Bail: An 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. Existing federal law affords the judge or magistrate four options which it places in descending order of preference. First, he may release the accused on personal recognizance or under an unsecured appearance bond. 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 the least restrictive combination of fourteen conditions. Third, he may 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. Finally, under some circumstances, the judge or magistrate may order the accused detained prior to trial.

When a defendant appeals following conviction, 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.

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 arrested material witnesses.

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."

This report is available in an abridged version—without footnotes, appendices, most of the citations to authority, and some of the discussion—as CRS Report R40222, *Bail: An Abbreviated Overview of Federal Criminal Law*, by (name redacted).

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Introduction

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, that is, "To obtain the release of (oneself or another) by providing security for future appearance."[1] 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,[2] to release or detention pending sentencing or appeal,[3] and to release or detention of a material witness.[4] This is overview of federal law in each of these areas as well as in the area of extradition from the United States to another jurisdiction.[5]

History

American bail law has its origins in England, where it was said that "the right to be bailed . . . is as old as the law of England itself."[6] Blackstone wrote that 'by the ancient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case."[7] In the beginning, however, officials enjoyed considerable discretion over the circumstances under which bail might be granted or denied.[8] The First Statute of Westminister of 1275 limited that discretion when it listed the criminal offenses which were bailable and those which were not.[9]

Yet, if an individual was imprisoned without charge, the question of whether the crime charged was bailable never arose. If an individual was imprisoned without bail and his jailer failed to make a timely return on his writ of habeas corpus, the right to bail would become meaningless. (A writ of habeas corpus instructed the sheriff or other custodian to whom it was addressed to return to the court which issued the writ and to justify the prisoner's detention.[10]) So too, if an individual was imprisoned and his bail set at an exorbitant amount.

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[1] BLACK'S LAW DICTIONARY, 150 (8th ed. 2004).

[2] 18 U.S.C. 3142.

[3] 18 U.S.C. 3143.

[4] 18 U.S.C. 3144.

[5] (For a more expansive treatment of many of the same matters see, 3B WRIGHT, KING & KLEIN, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §§761-779 (2004 & 2008 Supp.); *Thirty-Seventh Annual Review of Criminal Procedure: Bail*, 37 GEORGETOWN LAW JOURNAL ANNUAL REVIEW OF CRIMINAL PROCEDURE 311 (2008)).

[6] 1ST EPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 223 (1883 ed.).

[7] BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 295 (1769)(transliteration supplied); see generally, DEHASS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENTS IN CRIMINAL CASES TO THE YEAR 1275 (1940).

[8] 1ST EPHEN, *supra*, at 236; Duker, *The Right to Bail: A Historical Inquiry*, 42 ALBANY LAW REVIEW 33, 45-6 (1977).

[9] 3 Edw. I, ch. 12 (1275).

[10] III BLACKSTONE, *supra* at 131.

At the dawn of the American colonial period, Parliament had occasion to visit each of these concerns. First in the Petition of Right, it precluded pre-trial imprisonment without a criminal charge and confirmed the availability of habeas corpus relief for those who were held without charge.[11] Then in the Habeas Corpus Act of 1679, it imposed a three-day deadline for return on a habeas writ,[12] thus eliminating a custodian's use of delay to frustrate a pretrial prisoner's right to bail. Finally in the Bill of Rights of 1689, it prohibited excessive bail.[13]

In this country, the right to bail appears to have been widely recognized during the colonial period and in the early years of the Republic. The 1641 Massachusetts Body of Liberties included a right to bail section: "No mans person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behaviour in the meane time, unless it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of [the General] Court doth allow it."[14] The United States Bill of Rights and many of the constitutions of the original states featured excessive bail clauses, and less often, right to bail clauses.[15]

The Continental Congress made a right to bail part of the Northwest Ordinance (". . .All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. . ."),[16] and the First Congress added a similar clause to the first Judiciary Act ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by justice of the supreme court, or a judge of a district court, who shall exercise this discretion thereto, regarding the nature and circumstances of the offence, and of the evidence, and usage of law. . .").[17]

The Revised Statutes of 1878 mirrored the provisions of the Judiciary Act.[18] The Revised Statutes included additional provisions relating to bail for habeas petitioners, and the arrest and subsequent proceedings concerning individuals previously admitted to bail.[19] These continued in place with little substantive revision until the Bail Reform Act of 1966.[20]

In the mid-60s, the state of federal bail troubled the Congress for two reasons. First, Congress believed that, in spite of the presumption of innocence, an accused's prospects of pretrial release

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[11] 3 Car. I, ch. 1 (1628).

[12] 31 Car. II, ch. 2 (1679).

[13] 1 Wm. & M. 2, ch.2 (1689).

[14] *The Body of Liberties*, ¶18, reprinted in, WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS 36 (1889)).

[15] United States Constitution of 1789, Amend. VIII ("Excessive bail shall not be required. . ."); VIRGINIA CONSTITUTION OF 1776, BILL OF RIGHTS, §9 (no excessive bail); PENNSYLVANIA CONSTITUTION OF 1776, FRAME OF GOVERNMENT, §28 (". . . All prisoners shall be bailable by sufficient securities, unless for capital offences, when the proof is evident or presumption great"), §29 (no excessive bail); NORTH CAROLINA CONSTITUTION OF 1776, DECLARATION OF RIGHTS, Art. X (no excessive bail); MARYLAND CONSTITUTION OF 1776, DECLARATION OF RIGHTS, Art. XXII; VERMONT CONSTITUTION OF 1777, Ch.II, §XXV (right to bail), Ch.II, §XXVI (no excessive bail); GEORGIA CONSTITUTION OF 1777, Art. LIX (no excessive bail); MASSACHUSETTS CONSTITUTION OF 1780, Pt.I, Art. XXVI (no excessive bail); NEW HAMPSHIRE CONSTITUTION OF 1784, Pt. I, Art. XXXIII (no excessive bail); SOUTH CAROLINA CONSTITUTION OF 1790, Art. IX, §4 (no excessive bail); DELAWARE CONSTITUTION OF 1792, Art. I, §11 (no excessive bail), §12 (right to bail).

[16] Art. II , reprinted in the preface to the first volume of the United States Code at LIV.

[17] Act of September 24, 1789, 1 Stat. 73, 91 (1789).

[18] Rev. Stat. §§1015, 1016 (1878).

[19] *Id*. at. §§1017-1020.

[20] See e.g., 18 U.S.C. 597-601 (1940 ed.); F.R.Crim.P. 46 (1944 ed.); 18 U.S.C. 3141-3146 (1964 ed.).

turned primarily on his wealth. "Every witness before the subcommittees agreed that, at least in noncapital cases, the principal purpose of bail is to assure that the accused will appear in court for his trial. There is no doubt, however, that each year thousands of citizens accused of crimes are confined before their innocence or guilt has been determined by a court of law, not because there is any substantial doubt that they will appear for trial but merely because they cannot afford money bail. There is little disagreement that this system is indefensible."[21]

It further believed that a poor defendant suffered considerable disadvantages as a consequence. "There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses, cannot consult his lawyer in private, and enters the courtroom – not in the company of an attorney – but from a cell block in the company of a marshal. Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty."[22]

Second, it feared that the existing bail system permit had no real means holding of those charged with a crime whose release would posed a danger to the community or someone in the community. Congress addressed the first concern in the Bail Reform Act of 1996, but was unable to reach consensus on the second, preventive detention, until several years later. "This legislation does not deal with the problem of the prevention detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. . . . Obviously, the problem of preventive detention is closely related ot the problem of bail reform. A solution goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis. The present problem of reform of existing bail procedures demands an immediate solution. It should not be delayed by consideration of the question preventive detention."[23]

The 1966 Bail Reform Act amended federal law to require the pretrial release of an individual charged with a noncapital federal offense upon personal recognizance or an unsecured appearance bond, unless the court determined they were likely to be insufficient to assure the appearance of the accused at trial.[24] The court was to assess the risk of flight by considering:

> the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[25]

Should the court conclude that an accused would otherwise pose a risk of flight, it was to impose the least restrictive of a series of conditions that included first, third party custody; then, travel

[21] S.Rept. 89-750 at 6 (1965); see also, H.Rept. 89-1541 at 8-9 (1966).

[22] S.Rept. 89-750 at 7; see also, H.Rept. 89-1541 at 9.

[23] *Id.* at 5-6.

[24] 18 U.S.C. 3146(a) (1964 ed., Supp. II).

[25] 18 U.S.C. 3146(b) (1964 ed., Supp.II).

and associational limitations; then, cash or secured bail; and finally night-time incarceration.[26] The accused was given an explicit right to appeal the imposition of any such conditions.[27]

Release was also required in capital cases and following conviction, unless the court concluded that no condition or series of conditions could overcome the risk of flight or danger to the community posed by the defendant.[28]

For several years thereafter, debate continued over the wisdom and constitutionality of pretrial preventive detention in noncapital cases. Some found preventive detention incompatible with the right to bail they considered implicit in either the Eighth Amendment's excessive bail clause or the Fifth Amendment's due process clause or in both.[29] Others felt the right was subject to reasonable legislative regulation.[30]

History seemed to provide support for either view. On one hand, the excessive bail clause in the English Bill of Rights was clearly enacted to prevent judges from frustrating the right to bail by requiring excessive bail. ("Unfortunately, the [Habeas Corpus] Act closed one loophole and opened another. The acknowledgment of discretion in clause III allowed bail to be set at prohibitively high amounts. . . .The Bill of Rights corrected the practice of setting excessive bail in criminal cases . . .").[31] Moreover, until the mid-twentieth century Congress and the vast majority of state constitutions had consistently recognized a right to bail in noncapital cases save only when the accused posed a risk of flight.[32] On the other hand, both the English and the federal right to bail had always been a matter of statute, that is, a matter subject to reasonable legislative regulation.

Dicta in various Supreme Court cases seemed equally conflicted. In *Stack v. Boyle*, the Court noted that "this traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption innocence, secured only after centuries of struggle, would lose its meaning."[33] Yet shortly thereafter it observed in *Carlson v. Landon* that, "the [excessive] bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable."[34]

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[26] 18 U.S.C. 3146(a)(1)-(5) (1964 ed., Supp. II).

[27] 18 U.S.C. 3147 (1964 ed., Supp. II).

[28] 18 U.S.C. 3148 (1964 ed., Supp. II).

[29] E.g., Foote, *The Coming Constitutional Crisis in Bail: I & II*, 113 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 959, 1125 (1965).

[30] E.g., Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VIRGINIA LAW REVIEW 1223 (1969).

[31] Duker, *The Right to Bail: A Historical Inquiry*, 42 ALBANY LAW REVIEW 33, 66 (1977).

[32] *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUMBIA LAW REVIEW 328, 353 (1982).

[33] 342 U.S. 1, 4 (1952).

[34] 342 U.S. 524, 545-46 (1952)

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.[35] 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:

> In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception. The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel. The numerous procedural safeguards detailed above must attend this adversary hearing. We are unwilling to say that this congressional determination, based as it is upon that primary concern of every government – a concern for the safety and indeed the lives of its citizens – on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.[36]

The Court explained that the regulatory character of the regime immunized it from substantive due process assault, "Unless Congress expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned to it. We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history . . . indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals. Congress instead perceived pretrial detention as a potential solution to a pressing societal problem. There is no doubt that preventing danger to the community is a legitimate regulatory goal. Nor are the incidents of pretrial detention excessive in relation to the regulatory goal Congress sought to achieve."[37]

Its tailored procedural safeguards shielded it from procedural due process, ("Finally, we may dispose briefly of respondents' facial challenge to the procedures of the Bail Reform Act. . . . We think [its] extensive safeguards sufficient to repel a facial challenge'),[38] and excessive bail challenges ("Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be excessive in light of the perceived evil. . . . We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail").[39] So a majority of the Court declared. Three Justices – Marshall, Brennan and Stevens – found the majority's arguments unpersuasive.[40]

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.

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[35] The Bail Reform Act of 1984 was enacted as chapter I of Title II (Comprehensive Crime Control Act of 1984) of P.L. 98-473, 98 Stat. 1837, 1976 (1984), 18 U.S.C. 3141-3156 (1982 ed., Supp. II).

[36] *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

[37] *Id*. at 747-48 (internal citations omitted).

[38] *Id.* at 751.

[39] *Id.* at 754.

[40] *Id.* at 755 (Marshall and Brennan, JJ., dissenting); *id*. at 768 (Stevens, J., dissenting).

Pretrial

An individual released prior to trial remains free under the same conditions throughout the trial, subject to modification by the court, until conviction or acquittal, F.R.Crim.P.46(b). For that reason, the term pre-trial release is understood to include all pre-conviction release, both before and during trial. 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. "A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter," 18 U.S.C. 3141(a). Section 3141 authorizes arrest by order of "any justice or judge of the United States . . . any United States magistrate judge . . . [and] any chancellor, judge of a supreme or superior court, chief or first judge of the common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found").

The law affords the judge or magistrate four options which it places in descending order of preference. 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.[41] The federal courts have generally upheld the warrantless, suspicionless collection of DNA samples from the convicted, parolees, probationers, and individuals on supervised release.[42] There may be some question, however, whether the result would be the same in the case of arrestees. When the Eighth Circuit in *Kills Enemy* rejected a challenge to a general search requirement imposed as a bail condition following conviction, it was careful to note that the critical distinction between pre-trial and post-conviction bail, "Kills Enemy contends that the condition of a convicted person on presentence release is analogous to that of a pretrial releasee, not to a probationer or convict on supervised release, and consequently there is not the same justification for abridgement of his fourth amendment rights . . . We reject this argument. A convicted person awaiting sentence is no longer entitled to a presumption of innocence or presumptively entitled to his freedom. *Compare* 18 U.S.C. §§ 3142(b) (presumption in favor of pretrial release) and 3143(a) (presumption of detention pending sentence). As with the parole and probation cases, there is a heightened need for close supervision of the convicted person's activities to protect society and the releasee himself, and the releasee is entitled only to a conditional liberty."[43] More recently, the Ninth Circuit held that the Fourth Amendment's probable cause requirement applies to state random drug test of an individual released on personal recognizance on the condition that he agree to random searches,[44] although some have questioned its analysis.[45]

[41] 18 U.S.C. 3142(a)(1), (b)

[42] *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007)(citing cases from the other circuits).

[43] *United States v. Kills Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993).

[44] *United States v. Scott*, 450 F.3d 863, 874-75 (9th Cir. 2006),

[45] E.g., *Unconstitutional Conditional Release: A Pyrrhic Victory for Arrestees' Privacy Rights Under* United States v. Scott, 48 WILLIAM & MARY LAW REVIEW 2365 (2007).

Conditional Release

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.[46] Under the appropriate circumstances, the "community" whose safety is the focus of the judge or magistrate's inquiry need not be limited geographically to either the district or even the United States.[47] The fourteen statutory conditions are:

- *third party supervision*, 18 U.S.C. 3142(c)(1)(B)(i)("remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community")
- seeking or maintaining employment, 18 U.S.C. 3142(c)(1)(B)(ii)
- *meeting education requirements*, 18 U.S.C. 3142(c)(1)(B)(iii)
- *observing residency, travel, or associational restrictions*, 18 U.S.C. 3142(c)(1)(B)(iv)(The * symbol indicates the conditions that must be imposed when the accused is charged with certain sexual offenses committed against a child. A list of these offenses with captions is appended.) *
- avoiding contact with victims or witnesses, 18 U.S.C. 3142(c)(1)(B)(v) *
- maintaining regular reporting requirements, 18 U.S.C. 3142(c)(1)(B)(vi) *
- *obeying a curfew*, 18 U.S.C. 3142(c)(1)(B)(vii) *
- *adhering to firearms limitations*, 18 U.S.C. 3142(c)(1)(B)(viii) *
- avoiding alcohol or controlled substance abuse, 18 U.S.C. 3142(c)(1)(B)(ix)
- *undergoing medical treatment*, 18 U.S.C. 3142(c)(1)(B)(x)
- •*entering into a personally secured appearance agreement*, 18 U.S.C. 3142(c)(1)(B)(xi)("execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require"). Both here and in case of a bail bond, the judge or magistrate " the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required," 18 U.S.C. 3142(g)

[46] 18 U.S.C. 3142(a)(2), (c).

[47] E.g., *United States v. Hir*, 517 F.3d 1081, 1088 (9th Cir. 2008).

- *executing a bail bond*, 18 U.S.C. 3142(c)(1)(B)(xii) ("execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require"). Both here and in case of a bail bond, the judge or magistrate "the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required," 18 U.S.C. 3142(g).
- submitting to after hours incarceration,18 U.S.C. 3142(c)(1)(B)(xiii) , and
- complying with any other court imposed condition, 18 U.S.C. 3142(c)(1)(B)(xiii).

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, 18 U.S.C. 3142(c)(1)(a citation list with captions is appended). Some defendants have successfully challenged this mandatory requirement on procedural due process grounds.[48]

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."[49] 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. As the Ninth Circuit explained:

> Several other circuits have addressed the apparent violation of § 3142(c)(2) that arises when, as in Fidler's case, a defendant is granted pretrial bail, but is unable to comply with a financial condition, resulting in his detention. It may appear that detention in such circumstances always contravenes the statute. We agree, however, with our sister circuits that have concluded that this is not so. These cases establish that the de facto detention of a defendant under these circumstances does not violate §3142(c)(2) if the record shows that the detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community. This is because, under those circumstances, the defendant's detention is not because he cannot raise the money, but because without the money, the risk of flight [or danger to others] is too great.[50]

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[48] *United States v. Torres*, 566 F.Supp.2d 591, 601 (W.D. Tex. 2008)(violates due process as applied), *accord*, *United States v. Vujnovich*, 2007 WL 4125901 (D. Kan. Nov. 20, 2007); *United States v. Crowell*, 2006 WL 3541736 (W.D.N.Y. Dec. 7, 2006); *contra*, *United States v. Gardner*, 523 F.Supp.2d 1025, 1031-34 (N.D. Cal. 2007).

[49] 18 U.S.C. 3142(c)(2).

[50] *United States v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005), citing, *United States v. Westbrook*, 780 F.2d 1185, 1188-189 (5th Cir. 1986); *United States v. McConnell*, 842 F.2d 105, 108-09 (5th Cir.1988); *United States v. Szott*, 768 F.2d 159, 160 (7th Cir.1985) (per curiam); *United States v. Wong-Alvarez*, 779 F.2d 583, 585 (11th Cir.1985) (per curiam); (continued...)

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, 18 U.S.C. 3142(a)(3), 3142(d). Otherwise applicable bail provisions come into play if the accused has not been transferred within the ten-day deadline, 18 U.S.C. 3142(d).

Pretrial Detention

Finally, under some circumstances, the judge or magistrate may order the accused detained prior to trial.[51] Although pre-trial detention is the least statutorily favored alternative in the federal pre-trial bail scheme, over 60% of those accused of federal crimes and presented to a federal judge or magistrate are detained prior to trial.[52]

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.[53] 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.[54]

Offense-driven detention

A detention hearing may be held on the government's motion when the accused is charged with any of nine categories of federal crime:

- crimes of violence;
- sex trafficking involving a child or the use of force, fraud or coercion
- federal crimes of terrorism with a maximum term of imprisonment of 10 years or more;
- offenses punishable by death or one punishable by life imprisonment;
- controlled substance offenses with a maximum term of imprisonment of 10 years or more;

(...continued)

United States v. Jessup, 757 F.2d 378, 388-89 (1st Cir.1985), *abrogated on other grounds by United States v. O'Brien*, 895 F.2d 810 (1st Cir.1990).

[51] 18 U.S.C. 3142(a)(4), (e), (f), (g).

[52] Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 2007 Annual Report of the Director*, Table H-14 (Pretrial Services Release and Detention for the 12-month Period Ending September 30, 2007), at 331 (61.8% listed as "Detained and Never Released"), at http://www.uscourts.gov/judbus2007/contents.html.

[53] 18 U.S.C. 3142(f)(1).

[54] 18 U.S.C. 3142(f)(2).

- 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;
- nonviolent felonies committed against a child;
- felonies involving the use of firearms, explosives or other dangerous weapons;
- failure to register as a sex offender, 18 U.S.C. 3142(f)(1)(A)-(E).

The categories obviously overlap and reenforce each other. For example, many of the federal crimes of terrorism are also crimes punishable by life imprisonment or death. (A list of the federal crimes of terrorism with a maximum penalty of imprisonment of 10 years or more is appended; as is a list of the federal crimes with a maximum penalty of death or of imprisonment for life.)

In some instances the apparent duplication provides clarification. Absent a separate specific category, crimes of violence might not be understood to include felonies involving the use of firearms, explosives or other dangerous weapons, as was often the case prior to creation of the explicit firearm category.[55] By the same token, listing offenses punishable by death or life imprisonment makes it clear that espionage is covered without the necessity of inquiring whether a particular offense in fact involved the risk of violence which would qualify it as crime of violence.

Section 3156 provides still further clarification. It 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).[56]

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.[57]

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 three days thereafter at the option of the government or within five days thereafter at the option of the accused.[58] 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.[59] Failure to comply with the deadlines for a detention

[55] E.g., *United States v. Ingle*, 454 F.3d 1082, 1084-86 (10th Cir. 2006); accord, *United States v. Bowers*, 432 F.3d 518, 520-21 (3d Cir. 2005)(citing cases from the District of Columbia, Seventh and Eleventh Circuits).

[56] 18 U.S.C. 3156(a)(1).

[57] 18 U.S.C. 3142(f)(2).

[58] 18 U.S.C. 3142(f)

[59] *Id.*

hearing, however, does not entitle the accused to release.[60] The accused is entitled to the representation and appointment of counsel at the hearing.[61] He may testify, examine and cross-examine witnesses, and present evidence on his own behalf.[62] Evidentiary rules governing criminal trials do not apply at the detention hearing.[63]

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.[64] 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 nine 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 five years.[65] Section 3142 establishes a second rebuttal 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 kidnaping or sexual offenses committed against a child.[66]

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[60] *United States v. Montalvo-Murillo*, 495 U.S. 711, 173 (1990).

[61] 18 U.S.C. 3142(f)

[62] *Id.*

[63] *Id.*

[64] 18 U.S.C. 3142(g)("The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning – (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device; (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including – (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release").

[65] 18 U.S.C. 3142(e), (f).

[66]

18 U.S.C. 3142(e)(3)("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed – (A)an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46[46 U.S.C. 70501-70507, the Maritime Drug Law Enforcement Act (smuggling controlled substances)], (B) an offense under section 924(c)[use of a firearm during and furtherance of a crime of violence or 10-year controlled substance offense], 956(a)[conspiracy to commit overseas murder, maiming, kidnaping or malicious mischief], or 2332b [transnational terrorism] of this title, (C) an offense listed in section 2332b(g)(5)(B)[federal crimes of terrorism] of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed (D) an offense under chapter 77 of this title [sexual abuse]for which a maximum term of imprisonment of 20 yeaers or more is prescribed; or (E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 [child-victim offenses] of this title"). The appendix to this report includes lists of the federal crimes of terrorism, the controlled substance offenses which carry a maximum term of imprisonment of 10 years or more, and the child-victim offenses.

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

> 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).[67]

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.[68] Detention orders contain written findings and justifications.[69] 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.[70]

After the issuance of an order, the court is free (1) to amend a release or detention order;[71] (2) to reopen the detention hearing to consider newly discovered information or changed

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[67] *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008)(internal citations omitted); accord, *United States v. Abad*, 350 F.3d 793, 797 (8th Cir. 2003); *United States v. Close*, 550 F.Supp.2d 185, 187-88 (D.Mass. 2008).

[68] 18 U.S.C. 3142(h)("In a release order issued under subsection (b) or (c) of this section, the judicial officer shall– (1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and (2) advise the person of – (A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release; (B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and (C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant)").

[69] 18 U.S.C. 3142(i)(1).

[70] 18 U.S.C. 3142(i)(2)("In a detention order issued under subsection (e) of this section, the judicial officer shall. . .(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; (3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and (4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding").

[71] 18 U.S.C. 3142(c)(3), 3145(a).

circumstances;[72] 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.[73] Release orders and detention orders are final orders for appellate purposes,[74] and either the government or the accused may appeal them.[75]

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.[76] 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,[77] 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,[78] or that exceptional reasons exist for granting bail.[79] 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.[80]

Bail Pending Appeal

When a defendant appeals following conviction, 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.[81] An additional

[72] 18 U.S.C. 3142(f).

[73] 18 U.S.C. 3142(i).

[74] 18 U.S.C. 3145(c).

[75] 18 U.S.C. 3145(a), (b).

[76] 18 U.S.C. 3143(a)(1),

[77] 18 U.S.C. 3143(a)(2), 3142(f)(1)(A), (B), (C).

[78] 18 U.S.C. 3143(a)(2).

[79] 18 U.S.C. 3145(c)(". . . A person subject to detention pursuant to section 3143(a)(2)or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate"); the exceptional reasons must be uncommon, unusual, unique, rare, *United States v. Little*, 485 F.3d 1210, 1211 (8th Cir. 2007); *United States v. Brown*, 368 F.3d 992, 993 (8th Cir. 2004).

[80] 18 U.S.C. 3143(a)(1).

[81] 18 U.S.C. 3143(b)(1)(". . . the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds – (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence"). *United States v. Turner*, 531 F.Supp. 2d 123, 126 (D.D.C. 2008)("A question raised on appeal is consider (continued...)

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.[82] As with bail pending sentencing, in such instances a judge or magistrate may only order release if he finds that exceptional reasons exist to justify such an order.[83] The circumstances giving rise to exceptional reasons have variously described as uncommon, unusual, unique, and rare.[84]

When the government alone appeals, the pretrial bail provisions of section 3142 apply, unless the government is simply appealing the sentence imposed.[85] 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.[86]

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 one year to not more than 10 years depending on the severity of the underlying offense.[87] An individual who violates a condition of his release on bail may also be

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'substantial' when it is 'a close question or one that very well could be decided either way.' *United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987)"); *accord, United States v. Colon-Munoz*in , 292 F.3d 18, 20 (1st Cir. 2002); *United States v. Marshall*, 78 F.3d 365, 366 (8th Cir. 1996).

[82] 18 U.S.C. 3143(b)(2).

[83] 18 U.S.C. 3145(c); *United States v. Verkhoglyad*, 516 F.3d 122, 126 (2d Cir. 2008); *United States v. Larue*, 478 F.3d 924, 925 (8th Cir. 2007); *United States v. Garcia*, 340 F.3d 1013, 1015(9th Cir. 2003).

[84] *United States v. Larue*, 478 F.3d at 925; *United States v. Lea*, 360 F.3d 401, 403 (2d Cir. 2004); *United States v. Garcia*, 340 F.3d at 1022.

[85] 18 U.S.C. 3143(c).

[86] *Id.*

[87] 18 U.S.C. 3146(a), (b)("Whoever, having been released under this chapter knowingly – (1) fails to appear before a court as required by the conditions of release; or (2) fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section. (b) Punishment.– (1) The punishment for an offense under this section is– (A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for– (i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both; (ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both; (iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or (iv)a misdemeanor, a fine under this title or imprisonment for not more than one year, or both; and (B) if the person was released for appearance as a material witness, a fine under this chapter or (continued...)

prosecuted for contempt of court under 18 U.S.C. 401.[88] If the violation takes the form of a separate federal or state offense,[89] 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).[90]

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.[91] 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.[92] 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.[93] A finding of probable cause that the individual has committed a new offense triggers a presumption that no combination of conditions will dispel concerns for public safety.[94]

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.[95] The court must do so if he fails to abide by any condition imposed for his release.[96] The prosecution begins the process with a motion to enforce.[97] If the surety returns the individual to the custody of the court,[98] or if not contrary to interests of justice,[99] the court may set aside, mitigate, or remit the forfeiture or may exonerate the surety and release the bail.[100]

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imprisonment for not more than one year, or both. (2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense"); *United States v. Locklin*, 530 F.3d 908, 910-11 (9th Cir. 2008)("To establish a violation of 18 U.S.C. §3146, the government ordinarily must prove that the defendant (1) was released pursuant to Title 18, Chapter 207 of the U.S. Code, (2) was required to appear in court, (3) knew he was required to appear, (4) failed to appear as required, and (5) was willful in his failure to appear").

[88] 18 U.S.C. 3148(c); *United States v. Edelmann*, 378 F.Supp.2d 876, 879 (E.D. Ark. 2005).

[89] Release on condition or recognizance are each "subject to the condition that the person not commit a Federal, state or local crime during the period of release," 18 U.S.C. 3142(b), (c).

[90] 18 U.S.C. 3147. See, *United States v. Brodie*, 507 F.3d 527, 532 n.1 (7th Cir. 2007); *United States v. Fitzgerald*, 435 F.3d 484, (4th Cir. 2006)(holding that punishment under section 3147 offended neither the rule of lenity nor the double jeopardy clause).

[91] 18 U.S.C. 3142(c)(3), 3148.

[92] 18 U.S.C. 3148(b).

[93] *Id.*

[94] *Id.*

[95] 18 U.S.C. 3146(d).

[96] F.R.Crim.P. 46(f).

[97] F.R.Crim.P. 46(f)(3)(c).

[98] Federal law authorizes a surety to arrest and deliver an individual for whose bail or appearance bond the surety has pledged security, 18 U.S.C. 3149; F.R.Crim.P. 46(f)(2)(A).

In the 110th 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.[101] 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.[102] Its officers enjoy statutory authority to:

- Provide judges and magistrates with information relevant to initial bail determinations[103]
- Prepare reports relevant for the review of release and detention orders[104]
- Supervise bailees released into its custody[105]
- Operate halfway houses, treatment facilities and the like for those released on bail[106]

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[99] F.R.Crim.P. 46(f)(2)(B).

[100] F.R.Crim.P. 46(f)(2), (g). *United States v. Famiglietti*, 548 F.Supp.2d 398, (S.D. Tex. 2008) ("The precedents in this Circuit make it clear that district courts have considerable discretion in deciding this issue and in fixing conditions on which all or some portion of a bail forfeiture should be set aside. The authorities instruct district courts, when making these determinations, to take into account the following non-exhaustive list of considerations: (1) whether the defendant's breach of the conditions of release was willful, (2) whether actions by the government, unknown to the surety, increased the risk that the defendant would violate the terms and conditions of his release, (3) whether the surety assisted in apprehending the defendant, (4) whether the surety assisted, played any role in, or was in some measure responsible for the conduct by the defendant that breached the release conditions, (5) any cost, inconvenience, or prejudice suffered by the government as a result of the defendant's breaching conduct or of the surety's actions or inactions, (6) whether the surety was a professional bail bondsman or was a family member or friend of the defendant, (7) the appropriateness of the amount of the bond, and (8) any other pertinent mitigating circumstances that were not taken into account when addressing the other identified factors. *See United States v. Nguyen*, 279 F.3d 1112, 1115-16 (9th Cir.2002); *United States v. Amwest Surety Insurance Company*, 54 F.3d 601 (9th Cir.1995)").

[101] H.R. 2286 (Bail Bond Fairness Act of 2007), 153 *Cong. Rec.* H7036 (daily ed. June 25, 2007); see also, H.Rept. 110-208 (2007); *Bail Bond Fairness Act of 2007: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 110th Cong., 1st Sess. (2007).

[102] 18 U.S.C. 3152-3154.

[103] 18 U.S.C. 3154(1)("Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release; except that a district court may direct that information not be collected, verified, or reported under this paragraph on individuals charged with Class A misdemeanors as defined in section 3559(a)(6) of this title").

[104] 18 U.S.C. 3154(2) ("Review and modify the reports and recommendations specified in paragraph (1) of this section for persons seeking release pursuant to section 3145 of this chapter").

[105] 18 U.S.C. 3154(3).

[106] 18 U.S.C. 3154(4)("Operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including residential halfway houses, addict and alcoholic treatment centers, and counseling services, and contract with any appropriate public or private agency or person, or expend funds, to monitor and provide treatment as well as nontreatment services to any such persons released in the community, including equipment and (continued...)

- Inform the court and prosecutors of release order violations[107]
- Advise the court on the availability of third party custodians[108]
- Help bailees secure employment, medical, legal and social services[109]
- Prepare reports on supervision of pretrial detainees[110]
- Prepare reports on the bail system[111]
- Prepare pretrial diversion reports for prosecutors[112]
- Contract for the performance of its responsibilities[113]
- Supervise and report on prisoners conditionally released following hospitalization for mental disease or defect[114]
- Carry firearms[115]
- Perform other functions assigned to it by the bail laws.[116]

Material Witnesses

Federal law authorizes the arrest and detention or bail of individuals with evidence material to the prosecution of a federal offense.[117] With limited variations, federal bail laws apply to material

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emergency housing, corrective and preventative guidance and training, and other services reasonably deemed necessary to protect the public and ensure that such persons appear in court as required").

[107] 18 U.S.C. 3154(5)("Inform the court and the United States attorney of all apparent violations of pretrial release conditions, arrests of persons released to the custody of providers of pretrial services or under the supervision of providers of pretrial services, and any danger that any such person may come to pose to any other person or the community, and recommend appropriate modifications of release conditions").

[108] 18 U.S.C. 3154(6).

[109] 18 U.S.C. 3154(7).

[110] 18 U.S.C. 3154(8).

[111] 18 U.S.C. 3154(9)("Develop and implement a system to monitor and evaluate bail activities, provide information to judicial officers on the results of bail decisions, and prepare periodic reports to assist in the improvement of the bail process").

[112] 18 U.S.C. 3154(10)("To the extent provided for in an agreement between a chief pretrial services officer in districts in which pretrial services are established under section 3152(b) of this title, or the chief probation officer in all other districts, and the United States attorney, collect, verify, and prepare reports for the United States attorney's office of information pertaining to the pretrial diversion of any individual who is or may be charged with an offense, and perform such other duties as may be required under any such agreement").

[113] 18 U.S.C. 3154(11).

[114] 18 U.S.C. 3154(12).

[115] 18 U.S.C. 3154(13).

[116] 18 U.S.C. 3154(14).

[117] "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title [relating to bail]. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the (continued...)

witnesses arrested under section 3144.[118] 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.[119] Release is generally favored, if not then release with conditions or limitations is preferred, and finally as a last option detention is permitted.[120] 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.[121] A material witness, however, need only satisfy the appearance standard.[122] 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.[123] If neither word nor bond nor conditions will suffice, the witness may be detained.[124] 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.[125]

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."[126]

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deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure," 18 U.S.C. 3144. For a more detailed discussion of section 3144, see CRS Report RL33077, *Arrest and Detention of Material Witnesses: Federal Law In Brief*, by (name redacted), from which portions of this report have been drawn. Some commentators have questioned the use of the authority under section 3144, see e.g., Bascuas, *The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VANDERBILT LAW REVIEW 677 (2005); Carlson, *Distorting Due Process for Noble Purposes: The Emasculation of America's Material Witness Laws*, 42 GEORGIA LAW REVIEW 941 (2008).

[118] 18 U.S.C. 3144 (". . .a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title . . .").

[119] *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in Western District of Texas*, 612 F.Supp. 940, 943-45(W.D.Tex. 1985); 18 U.S.C. 3142(f); 18 U.S.C. 3006A(a)(1)(G).

[120] 18 U.S.C. 3142(a)("Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section; (2) released on a condition or combination of conditions under subsection (c) of this section; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or (4) detained under subsection (e) of this section").

[121] 18 U.S.C. 3142(b)("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

[122] *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003), citing, S.Rep.No. 98-225, at 28 no.90 (1983)("Of course a material witness is not to be detained on the basis of dangerousness"); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass. 1996)("a material witness may be detained only if the judicial officer finds by a preponderance of the evidence, that the material witness poses a risk of flight").

[123] 18 U.S.C. 3142(c).

[124] 18 U.S.C. 3142(e).

[125] *United States v. Awadallah*, 349 F.3d 42, 63 n.15 (2d Cir. 2003); 18 U.S.C. 3142(g).

[126] *In re Extradition of Kirby*, 106 F.3d 855, 858 (9th Cir. 1997)("there is a presumption against bail in an extradition case and only special circumstances will justify bail"), citing, *Wright v. Henkel*, 190 U.S. 49, 63 (1903); *accord*, *United States v. Lin-Hong*, 83 F.3d 523, 525 (1st Cir. 1996); *Martin v. Warden*, 993 F.2d 824, 827 (11th Cir. 1993); *United* (continued...)

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.[127] In the past they have included, singularly or in some combination, factors such as:

- unusual anticipated delays prior to extradition;[128]
- the likelihood that extradition may not be granted;[129]
- the likelihood that the individual will prevail following extradition;[130]
- the ill health of the individual;[131]
- the availability of bail under the laws of both countries for the offense for which extradition was sought;[132]
- the adverse impact on third parties of a refusal to grant bail;[133]
- the fact that the individual was a minor;[134]
- religious prerogatives lost if bail was not granted;[135] and
- lack of urgency to prosecute previously evidenced by the requesting nation.[136]

On the other hand, "a partial list of what have not been found to be 'special circumstances' includes

- a significant bond and an unblemished record;[137]

(...continued)

States v. Russell, 1215, 1216 (5th Cir. 1986); *United States v. Keitner*, 784 F.2d 159, (2d Cir. 1986);*United States v. Wroclawski*, 574 F.Supp.2d 1040, 1044-45 (D. Ariz. 2008); see generally, Iraola, *The Federal Common Law of Bail in International Extradition Proceedings*, 17 INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW 29 (2007).

[127] *In re Extradition of Santos*, 473 F.Supp.2d 1030, 1036 (C.D. Cal. 2006) ("The list of potential 'special circumstances' is not limited to those previously recognized in published decisions, and the determination of what constitutes a 'special circumstance' is left to the sound discretion of the trial judge").

[128] *In re Extradition of Kirby*, 106 F.3d at 863; *United States v. Lin-Hong*, 83 F.3d at 524; *In re Extradition of Santos*, 473 F.Supp.2d 1030, 1036 (C.D. Cal. 2006); *United States v. Ramnath*, 533 F.Supp.2d 662, 666 (E.D. Tex. 2008); *In re Extradition of Chapman*, 459 F.Supp.2d 1024, 1027 (D. Haw. 2006).

[129] *In re Extradition of Kirby*, 106 F.3d at 864; *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989); *In re Extradition of Santos*, 473 F.Supp.2d at 1036; *United States v. Ramnath*, 533 F.Supp.2d at 666; *In re Extradition of Mironescu*, 296 F.Supp.2d 632, 634 (M.D. N.C. 2003)

[130] *United States v. Ramnath*, 533 F.Supp.2d 662, 666 (E.D. Tex. 2008); *United States v. Ramnath*, 533 F.Supp.2d at 666; *In re Extradition of Bowey*, 147 F.Supp.2d 1365, 1368 (N.D. Ga. 2001).

[131] *In re Extradition of Santos*, 473 F.Supp.2d at 1036; *United States v. Ramnath*, 533 F.Supp.2d at 666; *In re Extradition of Nacif-Borge*, 829 F.supp. 1210, 1221 (D. Nev. 1993).

[132] *United States v. Ramnath*, 533 F.Supp.2d at 666; *In re Extradition of Nacif-Borge*, 829 F.supp. 1210, 1221 (D. Nev. 1993).

[133] *In re Extradition of Kirby*, 106 F.3d at 864-65; *United States v. Ramnath*, 533 F.Supp.2d at 685; *United States v. Wroclawski*, 574 F.Supp.2d at 1045.

[134] *United States v. Ramnath*, 533 F.Supp.2d at 666; *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 915 (2d Cir. 1981).

[135] *United States v. Ramnath*, 533 F.Supp.2d at 666; *United States v. Taitz*, 130 F.R.D. 442, 443 (S.D. Cal. 1990).

[136] *United States v. Wroclawski*, 574 F.Supp.2d at 1044; *In re Extradition of Chapman*, 459 F.Supp.2d at 1027.

[137] *United States v. Leitner*, 784 F.2d 159, 161 (2d Cir. 1986).

- the defendant being a highly trained doctor available to administer to the public;[138]
- need to consult with counsel and assist in gathering evidence to support defense; [139]
- defendants' brother had been released;[140]
- discomfort of sitting in jail;[141]
- 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;[142]
- the need for a special diet due to having one kidney and health concerns,[143] *In re Extradition of Molnar*, 182 F.Supp.2d 684, 688 (N.D. Ill. 2002)(bullets added)(full citations added in some instances).

In addition, the individual must establish that if released he will not flee or pose a danger[144] and may be made subject to whatever relevant conditions the court deems to impose.[145]

[138] *In the Matter of Extradition of Yechiel Heilbronn,* 773 F.Supp. 1576 (W.D.Mich.1991).

[139] *Extradition of Smyth*, 976 F.2d 1535 (9th Cir. 1992).

[140] *United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979).

[141] *In re Klein,* 46 F.2d 85 (S.D.N.Y.1930).

[142] *In the Matter of Extradition of Artukovic*, 628 F.Supp. 1370, 1374-75 (C.D.Cal.1986) (stay denied *sub. nom. Artukovic v. Rison,* 784 F.2d 1354 (9th Cir.1986)).

[143] *In the Matter of the Extradition of Kamel Nacif-Borge,* 829 F.Supp. at 1216.

[144] *In re Extradition of Santos*, 473 F.Supp.2d at 1035.

[145] See e.g., *In re Extradition of Kirby*, 106 F.3d 855, 865-66 (9th Cir. 1997).

Appendix A. Federal Crimes of Terrorism 18 U.S.C. 2332b(g)(5)(B) With a Maximum Penalty of 10 years' Imprisonment or More

18 U.S.C. 32 (destruction of aircraft or aircraft facilities)(other than 32(c)(threats)

18 U.S.C. 37 (violence at international airports)

18 U.S.C. 81 (arson within special maritime and territorial jurisdiction)

18 U.S.C. 175 (biological weapons)

18 U.S.C. 175b(a) (transfer of biological weapons to restricted persons)

18 U.S.C. 175c (variola virus)

18 U.S.C. 229 (chemical weapons)

18 U.S.C. 351(a) (b) (c) or (d) (congressional, cabinet, and Supreme Court assassination

and kidnaping)

18 U.S.C. 831 (nuclear materials)

18 U.S.C. 832 (participation in nuclear and weapons of mass destruction threats to the United States)

18 U.S.C. 842(m) or (n) (plastic explosives)

18 U.S.C. 844(f)(2) or (3) (arson and bombing of Government property risking or causing death)

18 U.S.C. 844(i) (arson and bombing of property used in interstate commerce)

18 U.S.C. 930(c) (murder or conspiracy to murder during an attack on a Federal facility

with a dangerous weapon)

18 U.S.C. 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad)

18 U.S.C. 1030(a)(1) (computers espionage to injure the U.S. or aid a foreign nation)

18 U.S.C. 1030(a)(5)(A) (computer damage resulting in death or serious injury)

18 U.S.C. 1114 (murder of officers and employees of the United States)

18 U.S.C. 1116 (murder of foreign officials, official guests, or internationally protected persons)

18 U.S.C. 1203 (hostage taking)

18 U.S.C. 1362 (destruction of communication lines, stations, or systems)

18 U.S.C. 1363 (injury to buildings or property within special maritime and territorial jurisdiction of the United States)

18 U.S.C. 1366(a) (destruction of an energy facility)

18 U.S.C. 1751(a) (b) (c) or (d) (Presidential and Presidential staff assassination and kidnaping)

18 U.S.C. 1992 (terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air)

18 U.S.C. 2155 (destruction of national defense materials, premises, or utilities)

18 U.S.C. 2156 (national defense material, premises, or utilities)

18 U.S.C. 2280 (violence against maritime navigation)(other than 2280(a)(2)(threats))

18 U.S.C. 2281 (violence against maritime fixed platforms) (other than 2281(a)(2)(threats))

18 U.S.C. 2332 (murder, attempted murder, or conspiracy to murder United States nationals overseas)

18 U.S.C. 2332a (use of weapons of mass destruction)

18 U.S.C. 2332b (acts of terrorism transcending national boundaries)

18 U.S.C. 2332f (bombing of public places and facilities)

18 U.S.C. 2332g (missile systems designed to destroy aircraft)

18 U.S.C. 2332h (radiological dispersal devices)

18 U.S.C. 2339 (harboring terrorists)

18 U.S.C. 2339A (providing material support to terrorists)

18 U.S.C. 2339B (providing material support to terrorist organizations)

18 U.S.C. 2339C (financing of terrorism)

18 U.S.C. 2339D (military-type training from a foreign terrorist organization)

18 U.S.C. 2340A (torture);

21 U.S.C. 960a (narco-terrorism)

42 U.S.C. 2122 (prohibitions governing atomic weapons)

42 U.S.C. 2284 (sabotage of nuclear facilities or fuel)

49 U.S.C. 46502 (aircraft piracy)

49 U.S.C. 46504 (second sentence)(assault on a flight crew with a dangerous weapon)

49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft)

49 U.S.C. 46506 if homicide or attempted homicide is involved (application of certain criminal laws to acts on aircraft)

49 U.S.C. 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility)

Appendix B. Federal Offenses With a Maximum Penalty of Death or Life Imprisonment

7 U.S.C. 2146 (murder of a federal animal transportation inspector)

8 U.S.C. 1324 (death resulting from smuggling aliens into the U.S.)

15 U.S.C. 1825(a)(2)(C) (killing those enforcing the Horse Protection Act)

18 U.S.C. 32 (death resulting from destruction of aircraft or their facilities)

18 U.S.C. 33 (death resulting from destruction of motor vehicles or their facilities used in United States foreign commerce)

18 U.S.C. 36 (murder by drive-by shooting)

18 U.S.C. 37 (death resulting from violence at international airports)

18 U.S.C. 38 (fraud involving aircraft or space vehicle parts resulting in death)

18 U.S.C. 43 (force or violence involving animal enterprises where death results)

18 U.S.C. 81 (life threatening arson in the U.S. special maritime or territorial jurisdiction)

18 U.S.C. 115(a)(1)(A) (murder of a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)

18 U.S.C. 115(a)(1)(B) (murder of a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)

18 U.S.C. 229 (death resulting from chemical weapons offenses)

18 U.S.C. 175 (biological weapons)

18 U.S.C. 175c (variola virus (smallpox))

18 U.S.C. 225 (continuing financial enterprise)

18 U.S.C. 229 (chemical weapons)

18 U.S.C. 241 (death resulting from conspiracy against civil rights)

18 U.S.C. 242 (death resulting from deprivation of civil rights under color of law)

18 U.S.C. 245 (death resulting from deprivation of federally protected activities)

18 U.S.C. 247 (death resulting from obstruction of religious beliefs)

18 U.S.C. 248 (freedom of access to clinic entrances where death results)

18 U.S.C. 351 (killing a Member of Congress, cabinet officer, or Supreme Court justice)

18 U.S.C. 794 (espionage)

18 U.S.C. 831 (nuclear materials)

18 U.S.C. 832 (participant in foreign program involving nuclear or weapons of mass destruction)

18 U.S.C.844(d) (death resulting from the unlawful transportation of explosives in United States foreign commerce)

18 U.S.C. 844(f) (death resulting from bombing federal property)

18 U.S.C. 844(i) (death resulting from bombing property used in or used in an activity which affects United States foreign commerce)

18 U.S.C. 924(c) (death resulting from carrying or using a firearm during and in relation to a crime of violence or a drug trafficking offense)

18 U.S.C.930(c) (use of a firearm or dangerous weapon a firearm or other dangerous weapon in a federal facility)

18 U.S.C. 956 (conspiracy to commit overseas murder or kidnaping)

18 U.S.C. 1030 (computer damage resulting in death)

18 U.S.C. 1038 (false information or hoax resulting in death)

18 U.S.C.1091 (genocide when the offender is a United States national)

18 U.S.C.1111 (murder within the special maritime jurisdiction of the United States)

18 U.S.C.1114 (murder of a federal employee, including a member of the United States military, or anyone assisting a federal employee or member of the United States military during the performance of (or on account of) the performance of official duties)

18 U.S.C.1116 (murder of an internationally protected person)

18 U.S.C. 1117 (conspiracy to commit murder proscribed under section 1111, 1114, 1116 or 1119)

18 U.S.C. 1118 (murder by a federal prisoner)

18 U.S.C.1119 (murder of a U.S. national by another outside the U.S.)

18 U.S.C.1120 (murder by a person who has previously escaped from a federal prison)

18 U.S.C.1121(a) (murder of another who is assisting or because of the other's assistance in a federal criminal investigation or killing (because of official status) a state law enforcement officer assisting in a federal criminal investigation)

18 U.S.C.1201 (kidnaping where death results)

18 U.S.C.1203 (hostage taking where death results)

18 U.S.C. 1347 (health care fraud where death results)

18 U.S.C. 1365 (tampering with consumer products where death results)

18 U.S.C. 1366 (destruction of energy facility property where death results)

18 U.S.C.1503 (murder to obstruct federal judicial proceedings)

18 U.S.C.1512 (tampering with a federal witness or informant where death results)

18 U.S.C. 1513 (retaliatory murder of a federal witness or informant)

18 U.S.C. 1581 (peonage involving killing, kidnaping, rape or attempt to commit such offenses)

18 U.S.C. 1583 (enticement into slavery involving killing, kidnaping, rape or attempt to commit such offenses)

18 U.S.C. 1584 (sale into involuntary servitude involving killing, kidnaping, rape or attempt to commit such offenses)

18 U.S.C. 1589 (forced labor involving killing, kidnaping, rape or attempt to commit such offenses)

18 U.S.C. 1590 (human trafficking involving killing, kidnaping, rape or attempt to commit such offenses)

18 U.S.C. 1591 (trafficking in children for sexual purposes)

18 U.S.C. 1651 (piracy)

18 U.S.C. 1652 (piracy)

18 U.S.C. 1653 (piracy)

18 U.S.C. 1655 (seaman laying violent hands upon a commander)

18 U.S.C. 1658 (plunder of distressed vessel)

18 U.S.C. 1661 (robbery ashore by pirates)

18 U.S.C. 1716 (death resulting from mailing injurious items)

18 U.S.C. 1751 (murder of the President, Vice President, or a senior White House official)

18 U.S.C. 1864 (hazardous or injurious devices on federal law where death results)

18 U.S.C. 1952 (interstate travel in aid of racketeering where death results)

18 U.S.C. 1958 (murder for hire in violation of U.S. law)

18 U.S.C. 1959 (murder in aid of racketeering)

18 U.S.C. 1962 (RICO where the predicate offense is punishable by imprisonment for life)

18 U.S.C. 1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce resulting in death)

18 U.S.C. 2113 (murder committed during the course of a bank robbery)

18 U.S.C. 2118 (killing during the course of a controlled substance robbery or burglary)

18 U.S.C. 2119 (death resulting from carjacking)

18 U.S.C. 2155 (destruction of defense material where death results)

18 U.S.C. 2199 (stowaways where death results)

18 U.S.C.2241 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States)

18 U.S.C.2242(sexual abuse within the special maritime and territorial jurisdiction of the United States)

18 U.S.C.2243, 2245 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C.2244,2245 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C. 2251 (murder during the course of sexual exploitation of a child)

18 U.S.C. 2252A(g) (child exploitation enterprises)

18 U.S.C. 2261 (interstate domestic violence where death results)

18 U.S.C. 2261A (interstate stalking where death results)

18 U.S.C. 2262 (interstate violation of a protective order where death results)

18 U.S.C. 2272 (destruction of a vessel by its owner)

18 U.S.C. 2280 (a killing resulting from violence against maritime navigation)

18 U.S.C. 2281 (death resulting from violence against fixed maritime platforms)

18 U.S.C. 2282A (murder using devices or dangerous substances in U.S. waters)

18 U.S.C. 2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)

18 U.S.C. 2284 (transporting a terrorist)

18 U.S.C. 2291 (murder in the destruction of vessels or maritime facilities)

18 U.S.C. 2320 (trafficking in counterfeit goods where death results)

18 U.S.C. 2332 (killing an American overseas)

18 U.S.C. 2332a (death resulting from use of weapons of mass destruction)

18 U.S.C. 2322b (multinational terrorism involving murder)

18 U.S.C. 2332f (death resulting from bombing of public places, government facilities, public transportation systems or infrastructure facilities)

18 U.S.C. 2332g (anti-aircraft missiles)

18 U.S.C. 2332h (radiological dispersal devices)

18 U.S.C. 2332A (providing material support to terrorists where death results)

18 U.S.C. 2332A (providing material support to terrorist organizations where death results)

18 U.S.C. 2340A (death resulting from torture committed outside the U.S.)

18 U.S.C. 2381 (treason)

18 U.S.C. 2422 (use of the mail or interstate commerce to coerce or entice a child to engage in sexual activity)

18 U.S.C. 2423 (interstate transportation of a child for sexual purposes)

18 U.S.C. 2441 (war crimes)

18 U.S.C. 2442 (recruitment or use of children as soldiers where death results)

18 U.S.C. 3261(murder committed by members of the United States armed forces

or accompanying or employed by the United States armed forces overseas)

21 U.S.C.461(c) (murder of federal poultry inspectors during or because of official duties)

21 U.S.C.675 (murder of federal meat inspectors during or because of official duties)

21 U.S.C.841 (trafficking in substantial amounts of a controlled substance)

21 U.S.C.848 (drug kingpin)

21 U.S.C.860(b) (trafficking in controlled substance near a school by a repeat offender)

21 U.S.C.960 (importing substantial amounts of a controlled substance)

21 U.S.C.960a (nacro-terrorism)

21 U.S.C.1041(c) (murder of an egg inspector during or because of official duties)

42 U.S.C. 2000e-13(killing EEOC personnel during or because of official duties)

42 U.S.C. 2077, 2272 (prohibitions governing atomic weapons)

42 U.S.C. 2122, 2272 (prohibitions governing atomic weapons)

42 U.S.C. 2131, 2272 (prohibitions governing atomic weapons)

42 U.S.C. 2274 (communication of restricted data to injure the U.S. or aid a foreign nation)

42 U.S.C. 2275 (receipt of restricted data to injure the U.S. or aid a foreign nation)

42 U.S.C. 2274 (tampering with restricted data to injure the U.S. or aid a foreign nation)

42 U.S.C. 2283 (killing federal nuclear inspectors during or because of official duties)

42 U.S.C. 2284 (sabotage of nuclear facilities or fuel)

42 U.S.C. 3631 (Fair Housing Act offenses involving killing, kidnaping, rape or attempt to commit

such offenses)

49 U.S.C. 46502 (aircraft piracy if death results)

49 U.S.C. 46503 (interference with a screening personnel using a dangerous weapon)

49 U.S.C. 46504 (assault on a flight crew with a dangerous weapon)

49 U.S.C. 46505 (carrying a weapon or explosive device aboard an aircraft if death results)

49 U.S.C. 46506 (murder aboard an aircraft)

49 U.S.C. 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility if death results)

Appendix C. Controlled Substance Offenses With a Maximum Penalty of 10 Years' Imprisonment or More

21 U.S.C. 841(a), (b) (trafficking in schedule I or II controlled substances)

21 U.S.C. 841(c) (trafficking in listed chemicals)

21 U.S.C. 841(d) (boobytraps on federal property)

21 U.S.C. 841(g) (internet sale of date rape drugs)

21 U.S.C. 843(a)(6),(7), (d)(2)(possession or manufacture of methamphetamine manufacturing paraphernalia)

21 U.S.C. 844(a)(possession of crack cocaine)

21 U.S.C. 846 (conspiracy to commit a 10-year controlled substances offense)

21 U.S.C. 848 (drug kingpin)

21 U.S.C. 849 (trafficking in schedule I, II, or III controlled substance at a truck stop)

21 U.S.C. 854 (investment of illicit drug profits)

21 U.S.C. 856 (maintaining drug-involved premises)

21 U.S.C. 858 (dangerous production of illicit controlled substances)

21 U.S.C. 859 (trafficking in schedule I, II, or III controlled substance to a child)

21 U.S.C. 860 (trafficking in schedule I, II, or III controlled substance using a child or near a school)

21 U.S.C. 861 (trafficking in schedule I, II, or III controlled substance using a child)

21 U.S.C. 865 (smuggling methamphetamine or its precursors into the U.S.)

21 U.S.C. 960 (& 46 U.S.C. 70506)(illegal import or export of schedule I or II controlled substance)

21 U.S.C. 960a (narco-terrorism)

Appendix D. Child-Victim Offenses

18 U.S.C. 1201 (kidnaping)

18 U.S.C. 1591 (trafficking children for sexual purposes)

18 U.S.C. 2241 (aggravated sexual abuse)

18 U.S.C. 2242 (sexual abuse)

18 U.S.C. 2244(a)(1) (abusive sexual conduct by force or threat)

18 U.S.C. 2251 (sexual exploitation of children)

18 U.S.C. 2251A(selling or buying children)

18 U.S.C. 2252(a)(1) (transporting child sexual exploitive material)

18 U.S.C. 2252(a)(2) (receiving or distributing child sexual exploitive material)

18 U.S.C. 2252(a)(3) (possessing child sexual exploitive material with intent to sell)

18 U.S.C. 2252A(a)(1) (transporting child pornography)

18 U.S.C. 2252A(a)(2) (receiving or distributing child pornography)

18 U.S.C. 2252A(a)(3) (promoting child pornography)

18 U.S.C. 2252A(a)(4) (possessing child pornography with intent to sell)

18 U.S.C. 2260 (overseas production of sexual explicit depiction of children)

18 U.S.C. 2421 (interstate transportation of illicit sexual purposes)

18 U.S.C. 2422 (coercing or enticing interstate travel for illicit sexual purposes)

18 U.S.C. 2423 (interstate travel to engage in illicit sexual activities with a child)

18 U.S.C. 2425 (interstate transmission of information relating to a child with the intent to engage in illicit sexual activities)

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