



# Bail: An Abbreviated Overview of Federal Criminal Law

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## Summary

In a criminal law context, bail is most often thought of as the posting of security to ensure the presence of an accused at subsequent judicial proceedings. The term itself is less frequently used now, however, due in part to the practice of release on personal recognizance, which is permitting an individual to pledge his word, rather than his property, for his future appearance. Moreover, today an individual's release pending subsequent criminal proceedings is often predicated on conditions other than, or in addition to, the posting of an appearance bond, secured or unsecured. As a consequence, rather than speaking of bail, existing federal law refers to release or detention pending trial, to release or detention pending sentencing or appeal, and to release or detention of a material witness. This is an abridged version of CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by (name redacted), without the citations to authority, footnotes, appendices, and some of the discussion found in the longer report.

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## Introduction

In 1984, Congress amended federal bail law to permit the use of preventive detention in certain limited instances when the accused posed a danger to the public or particular members of the public. Three years later, the Supreme Court in *Salerno* held that the legislation offended neither the Eighth Amendment's excessive bail clause nor the Fifth Amendment's due process clause. The basic structure of federal bail law is as the 1984 Bail Reform Act left it, although Congress has made a number of adjustments in the years since.

## Pretrial

Under existing federal law, any federal or state judge or federal or state magistrate may order an individual accused of a federal crime either released or detained prior to trial and conviction. The law affords the judge or magistrate four options which it places in descending order of preference.

## Personal Recognizance

First, he may release the accused on personal recognizance or under an unsecured appearance bond subject to the condition that the accused commit no subsequent federal, state or local offense and that he submit a sample for DNA analysis. The federal courts have generally upheld the warrantless, suspicionless collection of DNA samples from the convicted, parolees, probationers, and individuals on supervised release. There may be some question, however, whether the result would be the same in the case of arrestees.

## Conditional Release

Second, if the judge or magistrate concludes that personal recognizance or unsecured appearance bond are insufficient to overcome the risk of flight or to community or individual safety, he may condition the individuals' release on a refrain from criminal activity, collection of a DNA sample, and the least restrictive combination of fourteen conditions. The fourteen statutory conditions are: (1) third party supervision, (2) seeking or maintaining employment, (3) meeting education requirements, (4) observing residency, travel, or associational restrictions,\* (5) avoiding contact with victims or witnesses,\* (6) maintaining regular reporting requirements,\* (7) obeying a curfew,\* (8) adhering to firearms limitations,\* (9) avoiding alcohol or controlled substance abuse, (10) undergoing medical treatment, (11) entering into a personally secured appearance agreement, (12) executing a bail bond, (13) submitting to after hours incarceration, and (14) complying with any other court imposed condition. (The \* symbol indicates the conditions that must be imposed when the accused is charged with certain sexual offenses committed against a child.)

The statute requires the judge or magistrate to impose several of these conditions when the accused is ineligible for release on personal recognizance or unsecured bond and is charged with one of several sex related offenses against children. Some defendants have successfully challenged this mandatory requirement on procedural due process grounds.

Notwithstanding the explicit conditions that seem to be contemplated requiring an accused to post security for his release or face detention, section 3142 provides that, "The judicial officer may not

impose a financial condition that results in the pretrial detention of the person.” The courts have resolved the apparent conflict by essentially construing the provision to apply only to those cases where the financial condition is calculated to result in pretrial detention rather than to those where it reflects the court’s determination of the amount necessary for safety and to prevent flight and results in detention only as a collateral consequence.

## **Detain for Revocation or Deportation**

The third option available to the judge or magistrate if the accused poses a flight or safety risk is to order him detained for up to ten days to allow for a transfer of custody for purposes of revocation of bail, probation or parole or deportation proceedings. Otherwise applicable bail provisions come into play if the accused has not been transferred within the ten-day deadline.

## **Pretrial Detention**

Finally, under some circumstances, the judge or magistrate may order the accused detained prior to trial. Although the least statutorily favored alternative in the federal pre-trial bail scheme, pre-trial detention is the fate of over 60% of those accused of federal crimes and presented to a federal judge or magistrate prior to trial.

The judge or magistrate may order pre-trial detention only after a hearing and determination that no combination of conditions are sufficient to protect against the risk of flight or threat to safety. There are two kinds of detention hearings and consequently two kinds of situations when pre-trial detention is appropriate. The first consists of cases in which the accused is charged with one or more serious federal offenses, 18 U.S.C. 3142(f)(1). The second consists of cases in which the risk of flight or threat to safety are serious, regardless of the crime with which the individual is charged, 18 U.S.C. 3142(f)(2).

## **Offense-driven detention**

A detention hearing may be held on the government’s motion when the accused is charged with any of eight categories of federal crime: (1) crimes of violence; (2) federal crimes of terrorism with a maximum term of imprisonment of 10 years or more; (3) offenses punishable by death or one punishable by life imprisonment; (4) controlled substance offenses with a maximum term of imprisonment of 10 years or more; (5) felonies, if the accused has previously been convicted of two or more of such crimes of violence, crimes of terrorism, capital offenses, controlled substance violations, or their equivalents under state law; (6) nonviolent felonies committed against a child; (7) felonies involving the use of firearms, explosives or other dangerous weapons; and (8) failure to register as a sex offender.

Section 3156 defines “crimes of violence” for purposes of section 3142 and several other provisions of the bail chapter to mean not only a crime with a violent element and a crime that involves the risk of violence but also various federal sex offenses including interstate prostitution and possession or distribution of child pornography, *i.e.*, any felony under chapter 109A (sexual abuse), 110 (sexual exploitation of children), or 117 (interstate travel of illicit sexual purposes).

## **Risk-driven detention**

A detention hearing may also be held on the government's motion or on the court's initiative when the accused poses a serious risk of flight or obstruction of justice.

## **Detention hearing procedures**

Regardless of whether the nature of the offense or the risk posed by the accused triggers the detention hearing, the hearing must be held when the accused first appears before the judge or magistrate or alternatively within 3 days thereafter at the option of the government or within 5 days thereafter at the option of the accused. The accused remains in custody, if the detention hearing is not held at his first appearance and he may be further detained until the conclusion of the detention hearing. Failure to comply with the deadlines for a detention hearing, however, does not entitle the accused to release. The accused is entitled to the representation and appointment of counsel at the hearing. He may testify, examine and cross-examine witnesses, and present evidence on his own behalf. Evidentiary rules governing criminal trials do not apply at the detention hearing.

The judge or magistrate's assessment of the safety or flight risks is to take into account the nature and circumstances of the crime charged, the weight of the evidence against the accused, his record and character, and the nature of threat that might be posed by the accused's release. Section 3142 creates a rebuttable presumption of offense-driven detention (i.e., that no combination of conditions will ensure public or individual safety) when the judge or magistrate determines on the basis of clear and convincing evidence that the accused has a prior conviction for an offense included within one of the eight categories of detention-qualifying offenses (crimes of violence, etc.), committed while the accused was free on pretrial release and for which the accused was convicted or released from prison within the last 5 years. Section 3142 establishes a second rebuttable presumption of detention (i.e., no combination of conditions will negate the risk of flight or public danger) when the judge or magistrate finds probable cause to believe the accused has committed a 10-year controlled substance offense, federal crime of terrorism offense, or various kidnapping or sexual offenses committed against a child.

As consequence of the rebuttable presumption the accused has the burden of producing some evidence in rebuttal as which point the obligation shifts to the prosecution. The judge or magistrate then weighs the presumption along with the other bail-relevant factors. As the courts have observed:

Although the presumption shifts a burden of production to the defendant, the burden of persuasion remains with the government. A finding that a defendant is a danger to any other person or the community must be supported by clear and convincing evidence. If a defendant proffers evidence to rebut the presumption of dangerousness, the court considers four factors in determining whether the pretrial detention standard is met: (1) the nature and circumstances of the offense charged, including whether the offense is a federal crime of terrorism; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including the person's character, physical and mental condition, family and community ties, employment, financial resources, past criminal conduct, and history relating to drug or alcohol abuse; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. The presumption is not erased when a defendant proffers evidence to rebut it; rather the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g).

## **Detention and Release Orders**

Section 3142 dictates what the judge or magistrate must include within her release or detention order. Release orders, whether issued following a detention hearing, or upon conditional release without such a hearing, provide the accused with written notification of the consequences of violating a condition of release and of the prohibitions on obstruction of justice. Detention orders contain written findings and justifications. They also direct custodial authorities to hold the accused apart from other detainees to the extent possible, to permit him to consult with his attorney, and to deliver him up for subsequent judicial proceedings.

After the issuance of an order, the court is free (1) to amend a release or detention order; (2) to reopen the detention hearing to consider newly discovered information or changed circumstances; or (3) to permit an accused under a detention order to assist in the preparation of his defense or to be temporarily released for other compelling reasons. Release orders and detention orders are final orders for appellate purposes, and either the government or the accused may appeal them.

## **Bail Pending Sentencing**

Federal law treats bail following conviction but prior to sentencing in one of three ways depending upon the crime of conviction. First, a defendant may not be detained prior to sentencing for an offense for which the United States Sentencing Guidelines do not recommend a sentence of imprisonment. Second, when the defendant has been convicted of a capital offense, a 10-year federal crime of terrorism, a 10-year controlled substance offense, or a crime of violence, the defendant must be detained unless the court finds that the defendant is not likely to flee or pose a safety concern and either that a motion for acquittal or a new trial is likely to be granted, that the prosecution has recommended no sentence of imprisonment be imposed, or that exceptional reasons exist for granting bail. Third, in any other case, the defendant must be detained, unless the court concludes that the defendant is unlikely to flee or pose a safety concern if released conditionally or on his own recognizance.

## **Bail Pending Appeal**

When a defendant appeals, the judge or magistrate may release him on condition or recognizance, if the judicial official is convinced that the defendant poses neither a flight risk nor a safety concern and that his appeal offers the prospect of success. An additional requirement applies when the defendant has been sentenced to prison upon conviction for a capital offense, a 10-year federal crime of terrorism, a 10-year controlled substance offense, or a crime of violence. As with bail pending sentencing, in such instances a judge or magistrate must also find that exceptional reasons exist to justify a release order. The circumstances giving rise to exceptional reasons have variously been described as uncommon, unusual, unique, and rare. When the government alone appeals, the pre-trial bail provisions of section 3142 apply, unless the government is simply appealing the sentence imposed. When the government appeals the sentence imposed, the defendant must be detained if he has been sentenced to a term of imprisonment; otherwise, section 3142 applies.

## **Consequences of Failure to Appear or Otherwise Honor Conditions**

A number of consequences flow from an individual's failure to appear or other failure to honor the conditions imposed upon his release. He may be prosecuted for contempt of court, he may be prosecuted separately for failure to appear, his release order may be revoked or amended, security pledged for his compliance may be forfeited, and/or he may be subject to arrest by his surety.

### **Criminal Penalties**

An individual, released on bail who fails to appear for required judicial appearances or to report for service of sentence, is guilty of a federal offense punishable by imprisonment for a term ranging from not more than 1 year to not more than 10 years depending on the severity of the underlying offense. An individual who violates a condition of his release on bail may also be prosecuted for contempt of court under 18 U.S.C. 401. If the violation takes the form of a separate federal or state offense, the individual faces an additional term of imprisonment for not more than 10 years (not more than a year if the new offense is a misdemeanor).

### **Amended or Revoked Release Orders**

Faced with failure to comply with a condition of release, the judge or magistrate may amend an individual's release order amending existing conditions or adding new ones. The judge or magistrate may also order revocation of the release order and detention of the individual after a hearing, if he finds either probable cause to believe that the individual has committed a new offense or by clear and convincing evidence that the individual has breached some other condition of his release. The new detention order must be premised on a finding that the individual is unlikely to abide by the conditions imposed for his release or that there is no combination of conditions sufficient to guard against the individual's flight or danger to the public or any member of the public. A finding that of probable cause to believe that the individual has committed a new offense triggers a presumption that no combination of conditions will dispel concerns for public safety.

### **Forfeiture of Security**

The judge or magistrate may order any bail bond or other security forfeited, if the individual fails to appear at judicial proceedings as required or fails to appear to begin service of his sentence. The court must do so if he fails to abide by any condition imposed for his release. The prosecution begins the process with a motion to enforce. If the surety returns the individual to the custody of the court, or if not contrary to interests of justice, the court may set aside, mitigate, or remit the forfeiture or may exonerate the surety and release the bail. In the 110<sup>th</sup> Congress, the House passed legislation that would have permitted forfeiture upon the failure of the accused to appear, but not for any other breach of any other condition in the release order. Congress adjourned, however, without taking final action on the proposal.



## **Pretrial Service Agency**

The United State Probation and Pretrial Service Office conducts preliminary investigations and otherwise assists the courts in their administration of federal bail law. Its officers enjoy statutory authority to: (1) provide judges and magistrates with information relevant to initial bail determinations; (2) prepare reports relevant for the review of release and detention orders; (3) supervise bailees released into its custody; (4) operate halfway houses, treatment facilities and the like for those released on bail; (5) inform the court and prosecutors of release order violations; (6) advise the court on the availability of third party custodians; (7) help bailees secure employment, medical, legal and social services; (8) prepare reports on supervision of pretrial detainees; (9) prepare reports on the bail system; (10) prepare pretrial diversion reports for prosecutors; (11) contract for the performance of its responsibilities; (11) supervise and report on prisoners conditionally released following hospitalization for mental disease or defect; (12) carry firearms; and (13) perform other functions assigned to it by the bail laws.

## **Material Witnesses**

Federal law authorizes the arrest and detention or bail of individuals with evidence material to the prosecution of a federal offense. With limited variations, federal bail laws apply to material witnesses arrested under section 3144. Thus, arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to retain private counsel. Release is generally favored, if not then release with conditions or limitations is preferred, and finally as a last option detention is permitted. An accused is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety. A material witness, however, need only satisfy the appearance standard. A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify. If neither word nor bond nor conditions will suffice, the witness may be detained. The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.

## **Extradition**

Federal bail laws make no mention of bail in extradition cases. The federal courts instead adhere to the principle announced by the Supreme Court over a century ago that “bail should not ordinarily be granted in cases of foreign extradition” except under “special circumstances.” There is no precise definition of what constitutes “special circumstances;” the category is reserved for those extraordinary characteristics of a case which the court feels merit the designation. In the past they have included, singular or in some combination, factors such as unusual anticipated delays prior to extradition; the likelihood that extradition may not be granted; the likelihood that the individual will prevail following extradition; the ill health of the individual; the availability of bail under the laws of both countries for the offense for which extradition was sought; the adverse impact on third parties of a refusal to grant bail; the fact that the individual was a minor; religious prerogatives lost if bail was not granted; and lack of urgency to prosecute previously evidenced by the requesting nation. On the other hand, a partial list of insufficient special circumstances compiled by one court includes: a significant bond and an unblemished record; defendant being a highly trained doctor available to administer to the public; need to consult with counsel and assist

in gathering evidence to support defense; defendants' brother had been released; discomfort of sitting in jail; the need to consult with one's attorney about pending civil litigation, complexity of the criminal case, and severe financial and emotional hardships; advanced age or infirmity; and the need for a special diet due to having one kidney and health concerns. In addition, the individual must establish that if released he will not flee or pose a danger and may be made subject to whatever relevant conditions the court deems to impose.

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