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The Federal Bail Reform Act of 1984:
Effect of the Dangerousness Determination on Pretrial Detention

The Federal Rules of Criminal Procedure provide that an arrested person must appear before a federal magistrate for arraignment without unnecessary delay. At this initial appearance, the magistrate must advise the defendant of his or her rights and detain or conditionally release the defendant on bail or personal recognizance. The magistrate has broad discretion, based on the type of crime involved and the characteristics of the defendant, to set or deny bail or impose conditions of release.

Although the eighth amendment to the United States Constitution guarantees a right to be free from excessive bail, there is no...
constitutional requirement that every person charged with a crime be released on bail pending trial. Since 1789, Congress has provided a right to bail in noncapital criminal cases in the federal courts. Nevertheless, courts have traditionally detained defendants who are likely to flee and defendants who are charged with capital crimes. The rationale behind the detention policy in capital cases is that a defendant charged with a capital crime has nothing to lose by fleeing, and therefore no amount of bail will ensure the presence of the defendant at trial. Courts also detain defendants who are likely to interfere with the jury or witnesses since such interference disrupts the adjudication process. When a defendant is considered a flight risk or is charged with a serious offense, the judge has traditionally set bail beyond the resources of the defendant thereby effectively detaining the defendant before trial.

In the early 1960s, public dissatisfaction developed with a bail system that detained indigent defendants solely because of inability to post bail. The Bail Reform Act of 1966 addressed this problem by encouraging courts to either release defendants on their own

of the defendant to post bail does not necessarily mean that the bail is excessive. 2 J. Cook, Constitutional Rights of the Accused § 11.1, at 414-16 (2d ed. 1986); Ex parte Burnette, 35 Cal. App. 2d 358, 360, 95 P.2d 684, 685 (1939); Gusick v. Boiles, 233 P.2d 446, 448 (1951).

5. Wagner v. United States, 250 F.2d 804, 805 (1957) (the Constitution provides that bail shall not be excessive, not that every defendant is entitled to bail); Nail v. Slayton, 353 F. Supp. 1013, 1019 (1972) (neither the eighth nor fourteenth amendment requires that every defendant be released on bail pending trial); see generally, J. Cook, supra note 4, § 11.1 (general discussion of the right to bail); Meyer, Constitutionality of Pretrial Detention, 60 Geo. L.J. 1140, 1178-94 (1972) (historical evaluation of constitutionality of pretrial detention); but see Note, The Eighth Amendment and the Right to Bail: Historical Perspectives, 82 Colum. L. Rev. 328, 354 (1982) (suggesting that the eighth amendment be interpreted to include a right to bail).


8. Note, supra note 7, at 807.

9. Id.; see Carbo v. United States, 288 F.2d. at 686 (threat to witnesses as grounds for denial of bail).


11. See W. Thomas, Jr., Bail Reform in America 4-5 (1976).

recognizance or grant defendants a conditional release pending trial. The 1966 Act did not, however, allow judges to consider the future dangerousness of a defendant when making the bail determination.

By the 1980s, public concern about the high percentage of crimes committed by defendants out on bail led to an increased desire to keep potentially dangerous defendants in jail pending trial. The Bail Reform Act of 1984 was enacted to address this concern. The 1984 Act departs from the traditional view that the likelihood that a defendant will appear for trial should be the sole basis for determining whether to release that defendant pending trial. Instead, the 1984 Act expressly grants judges the power to consider the potential dangerousness of the defendant when making bail decisions. Furthermore, under certain circumstances the defendant may be detained solely on the basis of dangerousness.

This comment will initially review bail reform in the United States and the Bail Reform Act of 1966. Next, the provisions of the Bail Reform Act of 1984 pertaining to defendants pending trial will be examined. The congressional intent behind the adoption of the 1984 Act will also be discussed. The judicial application of the

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13. See supra note 2 (definition of personal recognizance).
14. If own recognizance release will not reasonably ensure appearance of the defendant at trial, a judge has discretion to impose conditions of release necessary to secure appearance. See infra note 53 (conditions of release, 1966 Bail Reform Act), note 65 (conditions of release, 1984 Bail Reform Act).
16. See id.
20. Id. § 3142(b). The 1984 Act was based primarily on the Washington, D.C. Bail Reform Act of 1970 which allows for preventive detention based on dangerousness. W. Thomas, Jr., supra note 11, at 8-9.
21. 18 U.S.C. § 3142(e) (Supp. II 1984) (circumstances under which detention is authorized); see id. § 3142(f) (cases giving rise to a detention hearing and required procedures).
22. See infra notes 29-58 and accompanying text.
24. See infra notes 95-122 and accompanying text.
1984 Act to crimes of violence and controlled substance violations will then be discussed.\textsuperscript{25} This comment will conclude that federal courts are applying the 1984 Act too broadly in crimes of violence and controlled substance cases thereby detaining defendants unnecessarily and unconstitutionally.\textsuperscript{26} This overbroad application disregards the congressional intent behind the 1984 Act.\textsuperscript{27} Finally, proposals for legislative reform will be offered to ensure that application of the 1984 Act is uniform, fair, and consistent with legislative intent.\textsuperscript{28}

**BAIL REFORM IN THE UNITED STATES**

**A. Bail Reform Projects**

Although bail is not constitutionally required, most courts consider bail fundamental to the American concept of liberty.\textsuperscript{29} The traditional purposes of bail are to ensure the appearance of the defendant at trial,\textsuperscript{30} to prevent the punishment of innocent persons,\textsuperscript{31} and to enable accused persons to prepare a defense.\textsuperscript{32} However, release on bail was traditionally unavailable to some defendants because of financial hardship.\textsuperscript{33} The inherent inequities of a system which allows pretrial incarceration of defendants on the basis of economic disadvantage alone led to a national bail reform movement in the early 1960s.\textsuperscript{34}

\textsuperscript{25} See infra notes 123-89 and accompanying text. This comment will not discuss detention of defendants based solely on risk of flight or tampering with a juror or witness, or defendants charged with a capital crime.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} See infra notes 190-202 and accompanying text.


\textsuperscript{30} See Bandy v. United States, 81 S.Ct. 197, 197 (1960).

\textsuperscript{31} See Stack v. Boyle, 342 U.S. 1, 4 (1951).

\textsuperscript{32} See Heikkinen v. United States, 208 F.2d 738, 742 (7th Cir. 1953).

\textsuperscript{33} W. THOMAS, JR., supra note 11, at 4-5.

\textsuperscript{34} Id.; P. WICE, FREEDOM FOR SALE 97 (1974).
In 1961, the Vera Foundation\textsuperscript{35} instituted the Manhattan Bail Project, a three-year pretrial release experiment.\textsuperscript{36} The project was designed to provide information to the courts about the community ties and risk of flight of individual defendants.\textsuperscript{37} The courts used this information to determine whether to grant own recognizance release to the defendant.\textsuperscript{38} The success of the Manhattan Bail Project\textsuperscript{39} led to the development of similar bail projects throughout the United States.\textsuperscript{40} In general, a bail project staff member conducts an interview with the defendant and investigates the defendant's background, community ties, past criminal record, and the seriousness of the current charge.\textsuperscript{41} The project staff then predicts the likelihood that the defendant will appear for trial and reports their findings to the court.\textsuperscript{42} If the risk of flight is low, the bail reform project generally recommends own recognizance release of the defendant.\textsuperscript{43} By 1964, Congress became aware of the success of these bail reform projects and legislation designed to reform bail practices in the federal courts was introduced in Congress.\textsuperscript{44} These bills culminated in the passage of the Bail Reform Act of 1966.\textsuperscript{45}

B. The Bail Reform Act of 1966

A congressional investigation of bail procedures in the federal courts uncovered wide variations in bail practices.\textsuperscript{46} Some district courts routinely released a high percentage of defendants on their

\textsuperscript{35} The Vera Foundation, later known as the Vera Institute of Justice, was created to finance the Manhattan Bail Project. P. Wise, \textit{supra} note 34, at 99.

\textsuperscript{36} See W. Thomas, Jr., \textit{supra} note 11, at 3-6 (discussion of the Manhattan Bail Project).

\textsuperscript{37} \textit{Id.} at 4.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} The Manhattan Bail Project released over 2000 defendants on their own recognizance during the first years of operation and generated a national interest in bail reform. \textit{Id.} at 6.

\textsuperscript{40} \textit{Id.}; see P. Wise, \textit{supra} note 34, at 98-108 (discussion of bail reform projects). A bail project is a "program which systematically investigates an arrested defendant, usually employing a type of standardized fact-finding mechanism, to determine his reliability for release on his own recognizance." \textit{Id.} at 99. Bail projects differ widely in procedures, results, and philosophies. See P. Wise, \textit{supra} note 3, at 30-52 (examination of bail reform projects in eleven United States cities).

\textsuperscript{41} P. Wise, \textit{supra} note 34, at 99.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{See id.} If the judge releases a defendant before trial on the basis of a recommendation from a bail reform project, the project is usually responsible for supervising the defendant before trial. \textit{Id.}

\textsuperscript{44} See W. Thomas, Jr., \textit{supra} note 11, at 6.

\textsuperscript{45} \textit{See id.} at 6-7.

\textsuperscript{46} \textit{Id.} at 161-62.
own recognizance while other district courts never granted such releases.\textsuperscript{47} Additionally, some districts detained a high percentage of indigent defendants merely because these defendants were unable to post nominal bail.\textsuperscript{48} The inconsistent release patterns among federal district courts and the success of bail reform projects in securing pretrial release of defendants prompted the enactment of the Bail Reform Act of 1966.\textsuperscript{49} The 1966 Act was based on the premise that own recognizance release should be the preferred method of release.\textsuperscript{50}

The 1966 Act provides that a person charged with an offense not punishable by death must be released pending trial on either personal recognizance or an unsecured bond,\textsuperscript{51} unless in the judge's discretion this procedure would not reasonably ensure the appearance of the accused at trial.\textsuperscript{52} Under the 1966 Act, if a judge determined that an unsecured release was inadequate to secure appearance of the defendant as required, several alternative conditions of release could be imposed.\textsuperscript{53} These conditions were intended to reasonably ensure appearance of the defendant at trial.\textsuperscript{54}

Despite the congressional goal of requiring uniform release of defendants who were not flight risks,\textsuperscript{55} commentators criticized the

\textsuperscript{47} Id. at 162.

\textsuperscript{48} Id. A study of federal district courts showed that the percentage of defendants unable to post bail in amounts of five hundred dollars or less ranged from 11 to 78 percent. Id.

\textsuperscript{49} Id. at 162-63.


\textsuperscript{51} An unsecured bond is a bail bond for which the defendant is fully liable upon failure to appear in court as required, but which is not secured by any deposit of or lien upon property. BLACK'S LAW DICTIONARY 128 (5th ed. 1979).


\textsuperscript{53} Id. One or all of the following conditions are to be utilized in any combination necessary to reasonably assure appearance:

\begin{enumerate}
\item [1] Place the person in the custody of a designated person or organization agreeing to supervise him;
\item [2] place restrictions on the travel, association, or place of abode of the person during the period of release;
\item [3] require the execution of an appearance bond in a specified amount . . .;
\item [4] require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
\item [5] impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.
\end{enumerate}

\textit{Id.}

\textsuperscript{54} Id.

1966 Act for encouraging the disproportionate use of high bail to detain poor defendants.\textsuperscript{56} The 1966 Act was also criticized for failing to provide appropriate release conditions.\textsuperscript{57} Opponents of the 1966 Act further claimed the Act was too liberal in allowing pretrial release because it did not give judges enough flexibility in making release decisions regarding a defendant who was a serious flight risk or a danger to the community.\textsuperscript{58}

\textbf{C. The Bail Reform Act of 1984}

Congressional dissatisfaction with the 1966 Act, coupled with growing public concern about crime committed by bailees, led to the passage of the Bail Reform Act of 1984.\textsuperscript{59} While release of defendants before trial was the primary purpose of the 1966 Act, a concern for community safety and the need for preventive detention\textsuperscript{60} distinguishes the 1984 Act.\textsuperscript{61} Although judges considered the potential dangerousness of a defendant when making bail decisions under the 1966 Act, such a consideration was not statutorily required.\textsuperscript{62} The 1984 Act, however, specifically allows consideration of dangerousness in the bail decision.\textsuperscript{63}

\textbf{1. General Provisions}

The Bail Reform Act of 1984 requires a judge to order pretrial release on personal recognizance or unsecured bond unless the judge

\begin{footnotes}
\footnotetext{56}{Powers, Detention Under the Federal Bail Reform Act of 1984, 21 CRIM. L. BULL. 413, 414 (1985).}
\footnotetext{57}{Id.}
\footnotetext{58}{Id.}
\footnotetext{59}{S. Rep. No. 225, supra note 10, at 3185. See also W. THOMAS, JR., supra note 11, at 8-10 (history of the bail reform movement); Lay & De La Hunt, supra note 50, at 934-36 (discussion of bail reform legislation).}
\footnotetext{60}{Preventive detention is used here to mean pretrial incarceration of a defendant if release would pose a danger to the community or if the defendant would be likely to commit crime if released pending trial. See Note, Pretrial Preventive Detention Under the Bail Reform Act of 1984, 63 WASH. U.L.Q. 523, 523 n.2 (1985) (definition of preventive detention); Editorial Note, Detention for the Dangerous: The Bail Reform Act of 1984, 55 U. CIN. L. REV. 153, 153 n.2 (1986) (definition of preventive detention).}
\footnotetext{61}{See generally Lay & De La Hunt, supra note 50, at 936-37 (discussion and comparison of the 1966 and 1984 Bail Reform Acts).}
\footnotetext{63}{18 U.S.C. § 3142(b) (Supp. II 1984). A judge must order the release of a defendant unless release will endanger the safety of any other person or the community. Id.}
\end{footnotes}
determines that such a release would not reasonably ensure appearance or would endanger the safety of any other person or the community. If a judge determines that such a release would result in flight or danger to the community, conditional release must be granted if any combination of conditions will adequately safeguard these interests. Thus, the 1984 Act expands the provisions of the 1966 Act by specifying additional conditions of release. In addition, the 1984 Act specifically prohibits a judge from imposing a financial condition that results in the pretrial detention of a defendant.

64. Id. The judicial officer may issue one of four orders under the Act: (1) release on personal recognizance or unsecured bond; (2) release on conditions; (3) temporary detention under section 3142(d); or (4) detention under section 3142(e). Id. § 3142(a).

65. Id. § 3142(c). One or more of the following conditions must be utilized in the least restrictive combination necessary to reasonably ensure appearance of the defendant at trial and the safety of the community. The defendant may be required to:

(A) remain in the custody of a designated person who agrees to supervise him . . . ;
(B) maintain employment, or, if unemployed, actively seek employment;
(C) maintain or commence an educational program;
(D) abide by specified restrictions on his personal associations, place of abode, or travel;
(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;
(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;
(G) comply with a specified curfew;
(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;
(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance . . . without a prescription by a licensed medical practitioner;
(J) undergo available medical or psychiatric treatment . . . ;
(K) execute an agreement to forfeit upon failing to appear as required, such designated property . . . as is reasonably necessary to assure the appearance of the person as required . . . ;
(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;
(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

Id. § 3142(c)(2). Release of every defendant is subject to the condition that the defendant refrain from committing any crime during the period of release. Id. § 3142(c)(1).


67. 18 U.S.C. § 3142(e) (Supp. II 1984). The purpose of this provision is to preclude the sub rosa use of high bail to detain a dangerous defendant. S. Rep. No. 225, supra note 10, at 3199. If a judge determines that a high bail is the only conditional release that will reasonably ensure the appearance of the defendant at trial, section 3142(e) does not require the release of the defendant, but only requires compliance with the detention hearing provisions of the Act. Id.; see Serr, The Federal Bail Reform Act of 1984: The First Wave of Case Law, 39 Ark. L. Rev. 169, 200 (1985) (discussion of the use of a financial condition to detain a defendant before trial).
2. Detention

The 1984 Bail Reform Act provides that under certain circumstances a detention hearing must be held to determine whether any conditions of release could be imposed to adequately ensure both the appearance of the defendant at trial and the safety of the community.\(^{68}\) A detention hearing must be held\(^{69}\) in any case that involves: (a) a crime of violence;\(^{70}\) (b) an offense with a maximum sentence of life imprisonment or death; (c) an offense in violation of certain controlled substances acts;\(^{71}\) or (d) any felony committed after the defendant has previously been convicted of two or more offenses falling into any of the above categories.\(^{72}\) A detention hearing is also required\(^{73}\) in any case that involves either a serious

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68. 18 U.S.C. § 3142(f) (Supp. II 1984). The detention hearing must be held immediately upon the first appearance by the defendant unless a continuance is sought. \(\text{Id.}\) Except for good cause, a continuance granted to the defendant must not exceed five days and a continuance granted to the prosecutor must not exceed three days. \(\text{Id.}\) See United States v. Al-Azzawy, 768 F.2d 1141, 1145 (9th Cir. 1985) (timely hearing and continuance provisions of statute are to be strictly construed); Note, Granting Prosecutors’ Requests for Continuances of Detention Hearings, 39 Stan. L. Rev. 761, 790 (1987) (concluding that the continuance procedures in the 1984 Act are unconstitutional as written).


70. “Crime of violence” is defined as: (a) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. \(\text{Id.}\) § 3156(a)(4).


72. \(\text{Id.}\) § 3142(f)(1). In a case involving one of these four categories, a rebuttable presumption arises that no condition will reasonably ensure public safety if the judge finds that the defendant has been convicted of one of the four offenses within the past five years and the prior offense was committed while the defendant was on release pending trial. \(\text{Id.}\) § 3142(e). See generally Comment, Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984, 134 U. Pa. L. Rev. 225 (1985) (discusses the rebuttable presumptions and the burdens of proof required and concludes that the use of presumptions is unconstitutional).

73. A detention hearing is only required upon motion of the prosecuting attorney or the judge. 18 U.S.C. § 3142(f)(2) (Supp. II 1984).
risk that the defendant will flee, or a serious risk that the defendant will obstruct justice or interfere with a prospective witness or juror. If the court determines that no conditions will reasonably ensure both the appearance of the defendant at trial and the safety of the community, the judge must order the detention of the defendant before trial.

3. Determination of Dangerousness

The Bail Reform Act of 1984 allows a judge to consider the potential dangerousness of a defendant when determining whether to release or detain the defendant before trial. Although the judge has discretion in determining whether a defendant is dangerous, the 1984 Act specifies factors that the judge must take into consideration. The Act requires a judge to consider the nature and circumstances of the offense charged, the weight of the evidence, the history and characteristics of the defendant, and the nature and seriousness of any potential public danger resulting from pretrial release. Additionally, a rebuttable presumption of dangerousness arises in certain cases involving controlled substances and prior offenses committed while free on bail.

When a judge determines that a defendant is potentially dangerous, pretrial detention is justified to protect the community. Studies have indicated, however, that it is difficult to predict accurately which defendants will commit future crimes. For example, a 1970 study conducted by the National Bureau of Standards showed that

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74. Id. This category reflects case law at the time of the implementation of the 1984 Act and the existing practice of denying release in such cases. See S. Rep. No. 225, supra note 10, at 3204.
76. Id. § 3142(b).
77. Id.; id. § 3142(g) (factors to be considered).
78. Id. § 3142(g).
79. Id. § 3142(e); see supra notes 71-72 and accompanying text (discussion of the rebuttable presumptions of the 1984 Act).
the incidence of pretrial crime was approximately 17% for both felony and misdemeanor arrests, but only 5% for successive arrests on serious felony charges. According to the study, little correlation exists between the type of crime for which the defendant was initially indicted and the severity of the second offense committed by the defendant while on release pending trial. In addition, most crime committed by defendants released on bail does not occur in the immediate post-arrest period. The findings of the National Bureau of Standards therefore undercut the assumption that there is a high incidence of crime committed by defendants released on bail before trial for serious felony offenses.

The Harvard Study, conducted in 1971, confirmed the findings of the National Bureau of Standards. Factors often used in dangerousness predictions include the occupational status, educational background, marital status, drug or alcohol use, and prior criminal record of the defendant. The Harvard Study concluded that these factors provide only a 40% chance of accurate prediction of dangerousness. Accordingly, the study found that a defendant arrested for a violent crime is no more likely to commit a violent crime while on bail than a defendant arrested for a misdemeanor. This finding is inconsistent with the assumption underlying the 1984 Act that only defendants charged with serious felonies will engage in criminal activity if released.

Since both the Harvard Study and the National Bureau of Standards Study undercut the validity of a judicial determination of

83. *Id.*
84. *Id.* Most rearrests occur between 120 and 240 days following the first arrest. *Id.* at 295. Preventive detention is generally limited to a 60 or 90 day period following arrest. *Id.* at 294. Therefore, defendants are being detained when they are not likely to commit crimes. *Id.*
85. *Id.* The study shows that detention of dangerous and violent offenders does not provide adequate assurance that serious bail offenses can be eliminated or reduced. *Id.*
86. Four Harvard Law School students studied pretrial crime committed by defendants in Boston, Massachusetts, during six months in 1968. They used principles of pretrial detention to determine the number and seriousness of offenses that might have been prevented had pretrial detention been available to the court. Note, *Preventive Detention: An Empirical Analysis*, 6 Harv. C.R.-C.L. L. Rev. 300 (1971) (report and evaluation of the Harvard Study findings).
87. *Id.* at 317-32.
88. See *Id.* at 310.
89. *Id.* at 325-27.
90. *Id.*
91. *Id.* at 327.
dangerousness, preventive detention statutes should be reevaluated.\textsuperscript{92} The low correlation between the factors used to determine the dangerousness of a defendant, and the actual probability of recidivism while released on bail, results in the unwarranted detention of defendants pending trial.\textsuperscript{93} Consequently, the procedures for predicting dangerousness under the 1984 Act have been criticized.\textsuperscript{94}

\textbf{CONGRESSIONAL INTENT BEHIND THE BAIL REFORM ACT OF 1984}

The main legislative purposes of the 1984 Bail Reform Act are: (1) to allow judges to consider community safety in setting nonfinancial release conditions; (2) to expand the list of statutory release conditions; and (3) to permit preventive detention of dangerous defendants.\textsuperscript{95} According to the congressional record, safety of the community is a primary motivation for allowing a judge to consider the potential dangerousness of a defendant when setting bail.\textsuperscript{96} Additionally, Congress believed that the 1984 Act would be fairer to defendants since judges could no longer effectively impose pretrial detention by setting a high bail.\textsuperscript{97} Instead, a due process detention hearing is required.\textsuperscript{98} Therefore, the Bail Reform Act of 1984 was designed to safeguard the rights of the accused and to promote community safety.\textsuperscript{99}

Congress intended to detain only defendants who constituted the most serious threats to community safety.\textsuperscript{100} The legislative history focuses on a "small group of particularly dangerous defendants" and a "reasonably identifiable" group of defendants who would be

\textsuperscript{92} See Lay & De La Hunt, supra note 50, at 951.
\textsuperscript{93} Id.; see also Kastenmeir & Beier, \textit{Bail Reform Revisited}, 32 Fed. B. News & J. 82, 83 (1985) (it is likely that up to 40% of all federal defendants will be eligible to have a detention motion made against them).
\textsuperscript{94} See Note, supra note 7, at 811-14. Since courts cannot accurately predict which defendants will commit a crime if released before trial, the detention provisions are unsatisfactory as a guide to determine dangerousness. Id.
\textsuperscript{95} Kastenmeir & Beier, supra note 93, at 82.
\textsuperscript{97} 130 CONG. REC. S934, S938 (daily ed. Feb. 3, 1984) (statement of Sen. Thurmond);
\textsuperscript{98} S. REP. No. 225, supra note 10, at 3194.
\textsuperscript{99} Id. at 3189, 3193.
\textsuperscript{100} Id. at 3189.
\textsuperscript{101} Id. at 3189.
a risk to community safety if released before trial.\textsuperscript{102} For example, the 1984 Act sought to implement procedures to ensure that pretrial detention be imposed in a rational and fair manner.\textsuperscript{103} To achieve this purpose, Congress limited the application of the pretrial detention provisions of the Act\textsuperscript{104} to violent crimes and major drug trafficking offenses.\textsuperscript{105}

Congress was afraid that a defendant charged with a violent crime would commit other violent crimes if released on bail.\textsuperscript{106} Although Congress refers to "career criminals"\textsuperscript{107} and "particularly dangerous"\textsuperscript{108} defendants, the method for determining which defendants meet these qualifications is not clearly indicated in the 1984 Act.\textsuperscript{109} Congress intended, however, that "crimes of violence" be interpreted to include more than offenses involving physical violence.\textsuperscript{110} Congress specified that the 1984 Act also applies to a defendant charged with a nonphysical offense such as corrupting a union\textsuperscript{111} or continuing to engage in drug trafficking since these activities constitute a harm to the community.\textsuperscript{112} Congress did not identify the specific dangers to be controlled by preventive detention and did not establish specific guidelines for determining the appropriateness of pretrial detention.\textsuperscript{113} Therefore, courts are forced to interpret the boundaries of the 1984 Act.

\begin{itemize}
  \item \textsuperscript{102} Id. at 3193; 130 Cong. Rec. S934, S942 (daily ed. Feb. 3, 1984) (letter from Assistant Attorney General to Committee on Judiciary (detention is appropriate for only a small minority of federal defendants).
  \item \textsuperscript{103} See 18 U.S.C. § 3142(f) (Supp. II 1984) (offenses subject to a detention hearing and procedural requirements for the hearing).
  \item \textsuperscript{104} Id.
  \item \textsuperscript{106} S. Rep. No. 225, supra note 10, at 3195.
  \item \textsuperscript{107} See 18 U.S.C. § 3142(g) (Supp. II 1984) (factors to be considered in the detention decision); see also supra notes 76-94 and accompanying text (problems of predicting future dangerousness).
  \item \textsuperscript{108} S. Rep. No. 225, supra note 10, at 3193.
  \item \textsuperscript{109} See United States v. Provenzano, 605 F.2d 85, 95 (3d Cir. 1979). The Provenzano court held that corrupting a union constituted a crime of violence within the meaning of the 1984 Act. Id.
  \item \textsuperscript{111} See S. Rep. No. 225, supra note 10, at 3195-96.
\end{itemize}
Drug offenses which involve trafficking in large amounts of controlled substances give rise to a presumption of dangerousness under the 1984 Act. Congress defined these offenses as “serious and dangerous” federal crimes because drug traffickers are frequently persons with criminal records who are therefore likely to engage in continued serious drug-related or violent crimes. Congress reasoned that a defendant charged with a serious drug trafficking crime is often a drug “kingpin” who is in the business of importing or distributing dangerous drugs and is likely to commit similar drug offenses while released on bail.

Congress further observed that the risk of flight to avoid prosecution is particularly high when the defendant is charged with a major drug offense. The lucrative nature of the drug trade enables the trafficker to post millions of dollars in bail with no incentive to appear at trial since the bail is considered an incidental cost of doing business. Additionally, since most major drug traffickers have substantial ties outside the United States, flight to avoid prosecution is relatively easy.

Notwithstanding the preventive detention procedures of the 1984 Act, pretrial release is still favored by the Act. Release is required if conditions can be imposed that are adequate to ensure appearance of the defendant at trial and to protect the community.

Clearly, Congress intended preventive detention to serve as an exceptional remedy to be employed only in a limited number of cases, and only if no method of pretrial release would adequately serve societal interests.

**Application of the Bail Reform Act of 1984**

114. 18 U.S.C. § 3142(f)(1)(C) (Supp. II 1984) (drug offenses subject to a detention hearing under the 1984 Act); id. § 3142(e) (rebuttable presumption of dangerousness).
116. Id.
117. Id.
118. Id.
119. Id.
120. 18 U.S.C. § 3142(b) (Supp. II 1984). See also Lay & De La Hunt, supra note 50, at 952 (Despite the presumptions against release in certain cases, pretrial detention is still the alternative of last resort).
A. Constitutionality of the Act

1. United States v. Salerno

The federal courts have interpreted various provisions of the 1984 Bail Reform Act inconsistently. Initially, controversy among the courts focused on the constitutionality of using a prediction of the future dangerousness of a defendant in a bail decision. In United States v. Salerno, the United States Supreme Court upheld the facial constitutionality of the 1984 Act. In Salerno two leaders of the New York City Genovese crime family were detained before trial. The defendants were charged with various Racketeer Influenced and Corrupt Organizations Act (RICO) violations, including racketeering, fraud, extortion, gambling, and conspiracy to commit murder. The lower court ordered pretrial detention on the grounds that no conditions of release would reasonably ensure community safety. In the appeal of the detention order, the defendants claimed that the 1984 Bail Reform Act violated due process because the Act authorized punishment before trial. In the alternative, the defendants argued that the Act violated prohibitions against excessive bail. This claim was based on the assertion that the right to bail rested solely on considerations of flight. The Supreme Court rejected both arguments and held that the governmental interest in community safety outweighs the liberty interest of the individual.

123. Compare United States v. Melendez-Carrion, 790 F.2d 984, 1004 (2d Cir. 1986) and United States v. Salerno, 794 F.2d 64, 72-73 (2d Cir. 1986), rev'd, 107 S.Ct. 2095 (1987) (pretrial detention based on a prediction of dangerousness violates substantive due process and is unconstitutional) with United States v. Portes, 786 F.2d 758, 766-68 (7th Cir. 1986) (the use of a dangerousness determination in bail decisions is constitutional).
125. Id. at 2098.
126. Id. at 2099.
127. Id.
128. Id.
129. Id. at 2101. See Editorial Note, supra note 60, at 166-87 (preventive detention is unconstitutional because it constitutes punishment without an adjudication of guilt).
130. Salerno, 107 S. Ct. 2095, 2104 (1987). See Editorial Note, supra note 60, at 195-98 (the excessive bail clause prohibits unreasonable denials of bail); Meyer, supra note 5, at 1179-80 (the excessive bail clause does not guarantee a right to bail).
131. Salerno, 107 S. Ct. at 2104.
132. Id. at 2102.
Since pretrial detention is not intended to punish a dangerous defendant before trial, the Court held that the due process rights of the defendants were not violated. Furthermore, since the 1984 Act serves a legitimate and compelling interest in protecting society, the eighth amendment does not require release on bail. Additionally, the Act focuses narrowly on serious offenders and provides procedural safeguards to protect the defendant. Therefore, the Court held that a determination of dangerousness is a valid consideration to be utilized by the courts in bail decisions.

2. Procedural Considerations

Although the *Salerno* Court upheld the facial constitutionality of the 1984 Bail Reform Act, the Court noted that the possibility of unconstitutional application of the Act still exists. The Court emphasized the importance of providing adequate procedural safeguards before pretrial detention is authorized. Congress also recognized that the preventive detention provisions of the 1984 Act require adequate procedural safeguards to meet constitutional standards.

The 1984 Act grants defendants the right to counsel at a detention hearing and the right to testify and present evidence. In addition, the judge is required to consider certain factors when making a detention decision, including the circumstances surrounding the charged offense and the individual characteristics of the defendant. Congress also observed that the 1984 Act might be unconstitutional if applied to cases in which pretrial detention is not necessary to protect society from a potentially dangerous defendant.

133. *Id.* at 2101.
134. *Id.* at 2105.
135. *Id.* at 2103-04.
136. *Id.* at 2105.
137. *Id.* at 2100.
138. *Id.* at 2103-04 (the procedural safeguards are sufficient to withstand a facial attack but might be insufficient in particular circumstances).
140. 18 U.S.C. § 3142(f) (Supp. II 1984). The government's case must be proven by clear and convincing evidence. *Id.* A judge must provide a written statement of reasons for a decision to detain. *Id.* § 3142(f).
141. *Id.* § 3142(g). Characteristics of the defendant that the court must consider include: character, physical and mental condition, family ties, employment, financial resources, community ties, past conduct, drug or alcohol abuse, and criminal record. *Id.* § 3142(g)(3).
The procedural requirements of the Act relating to the length of pretrial detention may be unconstitutional since courts have held that due process limits the permissible length of pretrial detention.\textsuperscript{143} Congress utilized the provisions of the Speedy Trial Act of 1974\textsuperscript{144} in the procedures of the Bail Reform Act.\textsuperscript{145} The Speedy Trial Act requires that a trial be held within ninety days of arrest.\textsuperscript{146} Critics of the ninety day limit have noted that extensions are easily obtained, and in a complex case pretrial detention can last longer than a year.\textsuperscript{147} In such cases, federal courts have held that due process requires the release of the defendant from pretrial detention.\textsuperscript{148} Therefore, although the 1984 Act is facially valid, pretrial detention may be unconstitutional on procedural due process grounds if the detention procedures inadequately protect the liberty rights of the defendant, or if detention is not required to protect community safety.

B. Crimes of Violence

As set forth in the 1984 Bail Reform Act, a "crime of violence" includes an offense against the person or property of another by physical force, or any felony that involves a substantial risk of physical force.\textsuperscript{149} The legislative history of the Act clearly reveals that Congress intended to include offenses other than those resulting in physical harm to persons or property in determining the dangerousness of a defendant.\textsuperscript{150} As discussed previously, the 1984 Act...

\textsuperscript{143} See United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986) ("at some point due process may require a release from pretrial detention"); United States v. Vastola, 652 F. Supp. 1446, 1449 (D.N.J. 1987) (defendant conditionally released after three months of pretrial detention because the trial date was over a year away); United States v. Frisone, 795 F.2d 1, 2 (2d Cir. 1986) (twelve month detention violated the defendant's due process rights).


\textsuperscript{145} See 130 Cong. Rec. S934, S939 (daily ed. Feb. 3, 1984) (statement of Sen. Mitchell) (argument for a 60 day limit), Although the 1984 Act contains no time limitation for pretrial detention, the provisions of the Speedy Trial Act limit detention to 90 days. Id.


\textsuperscript{147} Alschuler, Preventive Pretrial Detention and the Failure of Interest Balancing Approaches to Due Process, 85 Mich. L. Rev. 510, 516 (1986).

\textsuperscript{148} United States v. Vastola, 652 F. Supp. 1446, 1449 (D.N.J. 1987) (defendant conditionally released after three months of pretrial detention because the trial date was over a year away); United States v. Frisone, 795 F.2d 1, 2 (2d Cir. 1986) (twelve month detention violated the defendant's due process rights).


\textsuperscript{150} See supra notes 100-13 and accompanying text (discussion of congressional intent regarding the scope of dangerousness considerations in detention decisions).
failed to expressly delineate the scope of dangerous crimes.\textsuperscript{151} Commentators suggest that since a "crime of violence" includes the use of force against persons or property, a broad interpretation of the 1984 Act could conceivably include offenses such as tipping over garbage cans and shoplifting.\textsuperscript{152} Consequently, critics of the 1984 Act argue that the definition of a "crime of violence" authorizes detention of defendants charged with minor offenses.\textsuperscript{153}

In \textit{United States v. Yeaple}\textsuperscript{154} the United States District Court held that possession of child pornography is a crime of violence.\textsuperscript{155} The defendant in \textit{Yeaple} was charged with receipt of material depicting minors engaging in sexually explicit conduct.\textsuperscript{156} Pursuant to the 1984 Act and after a detention hearing, the defendant was found to be potentially dangerous to society and ordered detained pending trial.\textsuperscript{157} According to the court, a person creates a demand for pornography by purchasing such material, and this demand indirectly causes minors to be drawn into the pornography trade.\textsuperscript{158} Therefore, the possessor of the pornographic material is indirectly responsible for the psychological and physical violence inflicted on minors by the illegal pornography business.\textsuperscript{159}

Subsequently, \textit{United States v. Cocco}\textsuperscript{160} was decided by the same district court. The defendant in \textit{Cocco} was charged with receipt of child pornography.\textsuperscript{161} The defendant had no prior criminal record, was a good father and husband, a respected businessman and a substantial property owner.\textsuperscript{162} The court nevertheless ordered the defendant to be detained prior to trial.\textsuperscript{163} Detention was authorized by the court on the basis of potential danger to the community because the court believed that pedophiles often continue their aberrant conduct even after being indicted for the crime.\textsuperscript{164}

\begin{thebibliography}{99}
\bibitem{151} Id.
\bibitem{152} Alschuler, \textit{supra} note 147, at 512 \& n.7.
\bibitem{153} Id.
\bibitem{155} Id. at 87.
\bibitem{156} Id.
\bibitem{157} Id. at 86.
\bibitem{158} Id. at 87.
\bibitem{159} Id.
\bibitem{161} Id. at 1061.
\bibitem{162} Id. at 1063.
\bibitem{163} Id.
\bibitem{164} Id.
\end{thebibliography}
In United States v. Chimurenga the Court of Appeals for the Second Circuit upheld the detention order of a defendant charged with conspiracy to commit armed robbery. The court reasoned that conspiracy constitutes a crime of violence because armed robbery, the underlying crime committed by the conspirators, is a crime of violence. The definition of crime of violence provided in the 1984 Act, however, does not specify that a judge may consider the object crime of the conspiracy when determining whether a crime is violent and a literal reading of the definition precludes such a consideration.

In United States v. Jones a federal district court held that a felon in possession of a firearm is subject to pretrial detention under the 1984 Act. The court found that possession of a firearm is a crime of violence. Rather than considering the individual characteristics of the defendant, the court justified the detention order by relying on the presumption that felons, as a class, are likely to use firearms irresponsibly. The Jones court held that possession of a firearm evidences disregard for the law since the defendant knows such possession is prohibited. Thus, the court found the defendant to be a substantial risk to society and detained him pending trial. A logical extension of the Jones decision is that all ex-felons possessing firearms should be detained prior to trial for subsequent offenses. Such a class is clearly not the target of the preventive detention provisions of the 1984 Act.

Preventive detention has also been invoked in cases involving credit card fraud and money laundering on the grounds of economic danger to the community. As with the previously discussed of-
fenses, these cases do not comport with the congressional intent that only the most violent and dangerous defendants should be detained before trial. The purpose of the 1984 Act is to protect the community from career criminals and major drug traffickers. A defendant without a criminal record, charged with either possession of pornographic material, credit card fraud, or conspiracy, is clearly not the intended target of pretrial detention. Therefore, some federal courts are applying the 1984 Act beyond the scope of congressional intent and detaining defendants unlawfully.

C. Controlled Substance Violations

Although Congress intended to target major drug traffickers as candidates for preventive detention, critics argue that this focus has resulted in the detention of every defendant charged with illegal narcotics dealings. First time offenders and defendants charged with relatively minor drug offenses have been detained under the 1984 Act. The Act provides that when a judge finds probable cause to believe that a defendant committed one of the controlled substance offenses specified in the Act, a rebuttable presumption arises that no conditions of release will be sufficient to protect society. The federal district courts disagree on the strength of the rebuttable presumption and the evidence required to rebut the presumption. As a result, preventive detention is being inconsistently applied in the federal courts.

For example, in United States v. Diaz the Court of Appeals for the Seventh Circuit upheld the rebuttable presumption of dan-

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1984) (presence of loaded guns in defendant's home was insufficient to establish risk to the community).
176. See supra notes 95-122 and accompanying text (discussion of congressional intent behind the 1984 Bail Reform Act).
177. Id.
178. Id.
180. See Nat'l L.J., Mar. 24, 1986, at 33, col. 2 (statement of Judy C. Clarke, Chief Federal Public Defender in San Diego). Border arrests involving "first-time offenders bringing 90 or 100 pounds of marijuana over the border ... for someone else" often result in pretrial detention. Id. Since the detention decision is made at a preliminary proceeding in the district court, most detention orders are unpublished. Therefore, citations to specific cases are unavailable.
182. See Berg, supra note 180, at 725.
183. Id.
184. 777 F.2d 1236 (7th Cir. 1985).
gerousness even though the defendant proved substantial ties to the community and had no prior criminal record. In *United States v. Dominguez*, however, the same court conditionally released a similarly situated defendant who had community ties and no criminal record. Even if the presumption of dangerousness was not rebutted, the *Dominguez* court held that the defendant could not be detained unless the judge explicitly found that no conditions of release would ensure community safety. Furthermore, the *Dominguez* court concluded that a finding of dangerousness could not rest solely on the presumption of dangerousness, unless clear and convincing evidence demonstrated that the defendant truly was dangerous. The *Diaz* and *Dominguez* decisions demonstrate the inconsistency of the courts in applying the provisions of the 1984 Act.

### The Need for Legislative Reform of the 1984 Bail Reform Act

Congress attempted to make the Bail Reform Act of 1984 clear and unambiguous with regard to the requirements for preventive detention. Nevertheless, courts have inconsistently applied the Act. Some federal courts interpret the Act narrowly and impose preventive detention less frequently, while other federal courts interpret the Act broadly and detain a wide range of defendants. The 1984 Act is used to detain defendants not targeted by the Act. The Act should therefore be amended to ensure that all defendants will be treated consistently throughout the federal courts, and that the rights of each defendant will be protected.

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185. *Id.* at 1238. *Cf.* *United States v. Olavarria*, Crim. No. 86-00262-02 (E.D. Pa. July 16, 1986) (WESTLAW: 1986 WL 8123). The defendant, charged with a controlled substance violation, was detained before trial even though the government offered no evidence that he was a threat to the community. *Id.* Detention was based solely on the rebuttable presumption of dangerousness. *Id.*

186. 783 F.2d 702 (7th Cir. 1986).

187. *Id.* at 707.

188. *Id.* (past danger is not conclusive except to the extent that it suggests the likelihood of future danger).

189. *Id.*


191. *See supra* notes 149-89 and accompanying text (judicial application of the 1984 Bail Reform Act).

192. *Id.*

Congress should specify which crimes are to be included in the category of crimes of violence.\textsuperscript{194} Delineation of the crimes of violence covered by the Act would ensure that defendants are treated consistently. Consistent application of the Act also requires the amendment of the controlled substance provisions of the Act. Congress should increase procedural safeguards to protect defendants who are not categorized as major drug traffickers.\textsuperscript{195}

Both the United States Supreme Court and Congress recognize that the Bail Reform Act of 1984 might be applied unconstitutionally if procedural safeguards are not adequate to protect the rights of the defendant.\textsuperscript{196} As previously discussed, due process requires limits on the length of permissible pretrial detention.\textsuperscript{197} Therefore, Congress should amend the Bail Reform Act of 1984 and set a limit on the length of pretrial detention.\textsuperscript{198} In addition, a provision of the Act requiring accelerated trials should be enacted.\textsuperscript{199} Statistics indicate that most crimes committed by bailees are committed more than three months after the initial arrest.\textsuperscript{200} Therefore, an accelerated trial requirement would protect both the due process rights of the accused and the interests of society to be protected from pretrial crime.\textsuperscript{201}

CONCLUSION

The problem of crimes being committed by defendants released on bail led to the enactment of the Bail Reform Act of 1984. The Act allows judges to consider the harm that might result from pretrial release of a defendant.\textsuperscript{202} Additionally, the Act provides a system whereby a defendant, in limited circumstances, may be detained prior to trial.\textsuperscript{203}

\begin{thebibliography}{9}
\bibitem{194} See supra notes 149-78 and accompanying text (discussion of crimes of violence).
\bibitem{197} See, e.g., United States v. Accetturo, 783 F.2d 383, 388 (3d Cir. 1986) ("at some point due process may require a release from pretrial detention").
\bibitem{198} See Alschuler, supra note 147, at 516.
\bibitem{199} See Note, supra note 86, at 359 (expedited trials as an alternative for reducing bail crime); Schlesinger, Bail Reform: Protecting the Community and the Accused, 9 Harv. J.L. & Pol'y 173, 199 (1986) (speedy trials should be required).
\bibitem{200} Ervin, supra note 82, at 295.
\bibitem{201} See Note, supra note 86, at 359-62.
\bibitem{202} 18 U.S.C. § 3142(b) (Supp. II 1984).
\bibitem{203} Id. § 3142(e).
\end{thebibliography}
The constitutional rights of criminal defendants should not be overlooked in an attempt to detain "dangerous" defendants. The 1984 Act contains procedural guarantees designed to safeguard the personal rights of the defendant. The application of these procedures, however, has not been uniform. A goal of the Bail Reform Act of 1984 is to make the application of the bail laws consistent and fair for all defendants. Since the detention procedures of the Act are being inconsistently applied, the goals of fairness are not being achieved.

The current judicial system detains defendants unnecessarily. Legislative reform is therefore required to clarify congressional intent. Societal goals of controlling crime committed by defendants while released on bail can be achieved by limiting application of the Act to serious criminal offenders. Such a limitation would also protect the fundamental rights of the accused.

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204. Id. § 3142(f)-(g).