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Pretrial Release and Detention and Pretrial Services

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This Issue in Brief

In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.

—United States v. Salerno, 107 S.Ct. 2095 (1987)

While it is impossible to predict future offender population levels with absolute precision, current Federal law enforcement policies and legislative initiatives lead everyone to agree that the number of new Federal offenders will continue to increase at a substantial rate. It is clear that the detention crisis will only become more severe if no action is taken to relieve the current situation. . . . If adequate bedspace to detain thousands of potentially dangerous prisoners is not acquired, public safety and the Federal Criminal Justice System itself could be threatened.

—Federal Detention Plan 1993-97 (United States Department of Justice, December 1992)

This is a special edition of *Federal Probation* devoted to the topics of pretrial detention and release and pretrial services. The two quotations above make an eloquent case for the timeliness and relevance of such an edition. The notion of depriving individuals of their liberty before they are proven guilty is one that deserves constant consideration and discussion by members of a free society. We hope this issue will provoke both.

The issue opens with a "call to arms" to persons actively involved in the criminal justice process—be they judges, probation or pretrial services officers, defense counsel, prosecutors, or prison officials—to use their knowledge and experience to foster effective approaches to the Nation's crime problem. Decrying what he calls a "Draconian" approach to alleviating crime, the Honorable Vincent L. Broderick, U.S. district judge, Southern District of New York, points out the folly in downplaying community corrections, fostering more prison construction, mandating longer prison terms, and enhancing the role of the criminal prosecutor while denigrating the role of the judiciary. In his article, **"Pretrial Detention in the Criminal Justice Process,"** he focuses on accelerating detention rates as a prime example of "one troublesome manifestation of the Draconian approach."

What can bail bondsmen do for defendants that the courts cannot? Absolutely nothing, contends the Honorable James G. Carr, U.S. magistrate judge, Northern District of Ohio, in his article, **"Bail Bondsmen and the Federal Courts."** Writing on the theme "corporate surety bonds fulfill no function and provide no service that cannot otherwise be accomplished within the framework of the Bail Reform Act, Judge Carr explains why releasing defendants on nonfinancial conditions imposed by the court is far preferable to involving bail bondsmen in the release process. He gives possible explanations for the perpetuation of bail bondsmen in some districts and urges pretrial services officers who continue to recommend surety bonds and judges who adopt such recom-

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The Federal Detention Crisis: Causes and Effects

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Introduction to the Crisis

In THE year prior to the passage of the Bail Reform Act of 1984,[1] the United States Marshals Service (USMS), the agency primarily responsible for detention of pretrial and unsentenced defendants in the Federal criminal justice system, had an average daily detainee population of approximately 5,000.[2] The agency budget for detention operations for that time period was $38.9 million.[3] During the same time period, United States pretrial services and probation offices were reporting that 2 percent of the 8,600 defendants they processed had been rearrested while released and 1 percent had failed to appear in court.[4]

It was against this backdrop that Congress passed the Bail Reform Act of 1984. The legislative history of the Act clearly states an intent to address such problems as the need to consider community safety when setting release conditions, the need to permit pretrial detention of defendants to assure their appearance in court or the safety of the community, and the need to permit the temporary detention of persons who are arrested while on some form of conditional release (S. Rep. No. 98225, 98th Cong., 2nd Sess. 3(1983) ["Senate Report"], reprinted in 1984 U.S. Code Cong. and Admin. News 3182, 3192). The report goes on to state that:

> Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released. The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act (of 1966), which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.

The Senate Report also expanded on the need to provide courts with the power to detain defendants when, in its criticism of the Bail Reform Act of 1966, it claimed that the existing statute failed to authorize judges to:

> . . . deny release to those defendants who pose an especially grave risk to the safety of the community. If a court believes that a defendant poses such a danger, it faces a dilemma—either it can release the defendant prior to trial, despite these fears, or it can find a reason such as risk of flight, to detain the defendant (usually by imposing high money bond). In the Committee's view, it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants. (Senate Report at 5)

While it seems obvious that Congress was clear regarding its legislative goal, the evidence seems to indicate the consequences of enactment were not well understood. That body was probably assisted in dropping the crystal ball by the United States Department of Justice, which in stating its views on bail reform told Congress:

> In our support of this legislation we have never asserted that pretrial detention would be appropriate for more than a small minority of federal defendants, and anticipate that enactment of this legislation would result in only a minor enlargement of the present number of persons subject to detention.[5]

With that assurance, the Bail Reform Act of 1984 became law, with provisions to deal with:

> . . . a *small but identifiable group* of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to *this limited group* of offenders that the courts must be given the power to deny release pending trial. (Emphasis added)(Senate Report at 6-7)

Five years after the Bail Reform Act became law, the Judicial Conference of the United States Committee on Criminal Law and Probation Administration recommended that the Conference adopt the following resolution and transmit it to the Congress:

> Upon reviewing the current and projected number of persons in custody awaiting trial in the federal court and the problems the Bureau of Prisons and U.S. Marshals Service have in housing these prisoners reasonably near the place of trial, *the Judicial Conference believes that there is a national pretrial detention crisis which is severely straining efficiency and effectiveness of the federal court system.* For example, prisoners detained in the Eastern District of Pennsylvania (Philadelphia) are housed in Petersburg, Virginia, and prisoners detained throughout most of New England are housed in Otisville, New York. Hearings and trials are delayed or scheduled to fit the availability of defendants rather than the orderly process of the court. Prisoners remanded to the custody of the U.S. Marshals by the court have a constitutional right to have legal representation, but are housed in areas remote from the courts. In addition, prosecutors, pretrial services and probation officers, investigators, and other parties in the criminal justice system require access to prisoners. The Conference implores the Congress of the United States to provide adequate funding to the Bureau of Prisons, U.S. Marshals Service and U.S. pretrial services officers to provide for adequate custody and supervision of pretrial detainees. In addition, it encourages the support of the development of alternatives to incarceration for some offenders, such as community supervision, house arrest, electronic monitoring, etc., which can help to reduce the increase in the pretrial detention population and allow space for those whom the courts have no choice but to confine. The development

> of community based correctional centers offers additional methods for providing alternatives to the current pretrial detention crisis. In addition, broader experimentation with remedies such as video access to prisoners at remote facilities by attorneys and other court officers is desirable. *The Judicial Conference encourages the support of the federal agencies responsible for the custody of pretrial detainees in the development of resources, the development of alternatives to relieve the crisis, and providing the funding necessary to accomplish the task.*[6] (Emphasis added)

The Judicial Conference adopted the resolution on what it termed the "Pretrial Detention Crisis" at its meeting in March 1990.[7] The remainder of this article will focus on the several changes in law and policy that brought about this crisis in detention and the impact of the crisis on the Federal criminal justice system.

Behind the Statistics—The Strange Journey of Defendant X

The situation which had prompted the Judicial Conference resolution still had not abated the following year. In fact, circumstances were such in the Eastern and Southern Districts of New York that Leonard F. Joy, chief of operations for the Federal Defender Services Unit of the Legal Aid Society, wrote that, "In the past several weeks, the situation which was abysmal at best, has deteriorated even further."[8]

Mr. Joy related the travels of one defendant who was described as a "garden variety, typical legal aid client." Following his arrest in New York in August 1991, the individual was initially held at the Metropolitan Community Correctional Center in Manhattan (MCC-NY) and moved to the Federal Correctional Institution at Otisville. Because of overcrowded conditions in both locations the defendant was then transported to the county jail in Webb County, Texas, for 5 weeks from whence he was conveyed to the Federal Correctional Institution at El Reno, Oklahoma, where he visited for a fortnight. On November 11, 1991, he was returned to MCC-NY for his second court appearance.[9]

Mr. Joy likened the status of this defendant to that of many other Legal Aid clients in detention when he stated that:

> Many of our clients are being bounced around like ping pong balls between institutions. They are awakened in the middle of the night in preparation for a trip to court and when they arrive they are exhausted and have difficulty concentrating. More than one District Judge has commented on the sorry, exhausted condition some of the incarcerated defendants are in. The clients who have not yet had detention hearings often are kept for days with little or no hygiene and inadequate sleep and food.[10]

Mr. Joy concluded, "The simple fact is that the system has broken down. Defense counsel are unable to operate under the present system and still provide constitutional representation for their clients. Remedial action can and should be taken as soon as possible.

What Happened?—The Boom in Detention

As previously stated, in fiscal year 1984, the average daily Federal detainee population was slightly over 5,000.[11] In fiscal year 1989 (the year that the Judicial Conference sent the aforementioned resolution on the "Pretrial Detention Crisis" to Congress) that number rose to 11,740 per day and the budget for prisoner detention costs increased from $38.9 million in FY 84 to $110.6 million.

While these increases were occurring, their impact went far beyond the obvious. USMS claims as an important part of its mission the production of detained defendants for Federal criminal proceedings. To perform this duty the agency must provide for the custody, care, and transportation of detainees. Because of a number of factors which will be discussed subsequently, USMS was unable to keep up with the detention boom between 1984 and 1989 in a manner which allowed it to acquire jail space within a reasonable commuting distance of the Federal courts. The United States Department of Justice defines reasonable commuting distance as "a 30 minute drive time, one way, from a local county jail to the Federal court city."[12]

During the period 1984-89, Federal district courts were located in approximately 250 cities, each requiring detention space. In those locations with small detainee populations, USMS traditionally contracted for jail space with county or local institutions, and cities with large numbers of detainees were serviced by Federal Bureau of Prisons (BOP) detention centers. Although the stated primary mission of BOP is "to carry out the judgments of the Federal Courts for Federal offenders sentenced to imprisonment,"[13] the growth in detention from 1984 to 1989 made it necessary for USMS to rely heavily on BOP to house its prisoners; in 1989, 4,193 of the average daily USMS population of 11,740 prisoners were held in BOP facilities.[14]

Dealing with the rapid expansion of pretrial confinement was not merely a matter of acquiring the necessary funding. Jail space was simply not available in many of the districts, especially in the more populous areas, and as a result USMS found itself having to house prisoners in localities distant from the courts in which they were being tried.

Following the aforementioned Judicial Conference resolution on the detention crisis, the Conference's Committee on Criminal Law and Probation Administration requested that the Probation Division of the Administrative Office of the United States Courts prepare a report which would identify in detail the problems resulting from the crisis.[15] In attempting to ascertain the impact of pretrial detention on the courts and their related agencies, the Probation Division

conducted a survey of the chief probation and pretrial services officers in the Federal districts. Each chief was questioned regarding the influence of the detention situation on court operations. They were also asked to solicit the views of other individuals, including members of USMS, judicial officers, and defense attorneys, on the issue.

Eighty-eight of the 93 Federal districts responded, and 76 percent of the respondents stated that pretrial incarceration was responsible for a number of operational problems in their jurisdictions; 42 (47 percent) believed that the problems seriously hampered the management of the courts.[16]

Problem Areas Identified by the Survey

United States Marshals Service. The marshals reported widespread difficulties such as increased overtime costs related to the need to transport defendants great distances from court to jails, additional time in court during detention hearings, and the necessity of making defendants available for additional interviews with pretrial services officers and defense lawyers to prepare for detention hearings.[17]

Pretrial Services Officers. These individuals pointed out that their ability to perform their statutorily mandated functions was hindered by their inaccessibility to defendants who were incarcerated substantial distances from the courts. The extra time necessary for U.S. marshals to transport those defendants limited their availability for pretrial interviews in the courthouse.[18]

Defense Attorneys. Members of the defense bar observed that the usual problems of preparing criminal cases for detainees were exacerbated in those jurisdictions where their clients were held in custody at a distance from the court. They further stated that the delays in their preparation time often impacted negatively on the ability of the courts to arrange their calendars.[19] An example of this situation occurred in the District of Massachusetts, where from November 1989 through November 1990, overcrowded local jails made it necessary to house defendants in BOP facilities in Otisville, New York, and Danbury, Connecticut. Transportation problems caused the marshals to detain individuals in the courthouse holding cells overnight on several occasions. The transportation problem became so severe that the court was limited to holding trials from 10 a.m. to 4 p.m., Tuesday through Friday.[20]

Probation Officers. According to the probation officers who responded, they were often hampered in preparation of presentence reports because of the limited access to defendants who were incarcerated in areas distant from the court.[21]

The conclusions of the report echoed what the Committee had stated to the Judicial Conference 6 months earlier: "The federal pretrial detention overcrowding problem is being experienced in every federal court district."[22]

How Did It Happen?—The Long List of Contributors

An analysis of the Federal detention crisis can serve as an excellent case study of the interdependence of the various entities of the Federal criminal justice system and the fact that none of them operates in a vacuum. In addition, because of the historical reliance by USMS on state and local facilities to provide space for detainees, at least one contributing factor may be seen to have cut across all jurisdictional lines. Simply put, the Federal detention crisis was the product of a number of legislative and policy changes which combined to put defendants in jail at a faster rate than the system could sensibly accommodate them.

The Bail Reform Act of 1984

As previously discussed, the legislation reflected the desire of Congress to grant authority to Federal judges to set conditions of pretrial release which would deal directly with the potential danger of defendants to the community and to empower judges to deny release to individuals for whom no conditions of release could reasonably assure community safety or appearance in court (Senate Report at 3). The legislative history makes it clear that Congress wanted to provide judges with the means to abandon the long-standing practice of achieving *sub rosa* detention by the use of high money bonds (Senate Report at 10).

As to what kinds of information would be sufficient to deny release, Congress stated its preference that resolution of that issue should be left to the courts "acting on a case by case basis" (Senate Report at 19). Having said that, Congress went on to create two rebuttable presumptions in the Act to cover the "circumstances under which a strong probability arises that no form of conditional release will be adequate" (Senate Report at 19). One presumption, which is seldom relied upon, relates to those cases where defendants who are currently charged with dangerous crimes have previously been convicted of offenses while free on bail.[23]

The second presumption, which may be seen as the key to the detention crisis, is known as the "drug and firearm presumption." The firearm element results when there is probable cause to believe a defendant used a gun in a crime of violence or in a drug trafficking offense as defined in 18 U.S.C. § 924(c).[24] Because of the low incidence of such charges in the Federal courts, this section of the presumption is not thought to be a major factor in the detention problem.

The "drug presumption" is another matter. Once there is a finding of probable cause that a defendant

has committed a drug crime under titles 21 or 46 of the U.S. Code which carry a 10-year or greater prison sentence, it is presumed that there are no conditions of release that will reasonably assure the appearance of the defendant or the safety of the community.[25] Courts have consistently held that the presumption places a burden on the defendant to show evidence that the presumption does not apply in his case.[26] Rebuttal of the presumption need not be accomplished by demonstrating a defendant's innocence but rather by production of evidence that indicates he would not continue to commit drug crimes or fail to appear if released: marital status, family relationships, employment background, lack of criminal record.[27] If a defendant fails to produce rebuttal evidence, a number of courts have held that the presumption by itself supports a finding for detention based upon risk of flight or danger to the community.[28] Even if the defendant successfully rebuts the presumption, it still remains as a factor to be weighed in the detention decision.[29]

It is understandable why Congress thought it desirable to allow Federal judicial officers to deal with the need for pretrial detention directly rather than reliance on *sub rosa* detention practices. Evidence that judges needed statutory help in determining who should be detained was to the contrary at the time Congress was considering the passage of the Bail Reform Act. Data collected in 10 pilot pretrial services projects in the years 1975-78 revealed that 3.5 percent of 11,949 defendants were charged with felonies while on pretrial release and 4.8 percent failed to appear in court.[30] In the introduction to this article it was noted that the rearrest rate was 2 percent and the failure to appear rate was 1 percent for the 8,600 released defendants processed by Federal pretrial services units in 1984.[31]

The data indicate that even with their hands tied behind their backs by the Bail Reform Act of 1966, Federal judges and magistrates had done a credible job of keeping bail violators off the streets. Congress did not take notice of the information that was available from the Federal courts and instead fashioned legislation based on data gathered from state and local jurisdictions. Indeed, the studies Congress relied upon cited pretrial rearrest rates of between 13 percent and 16 percent, several times higher than the rates in the Federal courts (Senate Report at 6).

The War on Drugs

Despite the "drug presumption" and the fact that most drug violation penalties after 1984 carried the requisite 10-year maximum to trigger the presumption, the actual number of defendants charged with drug offenses was small enough that Congress could feel confident that the presumption would deal with only "a small but identifiable group of potentially dangerous defendants"(Senate Report at 6). In 1984 the criminal charges were filed against 49,765 defendants in the Federal district courts; of that number 11,854 or 24 percent were charged with drug offenses. By 1986 drug charges were brought against 15,762 or 28 percent of the 55,886 defendants in Federal district courts. Finally, in 1989, 36 percent of the 60,303 Federal defendants were charged with drug offenses.

The increase in the number and percentage of defendants charged with drug crimes can be directly attributed to two pieces of legislation: the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988.[32] These laws established new Federal drug enforcement initiatives in the areas of customs enforcement and transportation safety. Penalties for most drug offenses were increased and mandatory minimum penalties were added. New money laundering provisions criminalized dealings with the proceeds of drug-related activities. Most significantly, greatly enhanced resources were provided to the Department of Justice for drug prosecutions.[33]

As the "War on Drugs" was waged, the greater length of sentences and sudden increase in investigations and prosecutional resources made the Federal court system a more attractive battlefield for "get tough" strategists and tacticians alike. One effect of these policy changes was to increase greatly the number of individuals who were subject to the presumption for detention. As figure 1 suggests, as the "War on Drugs" escalated so did the number of defendants who were ordered detained by the Federal courts.[34]

Not only were the types of charges changing in the Federal courts during the time period, but so were the types of defendants. The year that the Judicial Conference drafted the detention crisis resolution, defendants were: more likely to have been previously convicted of a drug or violence charge; more likely to be under 25 years of age; less likely to be United States citizens; less likely to have a high school diploma; less likely to be employed; more likely to have lived less than 1 month in the district of arrest; and less likely to be contributing to household expenses than in 1986-87.[35]

In short, from 1986-87 through June 1990, criminal defendants were more likely to come under the "drug presumption" but were less likely to possess the type of characteristics necessary to rebut the presumption.[36] This is reflected in the fact that during the same time period the rate of detention in those cases where a detention hearing was held increased from 70 percent to 74 percent,[37] while the

rates of failure to appear and rearrest never rose above 3 percent.[38]

Other Contributors

What follows is a list of other factors that served to fill up available detention facilities faster than new ones could be provided.

Temporary Detention to permit revocation of release, deportation, or exclusion (18 U.S.C. § 3142 (d)). This provision of the Bail Reform Act was created to permit immigration officials or courts of other jurisdictions to assert their authority over a defendant if he or she is, at the time of the current offense, on parole, probation, pretrial release, or is an illegal alien. If defendants fall into one of those categories, and pose a risk of flight or danger to the community, the court must detain them for up to 10 days in order to permit the other jurisdiction (Federal, state, or local) to act. Following the 10-day period, the court then orders release or detention.

Continuances of 3 or 5 Days (18 U.S.C. § 3142(f)). The continuances are allowed to permit counsel (3 days for the Government, 5 day for the defense) to prepare for detention hearings. Pending the hearing, the defendant is held in custody. Since not all hearings result in detention in some districts these continuances exacerbate overcrowding problems. For example, in the 12-month period ending June 30, 1990, the pretrial services office for the District of California Northern activated 593 cases. The Government made motions for detention in 429 of those cases, and 3142(f) continuances were granted in 137 cases; 57 percent of the motions for detention were granted in those cases following the continuances.[39]

Financial Conditions of Release. Although the legislative history of the Bail Reform Act acknowledged that "concern about the potential for such abuse does exist" regarding the continued use of financial conditions to achieve detention, the legislation retained those conditions (Senate Report at 15). As a result, in addition to those defendants held by explicit rulings for detention, a substantial number of defendants remained in custody because of their inability to meet financial conditions of release. For example in the 12-month period ending June 30, 1990, 3,880 of the 46,102 defendants (8.4 percent) processed by pretrial services units were unable to secure their release (following their initial appearance) for that reason.[40]

Mandatory Minimum Sentences and Federal Sentencing Guidelines. Legislation creating mandatory minimum sentences was a feature of the Anti-Drug Abuse Acts of 1986 and 1988. The purpose of such legislation was to ensure that individuals primarily convicted of drug and weapons charges would receive substantially long prison sentences. The Sentencing Reform Act of 1984 had as its goals the reduction of unwarranted disparity in sentencing, the increased certainty and uniformity of punishment and the correction of "past patterns of undue leniency for certain categories of serious offenses."[41] One study that attempted to analyze the impact of these changes on prison sentences was undertaken by the United States Sentencing Commission.[42] The study looked at four "interventions" that occurred between July 1984 and June 1990: the Anti-Drug Abuse Act of 1986; guideline implementation; the United States Supreme Court ruling that upheld the constitutionality of the guidelines (*Mistretta* v. *United States*, 488 U.S. 361 (1989)); and the Anti-Drug Abuse Act of 1988. One finding of the study was that "all interventions except the Anti-Drug Abuse Act of 1988 produced significant positive impacts on the number of cases sentenced to prison." From July 1984 through June 1990, the proportion of cases sentenced to prison rose from 54 percent to 65 percent.[43] In addition, the report states that mean sentence length increased from 24 to 46 months during the time of the study and that "[t]hese increases in the average term of imprisonment reflect statistically significant impacts of three major interventions—the Anti-Drug Abuse Act of 1986, the initial implementation of the guidelines, and the *Mistretta* decisions."[44] Obviously this growth in the number and length of Federal prison sentences further reduced the number of potential bed spaces for pretrial detainees.

Another area where sentencing legislation may have had an impact on the detention crisis was the increased length of time for case processing that occurred after the implementation of the guidelines. The United States General Accounting Office (GAO), in a 1992 report, stated that data showed a "link between guidelines implementation and increases in case processing time frames." GAO based its finding on the fact that the median number of months from case filing to disposition for Federal defendants increased from 3.2 months to 4.5 months between June 1986 and June 1990.[45] The report does not distinguish between detained and released defendants; however, if the increased time for case processing rose at a rate similar to the overall pattern, the result would have been a 30 percent increase in the length of pretrial detention during the period of the study. The system was being overburdened by an increasing number of defendants who were taking up limited space for longer periods of time.

Immigration and Naturalization Service Detention. The Immigration and Naturalization Service (INS) has authority to arrest and take into custody anyone who is believed to be in the United States illegally. A decision to detain is based upon the potential danger the alien presents to the community or the

likelihood that he or she will abscond. Like USMS, INS must rely in part on contractual agreements with state and local jurisdictions to provide jail space for individuals pending deportation or exclusion proceedings.[46] In the time period 1986 through 1990, the average length of detention for individuals in INS detention increased from 10.5 days to 22.9 days—another instance in which limited facilities were filled for longer periods of time, thus reducing jail space for criminal defendants.[47] INS attributes this increase to adverse political and economic conditions which caused more aliens to seek admission and political asylum during the years 1986 to 1990. Those conditions coupled with various court decisions were thought to result in lengthier periods of detention.[48]

Decreased Local Jail Space. The historical reliance of USMS on local jurisdictions for detention space was based upon the theory that the practice is more cost effective than the construction and operation of Federal institutions. Unfortunately, the practice left USMS vulnerable to competing budgetary priorities within local jurisdictions. This was reflected by the fact that in the period 1981-91 the number of jails under contract to USMS which were under court order for substandard conditions increased from 75 to 240. At the same time the number of jails which terminated or limited jail space for Federal prisoners grew from 146 to 640.[49]

The Post Resolution Jailhouse Blues

Following the Judicial Conference resolution in 1990, the crisis escalated. One change in the Bail Reform Act which further contributed to the problem became law in November of that year. Despite a tradition in the Federal courts that allowed most defendants who had been released while in pretrial status to remain at liberty while awaiting imposition or execution of sentence, Congress amended 18 U.S.C § 3143 with regard to defendants convicted of crimes of violence and drug offenses with maximum sentences of 10 years or more.[50] Following the amendments, such a defendant has to show by clear and convincing evidence that he or she is not likely to flee or pose a danger to the community and that there is a substantial likelihood that a motion for acquittal or new trial will be granted; or the prosecutor has recommended that no sentence of imprisonment be imposed. In the jargon of many district courts this is known as the "mandatory detention law," although Congress did provide in 18 U.S.C. § 3145(c) that a defendant falling under § 3143 could be released "if it is clearly shown that there are exceptional reasons why such a person's detention would not be appropriate."[51] Congress was silent on what the exceptional reasons might be.

It is worth noting that for the 12-month period ending June 1990, of the 25,466 released defendants processed by pretrial services, the violation rate (felony and misdemeanor arrests, failures to appear, and all technical violations) was 5 percent for those defendants awaiting imposition of sentence. Only 168 defendants committed any type of violation pending appeal or voluntary surrender.[52]

Once again, evidence of existing conditions in the Federal courts did not seem to support the need for the legislative change. Actually an understated argument can be made that, given the low violation rates and the problems created by overcrowding, the 1990 amendments were not responsive to the Judicial Conference resolution. Detention rates continued to climb at an astonishing rate while the attendant consequences multiplied. In 1991 the average daily detainee population grew to 16,168.[53]

As depicted in figure 2, detention took another leap upward in 1992 (21 percent) and as expected USMS and BOP had to resort to more extreme measures to provide custody of defendants.[54]

By 1992, USMS's reliance on BOP to provide detention facilities had continued to grow; 7,142 of the 19,617 defendants (36 percent) in USMS's average daily prisoner population were held by BOP.[55] While the crisis was taking place BOP was forced to abandon its policy of limiting its involvement with detainees except in the largest cities. Presently that agency operates six Federal detention centers and 14 detention units at other BOP facilities.[56] Currently under construction are three more Federal detention centers, and funding has been provided for an additional five detention centers and eight more detention units throughout the country.[57]

Despite the increase in BOP detention facilities, USMS continued to face new challenges to carry out the function of producing Federal detainees for judicial proceedings in 1992. Examples of some of those challenges were as follows.

- *District of Arizona* - Local facilities were so overcrowded that deputy U.S. marshals had to transport prisoners weekly to Torrence, New Mexico, 475 miles from Phoenix.
- *District of Eastern California* - Deputies had to transport prisoners up to 100 miles to jails in Alameda County on a regular basis. This resulted in deputies working many hours of overtime.
- *District of Northern Illinois* - Overcrowding in the MCC and the two local facilities has created the need to hold individuals in the United States Penitentiary at Terre Haute, Indiana, 175 miles from Chicago.

FIGURE 1. GROWTH OF PRETRIAL DETENTION

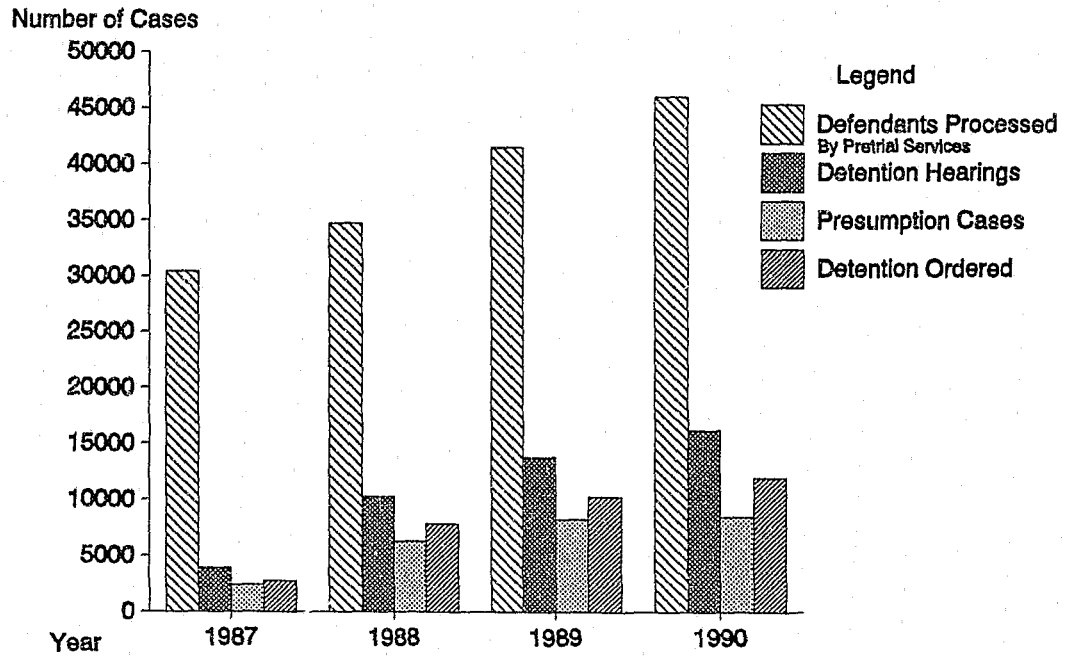
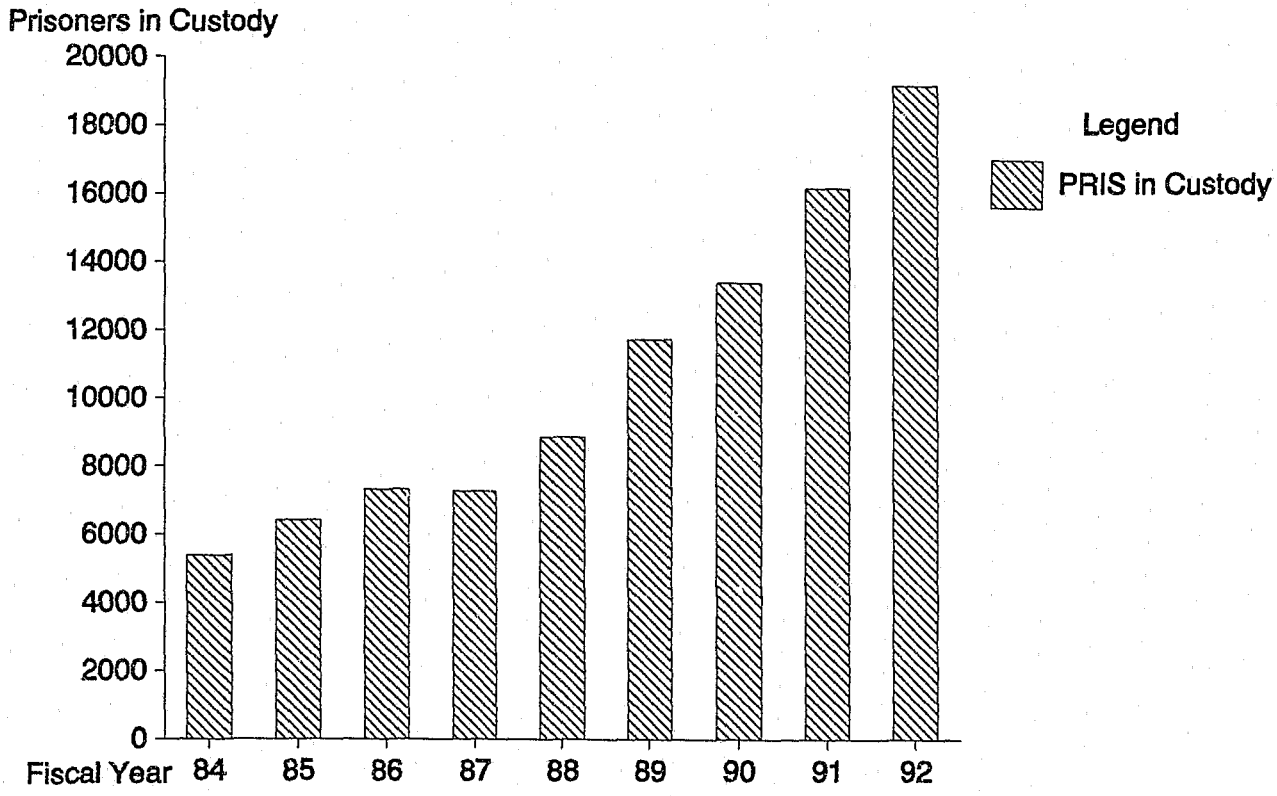


FIGURE 2. USMS AVERAGE DAILY PRISONER POPULATION



SOURCE: USMS DETENTION SURVEY

- *District of Central California* - The MCC in Los Angeles operated at 146 percent of its capacity in 1992. Local contract facilities were also above capacity, resulting in defendants being housed in Bakersfield, 200 miles away.
- *District of Eastern Missouri* - Lack of local jail space meant that defendants were transported on a regular basis to Massac County, Illinois, which is 200 miles from St. Louis.
- *District of Minnesota* - Local detention facilities were termed severely overcrowded by USMS, making it necessary to transport individuals to jails in Minnesota which were 12 miles from Minneapolis and others in North Dakota which were a 7-hour drive distance.
- *District of Southern New York* - USMS had to utilize BOP facilities in Otisville, New York; Danbury, Connecticut; and Alderson, West Virginia. Female detainees were held in Oklahoma City, convicted but unsentenced prisoners in Grand Rapids, Michigan, and sentenced but predesignated offenders in Webb County, Texas.[58]
- *District of Hawaii* - Because of a Federal court order which capped the population ceiling in state institutions, the Hawaii Department of Safety ordered the removal of all USMS prisoners above the previously agreed number of 50. In 1992, an average of over 100 of these defendants per day were housed in the Santa Rita Detention Facility in Alameda County, California, and were transported to and from Hawaii for their court appearances each week. This arrangement was projected to cost $5.5 million in 1993.[59]

Looking Ahead—The Continuing Crisis

The Federal detention crisis was, and continues to be, the product of a number of changes that took place at all levels of the criminal justice system and the three branches of Government. Some of the elements of the crisis were predictable in their results (the "War on Drugs") others were not (shrinking numbers of local jails, increasing numbers of aliens seeking asylum). What has been noticeably absent while the crisis was continuing was any type of systematic analysis of the situation. The various agencies charged with detention have issued reports and hold regular meetings about the problem among themselves. The Judicial Conference warned Congress of the deleterious effect the crisis was having on the ability of the Federal courts to dispense justice effectively and efficiently. In some areas of the country members of the Federal judiciary, prosecutors, USMS personnel, and defense counsel have established ad hoc committees to examine the situation. Obviously these scattered efforts do not add up to a coherent plan based upon the input of all relevant parties.

During the crisis the national policy seems to have been for the Department of Justice to request funds for additional construction of Federal detention space and for Congress to respond favorably to those requests; however, it may be time for that policy to be scrutinized. Apparently the Department of Justice may have come to this realization itself. In its plan for dealing with the issue of detention from 1993 through 1997 it stated that "the recommended solution to this detention crisis entails considerable expense...." Through 1997 *the plan recommends a total need for an additional $640 million* to provide for the construction or guarantee of detention space.[60] The report goes on to acknowledge that the resources requested do not reflect daily operational costs and that "funding constraints may prevent funding these recommendations."[61] Even those funding levels may not be enough to resolve the problem. USMS based its request on a 12 percent average annual growth rate in detention while stating that it is feasible that the 17 percent rate of increase that started in 1984 may continue through 1997. A request level based on the higher rate (even if likely) was rejected as being "unreasonable in this austere budget climate."[62] The report concludes that if the post-1984 historical rate increase continues the daily USMS prisoner population would approach 41,500 (up from 5,000 in 1984) and that "[i]f adequate bedspace to detain thousands of potentially dangerous prisoners is not acquired, public safety and the Federal Criminal Justice System itself could be threatened."[63]

There is no doubt that there has been a radical change in the type of defendants entering the Federal criminal justice system since the early 1980's. Similarly, there is no doubt that a number of those defendants would pose a substantial risk of failure to appear in court or danger to the community if released prior to final disposition or execution of sentence. Nevertheless, if for no other reason than fiscal exigency it is argued here that it is time for the three branches of the Federal Government to reexamine the laws and policies that contributed directly to what is widely acknowledged as the detention crisis.

What is proposed is a conference that would bring together representatives of the executive, legislative, and judicial branches of the Federal Government and relevant state and local agencies. A conference of the type proposed has precedents: in 1964 the Department of Justice and the Vera Institute of Justice co-sponsored a National Conference on Bail and Criminal Justice that examined a number of issues similar to those raised in this article. It is suggested that such a conference should attempt to begin a national dialogue around the following questions:

1. Are the conditions that brought about the crisis likely to continue?
2. Is it *necessary* to spend over $600 million for new jail construction to maintain the 2 percent failure to appear rate and 3 percent rearrest rate of Federal defendants in 1992?
3. Given the potential costs for construction and jail operations, from a policy standpoint, what are acceptable levels of violation rates?
4. Have alternatives to detention been adequately explored or funded? For example, the FY 1993 appropriation for support of prisoners was $268.4 million,[64] while the Federal judiciary's appropriation for alternatives to detention was $7.6 million. The former represented a *$35 million increase* over FY 92, the latter a $1.6 million decrease.
5. Must all detainees be kept in conditions of maximum security or are less costly types of custodial facilities appropriate for certain types of defendants?

The question listed above are just some of those that should be examined if the Federal criminal justice system is to begin dealing rationally with the detention crisis. It appears that the alternative, which has been to spend increasing amounts of money on the problem without necessary analysis, may no longer be seen as a viable solution.

NOTES

[1]Bail Reform Act of 1984, Public Law Number 98-473 - Title II, Chapter I, 98 Stat 1976 (October 12, 1984).

[2]United States Department of Justice, *Federal Detention Plan 1993 -1997* (December 1992) at 7.

[3]Interview with Patricia Macherey, Chief of Prisoner Operations Division, United States Marshals Service.

[4]United States Pretrial Services Statistical Information System.

[5]Letter from Robert A. McConnel, Assistant Attorney General, Office of Legislative Affairs, to Senator Strom Thurmond, reprinted in S. Rep. No. 147, 98th Cong., 1st Sess. 20 (1983).

[6]Report of the Judicial Conference Committee on Criminal Law and Probation Administration (January 1990) at 8.

[7]Report of the Proceedings of the Judicial Conference of the United States (March 1990) at 16.

[8]Letter of Leonard F. Joy to Honorable James L. Oakes, Chief Judge, U.S. Court of Appeals, Second Circuit (November 20, 1991).

[9]Id. at 2.

[10]Id.

[11]Supra note 3.

[12]Supra note 2 at 3.

[13]Id.

[14]Federal Bureau of Prisons, *USMS Prisoners Population in BOP Facilities 1981-1992* (February 1993).

[15]Probation Division of the Administrative Office of the United States Courts, *Pretrial Detention in the Federal System* (June 1990).

[16]Id. at 14.

[17]Id. at 15.

[18]Id. at 16.

[19]Id.

[20]Id. at 17.

[21]Id. at 18.

[22]Supra note 6 at 8.

[23]18 U.S.C. § 3142(e)

[24]Id.

[25]Id.

[26]*United States* v. *Jessup*, 757 F. 2d 378 (1st Cir. 1985).

[27]*United States* v. *Carbone*, 793 F. 2d 559 (3rd Cir. 1986); *United States* v. *Dominguez*, 783 F. 2d 702, 707 (7th Cir. 1986).

[28]*United States* v. *Perry*, 788 F.2d 100, 107 (3rd Cir.) *cert. denied*, 107 S. Ct. 218 (1986); *United States* v. *Alatishe*, 786 F. 2d 364, 371 (D.C. Cir. 1983); *United States* v. *Daniels*, 772 F. 2d 382, 383 (7th Cir. 1985).

[29]Supra note 26.

[30]Administrative Office of the United States Courts, *Report on Implementation of Title II of the Speedy Trial Act of 1974* (May 1979), Opp. A, Tables C-5, C-6.

[31]Supra note 4.

[32]Judicial Conference of the United States, Report to the Congress - *Impact of Drug Related Criminal Activity on the Federal Judiciary* (March 1989) at 8-10.

[33]Id.

[34]Supra Note 4. The chart reveals that pretrial services offices processed between 64 percent and 75 percent of all defendants against whom criminal charges were filed from 1986 through 1990. Analysis of the cases *that were not* processed demonstrates that most were misdemeanor charges or white collar felony charges which are seldom detained. Therefore it is unlikely that the increases in detention hearings, presumption cases, and detention decisions can be explained by increased pretrial services activity. Interviews with pretrial services personnel reveal that the drug presumption was the one invoked most of the time.

[35]Id.

[36]Supra note 27.

[37]Supra note 4.

[38]Id.

[39]Id.

[40]Id.

[41]United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimums in the Federal Criminal Justice System* (1991).

[42]United States Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use*

of Incarceration and Prosecutorial Discretion and Plea Bargaining (1991).

[43]Id. at 56.

[44]Id. at 60.

[45]United States General Accounting Office, *Sentencing Guidelines: Central Question Remain Unanswered* (1992) at 171.

[46]Supra note 2 at 15.

[47]Id. at 16.

[48]Id. at 18.

[49]Id. at 11.

[50]Crime Control Act of 1990, Public Law Number 101-647, Title IX, Section 902(a), (b), 104 Stat 4827 (November 29, 1990).

[51]Crime Control Act of 1990, Public Law Number 101-647, Title IX, Section 902 (c), 104 Stat 4827 (November 29, 1990).

[52]Supra note 4.

[53]Supra note 2 at 7.

[54]Id.

[55]Id. at 3.

[56]Id.

[57]Id. at 6.

[58]Id. at attachment C.

[59]Id. at 5.

[60]Id. at 27.

[61]Id.

[62]Id. at 10.

[63]Id. at 30.

[64]United States Marshals Service Budget Authority FY 1993.