

<p>Pretrial Detention Based Solely on Community Danger: A Practical Dilemma Krista Ward⁽¹⁾ and Todd R. Wright⁽²⁾</p> <p>Abstract</p> <p>[a.1] The Bail Reform Act of 1984 permits a federal judge to detain a criminal defendant pending trial if the defendant is a danger to the community or a flight risk. Incongruously, the Act does not explicitly permit a federal judge to hold a detention hearing based solely on the government's allegation that the defendant is a danger to the community. Absent express, statutory authority, federal judges have split on the issue of whether an allegation of danger to the community is itself sufficient to justify a detention hearing. This article addresses the issue by examining the history of federal bail law; the legislative history of the Bail Reform Act; case law and a confidential poll of United States Magistrate Judges, conducted over the internet on a judicial list-serv.</p>	<p>TABLE OF CONTENTS</p> <p>I. Scope</p> <p>II. A Case in Point</p> <p>III. History of Federal Bail Law</p> <p>IV. Pretrial Detention Hearings Under the 1984 Act</p> <p> A. Legislative History</p> <p> B. Case Law and Practice</p> <p>V. Conclusion</p>
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I. SCOPE

[1.1] Federal judges are split over whether or not community safety alone justifies their setting a detention hearing under the [Bail Reform Act of 1984](#)⁽³⁾ (the "Act"). Last year, in the United States, over 46,000 criminal defendants were detained before trial, after a hearing before a judicial officer.⁽⁴⁾ Because a defendant is presumed innocent until proven guilty, a judge may order pretrial detention only under limited circumstances.⁽⁵⁾

[1.2] In 1984, Congress passed the Bail Reform Act allowing judges to detain a defendant only if the judge finds the defendant is a danger to the community or a flight risk.⁽⁶⁾ The same statute, however, does not explicitly authorize judges to hold a detention hearing based only on an allegation of danger to the community.⁽⁷⁾ [Section 3142\(f\)](#) states a detention hearing may be held on the government's motion when a case involves one of the following circumstances: a crime of violence; an offense for which the maximum sentence is life imprisonment or death; a federal drug offense carrying a penalty of ten years or more; or any felony following conviction of two or more of the above offenses, two or more comparable state or local offenses, or a combination of such offenses.⁽⁸⁾ In addition, a hearing may be held on the government's or the court's motion if

the case involves a risk of flight or a risk that the defendant may attempt to obstruct justice.⁽⁹⁾ There is a presumption of detention in certain circumstances which may be rebutted by the defendant.⁽¹⁰⁾

II. A CASE IN POINT

[II.1] A problem arises when a judge confronts a defendant believed to be a danger to the community, and thus eligible for detention under § 3142(b) and (c), but none of the factors listed in § 3142(f) which allow a judge to hold a detention hearing exist. The question arose for United States Magistrate Judge Celeste F. Bremer when confronted with a 27-year-old Defendant indicted for conspiracy, transportation of a large number of stolen firearms and three stolen vehicles, and being a felon in possession of firearms.⁽¹¹⁾ Defense counsel challenged Judge Bremer's authority to hold a detention hearing, despite the fact that Defendant had an extensive criminal record and a serious drug and alcohol abuse problem. Over an eight year period, he had been convicted of forgery; operating a motor vehicle while intoxicated; giving false information to police; interference with official acts; possession with intent to sell cocaine; possession of controlled substances including cocaine, marijuana, methamphetamine, and drug paraphernalia; and theft in the first degree. The defendant's state probation had been revoked twice, and he was on parole while allegedly involved in the offenses charged under the indictment.

[II.2] Because of the nature of the charged offenses, lack of supervision because of weak family and community support, and the significant criminal history, Judge Bremer believed the defendant was a danger to the community and should be detained. Case law in Judge Bremer's circuit held that danger to the community is sufficient to authorize detention.⁽¹²⁾ However, the defense argued that the court did not have the authority to temporarily detain the defendant to hold a detention hearing, because none of the enumerated factors in § 3142(f) existed.⁽¹³⁾ Although the charges involved firearms, the government did not allege that the circumstances of the offenses charged qualified as a "crime of violence" pursuant to 18 U.S.C. § 3142(f)(1)(A),⁽¹⁴⁾ which would provide the basis for a detention hearing. Judge Bremer held that the Defendant could be detained under § 3142 when the Bail Reform Act is considered as a whole.

[II.3] Because this was a novel issue, Judge Bremer asked other Magistrate Judges how they resolved similar situations.⁽¹⁵⁾ The informal poll showed judges took varied approaches when applying § 3142(f). Several judges stated they hold detention hearings only when one of the circumstances listed in § 3142(f) exists. These judges felt the statute and existing case law clearly provide that a detention hearing may be held only under these limited circumstances.⁽¹⁶⁾

[II.4] One judge, who agreed that at least one of the § 3142(f) circumstances must exist before a detention hearing could be held, suggested, however, that there is almost always cause to hold a hearing based on risk of flight. If, at the detention hearing the judge discovered the defendant was not a flight risk, but also determined the defendant would be a danger to the community, the judge believed he could properly detain the defendant. Courts in the Second and Third Circuits have rejected this approach.⁽¹⁷⁾

[II.5] Several other judges stated that they hold detention hearings whenever they believe a danger to the community may exist, and there are no appropriate conditions of release available. Those judges reasoned § 3142(b) and § 3142(c), when read with the Act's legislative history, give a judicial officer the authority and duty to detain a defendant based on danger to the community. The judges further reasoned a detention hearing must be held to fairly analyze allegations about the defendant's dangerousness before determining any appropriate conditions of release, or before determining that no combination of conditions of release could assure the community's safety.

[II.6] Although the Bail Reform Act of 1984 was passed nearly fifteen years ago, confusion surrounds its application. Did Congress intend to limit grounds for holding a pretrial detention hearing only to circumstances specified in § 3142(f)? Or did Congress also intend to grant judicial officers authority to hold detention hearings based solely on danger to the community? This article examines that question through the history of federal bail law, legislative history of the Bail Reform Act, case law and judicial practice.

III. HISTORY OF FEDERAL BAIL LAW

[III.1] Federal bail law has its genesis in the Judiciary Act of 1789.⁽¹⁸⁾ Bail was available under that act in all noncapital cases.⁽¹⁹⁾ Federal bail law remained substantially unchanged for the next 177 years.⁽²⁰⁾ The first major change to federal bail law came with the adoption by Congress of the Bail Reform Act of 1966.⁽²¹⁾

[III.2] The 1966 Act focused on assuring the future appearance of an accused, and the statute authorized the use of nonmonetary conditions of pre-trial release to accomplish that end.⁽²²⁾ Prior to 1966, monetary bonds were the exclusive means upon which federal courts relied to assure the appearance of a defendant at future proceedings.⁽²³⁾

[III.3] The 1966 Act, while a dramatic improvement over prior bail procedures, sought only to assure a defendant's appearance; no provision was made for pretrial detention based upon dangerousness to any individual or to the community.⁽²⁴⁾ Accordingly, when faced with a defendant whom a judicial officer deemed a threat to the safety of an individual or the community, the courts had two options. A court could follow the literal terms of the 1966 Act and order pretrial release upon the satisfaction of those financial conditions that would merely assure the defendant's appearance. Alternatively, the court could rule the defendant was a flight risk and effectively assure pretrial detention by setting financial conditions of release that the defendant could not meet. Neither approach proved satisfactory.⁽²⁵⁾ Another major shortcoming of the 1966 Act was that it failed to address the problem of crimes committed by individuals on pretrial release.⁽²⁶⁾

[III.4] The Bail Reform Act of 1984 sought to remedy some of the most egregious problems of the 1966 Act. The 1984 Act expressly provides judicial officers with the statutory authority to consider the dangerousness of the defendant in setting the least restrictive conditions of

release.⁽²⁷⁾ Under the 1984 Act, a judicial officer may not impose financial conditions of release that an accused is unable to meet.⁽²⁸⁾

[III.5] Much of the spirit of prior federal bail law survives in the 1984 Act. The 1984 Act's reaffirmation of the view that pretrial release is to be the norm⁽²⁹⁾ is evident in the order of preference that the release/detention decisions are to be made: first, release on personal recognizance or unsecured bond;⁽³⁰⁾ second, release on condition or combination of conditions;⁽³¹⁾ third, temporary detention to permit revocation of conditional release, deportation, etc.;⁽³²⁾ and finally, pretrial detention.⁽³³⁾ Although the 1984 Act retains the 1966 Act's strong preference for pretrial release, it also provides grounds under which a judicial officer may order pretrial detention of a defendant.⁽³⁴⁾

IV. PRETRIAL DETENTION HEARINGS UNDER THE 1984 ACT

[IV.1] The 1984 Act provides judges with the authority to take a defendant's dangerousness and risk to the community into consideration when ordering pretrial release on conditions.⁽³⁵⁾ The question confronting federal judges when seeking to properly apply the terms of the 1984 Act in the release/detention determination is whether the Act grants those judicial officers the authority to take a defendant's dangerousness and risk to the community into consideration in determining whether to hold a detention hearing. Are courts limited to holding detention hearings only in cases of flight, violence, or certain drug offenses?

[IV.2] Because the 1984 Act is unclear, similarly situated criminal defendants in the federal system may suffer disparate treatment. Release on conditions may be ordered without delay, at the initial appearance, by some judges. A different judge, confronting similar facts, may enter an order of at least temporary detention prior to a hearing and ultimately order pretrial detention. This disparate treatment stems from a lack of uniformity of interpretation and application of [18 U.S.C. §§ 3142\(e\) and \(f\)](#), which govern pretrial detention hearings. Judges have looked to the Senate Report and the language of the Act itself to interpret the statute. They also have applied common sense to make [§§ 3142\(e\) and \(f\)](#) congruent.

A. Legislative History

[IV.A.1] By enacting the 1984 Act, Congress sought to ameliorate the 1966 Act's shortcomings.⁽³⁶⁾ The report of the Senate's Judiciary Committee on the Comprehensive Crime Control Act of 1983, which included discussion of the 1984 Bail Reform Act, addresses the proper scope of the 1984 Act's approach to the consideration of safety in pretrial release/detention settings.⁽³⁷⁾ A reason for the inconsistent application of the provisions of the 1984 Act may be found within the text of the Senate Report.⁽³⁸⁾

[IV.A.2] The Senate Report contains language describing in expansive terms a fundamental shift from all prior federal bail laws in allowing judicial officers to consider community safety in making pretrial release/detention decisions. According to Congress,

[t]he disturbing rate of recidivism among released defendants requires the law to recognize that the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood he will not appear for trial.⁽³⁹⁾

Such a statement may lead a judge to believe that the community-safety consideration is co-extensive with other relevant considerations throughout the act.

[IV.A.3] The Senate Report, however, also suggests Congress intended to limit the application of pretrial detention to a limited group of defendants. The Senate Report refers to a, "small but identifiable group of particularly dangerous defendants," to whom no conditions of release may adequately assure the safety of the community.⁽⁴⁰⁾ Congress determined that while this group cannot be identified with certainty, the confluence of the enumerated factors in § 3142(f) would allow courts to make decisions denying pretrial release with an acceptable level of accuracy.⁽⁴¹⁾ The circumstances listed in § 3142(f) "in effect serve to limit the types of cases in which detention may be ordered prior to trial."⁽⁴²⁾ A judge could, therefore, reasonably interpret the Senate Report as authorizing pretrial detention only in limited circumstances and for a reasonably identifiable class of offenders.⁽⁴³⁾

[IV.A.4] Much of the incongruity in application of the 1984 Act stems from the Act's structure. Subsections (b) and (c) state a judicial officer shall order pretrial release unless the judge determines the defendant is a danger to the community.⁽⁴⁴⁾ Subsections (e) and (f) also contain language granting a generalized authority for judicial officers to take community safety into account. Subsection (e), however, specifies that in order for detention to properly be ordered, the judicial officer must first conduct a detention hearing, "pursuant to the provisions of subsection (f)."⁽⁴⁵⁾ Subsection (f) states a detention hearing may properly be held upon the government's motion under certain considerations that do not include danger to the community.⁽⁴⁶⁾ The two grounds upon which a detention hearing may be held on either the government's or the court's motion are (1) that the defendant poses a serious risk of flight, and (2) that there is a serious risk that the defendant will obstruct or attempt to obstruct justice.⁽⁴⁷⁾ Obviously, neither of these factors address danger to the community.

B. Case Law and Practice

[IV.B.1] Two basic approaches to scheduling detention hearings seem to be prevalent. The first provides that the factors listed in § 3142(f) are non-exclusive, and the 1984 Act authorizes the holding of a detention hearing upon a judicial officer's determination that the defendant poses a danger to the community, even in the absence of the grounds specifically listed in the statute. This view stems from language in § 3142(e), which states:

If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any

other person and the community, such judicial officer shall order the detention of the person before trial.

[IV.B.2] Under the second approach, a judicial officer may properly hold a detention hearing upon the **government's motion** only when the underlying offense is explicitly enumerated in the statute,⁽⁴⁸⁾ or upon either the **government's or the court's motion** if the defendant poses a risk of flight or of obstruction of justice.⁽⁴⁹⁾ The informal poll of United States Magistrate Judges indicates that some judges routinely hold detention hearings based solely on their perception of a defendant's risk of danger to the community.⁽⁵⁰⁾ Little published case law, however, supports this practice.⁽⁵¹⁾ In one case that offers indirect support, the United States Supreme Court held that the "end of exacting compliance with the letter of § 3142(f) cannot justify the means of exposing the public to an increased likelihood of violent crime by persons on bail, an evil the statute aims to prevent."⁽⁵²⁾ Typically, detention orders are not published or appealed. Without published authority, local detention hearing custom will continue and practice will vary from district to district.

[IV.B.3] Cases that have directly addressed the issue state that a judge may hold a detention hearing only when a circumstance listed in § 3142(f) exists.⁽⁵³⁾ In support of this view, at least one court has looked to [United States v. Salerno](#),⁽⁵⁴⁾ in which the Court held the Bail Reform Act of 1984 carefully limits the circumstances under which detention may be sought to the most serious crimes.⁽⁵⁵⁾ The Third Circuit Court of Appeals held the Act's legislative history makes it clear the Bail Reform Act only intended detention for a "small but identifiable group of particularly dangerous defendants."⁽⁵⁶⁾

[IV.B.4] Under existing published case law, a judge may hold a detention hearing only if one of the circumstances listed in § 3142(f) exists. The option of holding a detention hearing based on risk of flight, finding at the hearing there was not a risk, and then detaining based on dangerousness is explicitly ruled out in the Second and Third Circuits.⁽⁵⁷⁾ In [Himler](#), the Third Circuit stated a judicial officer may not base detention solely on danger to the community if the reason to hold the detention hearing is unfounded.⁽⁵⁸⁾ If detention is not available for one of the reasons listed in § 3142(f), then no matter how dangerous or antisocial a defendant may be, the defendant must be released on conditions.⁽⁵⁹⁾ The problem with this reasoning is that it fails to give any weight to the defendant's danger to the community, a factor Congress intended for judges to consider. Also, no combination of conditions may exist that provide the community, family, employment and treatment support, which the defendant requires for adequate supervision while released, thus leaving detention as the only option.

V. CONCLUSION

[V.1] The Bail Reform Act of 1984 sought to remedy one of its predecessor's major failings by giving judicial officers the statutory authority to consider the risk a defendant poses to the community. The 1984 Act, however, fell short of its goal. Although the statute gives judicial officers authority to consider a defendant's risk to the community, it is unclear when a judge may

do so. As a result, judges are split in their application of the Act. Even if none of the circumstances enumerated in § 3142(f) exist, some judges set detention hearings based solely on danger to the community. Other judges do not consider community safety to be a basis to hold a hearing.

[V.2] Perhaps after fourteen years, it is time to take a closer look at the Bail Reform Act of 1984. Because detention orders are rarely appealed, there are no published opinions from judges who routinely hold detention hearings based solely on danger to the community. As a result, published case law does not address or answer the question posed in the title of this article. If there is to be an answer, it must be supplied by Congress or the Supreme Court. An answer is needed to prevent inconsistent detention standards from being applied in good faith by federal judges across the Nation.

1. B.A. 1996, University of Northern Iowa; J.D. 2000, Drake University. Law student intern to the Honorable Celeste F. Bremer, United States Magistrate Judge, Southern District of Iowa, fall 1998. Both authors would like to thank Judge Bremer for her support and assistance with this article.

2. B.S. 1990, Texas A&M University; J.D. 1999, Drake University. Law student intern to the Honorable Celeste F. Bremer, United States Magistrate Judge, Southern District of Iowa, summer 1998.

3. Bail Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1976, as amended by Pub. L. 99-646, 100 Stat. 3607, and codified at 18 U.S.C. §§ 3141-3150 and 3156. The relevant section of the 1984 Act for the purposes of this article is § 3142, and all references to "subsection" or "subsections" should be construed as referring to subsections of § 3142, unless otherwise noted.

4. Memorandum from Steven R. Schlesinger, Chief, Statistics Division, Administrative Office of the United States Courts, to all Chief Probation Officers in charge of Pretrial Services, and Chief Pretrial Services Officers (Dec. 3, 1998)(on file with the author).

5. See 18 U.S.C. § 3142(f).

6. 18 U.S.C. §§ 3142(b) and (c).

7. See 18 U.S.C. § 3142(f).

8. 18 U.S.C. § 3142(f)(1).

9. 18 U.S.C. § 3142(f)(2).

10. See 18 U.S.C. § 3142(e); United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992); United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991); United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991).

11. United States v. Armagost, Crim. No. 98-99 (S.D. Iowa) (indictment filed May 20, 1998).
12. United States v. Cantu, 935 F.2d 950, 952 (8th Cir. 1991) (citing United States v. Sazenski, 806 F.2d 846 (8th Cir. 1986) (holding either danger to community or risk of flight is sufficient to authorize detention)).
13. See [18 U.S.C. § 3142\(f\)](#) which provides as follows:

A judicial officer shall hold a detention hearing:

(1) upon motion of the attorney for the Government, in a case that involves:

(A) a crime of violence;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more; or

(D) any felony if the person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves:

(A) a serious risk that the person will flee; or

(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

14. Authority is split concerning whether the Act's definition of "crime of violence" in [18 U.S.C. § 3156\(a\)\(4\)\(B\)](#) includes felon in possession of a firearm. Compare United States v. Gloster, 969 F. Supp. 92, 94-97 (D.D.C. 1997) (holding possession of firearm by a convicted felon is not a crime of violence under the Bail Reform Act of 1984), with United States v. Butler, 165 F.R.D. 68, 71-72 (N.D. Ohio 1996) (holding possession of firearm by convicted felon is a crime of violence under the Bail Reform Act of 1984).

15. The informal poll was conducted over a confidential on-line judicial list-serve.

16. See United States v. Byrd, 969 F.2d 106 (5th Cir. 1992); United States v. Ploof, 851 F.2d 7 (1st Cir. 1988).

17. See United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986); see also United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988); Gloster, 969 F. Supp. at 94.

18. 1 Stat. 91 (repealed by [18 U.S.C. §§ 3141-3151](#) (1982)).

19. Thomas E. Scott, Pretrial Detention under the Bail Reform Act of 1984: An Empirical Analysis, 27 Am. Crim. L. Rev. 1, 3 (1989).
20. Id. at 4.
21. 18 U.S.C. §§ 3146-53. (repealed 1983).
22. Scott, supra note 17, at 4.
23. Bruce D. Pringle, Bail and Detention in Federal Criminal Proceedings, 22 Colo. Law. 913, 913 (May, 1993).
24. Id.
25. Id.
26. S. Rep. No. 98-225, at 5 (1983).
27. [18 U.S.C. § 3142\(c\)\(1\)\(B\)](#).
28. [18 U.S.C. § 3142\(c\)\(2\)](#).
29. [18 U.S.C. § 3142\(a\)](#).
30. [18 U.S.C. § 3142\(b\)](#).
31. [18 U.S.C. § 3142\(c\)](#).
32. [18 U.S.C. § 3142\(d\)](#).
33. [18 U.S.C. § 3142\(e\)](#).
34. Id.
35. [18 U.S.C. § 3142\(c\)\(1\)\(B\)](#). See also S. Rep. No. 98-225, at 3 (1983).
36. S. Rep. No. 98-225, at 2 (1983).
37. Id. at 3-15.
38. Id. at 3.
39. Id. at 6.
40. Id. at 6-7.

41. Id. at 9.

42. See Ploof, 851 F.2d at 11.

43. Id. at 10, 11-12, 20 and 21.

44. 18 U.S.C. § 3142(b) and (c).

45. 18 U.S.C. § 3142(e).

46. 18 U.S.C. § 3142(f)(1)(D).

47. 18 U.S.C. § 3142(f)(2)(B).

48. 18 U.S.C. § 3142(f)(1).

49. 18 U.S.C. § 3142(f)(2).

50. See Poll, supra note 15. Holding a hearing, of course, does not always result in a detention order, although it can result in a defendant's temporary detention for three to five days while the parties prepare.

51. Id.

52. United States v. Montalvo-Murillo, 495 U.S. 711, 720 (1990). The issue in Montalvo-Murillo, however, did not concern the circumstances that allowed a judge to order a detention hearing. Instead, the case involved the timing of the detention hearing. Id. at 713.

53. See Byrd, 969 F.2d at 109-110; Ploof, 851 F.2d at 10; United States v. Carter, 996 F. Supp. 260, 261 (W.D.N.Y. 1998); Gloster, 969 F. Supp. at 93; Butler, 165 F.R.D. at 71.

54. United States v. Salerno, 481 U.S. 739, 747 (1987).

55. See United States v. Cole, 715 F. Supp. 677, 679 n.1 (E.D. Pa. 1988) (citing Salerno, 481 U.S. 739; noting Supreme Court has never directly addressed issue).

56. Himler, 797 F.2d at 160.

57. See id.; see also Friedman, 837 F.2d at 49; Gloster, 969 F. Supp. at 94.

58. Himler, 797 F.2d at 160.

59. Gloster, 969 F. Supp. at 94.