspaper. And there is no thought going into it, and the people are being misled.

If we focus on a specific crime—I understand that you are concerned here with narcotics crimes—there is a danger that we will ignore other crimes that are equally as dangerous.

The provisions in this bill, for example, would trigger in certain narcotics cases the right of the prosecutor to ask the judge for a more lengthy hearing than that 30-second hearing because the prosecution has evidence that there is something here that is more than the normal case.

I would, I guess, close, at least in the summary that I have, by very strongly recommending that the staff work up for you folks on the committee an analysis of this Senate bill. It has got some holes in it. There is no question about that. I would argue about time limits. I would argue about definitions and things like that. They should take the time to present you with those arguments.

But there is no doubt in my mind that the Bail Reform Act needs massive overhaul, and that the overhaul that is proposed in this bill would be something, I think, that the country could use. It

would give these judges the opportunity to make the kinds of decisions they are required to make and do it in a way that will protect both the community and the safety issue, the defendant and his rights, but more important, it will be more cost effective than what we are doing now.

One of the things that bill has in it is the total elimination of money bail. That is going to shock probably everybody in the Congress, because we have all been taught in civics classes and in the environment in which we have grown up to believe that when you are charged with a crime, you make a money bail or you don't make a money bail.

Money bail is probably the worst alternative release condition that has ever been designed. It had bred more corruption within the criminal justice system than any other single process. The examples of surety conspiracies, surety bondsmen and what they have done, there are examples in every State of misuse and abuse of the surety bail system.

Mr. ZEFERETTI. Who owns them?

Mr. BEAUDIN. Well, that is another piece of it, Mr. Chairman. That is another piece of it.

But the point I am making is that we, as a society, can control through the bail process, if that is what we decide we should be doing, the release conditions of everybody coming before the courts in a far better way if we can eliminate money, because then we don't have to form two judgments.

You first have to decide as a judge, do I want this guy in or out? That is what they do. They will tell you—I wish Palermo and Smalkin were still here—they will tell you that the first thing I do is get into my gut and decide whether this guy is going to be in route. Then I decide how I am going to accomplish it.

If you have to use money, you have got to do another jump, because you have got to know what kind of resources are available. You heard the description of the Nebbia hearing and why we should take Nebbia and legislate it, as opposed to just having a case that exists. I think that would be a drastic mistake, because there is never going to be a resource available that will give you accurate information on what the source of the money that is to be posted is.

If a family member comes forward and says, "I have this money. I am putting it up." How in the hell are you going to go investigate that in the 30 seconds, or even the day or 2 days that it takes. There is nobody that is going to be able to go behind that.

So that to require a two-pronged process—reaching a decision as to whether the defendant should be in or out, and what amount of bail will accomplish that—is truly beyond our capacity and resources. But the existence of a series of alternatives—I decide if he is in or out, and then I decide how I will protect the community if I let him out, or under what conditions I will let him out to see that he will appear—permits me to not confuse myself with using money to accomplish that.

It took a long time, believe me, to sell this thing over on the other side. And I think it would take a long time to sell it anywhere else because of the inertia of dealing with the system the way that it is. But believe me, it will provide an accountability in

the bail-setting process which we do not have now, and it will eliminate the hypocritical manner by which the jails are full of people who can't make bail who maybe aren't intended to be there.

One of the judges described this process to me this way: He said it is kind of like bowling. He said: "Picture yourself throwing a bowling ball down the alley, and then somebody spins you around quickly. You hear pins fall, but you don't know what went down." A judge that sets bail doesn't always know who gets out and who doesn't. He sets a bail and, generally speaking, does not get the results of whether that person made bail or not, unless that defendant who did not make bail has a damn good lawyer who comes back if the guy is still in jail and says he wants to move to reduce the bail.

So, he said, "What I do is, I hear the pins fall, somebody told me some fell, and they turn me around and I bowl the ball the same way. I don't know whether I am being effective or not."

But you will know whether you are being effective or not if you decide whether to put somebody in or out and set conditions to control that.

Mr. ZEFERETTI. Mr. Dornan?

Mr. DORNAN. I have no questions, Mr. Chairman. But I certainly appreciate your vigorous testimony. Thank you.

Mr. ZEFERETTI. I can assure you that we are going to look at this. We are going to give it some examination. There are hearings scheduled before Kastenmeier's committee on this whole subject. We are hoping to play a role in that one, too.

I would like to keep our avenue of communication open. If I need some help along the way, I would like to reach out.

Mr. BEAUDIN. As you probably know, Mr. Chairman, my office is right here in Washington and I am available to you or to any other of the committee members to counsel if they wish any additional information.

Interestingly enough, there will be people who will say: "We must oppose the notion of pretrial detention." As you know, we have had a statute on the books in the District of Columbia since 1971. In 1980—let me give you—this will only take a second.

Mr. ZEFERETTI. Go right ahead.

Mr. BEAUDIN. In 1980, there were 12 requests by the United States for a pretrial detention hearing. In other words, the guy comes in for bail, the prosecutor can ask then for a detention hearing. They asked for it in 12 cases in 1980. Five were murder—these were the charges—five were murder, one was armed rape, three were armed robbery, one was an armed rape and an armed robbery, one was a rape, and one was assault with intent to rob.

In one of the armed robbery cases and in the assault with attempt to rob case, the Government did not have enough evidence to get by the request, a $5,000 bail was set, and the defendants were released.

In the other 10 cases, the defendants were convicted within 60 days, which is the statutory prescription in the D.C. law. The defendants were convicted of the crimes charged, and all of them were sentenced, 100-percent conviction rate.

So the critics who say it will be overused, it will fill the jails, the detention law is a bad thing to have, ought to take a look at the

1980 and 1981 use of it in the District of Columbia. It is following roughly the same pattern, although the use is about twice as much as U.S. Attorney Ruff has announced that he intends to use the statute more often.

My point is, though, that the Government is very careful about deciding what cases he is going to ask for detention hearing in, because they know darn well that they have got to do something more than just say that this guy's dangerous. They have got to be accountable.

Mr. ZEFERETTI. I think that the bottom line there, too, is—and what you said earlier also, is the definition of what dangerous is. If you want to make an analogy of what we are talking about and the high-money angle of what drugs are all about, if we can make that definition as part of the overall dangerous to the community concept, then we might have somewhere to go.

Our biggest problem is to get judges to recognize that that is also a dangerous threat to the community when you have that ability to pump drug paraphernalia into the area.

Mr. BEAUDIN. In the Senate bill, you will notice that the definition of violence is, I think, too wishy-washy. But one of the things they do say, in the narcotics area, is under the Controlled Substance Act, the penalty, if convicted, would be more than 10 years, then that acts as a triggering mechanism and says this case is one that would qualify for a hearing. So that you have got an initial triggering mechanism.

But then there is going to be a decision by the prosecutor as to whether or not he is going to set an even higher standard. And then the court will be able to decide whether there is in fact enough justification.

But you open the door in certain cases to require people to look at things they haven't looked at. And that is as much a need as anything else that exists.

I have sat in Judge Brownstein's court in Brooklyn many days and watched how he has handled these things. And it is really tough for a judge who is trying to follow the law and follow the presumptions laid out in the statute for release to set a bail that he knows is beyond the capacity of somebody to make. And he has to think: "Do I want this guy in the street molesting my wife?" And they make those judgments. But they are all made with no accountability and no process by which defense can challenge it.

The flip side of the coin is that if they set a $2 million bond it may seem to satisfy the community's need but if the bond is posted by an organized crime racketeer, he is free to ply his trade.

Mr. ZEFERETTI. Mr. Gilman, have you any questions?

Mr. GILMAN. Just one question I would like to ask: You talk about the concern of the high bail bond not accomplishing what you are seeking to accomplish.

Mr. BEAUDIN. Sure.

Mr. GILMAN. I assume that you feel that the Pretrial Services can take care of any of the problems that we have been encountering?

Mr. BEAUDIN. Yes; they can, Mr. Gilman. The existence of a Pretrial Services agency, and I will say that the experimental ones in the Federal districts were patterned on the one that I have been

Director of since 1968 in the District of Columbia, has enabled judges to set conditions that are pretty restrictive on the release of the defendants, and we can report violations. Violation of a condition is a crime. That is something that should happen in the Federal law.

If someone violates a condition of release, it should be a crime. If I report a violation of conditions, a judge can hold a defendant in contempt and sentence him summarily for contempt of a court order.

There are a lot of things that can be done with the existence of an agency to be a reporting mechanism or a factfinding mechanism for the judges that cannot be done now.

Mr. GILMAN. I regret that I was late in getting back to hear the opening part of the testimony. But we talk about the danger to the community, community safety. The problem we confronted this morning in earlier testimony was how do you put the limits on that definition? What criteria do you use?

Mr. BEAUDIN. Mr. Gilman, I did address that to some degree. There is a bill that will be introduced in the Senate that I think does a very good job of it, in addition to the D.C. detention bill. I would be very happy to work with you or any staff member you would delegate. I am here in Washington, and I would provide you with at least my notions on how it can be done, and I think it can.

I don't think we can predict danger. None of us can. But we really can't predict flight either.

Mr. GILMAN. You may have been here this morning when Mr. Rangel raised the issue of how far do we take this. Do you go out on the street then, and anyone that looks like he could impose a danger on the community, is he then subject to detention?

Mr. BEAUDIN. What the bill does is create a triggering process. That is just the first step, a triggering process that says this man may be considered. But that doesn't mean you must put him in. It means you may consider doing something in this case. Now, if you choose to do something, you must follow these guidelines. It is a two-pronged process.

You just can't go out on the street and take a guy who is charged with a securities violation and subject him to a detention hearing. But you can take somebody that you spot on the street who has been charged, for example, with perhaps a bank robbery or some crime that has violence associated with it and say, "We are going to subject you to a hearing in which we will explore the Government's case."

Mr. GILMAN. Which is the bill that is being submitted to the Senate?

Mr. BEAUDIN. It is an interesting one. It is unnumbered yet because——

Mr. GILMAN. Whose bill?

Mr. ZEFERETTI. We have it here.

Mr. BEAUDIN. But it has an interesting group backing it, Thurman, Kennedy, Hatch and Laxalt. I don't think Metzenbaum has been convinced yet. But at the moment, there is what I would consider both liberal and conservative philosophy at work in agreeing on a way to eliminate what I call hypocrisy of the present bail system.

Mr. GILMAN. Thank you.

Thank you, Mr. Chairman.

Mr. ZEFERETTI. Thank you again, Mr. Beaudin. Thank you so very much. We will get together.

Mr. BEAUDIN. Thank you.

[The prepared statement of Mr. Beaudin follows:]

PREPARED STATEMENT OF BRUCE D. BEAUDIN, ESQ., DIRECTOR, DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY

It is a privilege to be invited to testify before this Committee concerning title 18 of the United States Code, section 3146 et seq., (Bail Reform Act of 1966) and I appreciate the opportunity to be here.

As Director of this Agency since 1968, Director of the Public Defender Service and Staff Attorney with that office from 1964 until 1968, as a member of the original staff of the D.C. Bail Project, as founder and Chairman of the Board of Trustees of the Pretrial Services Resource Center, as founder, first President, and Co-Chairman of the Advisory Board of the National Association of Pretrial Services Agencies, and as a person concerned with the problems posed by the release of certain defendants, I hope that my experiences of the past 17 years can be of benefit to the deliberations of this Committee.

Recognizing that the primary purpose of my testimony today is to provide information that will assist in the very important decision of whether to amend the Bail Reform Act with respect to the special problems posed by those charged with narcotics abuse, I find that I must first address some of the basic issues that remain unanswered in the Bail Reform Act.

BACKGROUND AND HISTORY

In 1966, Congress passed the Federal Bail Reform Act. This law was the culmination of many studies of the overwhelmingly complex problems posed by the release of people charged with crime pending trial. Because many people were indigent and because the bail system that had grown up in the United States usually required access to fairly large sums of money in order to secure release, many people were detained solely because of inability to raise the necessary funds.

The original purpose of the Bail Reform Act was to eliminate discrimination between rich and poor and to provide less restrictive methods of release for persons awaiting trial than the traditional option of posting bail through a surety. Without recounting the evils of the surety system and the inherent difficulties in using financial conditions to address the specific problems posed, suffice to say that the main goal of the Act was to effect the safe release of more people and to change the release methods from financial to less restrictive, nonfinancial means.

Unfortunately, during hearings on the bills, the issue of community safety, although addressed in testimony, was never mentioned in the law. The sole criterion that was established for determining which release conditions were appropriate was, "Will the condition imposed reasonably assure the appearance of the defendant as required?"

As mentioned, the initial purpose of the Bail Reform Act was to provide alternatives to the surety system to permit the release of more people pending trial and, at the same time, to eliminate discriminatory practices based on financial ability to "pay out." The Act did not address the practice of setting bail not so much to assure appearance as to protect society. The issue of community safety was subsumed into risk of flight considerations. Many bail setters used, and continue to use, high bail to detain dangerous persons. They justify the high bail on risk of flight grounds, however. Unless the issue of safety is addressed in the open and on the record, the bail process will continue to be criticized for its apparent inefficiency.

We need a new approach to the bailing of the criminal suspect. But an understanding of where we are and the course bail reform should take, first requires an examination of the myths and realities of current bail practices:

Myth No. 1.—Current bail laws assure that the bail decision is limited to a single issue: whether the suspect is likely to appear for trial. This noble constitutional principle is honored in the breach today. Most suspects detained in jail pending trial are unlikely threats to flee. The possibility of flight is all too often used as a pretext to detain suspects perceived by the court to be dangerous to the community if released. A pervasive hypocrisy infects the bail process as sub rosa considerations of community safety lie at the heart of the bail decision while judges make public pronouncements about the likelihood of flight.

Myth No. 2.—Preventive detention statutes are one surefire way to protect the community from an increase in "bail crime." The hard evidence points to the opposite conclusion. Preventive detention, where it exists, is rarely invoked today, not only because prosecutors are unwilling to seek preventive detention because of due process prerequisites and expedited trial schedules but because such a measure is unnecessary. Instead, at the prosecutor's request, judges simply impose extraordinarily high bail—which the defendant cannot raise—on the phony ground that the suspect is likely to flee the jurisdiction.

Myth No. 3.—The more serious the crime, the more likely the possibility that an offender, if bailed, will flee. This is the most pervasive of the prevailing myths. Recent data confirms an opposite conclusion—that motivation to flee does *not* increase in direct proportion to the seriousness of the offense. The poorest bail risks—those most likely to flee rather than appear at trial—are not those charged with murder, rape and robbery, but, rather, suspects charged with relatively minor offenses such as larceny and prostitution.

Myth No. 4.—The setting of a financial bond is an effective way to guarantee a suspect's appearance at trial. Study after study demonstrates that the setting of a bail bond discriminates against the poor and that a simple promise to appear is as effective as the use of the bail bondsman in assuring appearance at trial. At the same time, it is clear that many who post bail (accused alien smugglers and narcotics traffickers, for example) can post even high bail, consider it a business expense, and fail to appear despite the substantial investment.

Those of us who are a part of the existing bail system continue to witness firsthand the evils traceable to these prevailing myths. The hypocrisy of the current system is responsible for the pretrial detention of thousands of suspects. It is time to recognize that considerations of community safety should candidly and publicly be taken into account by judges in attempting to fashion appropriate bail conditions.

There have been a number of proposals introduced that would amend the Bail Reform Act to permit the open consideration of community safety. The best of the bills first requires the court to make a bail release decision based solely on the likelihood of the defendant's future appearance at trial. Once a decision is made to bail the suspect, however, the court is given new authority to take into consideration community safety in setting release conditions designed solely to protect the community. The bill thus requires that the issues of appearance and community safety be treated separately and openly. And the bill also prohibits the use of high money bail as a vehicle to jail defendants perceived to be dangerous.

We all have a concern for community safety. Since recent data demonstrates that those charged with serious offenses are among the most likely to appear at trial, we can no longer continue to justify their pretrial detention on some appearance-based rationale. Rather, we should fashion bail release conditions designed to protect the community while, at the same time, assuring the release of those who have not yet been convicted of the crime charged. We can conclude from experience and from confessions made by bail setting magistrates that the issue of flight is neither the first nor the most important consideration at the bail hearing.

THE SURETY CONDITION: AN OUTMODED ALTERNATIVE

The American Bar Association, the National Advisory Commission on Criminal Justice Standards and Goals, the National Association of Pretrial Services Agencies, and the States of Wisconsin, Kentucky, Oregon, and Illinois have all concluded that the surety option of release serves absolutely no purpose. Both associations have recommended abolition of surety for profit. In the states named, the surety option has been eliminated and data reveal that neither recidivism, as measured by rearrest, nor failures to appear have increased while the percentage of people who have been able to secure release has increased. In fact, the commonwealth of Kentucky has made it a crime to post bond for profit and the Kentucky Supreme Court has upheld the validity of that law.

The surety bondsman has existed in our criminal justice society as an independent business person who exists to make a profit. In most cases, a surety charges 10 percent of the bond set as his fee for effecting release. That fee, once paid, is nonrefundable. We have permitted this enterprise on the theory that the bondsman, having substantial monetary stake in the defendant's appearance (he may be liable for the face amount of the bond if the defendant fails to appear) will insure the appearance of his bailees. Again, data being collected by various pretrial services agencies, courts, and independent organizations is revealing. Most defendants who fail to appear are brought back into the system by law enforcement officers executing warrants not by bondsmen. In addition, where forfeitures are offered, they are seldom, if ever, collected.

What has been recommended and what has replaced the surety system is an option which permits the defendant to post 10 percent of the bond amount with the court. Consider that the defendant who posts such a bond has a real stake in his own appearance since all or most of the money posted will be returned upon completion of the case. It only makes sense that the elimination of the surety option and the substitution of the 10 percent option will result in a better appearance rate for the simple reason that the defendant owns an interest in his appearance.

In conclusion, it is my belief that if the Act is amended to permit judges to protect the safety of the community by imposing conditions designed to accomplish that, we can virtually eliminate the need for surety and other financial conditions.

THE ROLE OF THE PRETRIAL SERVICES AGENCY

At the time that the Bail Reform Act was being designed and debated, a parallel bill creating the D.C. Bail Agency was also being debated. Since the District of Columbia was a federal jurisdiction to which the Bail Reform Act would apply, and since the District of Columbia federal courts had jurisdiction over crimes that would have been state crimes in other jurisdictions, testimony was overwhelming that an agency should be created to assist in the implementation of the Bail Reform Act. As a matter of history, the Bail Reform Act and the D.C. Bail Agency Act became effective in September of 1966.

Between 1966 and 1970, the Act as it was implemented in the District received careful scrutiny as did the Agency created to assist in its implementation. As the result of this scrutiny, in 1971 the size of the Agency was tripled, its budget was tripled, and its functions were expanded to permit a number of services not mandated in the original law. Those services are provided today and are similar to the services described in Title II of the Speedy Trial Act of 1974.

Prior to 1971, most of the D.C. Bail Agency's work took place in the United States District Court for the District of Columbia. During the five years between 1966 and 1971, the system witnessed a drastic change in the release practices of the courts. The proportion of people released on personal recognizance increased from only 5 percent in 1966 to nearly 60 percent in 1971. The overall release rate jumped from 45 percent to 70 percent. The pretrial detention population in the D.C. Jail diminished despite an overall increase in the number of cases coming into the criminal justice system. In addition, failure to appear rates and rearrest rates were studied. Because of the difficulty of obtaining sufficient data no one could really say whether these rates increased or decreased. At the same time, there was a "feeling" that the rearrest rate was climbing although the failure to appear rate seemed to be constant.

Since 1971, we have continued to serve the Federal courts in the District of Columbia. The value of this Agency's work can best be described by reference to the fact that better than 90 percent of the defendants charged in the United States District Court are released and more than 95 percent appear as required. At the local level, the Agency's workload in Superior Court for the District of Columbia, while higher in terms of actual numbers of cases processed, has about the same results.

The D.C. Pretrial Services Agency has a staff of 44, a budget of slightly over one million dollars, utilizes a fully automated system, employs law students and graduate students as its main professional work force, conducts more than 24,000 interviews a year, supervises more than 14,000 conditions of release (an average of 3 conditions for the nearly 4,500 people on release at any given time), prepares reports in every case prior to the setting of bail by the Magistrates, generates 35,000 notification letters, records 76,000 "check-in" calls from releasees, records 16,000 "check-in's" by people who appear in person, and submits information for use in the presentence reports of all defendants convicted for whom presentence reports are prepared. In 1980, the National Institute of Justice of the United States Department of Justice cited the work of the Agency as "exemplary" and declared it an Exemplary Program worthy of emulation.

Under the terms of the speedy Trial Act of 1974, experimental agencies were created to assist the other Federal Circuits in implementing the Bail Reform Act. These agencies were to interview, verify, and present reports concerning those charged with crime to assist bail setters. They were also to provide social services directly or referrals to community based agencies that could provide those services, provide information at sentencing, monitor conditions or release, and perform other functions as designated. It is obvious that these services were mandated so that as many people as possible could be released pretrial with conditions that would insure their appearance (and protect the community, although this purpose is illegal under the present law). How an agency approaches these tasks can dramatically affect its impact on the ultimate implementation of the Bail Reform Act. If, for example, an

attitude prevails that there is really no need to interview every defendant or to provide information to the bail setter in every case, then, the bail setter has no choice but to follow old practices and rely upon incomplete information. At the same time, unless the Agency approaches its tasks under a philosophy that each defendant is entitled to release on the least restrictive conditions possible, its standards will fall short of the innovative thinking necessary to persuade a criminal justice system used to other practices to change.

As was noted in a recent General Accounting Office report, there is a confusion among the judiciary with respect to the issues of danger and flight. Bail is not set with any consistency. As long as there are individual judges and individual defendants, bail probably should not be based solely upon things such as heinousness of crime, etc., nor should conditions be the same for each case. It is only an agency, however, that can provide the consistency of approach and uniformity of process that will ultimately persuade a system of change. Thus, it is important that an agency not only carry out its statutory mandates but also act as a catalyst. Otherwise, the entire release plan is probably doomed to fail.

To achieve the safe release of the greatest number of persons possible on the least restrictive conditions possible, should be the goal of the Bail Reform Act and of those charged with its implementation. Stumbling blocks to achieving that goal include such things as the inability under the present law to set conditions designed to protect the community, the existence of financial conditions which preserve the potential for discriminatory practices that are based on financial ability, inadequate information upon which intelligent decisions can be based, supervision that will insure appearance in court when required and acceptance by those charged with implementing the law of the principles upon which it is based.

SPECIFIC NARCOTICS CONSIDERATIONS

Against the general backdrop of the complexity of problems posed by the administration of the Bail Reform Act lie the special problems posed by those charged with abuse of narcotics laws. Traffickers, sellers, users, prescription writers, smokers, hard core addicts, etc., all represent different levels of problems and all make their appearances for bail setting clothed with the presumption of innocence and the presumption of least restrictive release conditions legislated in 18 USC 3146 et seq. If we accept the premise that community safety should be an open consideration in the bail process, then we must consider how the various lifestyles of all those charged with narcotics offenses affect community safety. Is an accused pot smoker, a preludin prescription forger, addict, to be equated with a courier, a trafficker, a peddler? What standards can we use to distinguish one case from another? How do we determine strength of evidence, probability of conviction, financial capability, etc?

Much has been said and written about the controversial 1971 Preventive Detention law in the District of Columbia. The most recent statement, confirming the constitutionality of pretrial detention was made by the District of Columbia Court of Appeals on May 8, 1981 in the case of *U.S.* v. *Marvin L. Edwards,* — Atl.2nd—, 1981. (The decision has been appealed to the U.S. Supreme Court and will not be considered until the fall term.) Although the basic issue of pretrial detention is discussed, it is discussed in the context of general statutory provisions that treat community safety. It does *not* address, nor has any opinion yet addressed, the special sections of the statute which deal with narcotics abuse.

D.C. Code § 23–1323 provides:

"§ 23–1323. Detention of addict—

"(a) Whenever it appears that a person charged with a crime of violence, as defined in section 23–1331 (4), may be an addict, as defined in section 23–1331 (5), 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 23–1321, or (2) upon motion of the United States attorney, may (A) hold a hearing pursuant to section 23–1322, 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 23–1322"

"(2) finds that—

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

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"(B) based on the factors set out in subsection (b) of section 23-1321, 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 by proffer or otherwise, 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 23-1322 shall apply to this section."

In addition, § 1331 (5) defines addict as "any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare."

These sections of the statute—unlike others—have never been invoked. It may well be that the attendant statutory procedures are considered burdensome, that resources to meet statutory requirements are non-existent, or that the sections do not address any but the "addict" problem. In any case, the statute contains the substance of unplowed territory. At the same time, one could say that the non-addict concerns are addressed in the balance of the statute. The term "dangerous crime," for example (a person charged with a dangerous crime may be detained if other statutory prerequisites are met) includes:

"(E) unlawful sale or distribution of a narcotic or depressant or stimulant drug (as defined by any Act of Congress) if the offense is punishable by imprisonment for more than one year."

Given this definition, if a detention provision akin to D.C.'s were adopted, there would exist adequate remedies to deal with the accused narcotic abuser.

The experiences of this Agency with regard to narcotics abuse in the federal (as distinguished from the local) court can be described as impressionistic. It is impressionistic because clear-cut data has been difficult to capture. We have the sense that about half of our federal caseload treats narcotics offenses. Most of these cases do not involve suspected "dealers" or "traffickers." Most are released on recognizance with conditions; most remain arrest free during the pendancy of the initial case, and most appear as required. In some few cases where high bail (over $10,000) has been posted, inquiries into the source of bail money have been initiated.

The exact data available show that of 955 defendants that our Agency interviewed in connection with federal crimes in 1980, 550 were charged with narcotics related offenses; 363 were released on Personal Recognizance with or without conditions, while 32 percent posted financial bond by way of surety or deposit release; 86 percent remained arrest-free during the period of release while 94 percent made all required court appearances. As can be seen from this data, there would be little or no justification for detention based on appearance grounds.

It should be noted, however, that D.C.'s experience with narcotics traffic does not parallel that of Los Angeles, Miami, New York, or other high intensity areas. There is no doubt that narcotics problems in those areas are significantly different. Again, if the traditional and Constitutional objections to detention provisions can be overcome as the *Edwards* opinion suggests, then community protection as well as individual liberties can be made the subject of a statute similar to that in effect in the District of Columbia.

I appreciate your attention, apologize for the length of my statement, and am available to answer any questions you may have of me.

Mr. ZEFERETTI. For the record, Mr. Kenneth Feinberg was supposed to testify. He had to leave.

We will, without objection, include his entire testimony into the record.

[The prepared statement of Mr. Feinberg follows:]

PREPARED STATEMENT OF KENNETH R. FEINBERG, ATTORNEY AT LAW

Mr. Chairman, and members of this Select Committee, I very much appreciate the opportunity to testify before this Committee on the important and timely subject of bail reform. As a former Assistant United States Attorney in the Southern District of New York, and, more recently, as Special Counsel to the United States Senate Committee on the Judiciary specializing in criminal law enforcement matters, I have spent a good portion of my professional career attempting to come to grips with the myths and realities which underlie the ongoing debate over bail reform. You have already heard from a comprehensive group of experts, and I will not begin to attempt to reiterate all that has been testified to here today.

I view my limited role as somewhat different; to offer you a concrete legislative plan of action. Some fifteen years have passed since the Congress last confronted the complexities of bail reform in a comprehensive way. The Bail Reform Act of 1966 constituted a watershed in the establishment of equitable procedures designed to assure that bail would not be denied the indigent based solely on their inability to pay. But we now know that the bail reform effort of the 1960's did not solve all of the problems surrounding bail; today there is a new awareness and a heightened expression of concern that existing bail procedure neither assure equitable treatment for all those arrested of crime nor assure community safety. I realize, of course, that current statistics and conclusions reached in various recent studies can be read many different ways. But there is no denying the prevalent public perception that our existing bail laws are ineffective and need to be changed.

I believe that a bipartisan legislative bail initiative is close to being achieved and that a new, comprehensive bail reform bill will shortly be introduced in both the Senate and the House that could form the basis for the most far-reaching reform of our federal bail laws since the 1966 Act. Indeed, in some respects, the new legislation that is nearing completion would mandate some of the most important bail reforms since the founding of our Nation.

Any effort to reform our existing bail laws must first overcome certain myths which continue to plague the current bail reform debate. For example, I believe that true bail reform requires the legislature to skirt one of the key obstacles to such reform—the issue of "preventive detention." As I will point out shortly in more detail, I believe that the never-ending debate over the constitutionality of pretrial custody is ultimately self-defeating and of little usefulness in any legislative drafting effort. As this Committee knows, the jails of our Nation are currently filled with suspects awaiting trial who are simply unable to post money bail. This is surely preventive detention in its most insidious, realistic form; any discussion of pretrial custody as part of some omnibus bail reform package, must take this striking fact into account.

One other introductory point. If recent bail studies agree on any single conclusion, it is that the bail system is most likely to break down in the area of narcotics enforcement and drug addiction. The ineffectiveness of existing bail procedures in dealing with the pervasive narcotics problem is proven by examining the type of person most likely to be rearrested while on bail. Those rearrested usually have some relationship to narcotics trafficking or addiction. Although a convincing argument can be made that the rearrest rate of persons bailed is not serious enough to warrant a wholesale change in existing bail procedures, I think it is becoming increasingly obvious that, when it comes to narcotics, bail reform takes on an additional urgency.

I also believe that it is in the area of narcotics enforcement that one sees the most common abuses of the existing money bail system. The record is filled with examples of the influential narcotics dealer who posts the one million dollar bail set by the judge as a condition of release and then proceeds to flee the jurisdiction or continues to ply his trade. One can hardly point with pride to bail procedures which allow such highly publicized examples of the misuse of money bail.

With these few preliminary thoughts in mind, allow me to propose for this committee's consideration a draft bill amending the Bail Reform Act of 1966. This bill—which I have attached as an appendix to my statement—is now being analyzed by various Senators and members of the House prior to formal introduction, hopefully in the next few weeks. The proposed bill is based on three fundamental principles: (1) That danger to the community should be considered by the court in setting pretrial release conditions; (2) that the traditional use of money bail should be completely eliminated; and (3) that a carefully circumscribed pretrial custody procedure for certain dangerous offenders should be permitted.

Before discussing the specific details of this draft legislation, it might prove helpful to the Committee if I discussed some of the bail policies underlying this comprehensive reform bill.

First, the bill mandates that considerations of community safety be given candid statutory recognition. It is becoming increasingly obvious that although most bail statutes today studiously avoid any reference to community safety, judges do not. In setting money bail or imposing pretrial release conditions, judges take into account—at least subconsciously—the issue of community safety. The courts may pay lip service to the sole statutory criteria of likelihood of appearance; but considerations of community safety certainly enter into these deliberations (such as, for example, by "assuming" that a suspected murderer is likely to flee the jurisdiction, even though recent studies have undercut the myth that there is a correlation between the seriousness of the crime charged and the likelihood of flight.) The draft bill is a recognition that the entire bail system will work much more effectively if

candor is made part of the judicial bail decision by requiring that considerations of community safety be publicly taken into account as part of the court's published findings, as opposed to being hidden under the guise of likelihood of flight.

Second, the draft bill would bring about the most drastic, radical reform in the history of our bail system—the complete elimination of money bail. Although various reform proposals in recent years have called for the elimination of the bail bondsman, the draft bill goes much further and would prohibit the imposition of any money bail as a condition of release.

The call for the elimination of all money bail is grounded in elemental considerations of justice, equal protection, and fair play, as well as law enforcement need. It is an appalling fact that today, four out of every ten persons in jail are awaiting trial, unable to raise even the minimal amount of cash bail ordered by the court as a precondition for release. This is unconscionable. Under the guise of requiring the suspect to post "reasonable" money bail, we have developed a system of "preventive detention" which assures the pretrial incarceration of almost half of our entire jail population. Indeed, the existing system is worse than preventive detention; the due process procedural protections which must be met before a suspect can be detained pretrial in the District of Columbia are wholly lacking when persons are jailed because of their inability to pay their bond.

But the elimination of money bail will benefit law enforcement as well. Especially in the area of narcotics enforcement, the elimination of money bail will help end the unacceptable situation which exists today, whereby large-scale narcotics traffickers are able to post substantial amounts of money bail and then flee the jurisdiction. The elimination of money bail will bring a refreshing candor to the system and force judges to make the key bail decision openly and on the record; whether a drug trafficker should be released or jailed pending trial will be based on reasons made known to the suspect, law enforcement personnel and the public alike. It is the narcotics trafficker, more than any other criminal, who forms the justification for the elimination of all money bail.

Finally, the proposed draft bill would, for the first time, enact a carefully circumscribed pretrial custody procedure. As I have already indicated, the traditional debate over the legality of preventive detention is largely misdirected. We already are experiencing preventive detention in our jails. The real issue is not whether preventive detention is constitutionally permissible; only the courts can decide that issue. The more important question is how can we assure that pretrial custody is limited in application to those suspects who are a danger to the community and who should, indeed, be jailed pending trial? As long as the pretrial custody procedures are carefully circumscribed to make sure that only the most violent, dangerous offenders are jailed, I believe that the new procedure is warranted. But there is a critical statutory relationship which must be met. If legislative approval is to be given to pretrial custody, then such new procedures must be tied to the elimination of money bail.

What should be the details of a comprehensive bail reform bill? How does one assure that the elimination of money bail and the implementation of pretrial custody procedures are in harmony with one another? These are questions that have occupied the attention of legislative drafters during the past few months. The answers to these questions can be found in the proposed draft bill that is attached to my testimony.

The bill states that any suspect arrested and brought before a judge or magistrate faces one of three options: release on his personal recognizance, release after satisfying one or more conditions specified in the statute, or pretrial custody. There is an express statutory presumption in favor of release on one's own personal recognizance; this is simply a recognition that in the great majority of cases today, at least in the federal system, personal recognizance remains the most effective bail condition.

The presumption can be overcome, however, if the judge determines that such release will not reasonably assure appearance or "will endanger the safety of any other person or the community." This latter phrase is, of course, a radical departure from existing federal statutory law and reflects the increasingly popular view that community safety should be a visible factor in the bail decision. The language constitutes an attempt to make explicit that which is implicit today in the bail decision. If the court concludes that personal recognizance will not assure either appearance or community safety, then the presumption in favor of release can still be respected if the suspect satisfies any combination of fifteen designated release conditions. These conditions range from the traditional—for example, maintenance of employment, participation in an educational program, specified restrictions on travel and association—to those new conditions tied to considerations of community safety, e.g., agreeing not to commit another crime during the period of release,

avoiding contact with the alleged victim and potential witnesses, etc. The bill expressly points out that the least restrictive condition or combination of conditions must be imposed which will reasonably assure the appearance of the suspect and the safety of the community.

Finally, the bill recognizes that in some situations neither personal recognizance nor designated pretrial release conditions will assure appearance or community safety. In such cases, pretrial custody is permitted if, after a hearing, the court concludes that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community" (§ 3142(d)(2)). In addition, the bill requires that, before pretrial custody may be imposed, there must be "substantial probability that the persons committed the offense for which he has been charged" (§ 3142(e)(2)). Such a pretrial custody procedure may be invoked only in cases involving a defined "crime or violence," an offense for which the maximum sentence is life imprisonment or death or certain narcotics violations specified in the legislation.[1] (The bill also recognizes that a preventive detention order can be secured on grounds unrelated to the nature of the crime, e.g., "a serious risk that the person will flee," a serious risk that the suspect "will obstruct or attempt to obstruct justice," or a situation where the suspect has allegedly committed an offense after previously being convicted of two or more violent crimes (§ 3142(f)).

The hearing required by the bill basically tracks the procedures currently found in the District of Columbia preventive detention statute. Thus, the suspect has the right to be represented by counsel and shall have an opportunity to testify, to present witnesses, to cross examine witnesses, and present other information. Of course, the person may be detained pending completion of the hearing.

The bill also attempts to limit somewhat the discretion of the judge considering bail by listing in the statute some of the prerequisites that should enter into the decision of whether or not to detain the suspect. For example, the bill requires the judge to consider "the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug," "the weight of the evidence" and "the history and characteristics of the person" charged as well as "the nature and seriousness of the danger to any person or the community that would be posed by the person's release (§ 3142(g)).

The bill also requires that, before any pretrial detention order may be issued, the judge include written findings of fact and a written statement of the reasons for the detention order (§ 3142(i)(1)). The bill also encourages, "to the extent practicable" that persons detained pretrial be incarcerated in facilities separate from those persons awaiting or serving sentences or being held in custody pending appeal from their conviction (§ 3142(i)(2)). In an effort to limit somewhat the incarcerative atmosphere of detention, the bill directs that the suspect "be afforded reasonable opportunity for private consultation with his counsel" (§ 3142(i)(3)).[2]

Mr. Chairman, I believe that a legislative reform package, similar to the proposed draft bill I have described to this Committee today, provides the best opportunity for true bail reform. The bill is, of course, just a draft and would benefit from detailed legislative hearings. Certainly, the drafters recognize that any bail reform effort that calls for the creation of pretrial custody procedures and the elimination of all money bail must be given the most careful scrutiny. Nevertheless, I do believe that if this Committee and other committees in both the Senate and the House are truly interested in comprehensive bail reform which attempts, for the first time, to break through the misunderstanding and misconceptions surrounding the existing bail system and attempts to deal accurately with the weaknesses found in the existing system, then a bill similar to the one I have described today offers the most opportunity for improvement. I am very eager to continue to work with this Committee in the next few months as it attempts to translate what it has heard today into a comprehensive, realistic and important legislative reform package. I believe

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[1] "An offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or Section 1 of the Act of September 15, 1980 (21 U.S.C. 955a)."

[2] The draft bill also makes important changes in other existing bail procedures. For example, the bill would reverse the presumption which exists today favoring the release of a defendant who has been convicted but is awaiting sentence or appeal (§ 3143). Today, the presumption favors release; the proposed bill encourages release after conviction only if "the appeal is not taken for purpose of delay and raises a substantial question of law or fact likely to result in reversal or and order for a new trial" and it can be shown "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community" (§ 3143(b)). The draft bill also deals with such other important subjects as release or detention of material witnesses (§ 3144), penalties for failure of a bailed suspect to appear (§ 3146) and penalties for an offense committed by (§ 3147).

this Committee is moving in the right direction, and I would be pleased and honored to work with the members of this Committee and the staff as we try and breathe life into the phrase "bail reform."

Thank you very much, Mr. Chairman and members of this Committee. I am prepared to answer any questions that you may have at this time.

Mr. ZEFERETTI. I would like to call Mr. Joel Hirschhorn and Mr. Sol Rosen, please, to the witness table.

Gentlemen, please identify yourselves.

TESTIMONY OF JOEL HIRSCHHORN, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. HIRSCHHORN. Mr. Chairman, I am Joel Hirschhorn from Miami, Fla.

Mr. ROSEN. I am Mr. Sol Rosen, Washington, D.C.

Mr. ZEFERETTI. Please, if you have any written statement, we will make them a part of the record. If not, just proceed in any manner that you feel comfortable.

Mr. HIRSCHHORN. I submitted a written statement, and I would like to kind of summarize it.

I have a response to Congressman Dornan's incredible hypothetical, but I will defer, hoping he comes back.

Mr. ZEFERETTI. He had to run to another meeting. He said he hopes to come back. Hopefully, by the time you finish, you can respond to that. OK?

Mr. HIRSCHHORN. As my statement reflects, I am here as a representative of the National Association of Criminal Defense Lawyers, but I make my living defending the people that we are talking about. In fact, in the past 3 years, I have three cases involving in excess of 35,000 pounds of marihuana each. I have two cases involving in excess of 300 pounds of cocaine. I have many other multikilo cocaine cases and multiton marihuana cases.

Therefore, I feel a little bit like the devil before Saint Peter right now, because——

Mr. ZEFERETTI. Thank you for the compliment.

Mr. HIRSCHHORN. I recognize that my remarks are not going to be well taken. But I think it is important that you have input from those of us who do labor in the trenches and the pits and represent the kind of people you are talking about.

In the first place, the position we take is that the present guidelines are adequate. There is more than enough discretion to enable the U.S. magistrate, who is underpaid, overworked, and understaffed, to make the kind of decision he has to make.

Second, you have got to define what you mean by drug trafficking. As I point out in my written statement, the average drug trafficking operation involves 10 kids under the age of 25, all of whom have been promised $10,000 to offload 30,000 pounds of grass, and two honchos who might be at the intermediate level.

I doubt seriously whether you want to consider pretrial detention of those 10 kids under the age of 25 who are nothing more than stash-house watchers, truck loaders, or offloaders of boats.

Third, there is an inherent assumption which I don't think is a fair assumption, and I will elaborate when and if Mr. Dornan comes back.

Drugs are a danger. They are a menace to our community, you say, and therefore the accused must be a danger because he is

involved in drug trafficking operations. It simply does not flow. I am not an advocate of legalizing marihuana and cocaine laws.

I do know, however, that the overreaction to the kind of things that Congressman Dornan was talking about is what leads us to the erroneous conclusion that drugs are the cause of all the violence.

When you raise the stakes, as you will by amending the Bail Reform Act to authorize pretrial detention of those who are merely accused, you are going to increase the violence.

I will give you a couple of examples, and I hope you will understand what I am talking about.

In the good old days, prior to 1978 or 1979, before the State of Florida enacted its mandatory minimum sentencing statute and also enacted a statute which prohibited bail to those convicted of narcotics trafficking pending appeal, in those days if somebody got arrested or busted for being part of a large-scale marihuana trafficking operation, there were relatively few guns involved, relatively few murders, deaths, relatively few shootings in an effort to avoid capture and detention.

Three days after that mandatory minimum sentencing statute went into effect, there was a murder of a law enforcement officer and a kidnapping of a law enforcement officer in the State of Florida, and it has gone on and on since then.

So raising the stakes is going to increase the violence, and that is the danger inherent in the drug scene today.

Mr. ZEFERETTI. Can I just interrupt you for a second?

Mr. HIRSCHHORN. Sure.

Mr. ZEFERETTI. I don't want you to feel that it is just Mr. Dornan. I think there is pretty much a consensus of opinion that the traffic in drugs and the use of drugs in jurisdictions throughout the country have led to street crime and violent crime, as a result of drug use, and dependency. That is No. 1.

Mr. HIRSCHHORN. Yes.

Mr. ZEFERETTI. No. 2, if you are trying to say to me that the only reason that the guns were used in the particular jurisdiction was because of the mandatory minimum sentences, that it might be an offshoot of the law, I would say to you, sir, that there is so much money involved in trafficking, that the use of violence is a threat that is always there because of the amount of moneys that is involved, and not because of the law enforcement aspect of it, because there is not enough law enforcement that could counteract that.

Mr. HIRSCHHORN. No, Mr. Chairman——

Mr. ZEFERETTI. Maybe I misunderstood your statement.

Mr. HIRSCHHORN. The point I was trying to make is that people who are involved in this business know that they are entitled to bail pending trial if they get arrested. They know that they are facing, if it is marihuana, up to 5 years in Federal court; if it is cocaine and heroin, it is up to 15 years. But they are still entitled to bail.

So you figure if they are going to take the risk, if they are going to pull for the brass ring and fail, they still have enough rights, and perhaps enough time on the street to get their lives in order, so that they won't risk compounding their problem by being in-

volved in an assault upon a police officer or possible murder. That is my point.

Mr. ZEFERETTI. OK.

Mr. HIRSCHHORN. I recognize it is just not Congressman Dornan. I am aware of that, that it is a widespread belief that drug usage leads to street crime. Of course, I am not sure the medical evidence supports that with respect to cocaine necessarily, or marihuana. I think it does support it with respect to heroin and some of the other habit-forming drugs.

Mr. ZEFERETTI. I again interrupt you and tell you that in a jurisdiction in California where they decriminalized marihuana, all the evidence that we got from local government and local law enforcement people was that violence has increased, there has been mayhem in the schools and the like as a result of that decriminalization.

So, again, it is a question of who you listen to and where the testimony is coming from.

Mr. HIRSCHHORN. And I am also sure they told you the population went up. When the population goes up, crime goes up.

Statistically, statistics that we are offered with respect to bail jumping, as I have laid out in my written statement, and I won't repeat them, the actual facts are so different than what the media hypes for us. Sure, we had a $1.2 million forfeiture in a narcotics trafficking case. I can cite you example after example where 10, 15, 20, or 30 people are arrested and charged with marihuana or cocaine trafficking in the United States in district courts or in State courts that I have personally been involved in cases or have been aware of where every defendant shows up, every defendant.

And yet, with your broad paintbrush, what you are likely to do is to detain people who may well be and wind up acquitted. Statistically, somewhere between 7 and 26 percent of all the people arrested in the U.S. district courts wind up exonerated. Those statistics, while a little less as far as narcotics cases are concerned, and that is the focal point of this committee, the bottom line still is that a pretrial detention bill or a bill which raises the stakes with respect to release on bail, is going to result in the incarceration of individuals who ought not be incarcerated, (a) because they might ultimately be acquitted, (b) the Government may eventually dismiss the charge and it may take a little time to get around it.

Also there is something else that you haven't considered—and the new acting director of the DEA probably doesn't have enough experience yet because he has just come over from the FBI, and I think that is a mistake. But that is a separate issue.

What you haven't considered is if you pass a bill that incarcerates everybody pending trial because they have been busted in a 35,000 pound marihuana case, you are going to destroy the informer system, which I would love to see, personally, as a defense lawyer. But it is not going to take too much brains for a client of mine who is sitting in jail to realize that eight of the other nine people who were arrested with him are still in jail while one guy is out on the street, and yet you are all charged with the same thing.

There are ramifications beyond the written word that you ought to take into consideration, because many, many people are arrested and flipped—if you know what I mean by flipped, turned into

cooperating individuals or confidential informers at the very time or shortly after their arrest. And you are not going to be able to do that under this kind of amendment.

Third, or the best example I guess I can give you about bail jumping and narcotics is the Black Tuna trial, for example, when the arrests from then Attorney General Griffin Bell who said it was the largest marihuana—I read in Miami they smuggled 100 tons of pot in 1 year.

I caught a plane from Miami to New York that day, and I read in the newspaper "$1 billion cocaine gang." It was the same story, same group but two different stories. Out of 14 defendants, only 1 skipped. He was captured twice by the Government and he slipped out of their hands. Only 1 defendant out of 14 skipped, and that was during trial. All of the 14 defendants showed for trial. Some pled guilty, some went to trial, and one even got acquitted. Of course, that was never mentioned, even though he was heralded as being involved in this nefarious gang.

There are sufficient considerations built into the Speedy Trial Act. There are enough acquittals to make you want to think twice.

Another example was referred to in my memorandum, in my written remarks, and that is the example Joe Duckett, convicted and sentenced to 20 years in prison for conspiracy to import 14 or 13.5 pounds of pure heroin. He was sentenced to 20 years in prison by the toughest judge, then the toughest judge in the Southern District of Florida since the decease of loved and very learned William Murtins, sentenced to 20 years in prison and denied bail. His conviction, 14 months after he started serving his sentence, reversed on the grounds of insufficient evidence of a conspiracy. He sat in jail, and there are many, many other examples like that.

When you start tinkering with the existing laws, you are going to create more unnecessary laws that are going to be subject to more court cases and more lawsuits.

Nebbia exists for those who want to use it. Unfortunately, Judge Palermo may have not communicated the impact of Nebbia.

Nebbia was a case in which a lawyer by the name of Arnold Stream from New York got a $100,000 cash bond set on a client of his by the name of Nebbia. Friday afternoon, he brought the $100,000 into the clerk's office. The clerk refused to accept it. The judge held the defendant and said he had a right to determine the source of that money. It was litigated, the second circuit said the judge certainly did.

The point being that if it wasn't the defendant's $100,000, we want to know whose it is, so we can investigate who is putting up the bond for the guy to go up the ladder.

What are you going to do with the fifth amendment? No one seems to have thought of this.

In the case of *United States* v. *Dohm,* also cited in my written memorandum, the 5th Circuit Court of Appeals held that a statement a defendant makes at a bail hearing may be used against him in a subsequent proceeding, even a trial on the very merits.

For example, let us assume that a defendant is charged with conspiracy to import a large quantity of marihuana. And let us assume that one of the material allegations is that the conspiracy

occurred at a particular address, or the meeting occurred at a particular address.

Now my friend, Mr. Beaudin over here, he wants to talk about property as opposed to money or alternatives. So now we have got this new bill that you have got, and the defendant knows he has to testify at his bail hearing and he has got to admit that he owns that house, or he lives in that house.

Under the *Dohm* case, in an effort to get his release on bail, statements that he makes can be used against him.

Now, I, for one, think that you ought not be penalized for exercising one constitutional right. If you are going to consider requiring a further and broad inquiry into bail matters at the time a defendant comes up for bail, then you ought to at least tack on the fact that the Government ought not be permitted to use a defendant's statements at the trial in chief except for impeachment purposes, which is to say, if the defendant at the bail hearing says my address is 14024 Southwest 10th Avenue, and later at trial he takes the stand and says, no, I lived at 3922 Southwest 12th Street at the time, then the Government can bring in that statement by way of impeachment.

These are issues you must take into consideration.

I have two other suggestions, and then I will defer and then hopefully reply if Congressman Dornan comes back.

I suggest that this committee, unannounced, visit some Federal judges setting bail. It would be very enlightening. Now, I agree with Mr. Beaudin that in State court it is a disaster. I don't even practice law in the State court anymore. I have three cases pending in State court, and I will be glad when they are done, because you are treated—there are so many hundreds of cases on the calendar everyday in Miami or in large metropolitan areas. The defendant is lucky if he gets a minute of law, much less due process.

The Federal court, at least, even though there are now being created tremendous time and pressure problems, if you have got a bond hearing, you generally get at least a half an hour, sometimes even an hour, at least in the Southern District of Florida, on getting a bond set. You ought to see the way Judge Palermo, Judge Shapiro, Judge Sorentino, Judge Kyle, our magistrates, labor over setting bonds, because they know that the focus of Congress and law enforcement is on the Southern District of Florida. They know they are subject to much criticism with respect to what the media hypes as low bails for narcotics traffickers. They are very cautious and very careful.

I am not defending them in any sense except I invite you—and I mentioned it to Judge Palermo, I said I am going to invite them and I am going to tell them to come unannounced so you won't know, they won't know, the judges won't know you are there, just to see what they go through and how cautious they are in weighing and balancing and what efforts they do make to determine the concept of danger to the community.

Mr. ZEFERETTI. There is no danger to the community under their concept.

Mr. HIRSCHHORN. Oh, no.

Mr. ZEFERETTI. There is not supposed to be, anyway, because all their considerations have to be whether or not he is going to reappear or not. That is the whole idea here.

Mr. HIRSCHHORN. Mr. Chairman, under the Bail Reform Act, they have the right to take into consideration the character and mental condition of the accused and the accused's record of convictions, from which they can reasonably arrive at the conclusion that the defendant's character is such and his record of convictions is such that he poses a danger.

Mr. ZEFERETTI. Only to reappear, only whether or not he is going to reappear. Not to whether or not he is going to be a danger to the community. Not to whether or not he is going to be a danger to another person. But only whether or not that reflects on his ability to reappear.

Mr. HIRSCHHORN. There is no question about that.

Mr. ZEFERETTI. We are not in disagreement there then.

Mr. HIRSCHHORN. The problem that we have is that you can't predict who is going to be a danger. And just because a person gets charged conspiracy to import 300 pounds of cocaine in what might be an isolated event does not necessarily mean, and I think the presumption is, that he is going to be a danger in the future.

I mean, you have to assume that he is going to continue to do what he did, or else he was a danger had the cocaine gotten through, perhaps, by your definition. But having been arrested, he is now going to return to his normal life of his 9-to-5 job and going home to his wife and loved ones and will not be a danger in the future.

Lastly, the only last suggestion I have, really, is that the answer is combined with dollars. I don't mean the drug trafficking dollars. If you are really going to do this, you have got to set up a whole new system which incorporates what Bruce was talking about.

You are going to need more judges to have real significant bail hearings. You are going to need more jails. You are going to need more marshals. You are going to need more pretrial investigators. I don't know exactly what the program is.

I know, for example, in the U.S. District Court for the Eastern District of North Carolina they require you to submit to a presentence investigation application at the time of your arraignment.

Well, I wouldn't let my clients do that because there I thought fifth amendment problems inherent within that.

But if that is the kind of thing you are talking about, requiring a defendant to submit to an extensive investigative background with respect to his ties to the community, and the concept of dangerousness in terms of future activities, you have got all sorts of fifth amendment problems that ought to be taken into consideration.

Mr. ZEFERETTI. Thank you.

[The prepared statement of Mr. Hirschhorn follows:]

PREPARED STATEMENT OF JOEL HIRSCHHORN, ESQ., ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

INTRODUCTION

I am a member of the Florida and Wisconsin Bars (the latter on an inactive status). I have been designated by the Florida Bar as a Criminal Trial and Appellate Specialist. I have been admitted to the Bars of, and have practiced before, The United States Supreme Court and the First, Fourth and Fifth Circuit Courts of

Appeals, all three Federal District Courts in the State of Florida and numerous other Federal District Courts as well as various State Courts (on a pro haec vice basis) including New York, New Jersey, North Carolina and Virginia.

I currently limit my practice exclusively to defense of criminal matters. My offices are in Miami, Florida. The majority of my cases involve major narcotics and controlled substances and related offenses.

In addition to memberships in the American Bar Association, the American Judicature Society, First Amendment Lawyers Association, and Dade County Bar Association, I am also a member, and director, of the National Association of Criminal Defense Lawyers. NACDL has approximately 2,000 members whose practices involve defense of all types of criminal cases.

This statement is intended to represent the general view of the NACDL membership. The statistics on "bail-jumping" are based on information supplied by the Clerk of the United States District Court for the Southern District of Florida. There is no reason to believe that these statistics are significantly different than the "bail-jumping" experiences of the District Courts located in other major metropolitan areas which have significant numbers of large narcotics trafficking activities and arrests.

I—PRESENT BAIL REFORM ACT GUIDELINES AND DECISIONAL CASE LAW ARE ADEQUATE TO ASSURE FAIR AND REASONABLE PRE- AND POST-TRIAL RELEASE CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS AND THE PUBLIC INTEREST

The purpose of bail, pending trial and even while on appeal, is to assure the Court that the defendant will appear when required.[1] Thus, once the court is assured of the adequacy of the accused's security (and in post-conviction proceedings that he is not a danger to the community or a repeat offender) he is entitled to bail in an amount which he can afford. The denial of bail amounts to punishment without a trial. Even post-trial, the denial of bail imposes a punishment which can never be reversed, deprivation of one's liberty even though 6 months, or 1 or 2 years later the defendant's conviction is overturned due to an error in a trial, a defect in the proceedings or because the "constable blundered". Thus the courts must have wide discretion in their bail setting functions.

The Bail Reform Act of 1966 (18 U.S.C. § 3146–3152) adequately serves this purpose. The cases interpreting and applying the Bail Reform Act and Rules 5(c), 46, Federal Rules of Criminal Procedure as well as Rule 9, Federal Rules of Appellate Procedure assure the prosecution, the defendant and the public alike that the imposition, or denial of bail (in the proper circumstances) will be fairly and impartially administered.

Before setting bail the judicial officer is required to evaluate:

1. The nature and circumstances of the offense charged,
2. The weight of the evidence against the accused,
3. The accused's family ties,
4. Employment,
5. Financial resources,
6. Character and mental condition,
7. The length of the accused's residence in the community,
8. The accused's record of convictions, and
9. The accused's record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings (18 U.S.C. § 3146(b)).

In addition, decisional case law authorizes the court to inquire into the adequacy of the collateral offered as security for the defendant's release. In certain circumstances the court can even refuse a cash bail when tendered to the Registry of the Court.[2] A defendant who testifies at a bail hearing also runs the risk that his statements to the court will be utilized against him at subsequent evidentiary hearings, including the trial itself,[3] as well as for other proceedings such as a prosecution for perjury should he deign to lie at the bail setting hearing.

Nonmonetary considerations must be a major factor in the bail setting decision making process. Many of those accused of major narcotics (and other offenses) have few assets, despite apparent involvement in a significant criminal enterprise. To assess bail solely on the accused's financial resources would result in disparate

[1] The prosecution, in a murder case, must at once demand bail from the defendant; and the latter shall provide three substantial securities—as approved by the court of the judges in such case—who guarantee to produce him at the trial, and if a man be unwilling or unable to provide these sureties, the court must take, bind and keep him, and produce him at the trial of the case. Plato, *Laws*, v. 2, p. 261 (Bury ed. 1952).

[2] *United States* v. *Nebbia*, 357 F.2d 303 (2nd Cir.1966).

[3] *United States* v. *Dohm*, 618 F.2d 1169 (5th Cir. 1980).

treatment for the financially disadvantaged. Conversely, setting bail solely on the basis of monetary considerations ignores the fact that most of those accused of crime have significant ties to their family and community, ties they would not likely sever for a year, or two or three much less a lifetime, as a fugitive.

The application of rigid rules to pre-trail release will serve little useful public policy or purpose. The public's interest will not be served by continuous warehousing of (even "major" narcotics) offenders particularly when viewed in light of the current crowded and often wretched conditions of jails and prisons throughout the United States. Removing judicial discretion from the bail setting decision will exacerbate, not ameliorate, the human misery and suffering, will impose unnecessary hardships on innocent "victims" such as the accused's family who are denied the financial support of the "bread winner", particularly where, despite the Federal Speedy Trial Act (18 U.S.C. § 3161 et. seq.,) it often takes as long as a year, or more to bring a case to trial.[4] It is important to note that of the 7,860 people charged with violations of drug laws in the United States District Courts in 1978, 2,043 were not indicted or convicted; 5,817 either pled guilty, nolo contendere or were found guilty. This means that approximately 26 percent were arrested but never convicted of drug violations.[5]

II—INCREASING BAIL REQUIREMENTS, LIKE THE IMPOSITION OF MANDATORY-MINIMUM SENTENCING REQUIREMENTS, ARE COUNTER PRODUCTIVE, DEPRIVING THE COURTS OF MUCH NEEDED JUDICIAL DISCRETION, FAIL TO SERVE THE PUBLIC INTEREST, AND ARE INCONSISTENT WITH THE AMERICAN JUSTICE SYSTEM'S CONCEPT OF INDIVIDUALIZED TREATMENT

There is no stereo type, or profile, for controlled substance offender. Narcotic and non-narcotic drug offenses cut across all age, race, ethnic, educational, vocational and demographic groups. Young and old, black and white, rich and poor, Anglo or Hispanic, blue collar workers and professionals are among those arrested, jailed, bonded out, indicted, convicted or acquitted of drug offenses.

Not everyone arrested for or charged with a narcotics offense is convicted. To create unnecessary barriers to release on bail pending indictment and trial will impose tremendous, and often undeserved emotional, social and economic problems and conditions. The overwhelming number of people charged with narcotics offenses are "first-timers" who, having reached for the "brass ring" and failed to get it, return to their normal lives, working everyday, coming home every night to their family and loved ones.

Regardless of how one defines a "major narcotics trafficker" or a "major narcotics trafficking operations", the fact of the matter is numerous underlings, "off loaders", "stash-house" watchers and truck drivers are often arrested with multi-ton caches of marijuana or multi-kilo quantities of cocaine. This kind of person is hardly the "major narcotics offender". Yet if 16 people are arrested and charged with conspiracy to import marijuana because they were found in, around and near 35,000 lbs. of marijuana they will be swept up in the net and despite no prior criminal behavior and being an otherwise good bail risk, they are likely to be denied bond, or placed under a bail so high that they will be jailed pending trial.

While perhaps not directly relevant it is significant to note the following which are found in the 1973 and 1980 editions of the "Source Book of Criminal Justice Statistics" published by the United States Department of Justice, Law Enforcement Administration, National Criminal Justice Information and Statistic Service:

1. In 1969 twelve (12 percent) percent of the over 21 years of age national population surveyed by the American Institute of Public Opinion believed that marijuana ought to be *legalized* (as distinguished from being decriminalized) (1973 edition of the "Source Book" at p. 156). By 1978 thirty (30 percent) percent of those polled responded that marijuana use should be legalized (1980 edition of the "Source Book" at p. 219).

That increase suggests that inflexible bail setting rules are not in the public's interest with respect to marijuana offenders at least. It is likely that similar attitudes prevail with regard to cocaine usage in America today.

[4] The Justice Department claims that 93 percent of everyone *indicted* (not arrested) either pleads, or is found, guilty in our Federal Trial Courts. A significant percentage of people arrested are not indicted (for various reasons). Indictment decisions are delayed for administrative reasons, and even accepting the Justice Department's claim, 7 percent of those who are finally indicted are exonerated. What happens to these people, sitting in jail because of inflexible bail rules regarding narcotics trafficking?

[5] These statistics are taken from "Source Book of Criminal Justice Statistics, 1980", United States Department of Justice, Bureau of Justice Statistics (copyright 1981 by the Criminal Justice Research Center).

2. Young adults, financially disadvantaged, even hard working blue collar workers and professionals seek the opportunity to "make" a quick fortune. The "deal" goes sour and otherwise previously decent, law abiding citizens, young and old, black and white, Anglo and Hispanic will be incarcerated pending indictment and trial. Their lives are altered, hopes dashed, careers ruined, and their dependents on welfare or relief. All the while the wheels of justice grind slowly. Somewhere between 7 percent and 26 percent of these people will be exonerated, or the charges dropped. Yet, weeks, even months of their lives lost while they languish in jails awaiting the Government's decision to indict or not, or if indicted awaiting a trial date and verdict.

3. "Raising the stakes" by precluding the opportunity for bail, just like withdrawing discretion by requiring the imposition of mandatory-minimum prison sentences will only create a greater risk of danger to those engaged in law enforcement activities. A person caught smuggling 15 or 20 tons of marijuana is less likely to shoot in an effort to avoid capture when he knows he has the opportunity of bail pending trial and that although the sentence may range up to 5, 10 or even 15 years, at least there is no mandatory-minimum prison term.

Denying bail to narcotics and marijuana traffickers, like setting mandatory-minimum sentences will only increase the risk. Businessmen recognize that "the greater the risk, the greater the profit". Any law which denies pre-trial bail will, ironically contribute to an increase in the street cost of marijuana, cocaine and other drugs as well as violence associated with those activities particularly with respect to efforts to evade capture and law enforcement activities. In short, such legislation would do little to stem the trafficking in narcotics. While it may isolate and warehouse a particular offender, more likely than not a new individual, with a new plan, a new scheme, a "better" idea will be along, undaunted, willing to take the risk for the potential profit.

III—"BAIL-JUMPING" STATISTICS ARE INCONSISTENT WITH THE GENERAL BELIEF THAT THOSE CHARGED WITH MAJOR NARCOTICS OFFENSES DO NOT APPEAR FOR TRIAL

Media reports and reckless statements suggest that "bail-jumping" in narcotics cases is literally out of hand. I can cite case after case where 5, 10 even 15 people charged with importation of, or possession with intent to distribute, anywhere from 1 to 15 tons of marijuana have been released on corporate surety or even personal recognizance bonds ranging between $25,000 to $50,000 each and yet these defendants show up for trial. Similar examples can be given for smaller groups of people charged with similar crimes involving multi-kilogram quantities of cocaine. Yet we only read or hear about the occasional, the very occasional, bond jumper. From the way printed media reports these few on the front page of the newspaper and the manner in which the electronic media broadcasts the news in living color, one would think the Government was forfeiting enough money to balance our National Budget.

In fact, the statistics obtained by my office from the Clerk of the United States District Court for the Southern District of Florida suggests the contrary is true. According to the Honorable Joseph Bogart, Clerk of the United States District Court for the Southern District of Florida, the following are the facts:

U.S. DISTRICT COURT—SOUTHERN DISTRICT OF FLORIDA

Year	Total number of cases filed	Total number of narcotics cases filed	Total number of bond-jumping indictments	Percentage of bond-jumping indictments	
				All cases	Narcotics cases
1978	920	439	16	2	4
1979	576	209	9	2	4
1980	739	289	12	2	4
Jan. 1, 1981, to June 30, 1981	352	168	16	5	10
Total	2,587	1,105	53	2	5

It is important to note that not all the "bond-jumpers" were indicted for narcotics offenses. Even if they were, the percentage of "bond-jumpers" is paltry indeed.

One must also remember that being a fugitive is different than "jumping bond". The Southern District of Florida currently has 760 "fugitives" who are involved in 466 open cases which extend back prior to 1978. The overwhelming percentage of

these are people who have never been arrested; people who may reside in other parts of the country, or the world; people who have never posted bond. Therefore, to "lump" fugitives with "bail-jumpers" is improper.

IV—CONSTITUTIONAL CONSIDERATIONS AND THE POTENTIAL FOR ABUSE

Our system of justice is bottomed on the tenet that doubts must be resolved in favor of the accused. This extends to bond setting decisions. See *Herzog* v. *United States,* 75 S. Ct. 349, 351 (1955). Bail is basic to our system of law. Eighth Amendment, United States Constitution and *Stack* v. *Boyle,* 342 U.S. 1, 72 S.Ct. 1, (1951). Mr. Justice Black has suggested that absent a crime of *physical* violence (and assuming the defendant is not a repeat offender) bail, even pending appeal, following conviction, ought to be granted. *Sellers* v. *United States,* 393 U.S. 6, 89 S.Ct. 36, 38.

There is a strong Federal judicial policy in favor of release on bail pending appeal, unless of course, the appeal appears to be frivilous or dilatory. *United States of America, ex. rel., Walker* v. *Twoney,* 484 F.2d 874, 876 (7th Cir. 1973). Similarly, requiring bail in an amount that "staggers the imagination" is obviously a denial of bail. *Carlisle* v. *Landon,* 73 S.Ct. 1179, 1182 (1953).

Given those legal principles and this country's commitment to the concept of "innocent until proven guilty beyond a reasonable doubt", one must take a long pause before seriously considering legislation (such as Florida has enacted, § 903.133, F.S.A.) which would deny bail to those convicted of narcotics trafficking. An even longer pause and more serious thought must go into the decision making process which would preclude bail to those merely arrested but not yet tried.

The potential for abuse and damage to lives, liberty, people, personality and emotions is literally without limit. People are convicted, unfairly, everyday. People are convicted and sentenced to prison daily despite insufficient evidence under our system of justice. One example of a heroin trafficker, released on bail pending trail who showed up for his jury trial, was thereafter convicted and sentenced to twenty (20) years in prison is Joseph Duckett. Denied bail pending appeal, he spent over one (1) year in a maximum security federal penitentiary before his conviction (for conspiracy to import 13½ pounds of high quality heroin) was reversed by the Fifth Circuit Court of Appeals due to insufficient evidence. *Duckett* v. *United States,* 550 F.2d 1027 (5th Cir. 1977). How does he regain his lost year? How does the 19 year old, never previously arrested marijuana off-loader charged with a conspiracy to import ten (10) tons of marijuana put his life back in order if having been held in jail pending trial, the judge grants a Motion for Judgment of Acquittal or the jury finds the defendant not guilty due to insufficient evidence or the Government's failure to prove him guilty beyond a reasonable doubt?

Can you not perceive case after case where the inflexible rule becomes abused, even by well meaning, sincere prosecutors caught in the crush of being overworked, the system overloaded, our prisons brimming with warehoused bodies? The courts must have wide discretion, must retain this discretion to make bail setting decisions free of the political process. If we trust our judges to impose sentences on the convicted, can we not trust their judgment enough to let them continue to make bail setting decisions on those who are merely accused?

The rare bail-jumper is well worth the risk, considering the potential for fundamental unfairness which would otherwise exist.

Mr. ZEFERETTI. Mr. Rosen?

TESTIMONY OF SOL Z. ROSEN, ATTORNEY AT LAW

Mr. ROSEN. Thank you.

My name is Sol Rosen. I am a member of the Bar in the District of Columbia and other jurisdictions. I have been practicing criminal law now for some 18 or 19 years.

I think the members of the committee are probably most familiar with one of my most recent cases involving *United States* v. *Bernard Welch* in the shooting of Dr. Halberstam, which was one of the few preventive detention cases that the Government brought in 1980. One advantage to Mr. Welch, of course, we had our trial within 60 days and, of course, he was found guilty in all cases.

I have presented a paper outlining some of the areas, and I think the main concern I want to talk about which I think all the

questioning this morning involved was wondering what to do on rearrests.

I believe I focused my paper on what I call the problem of recidivism. I would suggest to this committee amending both the Federal statute, as well as the D.C. statute, if you have jurisdiction over D.C., to allow the committing magistrate upon setting—for example, in the District of Columbia—I don't know if Mr. Beaudin has any of the forms here, but I gave one to your staff.

One of the conditions of release in the District of Columbia is no rearrests. And if somebody is rearrested for what we call probable cause, they are subject, number one, to contempt sanctions as well as revocation of bail.

The problem is that it is not enforced.

I propose to this committee, which I think would handle the problem that is bothering everybody, is that the committing magistrate who has the second case, either the same day or within a short period such as 24 hours, hold a defendant without bail pending review of the initial pretrial release by the other committing magistrate or by himself, whereon a determination can be made if a person is still trustworthy.

For example, in the District of Columbia Superior Court, defendants are released, conditions are set, such as reporting for narcotic testing, curfews, calling into the pretrial services agency and no rearrests. This is considered a violation of conditions of release and goes to one of the issues of trustworthiness.

If you had this automatic hearing by a judge, let us say within 24 hours, or 48 hours at most, you would solve this problem which I think is bothering everybody.

For example, I could tell this committee right now I have some defendants who are on bail in three or four cases at this very time. And the rearrests and the bail are tantamount to giving them a traffic ticket. It is like a revolving door of justice. And nothing is done about it.

I think, in my 18 years of practice, I don't think there have been more than half a dozen hearings instituted of petitions by the Government to modify conditions of release because of rearrests.

I think this committee does have the authority to do it. I don't think it would involve a violation of the eighth amendment rights because it is merely a proceedings to ascertain if in fact there has been compliance of conditions of release.

There is a decision in the D.C. Court of Appeals called *United States* v. *Peters,* which involves situations where defendants are rearrested while on either probation or parole. It allows the judge that imposed the probation or parole to hold an immediate hearing to make a determination of probable cause, whether to hold a person on revocation pending adjudication of his new case.

I have had situations where a revocation hearing has been held the same day as the arrest, and defendants have been held in jail with a token bond being set, but they were being held for violation of conditions of either probation or parole.

It seems to me this committee can impose provisions for having immediate hearings for violations of conditions of release. I think that would cover the questions of preventive detention, which everybody seems to be concerned about, as well as questions of rearrest.

Until the Supreme Court finally speaks on preventive detention, I might state as a practicing lawyer, we have always had preventive detention. All you have to do is set a bond high enough that someone can't reach. And it is tantamount to preventive detention.

The other advantage of the District of Columbia Code is someone is guaranteed a trial within 60 days. I have had three cases where someone was preventively detained, and it worked to their advantage, because we got a speedy trial. Otherwise, a defendant just languishes in jail on a high money bond for 7 to 10 months until they get a trial. I understand the situation is just as deplorable in New York and other major metropolitan areas?

Mr. ZEFERETTI. Would it be the same if he was out on bail?

Mr. ROSEN. No.

Mr. ZEFERETTI. Would he want it provided as quickly as 60 days?

Mr. ROSEN. No. If he is out on bail, what judges generally do, for example, on their calendars, give priority to jail cases. I have a case which hasn't gone to trial for 12 months with someone on bail. But if the judge knows he has to try someone in 60 days, that case moves along. Everything else is subsidiary. But I have defendants who have languished in jail for 8 or 9 months because they just can't make a money bond, any money bond. You could set a $1,000 surety bond, $100 surety bond, they can't make it. So it is tantamount or equivalent to preventive detention, which you have always had.

Mr. ZEFERETTI. Mr. Rosen, you said you had a paper. Is it something that I gave to the committee.

Mr. ROSEN. OK, fine.

I will make it part of the record.

[The prepared statement of Mr. Rosen follows:]

PREPARED STATEMENT OF SOL Z. ROSEN, ATTORNEY AT LAW

I appreciate the committee's interest in securing my views on the issue of bail reform as it applies to narcotics traffickers. I speak as a member of the bar who has represented thousands of criminal defendants during my 18 years of practice in the Washington, D.C. area. A majority of these individuals have been involved in drug trafficking and drug usage.

The District of Columbia Courts have, since the enactment of the Federal Bail Reform Act, directed that users of narcotics are to be tested and treated by the Substance Abuse Administration. That agency, which is funded by the Courts, has the facilities to monitor and test criminal defendants who are suspected of narcotics usage. I find their work to be satisfactory and suggest that this committee continue to fund the Substance Abuse Administration so that it might monitor and treat narcotics users.

The major problem of bail and narcotics users and traffickers is one of recidivism. I have represented many addicts and drug users who are and who have been in the past on their personal bond in two or three separate cases at the same time. The Courts, the Department of Justice and all agencies involved in the administration of justice have failed to adequately use the provisions of the Federal Bail Reform Act and the District of Columbia statute on pre-trial release to prohibit or control the re-release of the defendants on their personal bond or on some form of pre-trial release who have been re-arrested while on release status.

As the statutes are written the committing magistrate can only consider the likelihood of flight and reliability of the defendant to return to court. There are no provisions for an automatic review of conditions of release in the current law of a defendant on pre-trial release who is re-arrested while on bond. A defendant should not be released on the new charges until a judge has had an opportunity to review the conditions of release on the original charge. He should have the option of allowing the original bond to remain in effect or alter the same based on changed

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circumstances, such as the re-arrest based on probable cause. If he had this right and was of the view that a defendant had violated conditions of release in the initial case, he could hold the defendant without bond for violating his bond and the conditions imposed therein.

The Department of Justice has the option under the current statutes to apply to the court to amend the conditions of release upon the re-arrest of a defendant. They have used this power sparingly so that this statutory right has become a nullity.

I believe that in my 18 years of experience as a criminal defense lawyer the government has used this power in less than a half dozen instances. I firmly believe that the problem of recidivism is the major issue that this committee will have to face in considering reform of the statutes pertaining to bail as applied to narcotics users and traffickers.

I do not believe that bail hearings to have the source of collateral on bail would be fruitful, as individuals who are involved in drug trafficking would not be cooperative witnesses and the threat of contempt sanctions or jail would have little deterrent effect upon them.

The District of Columbia Code has provision for considering bail pending appeal for all criminal defendants who have been convicted in the Superior Court for the District of Columbia. It requires a defendant to show affirmatively that there is no likelihood of flight and that his release would not represent a danger to the community. I believe this standard to be adequate to protect the community interest and do not see a need for any reform in ths area.

Mr. ROSEN. This has been my suggestion to the committee, as far as dealing with rearrests: Most of the rearrests do involve drug traffickers, as I say, or drug-related offenses, whether it is larcenies or weapons or narcotics.

From the point of view of the community, I think this is a very, very serious offense, a very, very serious problem. As I say, I have defendants right now in four cases, and there is just no deterrent effect, and there is no protection for the community interests in bail.

Mr. ZEFERETTI. Any law that is not enforced is not a deterrent.

Mr. ROSEN. Well, it is not. The defendants just know it. They just come through the court. In fact, their court appearances solidify their reliability. There is one defendant I am thinking of, he has made one case four times, another case twice, and another case twice. So it shows that he is reliable in coming back to court.

But at the same time, he is getting—at least he has been arrested. That doesn't show how many other acts that he hasn't been arrested in. He is a narcotics user, and he gets the same conditions of release of narcotics testing and calling in——

Mr. ZEFERETTI. I could answer Mr. Hirschhorn's question of whether or not we think he is going to go out and do it again.

Mr. ROSEN. I don't know whether you can predict it. I don't know whether you can set up a statistical analysis to predict it, or say scientifically someone is going to do it.

But once you have the fait accompli, and once you have a probable cause hearing in the sense that a magistrate or a judge knows that the police are not leaning on a defendant, that it is not a sham charge, this is something legitimate, whether he gets a Gerstein proffer, whether to detain him or not, or whether he gets a statement of facts, or whether he has a short hearing with the testimony of a police officer subject to cross-examination.

I notice in the Kennedy-Thurmond bill mentioned by Mr. Beaudin, there is a provision of being held for 10 days. I think that is far too long to hold someone to consider revocation of bail. I think that can be done in 24 hours.

As I say, in the District of Columbia, we do probation revocation hearings in the same day. I have had several in the same day late in the afternoon when all business ends, 4:30 or 5 o'clock. It can be done within 24 hours, or 48 hours at most.

Or you can have a defendant show cause why he shouldn't be held in contempt for violating conditions of release. And if he is convicted, let us say, for rearrest, you don't have to worry about preventive detention because he is technically doing time on a contempt condition and there is no violation of his constitutional rights.

But the point I am trying to make is this provision dealing with rearrest is just laughed at. It is not enforced by the U.S. Attorney's Office, it is not enforced by the courts. It has just become a dead letter.

Mr. ZEFERETTI. Thank you very much.

Did you want to address Mr. Dornan?

Mr. HIRSCHHORN. Yes. Congressman Dornan, your hypothetical that you gave to Professor George—I am not sure if you have ever been down to the southern district of Florida and seen what really goes on down there. And I am not sure where you get the information from other than the newspaper, but the facts simply are not as consistent with that blood-dripping example, which I recognize was perhaps overstated and perhaps oversimplified.

Mr. DORNAN. Well, maybe oversimplified. Let me footnote what you are saying. It was not overstated.

I will give you the modus operandi I have used in assimilating information. Network specials, yes; newspapers, yes; yes, trips to the area, but not to the court system; Coast Guard briefings; DEA briefings; trips to the Virgin Islands and the Bahamas and talking to some of their officials down there; and reading several articles in "Yachting" and "Sailing" magazines about some of the piracy cases; personal conversation once with assistant to Peter Benchley who based his fictional, highly imaginative film script, "The Island," on some of the actual murders that were taking place down there.

You can disabuse me of the simplistic analysis of the billions of dollars and the death toll in that area. I doubt, after 4 years on this committee, you can disabuse me of the statement that I don't think was overstated of the death toll of young people across this country.

Mr. HIRSCHHORN. From what?

Mr. DORNAN. From polydrug use, from heavier drugs, from the whole lifestyle that leads them into crime to feed either pushing or using or a combination of habits.

In looking at your—and I will turn the platform back to you—in looking at the National Association of Criminal Defense Lawyers' Board of Directors, I see an old adversary of mine down there in the southern California area who had thought that narcotics was a big joke, that drugs of all use was a big joke, and specialized in defending like a revolving door those that thought America should be awash in recreational drugs.

I think we do have a war on our hands. I think the money loss and the death toll approaches maybe 4 of the 10 years that we were involved in Vietnam, on a yearly basis.

Mr. HIRSCHHORN. Well, I don't know who on the board that you are talking about. I can assure you that the board members that I know personally, none of think that narcotics and narcotics abuse is a joke.

Mr. DORNAN. Or should be recreational.

Mr. HIRSCHHORN. Well, I can't speak for individuals.

Mr. DORNAN. Right.

Mr. HIRSCHHORN. I just know that cocaine has become a very middleclass cocktail, right or wrong.

Mr. DORNAN. Here, as well as in Hollywood or as in Dade County?

Mr. HIRSCHHORN. Right.

I know from the statistics that I compiled from the Justice Department source book with respect to marihuana—I don't know of anybody who has overdosed on marihuana. Maybe there is. I don't know.

I do know, obviously, of relatively isolated, in terms of total number of people, who have died from mainlining or experimenting with cocaine, and certainly many, many more people who have ruined their bodies from cocaine. And, of course, the death toll from heroin is well documented.

Mr. DORNAN. You do know of people, though, who have overdosed, in a nonmedical sense, trafficking in marihuana, shooting it out with the police, shooting it out at landing sites in Colombia. I consider that a form of marihuana overdose when people will kill to traffic in it.

Mr. HIRSCHHORN. Now that I understand exactly what you mean, and you missed my earlier remarks when I said, when you raise the stakes and people know they are not going to get bail pending appeal, people know they are not going to get bail pending trial for trafficking, people know they are going to get a mandatory minimum prison sentence, (*a*) you are going to drive the price up because you are not going to eliminate the problem, because for every 1 the Coast Guard catches, 10 come in. And the minute you do all these things, you are raising the stakes and creating the likelihood of avoid-capture violence. You are going to increase that. It is just a simple fact. The greater the risk, the greater the profit.

Now the current wave of piracy hijackings that you are talking about, it is very interesting. For the first time in my life, I carried a gun on my boat. I wouldn't know from shooting a gun if my life depended on it, literally. But there was this article in the paper that said I am going to have to carry a gun if I am going over to the islands because someone is liable to try to hijack my boat.

Well, I discovered after getting over there and having a nice time in Bimini—and Bimini, by the way was deserted because that article ruined it—that the hijackings that are going on are not by Americans or people trying to smuggle the pot into the United States, it is island people who have a small, swift speedboat who come upon boats that look like they are smuggling small loads of pot who are taking over the boats.

The biggies, the people you should be concerned about, are not involved in that kind of stuff. I mean, that is amateur stuff in comparison to what you should be looking at. If you really want to eliminate the narcotics trafficking and get these people back to 760

fugitives who have never been arrested and are improperly lumped as bail jumpers, convince the Government of Colombia to ratify an extradition treaty. And wonder why the Colombian Government's cash reserves of American dollars has grown by $5 billion in the past 6 years, and I don't think it is from coffee.

What I am saying is, while the problem exists, unfortunately it is hyped, it really is not fair, because the political reaction and the political process will result in people who are not traffickers being treated like traffickers.

The average dope operation involving 10 tons of pot requires the services of about 10 to 12 people who have nothing to do with sharing in the profits. These are young kids, 18, 19, 20, perhaps up to 30 years old, who want to make a quick $10,000 for a night or two worth of work. And you are going to put them in jail pending trial, when the jury may acquit or the Government may not be able to put them behind the wheel of the boat. That is not the kind of person you want to aim at.

Mr. Chairman, I think there is a problem here, because this is the Federal congressional legislative process, and we are dealing with crimes underneath and within the jurisdiction of the U.S. Government. We are not talking about larcenies and muggings, forgetting about the District of Columbia.

I mean, I don't know about repeat offenders that Mr. Rosen was talking about. What you should be concerned about is the guy who gets out on bond for dope trafficking and gets busted again 2 or 3 weeks later with another load.

I tell you that the judges in the southern district of Florida, they don't need any additional law from you to revoke that man's bond, because then he established he was a danger to the community and he broke his faith. Bond is treated in the southern district of Florida as a form of contract.

Mr. ZEFERETTI. Mr. Hirschhorn, we have gone over this thing again. What the judges have testified to us, and what the law implies to us is that the only consideration that they can make is whether or not they are going to be somebody that is going to skip, not whether they are going to be a danger to the community or whether they have a prerecord of having 15 arrests. That is not a consideration. The consideration is whether or not they are going to be able to be in front of that court at the time of trial. That is all the prerequisite they have to make a determination on.

They could have a history of 50 arrests. It doesn't make any difference.

Mr. HIRSCHHORN. I think you are oversimplifying their testimony. When Judge Palermo gets a defendant in front of him that has six or seven arrests, even though he has had no bail forfeited, he says to himself, "Well, I'm going to raise the bail more than I would on someone else who might not have any arrests."

Mr. ZEFERETTI. OK. If I can stop you there. It is something of what Mr. Beaudin said. He may have a gut reaction and say this guy is a bad cookie. In his own mind he is saying instead of $5,000, I may put $50,000 on him; right?

Mr. HIRSCHHORN. Right.

Mr. ZEFERETTI. That is one thing he can say to himself.

But under the provisions of the law, from what I am told—and let me qualify something. I am not a lawyer. I was a policeman. I am not a lawyer.

But under the provisions of that law and from what I have read, the only thing he can rule on is whether or not this man is going to skip.

Mr. HIRSCHHORN. I guess my primary concern, then, is that you understand the point I am trying to make, which is just because someone is charged with possession of 5 kilos of cocaine, no matter how pure, or 1, 2, 3, 4, or 10 tons of marihuana today, he ought not be classified by virtue of that arrest as a danger to the community in the future.

Mr. ZEFERETTI. OK. There is where we get back into really what we were talking about with Mr. Beaudin also, is the definition, the words "definition of danger." You know, what becomes a danger to the community?

That is consideration that we are going to have to play with very, very carefully, and whether or not we can make an interpretation that is meaningful and can be accepted.

I think you are right. I think there has got to be a qualifying statement into that definition.

Mr. HIRSCHHORN. It may help your committee arrive at a definition by coming to court unannounced and watching when the Coast Guard brings in six or eight kids. You look at these guys and you say to yourself——

Mr. ZEFERETTI. I am not worried about six or eight kids. I am worried about the guy that is dealing in a half a million dollars' worth, and we bring him in, and he has got a battery of guys out there that can defend him.

Mr. HIRSCHHORN. Half a million dollars' worth of what? That is small. You have got to be worried about more than that.

Mr. ZEFERETTI. I am talking about using—I am just using——

Mr. HIRSCHHORN. No; I am very serious here.

Mr. ZEFERETTI. I know what you are saying.

Mr. HIRSCHHORN. You have got to be talking about more than that.

Mr. ZEFERETTI. More than a half a million, OK.

Mr. HIRSCHHORN. A lot more than that.

Mr. ZEFERETTI. We get caught up in numbers here.

But, seriously, that is the guy I am concerned with, the guy that is the heavy trafficker, the guy that is known to be in the area as a heavy trafficker, and is going to continue to be a heavy trafficker, regardless of what takes place.

That is the guy I am trying to stop. That is the guy I am trying to get to. Not this six or eight kids that have been caught up in doing errands for somebody to maybe sustain their own little habit or to make a buck. I am not talking about them. I am talking about the guy that is in it heavy.

Those are the people that we are trying, at least within what we consider to be due process and a proper kind of trial examination, to make it possible for us to stop him some way, legislatively, if possible.

Mr. HIRSCHHORN. There could be a bigger guy along the next day.

Mr. ZEFERETTI. Well, possibly so, because there are plenty of guys out there, it is a $70 billion operation. And that is a conservative number.

Mr. HIRSCHHORN. Oh, I think it is much more than that.

Mr. ZEFERETTI. OK. It is a conservative number.

But what I am saying to you is that with that kind of dollars in it, I am sure there are plenty of entrepreneurs out there that would like to get——

Mr. HIRSCHHORN. It has been said that if you stop the traffic, the economy in south Florida will collapse.

Mr. ZEFERETTI. Well, I know if we take some of the money out of those banks, the banks are going to collapse. I know that.

I am going to have to cut this short because I have a 4 o'clock Rules Committee meeting that I have got to run to.

I am just going to give you 5 minutes.

Mr. DORNAN. I am not even going to take the 5 minutes, because it would only torture both of us. I think there has to be a heavy information exchange here.

We are planning hopefully to go down to Dade County in October. I would love to have lunch with Mr. Hirschhorn down there, with some committee members, off the record, behind the scenes, with a free exchange of materials. I don't want to step on anybody's 5th amendment rights, 1st amendment, 14th amendment, anything. I am worried about kids just overdosing all over the country and getting involved in crime.

I would recommend you don't walk the streets of this city with that $30,000 Rolex, because drugs here——

Mr. HIRSCHHORN. It came from one of my dope clients.

Mr. DORNAN. Drugs here lead people to shoot you to take your wallet even before they know what is in it.

One of the prior witnesses, I think it was Mr. Beaudin, said, rape, robbery, and homicide; two of those crimes always go together, homicide and robbery. People don't go around "thrill killing." In San Francisco, maybe, one of the unique cities of the world, and that happens infrequently. Murder always comes with the robbery.

Rape is unique in itself. I could probably get in arguments with one of the other legal groups you belong to about the first amendment, because that is a cover flag for pornographers. I am convinced, at 48 years of age and 20 years of analyzing this, that the reason rape is out of control in the United States of America is we got the Sear's catalog out there and drugs trigger people to live out their fantasies and take what they want, treat women like meat on the street.

But the other thing, the murder comes from the drugs applied to robbers and burglars. That is how we lost one of our prominent writer doctors in this city.

Mr. ROSEN. I defended Mr. Welch.

Mr. DORNAN. That was a tough defense case. You charge in where angels fear to tread.

But what I would like to do for all of us American citizens, so we don't interfere with the rights of the individual, we get a handle on where you think, as an American citizen, not a lawyer, defense lawyer, or someone who fulfills people's rights and makes a lot of money out of it, where you can tell us where you think we should

focus our attention to stop something before we all end up in a casket somewhere and have anarchy across this country.

Rape and robbery is exacerbated in this country beyond all belief by drugs. I am convinced of it. The evidence is there.

Mr. ROSEN. But the point is this: The problem with drugs, it seems to me, is not really related to bail per se. Until you go focusing after the big dealers, I don't mean just marihuana, let us say your big drug wholesalers that make the pills, the Dilaudids, methedrine, everything else. Why not go after the doctors that prescribe them, or the drug houses that sell them? Nothing is being done.

Why do you go after a guy on the street that is selling three pills to make a few dollars? These are the reasons why kids are overdosing. You just have to read this morning's Washington Post in the story about "bamscam."

Mr. DORNAN. Mr. Rosen, I respond for this chairman and the prior chairman; we are all over the map on this issue trying to go after the pill dealers. We just don't go after "Mr. Big" in pills and another. We go after countries. A fourth country just joined this exclusive club of narcotics passing oil. Peru, I am told, it finally passed last month or the month before. Now we have Jamaica, Colombia, Peru, and Bolivia where their No. 1 cash crop is narcotics. And in my State of California, the Golden State, it is golden pot, it is sensemilla that is the No. 1 cash product.

So we are going after countries and everything at every level.

Mr. ROSEN. I think that point that Mr. Hirschhorn and I are concerned about, we deal with—Mr. Hirschhorn talked about the eight or nine people who come off with a boatload of marihuana. I deal with young, white suburbanites who get caught with one or two pills.

If you are going to set up preventive detention, if you are going to say this is dangerous to the community and you are going to hold them, I think it is disastrous.

Why not go after the doctors that prescribe them? Take a nice, middle-class doctor who lives in a $300,000 house in Bethesda, put him in jail for 60 days without bail.

Mr. ZEFERETTI. But, Mr. Rosen, I think that, using the good senses and the good judgment of some of these magistrates, I think that that same young boy that you are talking about with the two pills, he is not going to get that same kind of treatment.

I think you are going a little bit overboard, too, with the idea that all we are dealing with here is young people who are just caught up in this thing. There are a lot of young people caught up in this thing for a lot of heavy dollars and to supply a lot of heavy traffic in drugs. Whether it is New York City, the southern part of Miami, or California, there are a lot of young people that are using it, too, as an instrument of making money.

Let us not make it something that, you know, these poor, defenseless little people that are coming before the courts that are going to be treated differently.

If they are going to be caught up in this kind of traffic——

Mr. DORNAN. The biggest copout I have heard, and we are in an Armed Services Committee room, are these poor Vietnam veterans who are just flying airplanes. I was down at a meeting with our

Ambassador and DEA people in Costa Rica in April, and they said, until we start busting these people and taking their ticket away for life, their privilege to fly an airplane, they are going to keep going before judges and say: "I didn't know what I was flying. I'm a Vietnam veteran. I've got to get a pilot job somewhere. The airlines are shut down. I just fly whatever they throw in my airplane."

And that reminds me of Al Capone's driver who said: "I didn't know they were going to stick machine guns out the window and shoot people in the streets. I'm just driving the car. If you can get me a good chauffeur's job somewhere, just don't take my driver's license away."

Mr. ZEFERETTI. I am going to have to adjourn this hearing, but we will be knocking on your door. I guess Mr. Dornan will make the loudest knock.

I thank you so very much for contributing to our committee, and your testimony is valuable. Thank you so very much.

[Whereupon, at 4 p.m., the committee adjourned, to reconvene subject to the call of the Chair.]

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