DOCUMENT RESUME

07446 - [C2968042]

The Federal Bail Process Fosters Inequities. GGD-78-105; B-157179. October 17, 1978. 43 pp. + 3 appendices (21 pp.).

Report to the Congress; by Elmer B. Staats, Comptroller General.

Issue Area: Law Enforcement and Crime Prevention: Efforts to Reduce the Backlog of Cases and Provide for Speedy Trials in Federal Courts (513).
Contact: General Government Div.
Budget Function: Law Enforcement and Justice: Federal Judicial Activities (752).
Organization Concerned: Administrative Office of the United States Courts; Federal Judicial Center.
Authority: Bail Reform Act of 1966. Speedy Trial Act of 1974. 18 U.S.C. 3154. 18 U.S.C. 3146. United States v. Cramer, 451 F.2d 1198, 1200 (5th Cir. 1971). United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969). United States v. Gillin, 345 F. Supp. 1145, 1146-47 (S.D. Tex. 1972). United States v. Bigelow, 544 F.2d 904, 907-08 (6th Cir. 1967). United States v. Wind, 527 F.2d 672, 674-74 (6th Cir. 1975). Blunt v. United States, 322 A.2d 579 (D.C. App. 1974). United States v. Kirk, 534 F.2d 1262, 1280-81 (8th Cir. 1976). United States v. Gilbert, 425 F.2d 490, 491-92 (D.C.C. 1969). United States v. Bishop, 537 F.2d 1184, 1186 (4th Cir. 1976). United States v. Thompson, 452 F.2d 1333, 1340-41 (D.C.C. 1971). Allen v. United States, 386 F.2d 634, 636 (D.C.C. 1967).

Each of the 55,000 criminal defendants who annually enter the Federal court system must have a bail hearing before a judicial officer, usually a magistrate. This hearing is important because the magistrate decides the bail conditions under which the defendant may obtain release prior to trial. Pretrial release (bail) practices in Federal district courts were reviewed to determine if the bail system is used to cause a high rate of appearance without unnecessarily detaining defendants. Findings/Conclusions: Judicial officers have substantial discretion in making bail decisions. As a result, they set widely varying, and in some cases overly restrictive, release conditions because they use bail for differing purposes and weigh the criteria of the Bail Reform Act differently. Consequently, some defendants are jailed, have to pay to be released, or are otherwise restricted while other similarly charged defendants are not so restricted. Judicial officers need more complete and reliable information when making bail decisions. The Federal judiciary has not established a system to provide judicial officers with feedback on the results of their bail decisions in relation to the results of other judicial officers and to monitor and evaluate the bail process. The usefulness of Pretrial Services Agencies' (PSA's) supervision and social services functions has not been demonstrated; the

Administrative Office of the Courts' evaluation of PSAs will be useful but limited. Recommendations: The Chief Justice, in his capacity as Chairman of the Judicial Conference, should work with the Conference, the Director of the Administrative Office of the U.S. Courts, and the Federal Judicial Center to develop and implement a program to assist judicial officers in making sound and consistent bail decisions. He should also work with the Judicial Conference and the Administrative Office of the U.S. Courts to: develop a system to monitor and evaluate bail activities, provide information to judicial officers on the results of bail decisions so they may evaluate their performance against that of other judicial officers, and receive periodic reports on the status and problems in the bail area to assist in developing improvements in the bail process. The Judicial Conference should provide the means for judicial officers to have more complete and accurate information on defendants when making bail decisions. (RRS)

8042

BY THE COMPTROLLER GENERAL

Report To The Congress

OF THE UNITED STATES

The Federal Bail Process Fosters Inequities

U.S. judicial officers do not have the information and guidance they need to set bail conditions in Federal courts. Their decisions and practices are not being reviewed for the purpose of establishing systemwide consistency. As a result, some defendants are released who probably should not be and others are jailed or have restrictions placed on them needlessly. This report makes recommendations for improving the Federal bail process.

GGD-78-105
OCTOBER 17, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-157179

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses several ways to make Federal bail decisions fairer and more consistent. It also points out that the experimental pretrial services agencies, established by title II of the Speedy Trial Act of 1974, are providing judicial officers useful information on defendants but that the benefits of these agencies' other authorized activities have yet to be clearly demonstrated. Chapters 2 and 3 contain recommendations to components of the Federal judiciary for providing information and guidance to judicial officers to help improve their bail decisions.

We made our review pursuant to the Accounting and Auditing Act of 1950 (31 U.S.C. 67) and the December 1968 agreement between the Director, Administrative Office of the United States Courts, and the Comptroller General provided for in the September 1968 resolution of the Judicial Conference of the United States.

We are sending copies of the report to the Director, Office of Management and Budget; the Chairman, Subcommittee on Crime, House Committee on the Judiciary; the Chairman, Judicial Conference of the United States; the Director, Administrative Office of the United States Courts; and the Director, Federal Judicial Center.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

THE FEDERAL BAIL PROCESS FOSTERS INEQUITIES

D I G E S T

The Federal judiciary can make bail decisions more equitable and reduce the differences in conditions of release by:

--Clarifying the legitimate purposes of bail. Some judicial officers believe that the only purpose of bail is to reasonably assure a defendant's appearance. Others believe bail can be used to prevent release of defendants who might commit a new crime or can be used to induce defendants to act as informants by agreeing to release them. These differing interpretations on the purposes of bail result in defendants being treated inconsistently.

--Providing judicial officers information and guidance on how the bail decision criteria listed in the Bail Reform Act relate to determining appropriate conditions of release. Judicial officers' opinions on which factors are more important in setting bail differ widely, and these differences contribute to varying conditions of release.

--Eliminating the practice of placing blanket restrictions on all defendants. Judicial officers should consider for each defendant the danger of nonappearance.

--Developing ways to promote greater use of secured appearance bonds in lieu of corporate surety bonds.

--Providing the means for judicial officers to have more complete and accurate information on defendants in making bail decisions.

--Establishing a system to provide judicial officers feedback on the results of their bail decisions in relation to the decisions of other judicial officers and to monitor and evaluate the bail process. Such a system

is needed to enable judicial officers and the judiciary to identify and correct problem areas and promote more consistent bail decisions.

The Congress' concern about Federal bail practices led to passage of the Bail Reform Act of 1966. That act intended to reduce the emphasis on monetary bail, traditionally used to assure a defendant's appearance but also causing defendants to be detained needlessly.

Over a decade has gone by since the act was passed, yet the Federal judiciary has not established a basic management system to see that the act is properly carried out.

DEFENDANTS CAN RECEIVE INCONSISTENT BAIL TREATMENT

Judicial officers generally have not had the guidance and information they need in setting bail conditions; their decisions and practices are not reviewed on a systemwide basis to see that defendants are treated consistently and fairly throughout the country. They have substantial discretion in interpreting the law and often know little about a defendant when setting release conditions. Consequently, defendants can be treated inconsistently and sometimes unfairly by:

--Using money bail and particularly corporate surety bonds unnecessarily. Corporate sureties or cash were required in three of every four cases sampled where money bail was set. Yet information from non-Federal jurisdictions shows that defendants appear at about the same rate whether a secured appearance bond or corporate surety bond is set. The secured appearance bond is preferred over corporate surety bonds by the Bail Reform Act and enables defendants who appear as required to get their deposited security refunded, whereas bondsmen keep the fee paid by the defendants. GAO's statistics show that 96 percent of the defendants released on cash or corporate surety bonds appear as required. Thus, most of these

defendants incur a financial loss even though they meet their legal requirements to appear. (See p. 6.)

--Jailing persons in some districts who probably would be released in other districts. The widely varying detention rates among districts indicate the judicial officers differ in the risk they are willing to assume in releasing defendants. For example, the detention rates for persons charged with drug offenses varied from 1 to 30 percent in the eight districts GAO reviewed. The detention rates for persons charged with robbery offenses varied from 54 to 92 percent. (See p. 8.)

--Setting blanket travel and supervision restrictions in some districts although contrary to the Bail Reform Act. The act requires persons to be released without these restrictions unless the judicial officer decides in each case that the restriction is necessary to assure the defendant's appearance. (See p. 13.)

In addition, accurate and timely information on defendants' personal and criminal backgrounds is needed routinely at initial bail hearings. This would alleviate the problems of jailing some defendants who are good risks to appear and releasing others who are not.

PRETRIAL SERVICES AGENCIES

In reviewing the bail process, GAO was asked by the Chairman of the Subcommittee on Crime of the House Committee on the Judiciary to review the implementation of title II of the Speedy Trial Act. This act required that the Director of the Administrative Office of the United States Courts establish pretrial services agencies on a demonstration basis in 10 judicial district courts to provide judicial officers better information and recommendations for making bail decisions, to supervise defendants released to their custody, and to arrange for social services as required.

The Administrative Office is required to report to the Congress annually on the accomplishments of pretrial services agencies and to prepare a comprehensive final report by July 1979. The final report must discuss the impact these agencies have had and the relative effectiveness of pretrial services agencies operated by probation offices and those operated by boards of trustees.

GAO supports the continuation and expansion of the pretrial services agency function of providing verified defendant-related information. Better information is needed to improve bail decisions, and pretrial services agencies can provide this information. There is, however, a need for pretrial services agencies to have more time to obtain and verify information on defendants and for the agencies' recommendations on bail conditions to be more consistent. (See pp. 15, 30, and 31.)

The need for and benefits of pretrial services agency supervision and social services have not yet been clearly demonstrated. Unless the Administrative Office's final report demonstrates their value in improving the bail process, resources should not be provided for them on a large scale. In addition, supervision practices vary substantially among pretrial services agency districts, resulting in defendants being treated inconsistently and perhaps inequitably.

GAO believes that if pretrial services agencies are continued, they need to monitor and evaluate their own performance. Evaluations would help them identify problems in their operations, such as inconsistent bail recommendations, and develop corrective strategies. (See p. 33.)

The Administrative Office's final report will provide the Congress useful information on pretrial services agencies' accomplishments if it is carried out as planned. As to whether pretrial services agencies should be managed by boards of trustees or probation offices, GAO identified no clear operational

differences between them. Therefore, if the Congress elects to implement the concept nationwide, it will have to consider non-operational factors, such as attitudinal differences between districts, in making its decision on who will manage pretrial services agencies. (See pp. 26 and 29.)

AGENCY COMMENTS

The Administrative Office and the Federal Judicial Center said that this report is interesting and provocative and reflects a generally good and useful evaluation of the Federal bail process and the functions and purposes of the pretrial services agencies. (See apps. II and III.) The Administrative Office and the Judicial Center did raise certain issues, however, which they believe warrant further emphasis and discussion. (See pp. 39 to 40.)

Because of the congressional and judicial interest in the statistical results of GAO's bail review, a staff study presenting this information will be issued under separate cover.

Contents

ABBREVIATIONS

FTA	failure to appear
GAO	General Accounting Office
PSA	Pretrial services agency
PSO	Pretrial services officer

GLOSSARY

Bail, bail conditions, release conditions, pretrial release conditions*	The conditions, financial and non-financial, the defendant must meet to obtain release, including all forms of release specified in the Bail Reform Act.
Bail period*	The time between the date a defendant's bail is initially set and the final disposition of his case, such as acquittal, dismissal, guilty plea, or conviction.
Bond	A written promise to pay a certain amount of money if certain conditions are not met.
Bondsman or corporate surety	A professional who guarantees the appearance of the defendant in court in return for a nonrefundable fee which the defendant pays. If the defendant fails to appear as required, the bondsman and the defendant are liable for the face amount of the bond. In addition to the fee, the bondsman may also require a defendant to pledge collateral as security for the face value of the bond.
Capital offense	A crime punishable by death.
Corporate surety bond	A financial release condition signed by a bondsman guaranteeing the appearance of the defendant in return for a money premium.
Detention or pretrial detention*	Placed in a jail-like institution for failure to post bond.
Detention rate*	The number of defendants who did not obtain release during their bail period divided by the total number of defendants in that category.
Failure to appear (FTA)*	The willful failure of a defendant to appear for a scheduled court appearance.

*As defined by GAO for use in this report.

FTA rate*	Number of defendants failing to appear at least once during their bail period divided by the number of defendants released at least 1 day.
Judicial officer*	A Federal judge or magistrate, but may include various non-Federal officials such as State and local judges.
Magistrate	Court-appointed Federal judicial officer whose duties include issuing search and arrest warrants, appointing counsel, and setting bail.
Money bail*	Financial release conditions in which the defendant can obtain release only by depositing cash or security with the court directly or through a bondsman; includes secured appearance bonds and corporate surety (bail) bonds.
New crime*	Any crime, Federal or non-Federal, for which the defendant was arrested while out on bail, excluding minor traffic violations.
New crime rate*	Number of defendants rearrested during their bail period divided by the number of defendants released at least 1 day.
Noncapital offense	A crime not punishable by death.
Nonmoney bond*	A nonfinancial form of release in which a defendant's release is not dependent on his paying cash or posting security with the court, including personal recognizance and unsecured appearance bonds.
Personal recognizance	A nonfinancial form of release which requires only the defendant's signature representing his assurance to make future court appearances.

*As defined by GAO for use in this report.

Secured appearance bond	A financial form of release similar to a corporate surety bond except that the court assumes the position of the bondsman. Up to 10 percent of the amount of the bond, similar to the corporate surety premium, is deposited with the Clerk of Court. The deposit, unlike the corporate surety premium, is refunded to the defendant if he meets the condition of the bond.
Unsecured bond or unsecured appearance bond	A nonfinancial form of release in which the defendant promises to pay a specified amount of money if he fails to meet the conditions of the bond.

CHAPTER 1

INTRODUCTION

Each of the 55,000 criminal defendants who annually enter the Federal court system must have a bail hearing before a judicial officer, usually a magistrate. This hearing is very important to the defendant because the magistrate decides the bail conditions under which the defendant may obtain release prior to trial. The primary purpose of bail is to better assure the defendant's appearance in court as required. Bail may not be used to punish or detain persons who are likely to appear for trial.

We reviewed pretrial release (bail) practices in Federal district courts to determine if the bail system is used in a way to cause a high rate of appearance without unnecessarily detaining defendants. For this determination we took three random samples in each of eight districts: a district sample, including all crime categories; a drug sample; and a robbery sample. (See ch. 6.)

Also, as requested by the Chairman of the Subcommittee on Crime of the House Committee on the Judiciary, we reviewed implementation of title II of the Speedy Trial Act. (See app. I.) Title II required the Director, Administrative Office of the United States Courts, to establish pretrial services agencies (PSAs) on a demonstration basis in 10 judicial districts to provide judicial officers better information for making bail decisions, to supervise defendants released to their custody, and to arrange for social services.

STRUCTURE OF THE FEDERAL JUDICIAL SYSTEM

The United States Supreme Court is the highest of three levels of courts in the Federal judicial system. On the second level are the U.S. Courts of Appeals, and on the third level are the U.S. District Courts. The Judicial Conference of the United States, made up of judges representing all three levels, is the prime policymaking body of the Federal judiciary. The Administrative Office of the U.S. Courts is responsible for gathering data and preparing reports on the business of the courts, including bail practices. The Federal Judicial Center is responsible for researching and developing improvements in Federal judicial administration and for training judicial branch personnel. The Pretrial Services Branch of the Administrative Office's Division of Probation provides guidance to PSAs and evaluates their performance.

Although initial bail decisions are normally made by magistrates, judges may also make these decisions or review and amend them. Bail decisions may be appealed to the U.S. Courts of Appeals.

LEGISLATION RELATING TO THE FEDERAL BAIL PROCESS

The primary pieces of legislation affecting accused persons' rights in the bail process are the Bail Reform Act of 1966 and the Speedy Trial Act of 1974.

The Bail Reform Act of 1966

The Bail Reform Act of 1966 was passed to better assure that defendants, regardless of financial status, are not needlessly detained while awaiting court appearances. The act delineates the criteria a magistrate is to use in determining which conditions of release will reasonably assure a defendant's appearance. The criteria for releasing defendants charged with noncapital offenses before conviction are

--the nature and circumstances of the offense charged,

--the weight of the evidence against the accused,

--the accused's family ties,

--employment and financial resources,

--character and mental condition,

--length of residence in the community,

--record of convictions,

--record of appearance at court proceedings,

--record of flight to avoid prosecution, and

--record of failure to appear at court proceedings.

After conviction or for capital offenses, a criterion the magistrate may also consider is how dangerous a defendant may be to the community, when setting release conditions. However, this is not one of the criteria specified in the act for consideration in noncapital cases or before conviction.

After considering the appropriate factors, the judicial officer is required to release a person on his personal

recognizance or on an unsecured bond unless he believes these conditions will not reasonably assure the defendant's appearance. In this case, the officer must consider the following conditions in the order listed and impose the one that will most reasonably assure appearance:

--Place the person in the custody of a designated person or organization agreeing to supervise him.

--Place restrictions on travel, association, or residence.

--Require an appearance bond with a refundable deposit not to exceed 10 percent.

--Require a bail bond with sufficient solvent sureties or the deposit of cash.

--Impose any other condition needed to reasonably assure appearance, including a requirement that the person return to custody after specified hours.

If necessary, the judicial officer may impose combinations of these conditions.

The Speedy Trial Act of 1974

Title II of the Speedy Trial Act of 1974 required the Director, Administrative Office of the U.S. Courts, to establish pretrial services agencies in 10 of the 95 Federal district courts on a demonstration basis. A major objective of the pilot program is to determine whether PSAs can improve the bail process by reducing pretrial detention, failures to appear, and crimes committed on bail. To achieve this goal, PSAs (1) provide judicial officers with verified information (obtained from police records, employment records, discussions with friends and relatives, etc.) on the background of defendants, (2) make bail recommendations, (3) supervise defendants released to their custody, and (4) help them obtain needed social services. Five PSAs are governed by seven-member boards of trustees, and five are managed by district probation offices. Both are under the guidance of the Administrative Office's Probation Division.

The Administrative Office's responsibility for monitoring and evaluating the PSA project, reporting annually to the Congress on the accomplishments of PSAs, and issuing a comprehensive final report to the Congress by July 1979 has been given to the Pretrial Services Branch of the Probation Division.

THE FEDERAL BAIL PROCESS

Typically, a person charged with a Federal offense first comes into contact with the Federal justice system when he is arrested or summoned to appear before a Federal judge or magistrate. At the defendant's initial appearance, the judge or magistrate informs the defendant of his rights and the charges against him and sets his release conditions.

The defendant's second court appearance is usually a preliminary hearing in which the judicial officer determines whether there is probable cause to believe that the defendant committed the offense he is charged with. The defendant's next court appearance is usually an arraignment when he is asked to enter a plea. If he pleads guilty, trial is not necessary and the defendant is sentenced. If he pleads not guilty, a trial is held to determine his guilt or innocence. If found guilty, the defendant is sentenced.

A judicial officer may change bail conditions at any time; and the defendant, if unable to raise bail, is entitled upon request to have his bail conditions reviewed within 24 hours by the judicial officer who originally imposed them. If not released after a bail review, the defendant may appeal his bail conditions to a judge of the court having original jurisdiction over the offense charged. The defendant may also be released on bail after conviction, while awaiting sentencing, and during appeal. This report, however, deals only with the pretrial bail-setting process.

CHAPTER 2

THE FEDERAL BAIL PROCESS TREATS DEFENDANTS INCONSISTENTLY AND OFTEN UNFAIRLY

The purpose of the Bail Reform Act is to better assure that a defendant, regardless of financial status, is not needlessly detained prior to trial. The act requires a judicial officer to set the least restrictive conditions of release needed to reasonably assure a defendant's appearance. Over a decade has gone by since the act was passed, yet little has been done to help judicial officers to effectively implement the act.

Judicial officers do not have the necessary information and guidance to evaluate the significance of each of the factors listed in the Bail Reform Act as they relate to the danger of nonappearance posed by the defendant. Until a way of providing complete and reliable information on defendants is available in all districts, the soundness of bail decisions will suffer. Also, until guidance and information on the results of bail decisions is available to judicial officers to assist them in evaluating the various factors in the act, some defendants will be detained unnecessarily while others who should be detained will be released.

JUDICIAL OFFICERS NEED GUIDANCE TO UNIFORMLY IMPLEMENT THE BAIL REFORM ACT

Judicial officers have substantial discretion in making bail decisions. As a result, they are setting widely varying, and in some cases overly restrictive, release conditions because they

--use bail for differing purposes and

--weigh the criteria of the Bail Reform Act differently.

Consequently, some defendants are being jailed, having to pay to be released, or are being otherwise restricted; whereas other similarly charged defendants are not so restricted.

Judicial officers are setting widely varying release conditions

Judicial officers' practices in the use of money as a condition of release differ greatly and, when money is used, in the type of money bail they require. These differences indicate that some judicial officers may be requiring money when

they do not have to and requiring corporate surety bonds when a deposit with the court might work as well and save defendants substantial costs. In addition, districts vary widely in the rates at which they jail defendants, indicating that varying bail conditions are being set on defendants and that defendants are jailed in some districts who probably would be released in others.

Inconsistent use of money bail

The following table shows the extent to which districts vary in the use of money bail for defendants charged with drug offenses (the numbers shown are projections based on our drug defendants sample).

District	Money bail		Nonmoney bail	
	Number	Percent	Number	Percent
Eastern Michigan	51	21	190	79
Western Washington	53	42	74	58
Eastern New York	104	49	109	51
Northern California	67	63	39	37
Southern New York	200	64	113	36
Northern Ohio	50	67	24	33
Southern Florida	315	69	141	31
Northern Texas	79	75	26	25

As the table shows, 75 percent of the defendants charged with drug offenses in northern Texas had to pay money to secure release while only 21 percent of such defendants had to pay money in eastern Michigan. Although the defendants in the above table are not necessarily similar, they were all charged with drug-related offenses, and the figures indicate major differences in the use of money versus nonmoney bail. Accordingly, we believe defendants in some districts are having to pay to be released whereas defendants in similar circumstances in other districts are not.

Once a judicial officer decides to use money to assure a defendant's appearance, the Bail Reform Act requires him to consider setting a secured appearance bond before setting a corporate surety bond or cash. A secured appearance bond is less burdensome to a defendant because the amount he deposits with the court is returned if he appears as required. This contrasts with corporate surety bonds where the deposit with the bondsman is retained as a fee. The following table shows the varying use of secured appearance bonds versus corporate surety bonds or cash for the drug defendants in our samples who had money bail set at their initial appearance.

District	Secured appearance bonds Number	Percent	Cash or corporate surety Number	Percent
Southern Florida	9	3	306	97
Western Washington	4	7	49	93
Eastern New York	18	17	86	83
Northern California	17	25	50	75
Northern Ohio	14	28	36	72
Southern New York	63	32	137	68
Northern Texas	26	33	53	67
Eastern Michigan	33	65	18	35

These figures illustrate that some judicial districts may not be giving adequate consideration to using secured appearance bonds when setting money bail.

Judicial officers told us that corporate surety bonds better assure a defendant's appearance than do secured appearance bonds, but they had no statistical basis to support this belief. Based on information from jurisdictions which require corporate sureties infrequently or not at all, this belief does not appear to be valid. For example, the State of Illinois abolished corporate sureties after experimenting with both options and finding no significant difference in failure to appear (FTA) rates. In June 1976 Kentucky passed a law which allows corporate surety bonds only in capital cases, such as murder and kidnapping. Although no definitive study has been made, officials in Kentucky said they were reasonably sure that FTA rates had not increased.

In Philadelphia, Pennsylvania, defendants may choose between using a bondsman (corporate surety) or depositing a percentage of the bond with the court. The director of the Philadelphia pretrial services division said that most defendants deposit a 10-percent appearance bond with the court and that FTA rates have decreased since defendants have had this option.

The director of the pretrial release unit in Portland, Oregon, told us that bail bondsmen no longer operate in Portland since passage of the State Community Bond Act of 1973. All defendants released on money bail are required to deposit 10 percent of the bail amount with the court rather than use a bondsman. The director stated that FTA rates had not been affected as a result of this change.

Again, the deposit method is less costly to the defendant because the deposit is returned if he appears. Our samples indicate that over 96 percent of the defendants released

on cash or corporate surety bonds appeared as required. These defendants incurred a financial loss even though they met their legal requirements to appear.

Districts detain defendants at varying rates

Our statistics also show that the rates at which the judicial districts detain defendants prior to trial vary widely. We believe these varying rates indicate that defendants are being given widely differing bail conditions. The first of the following two charts shows the varying detention rates for drug defendants in our samples who were detained their entire pretrial period. The second chart shows the varying detention rates for defendants in our robbery samples.

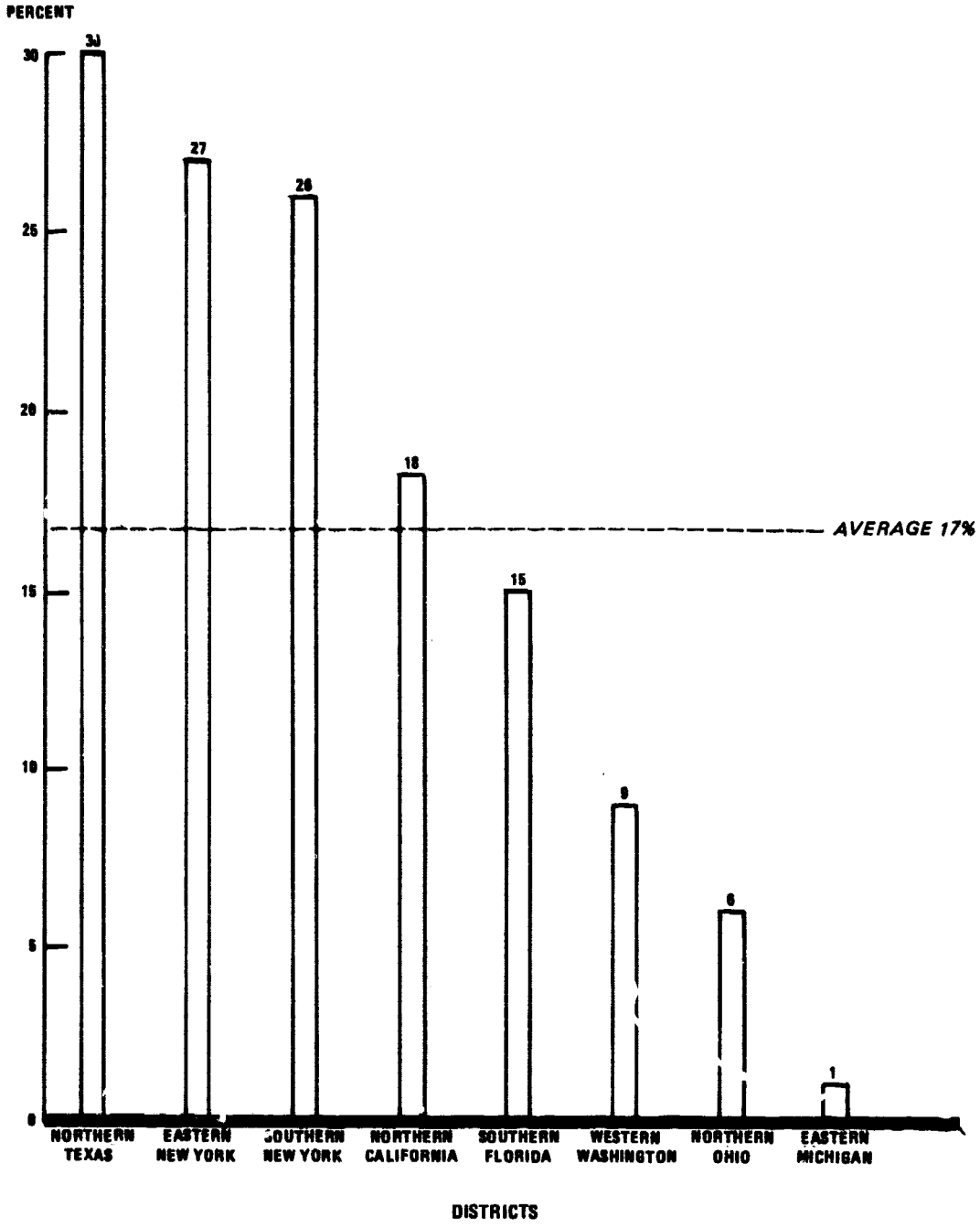
We believe that the widely varying detention rates among districts for drug and robbery defendants indicate that defendants jailed in some districts might be released in other districts.

We recognize that many factors influence the type of bail conditions set and the detention rates experienced in the district courts. The profiles of bail conditions and detention rates for a given district could be expected to vary somewhat over time. However, we believe the wide variances in the bail conditions and detention rates indicate that bail decisions are varying substantially among judicial officers.

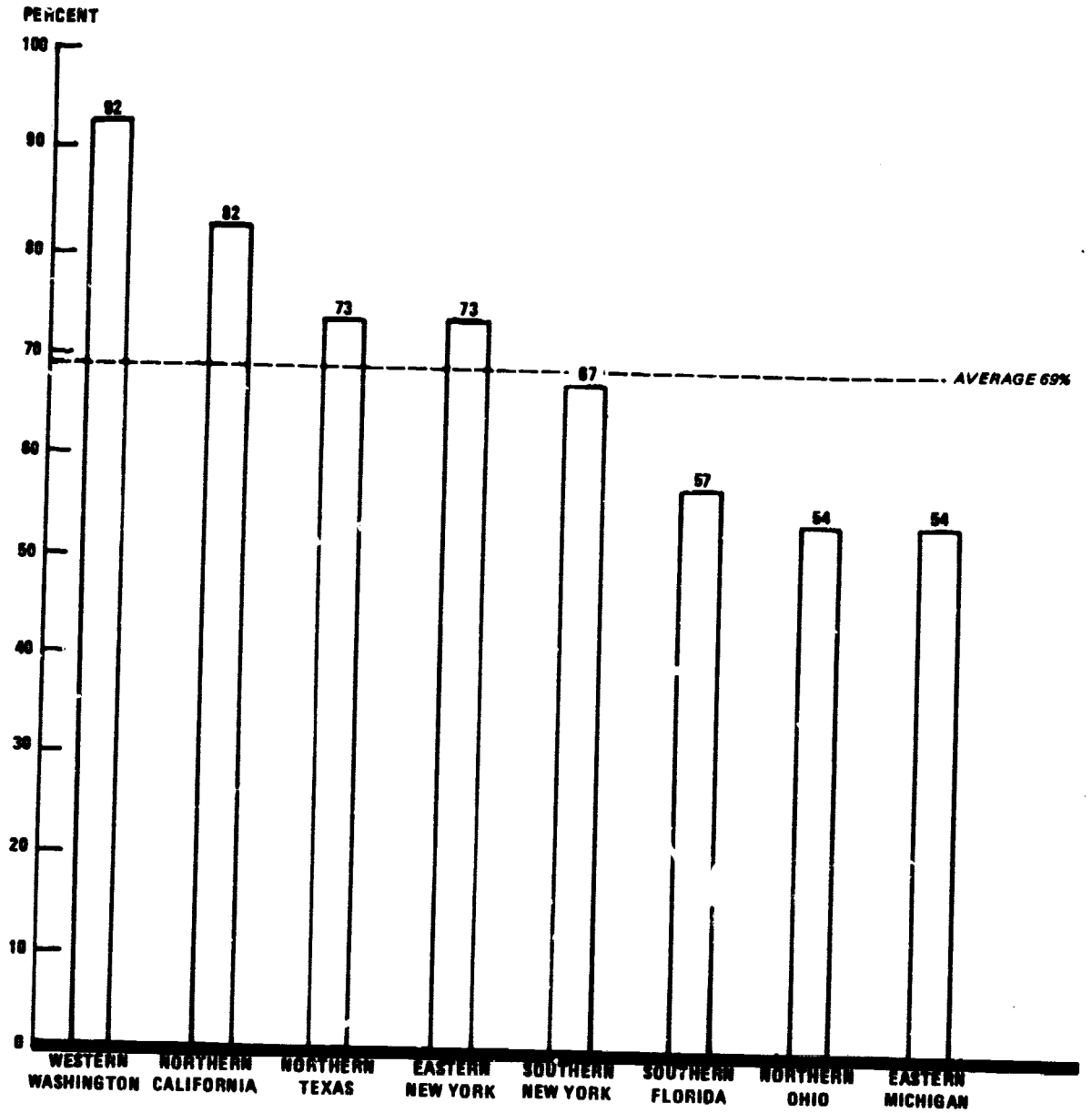
To help us determine the extent to which bail conditions vary on "similar" defendants, we requested 50 full-time magistrates in 14 district courts 1/ to set bail for 6 hypothetical defendants accused of crimes, such as armed bank robbery, distribution of drugs, and forgery. (The hypothetical cases were based on profiles of actual cases.) Forty-one magistrates responded, all basing their decisions on the same information. The range of bail conditions set for one of our hypothetical drug defendants is demonstrated by the six magistrate responses shown on page 11.

1/Western Washington, northern California, northern Ohio, southern Florida, southern New York, northern Texas, eastern New York, eastern Michigan, northern Georgia, northern Illinois, central California, eastern Pennsylvania, western Missouri, and Maryland.

DETENTION RATES FOR DRUG DEFENDANTS DETAINED
THEIR ENTIRE PRETRIAL PERIOD



DETENTION RATES FOR ROBBERY DEFENDANTS DETAINED THEIR ENTIRE PRETRIAL PERIOD



Magistrate	District	Bail set*
A	Eastern Michigan	$10,000(US) and PSA supervision
B	Western Washington	10,000(US)
C	Southern New York	10,000(SB) and PSA supervision
D	Western Washington	25,000(SB)
E	Northern Texas	30,000(SB) and PSA supervision
F	Eastern New York	50,000(10%) and PSA supervision

*US=unsecured; SB=surety bond; 10%=appearance bond with 10% deposit.

As shown in the table, magistrate responses varied widely--from a $10,000 unsecured bond with no other conditions to a $50,000 (10-percent) bond with PSA supervision. Disparity is also evident within a district, as magistrate B set a $10,000 unsecured bond while magistrate D set a $25,000 corporate surety bond.

We believe the widely varying release conditions and detention rates on similar defendants are primarily the result of judicial officers using bail for differing purposes and weighing the factors in the Bail Reform Act differently.

Judicial officers use bail for differing purposes

Some judicial officers we interviewed said when they set bail they are only concerned with whether the defendant will appear as this is the only legitimate purpose of bail under the Bail Reform Act. Most judicial officers, in addition to considering likelihood of appearance, also try to prevent new crimes by detaining defendants they believe pose a danger to the community. In addition, some judicial officers release defendants who are willing to cooperate with the Government by providing information which may lead to the arrest and prosecution of other offenders.

We believe the bail conditions which follow from these differing interpretations on the purposes of bail can vary widely and make a difference in whether the defendant is jailed or released. For example, a magistrate set bond at $10,000 cash or corporate surety for a defendant charged with mailing threatening letters. Although he believed the defendant was a good appearance risk, the magistrate said he set bail to detain the defendant because he appeared to be a potential threat to the community. After over a week in jail, the defendant requested a review of his bail conditions. He was released on his personal recognizance by another magistrate who believed the defendant was a good appearance risk.

The defendant made all court appearances and was not rearrested prior to the disposition of his case.

Several judicial officers and assistant U.S. attorneys told us they consider a defendant's willingness to help the Government prosecute or apprehend others when setting or recommending bail conditions. They defend this practice because they believe it results in more convictions. This purpose, however, can result in higher risk defendants being released. For example, a defendant accused of conspiracy to import marijuana, cocaine, and amphetamines was detained for 74 days on a $150,000 cash or corporate surety bond. The U.S. attorney's office eventually recommended the defendant's release because of his willingness to cooperate with drug enforcement agents. A judge lowered bail to $50,000 unsecured bond despite the defendant's lengthy prior record and outstanding fugitive warrants. The defendant subsequently failed to appear and was still a fugitive at the time we completed our audit.

Judicial officers are weighing the criteria of the Bail Reform Act differently

Although the Bail Reform Act lists certain factors which must be considered in setting bail, judicial officers have substantial discretion in weighing those factors when determining a defendant's likelihood of appearance. Without information and guidance on how each of these factors relates to the likelihood of appearance, each judicial officer must determine which characteristics about a particular defendant are most meaningful and set bail accordingly. This approach contributes to the widely varying release conditions being set for similar defendants.

We asked the full-time magistrates in 14 district courts to rank, in order of importance, a list of 15 factors 1/ they consider in setting bail. The most important factor to a magistrate would be ranked number 1 and the least important number 15. Five responses on three factors are summarized on the next page.

1/The 10 factors listed in the Bail Reform Act of 1966 (see ch. 1) and 5 other factors: a defendant's threat to the community, the U.S. attorney's and the defense counsel's bail recommendations, the PSA bail recommendation if applicable, and the adequacy of detention facilities.

Magistrate	Nature and circumstances of offense	Record of appearance	Family ties
A	1	9	2
B	9	1	3
C	1	13	12
D	1	7	8
E	9	1	2

As the table shows, magistrates differed widely in the factors they consider to be important in setting bail. For example, magistrates A, C, and D consider the nature and circumstances of an offense to be the most important factor while magistrates B and E consider it relatively unimportant. Magistrates B and E consider the defendant's record of appearance to be most important while magistrate C ranked this factor relatively unimportant. Magistrates A, B, and E ranked family ties as an important factor while magistrate C considered this factor relatively unimportant.

- - - - -

We recognize that judicial officers must be allowed to exercise judgment and discretion in tailoring release conditions to particular defendants. However, the present approach results in judicial officers weighing the criteria of the Bail Reform Act differently and using bail for various purposes. These differences contribute to the variation in release conditions being set for defendants and can result in the inconsistent and unfair treatment of these defendants.

The Administrative Office of the U.S. Courts has gathered data on Federal bail activities in 10 judicial districts as part of its effort to evaluate the PSAs in those districts. This data could be used to develop guidance which would help judicial officers make more consistent decisions.

Judicial officers are setting overly restrictive release conditions

Some judicial officers and district court policies place travel restrictions and supervision requirements on all defendants. The Bail Reform Act, however, requires judicial officers to release persons without these restrictions, unless the judicial officer decides in each case that the restriction is necessary to assure appearance. We believe that placing blanket restrictions on all defendants without regard to whether they pose a danger of nonappearance is inconsistent with the Bail Reform Act.

Judicial officers are setting blanket travel restrictions

Judicial officers from 12 of the 14 district courts we reviewed required released defendants to get the court's permission before traveling outside a designated geographical area. The following table shows the extent to which blanket travel restrictions varied among districts and judicial officers.

Magistrate	District	Travel restricted to
A	Northern Texas	Continental United States
B	Northern Texas	County
C	Western Missouri	City
D	Western Washington	Continental United States
E	Northern Ohio	Judicial district
F	Northern Georgia	Judicial district

While magistrate C required all released defendants to remain within the city limits, magistrates A and D allowed released defendants to travel throughout the continental United States. Within the same district, magistrate A permitted defendants to travel anywhere in the continental United States while magistrate B restricted defendants to the county.

Several magistrates contend that blanket travel restrictions are necessary to assure that released defendants are notified of court appearances and appear as required. We believe, however, that the practice of placing blanket travel restrictions on all defendants, regardless of circumstances, is contrary to the intent of the Bail Reform Act and may impose unnecessary hardships on some defendants. These restrictions are needed only if less restrictive forms of release will not reasonably assure appearance.

Judicial officers in PSA districts are imposing blanket supervision requirements

At the time of our review, district policy in 6 of the 10 PSA districts required all defendants released on bail to be supervised. We believe, and the Administrative Office agreed, that this practice is contrary to the intent of the Bail Reform Act which requires judicial officers to determine in each case whether supervision is required to assure appearance.

Most judicial officers who require all defendants to be supervised believe that this practice better assures a

defendant's appearance, while reducing detention. However, not all judicial officers believe that blanket supervision procedures are appropriate. For example, a judge in the Maryland district believed requiring supervision for all defendants was contrary to the intent of the Bail Reform Act; therefore, this practice was not adopted in his district. Another judicial officer in that district pointed out that not all defendants need to be supervised to assure their appearance.

Because blanket supervision practices are inconsistent with the Bail Reform Act, we believe that PSA districts which supervise all released defendants should be instructed to discontinue this practice. In commenting on our report, the Administrative Office said that it had taken steps to eliminate blanket supervision and that none of the PSA districts now impose blanket supervision.

JUDICIAL OFFICERS NEED MORE COMPLETE AND RELIABLE INFORMATION WHEN MAKING BAIL DECISIONS

The Bail Reform Act requires judicial officers to set bail based on available information about the defendant and the crime. While information concerning the crime charged is almost always available at the initial bail hearing, information on the defendant's personal and criminal background is often incomplete and unreliable. As a result, some judicial officers believe they must detain some defendants until more information is available. Others sometimes inadvertently release defendants who probably would not have been released if more had been known about them.

Most district courts have limited means for providing needed information about defendants. As a result, judicial officers often receive incomplete and conflicting information from the assistant U.S. attorney, defendant, and defense counsel and must set bail based on this incomplete and conflicting information. Without a source for accurate information, judicial officers sometimes resort to other methods of getting good information. For example, judicial officers in one district placed defendants under oath when trying to get information about their prior criminal history. We identified three FTA cases in that district where the defendants gave false information which the magistrates relied on in setting bail conditions. The magistrates in these cases said they probably would have set higher bail amounts if they had known of the defendants' prior records.

Several magistrates told us that, without complete and reliable information, they set bail to detain defendants until more information becomes available. Many of these defendants are later released. For example, the bail for codefendants accused of drug-related crimes was reduced and the defendants released after 6 days of detention when new information on their financial resources and community ties was presented to the magistrate. If this information had been presented at the initial appearance, the magistrate said a lower bail would have been set and the defendants probably released. Both defendants were sentenced to probation so the only time they served in jail was prior to trial. The information which was later made available to the judicial officer in this example and which triggered the change in release conditions could have been available initially if the districts had had a way to provide verified information to their judicial officers.

The lack of complete and reliable information can also result in high-risk defendants being released. For example, a defendant arrested on a narcotics charge was released on a $1,000 unsecured bond. He failed to appear and was later arrested for attempted murder. When the magistrate set bail, he did not know about the defendant's lengthy criminal record which included escape from prison. The magistrate told us he would have set a much higher bond had he known about the length and seriousness of the defendant's prior record.

In another case a defendant accused of possession with intent to distribute heroin was released on a $5,000 corporate surety bond and subsequently failed to appear. At the time the magistrate set bail, he did not know about the defendant's drug addiction, prior failure to appear, felony conviction, and pending felony charge. The magistrate said he would have set a higher bail to detain the defendant if he had known.

These examples demonstrate that a lack of complete information on defendants can often result in inappropriate bail decisions. Most magistrates in the 10 districts with PSAs told us the PSAs are providing them more complete and reliable information on defendants and that this information has improved their bail decisions. Some magistrates stated that before PSAs were available to provide them this information, many bail decisions were made in a vacuum and "by the seat of the pants."

The importance of having more complete information on which to make bail decisions has also been recognized in several non-PSA districts. Six such districts have

established PSA-type units in their courts to help magistrates make more informed bail decisions. The districts of northern California and northern Ohio are two such districts where "mini-PSA" operations have been established to provide verified information in selected cases. The six magistrates in these districts strongly believe that the verified information they are now getting on defendants helps them make better bail decisions.

In a northern California case, the information presented by the PSA-like unit resulted in a defendant being released who otherwise would have been detained. The case involved a defendant charged with bank robbery. At the initial bail hearing, the only personal information available to the magistrate came from the defendant. The magistrate requested a criminal record check, but the arresting agent said this would take about 6 weeks. Since the district was experimenting with using a probation officer to obtain and verify information on selected pretrial cases, the magistrate asked him to do a record check on the defendant. The magistrate set a $20,000 bond on the defendant pending the results of the record check. The next day, the probation officer provided information on the defendant's prior record and residency in the State. On the basis of this verified information, the magistrate released the defendant on personal recognizance, with the condition that he report regularly to the probation officer. The probation officer later told us the defendant complied with all conditions of release and was not rearrested before trial. Without the information supplied by the probation officer, the magistrate told us, this defendant would have been detained most, if not all, of his pretrial period.

CONCLUSIONS

Because judicial officers do not have the guidance and information they need to make sound bail decisions, the Bail Reform Act has been inconsistently applied. On occasion, defendants have been treated unfairly or society has been exposed to unnecessary risks. Judicial officers need information and guidance on the purposes of bail and in understanding and evaluating how the criteria listed in the act relate to determining the bail conditions which will reasonably assure a defendant's appearance. They also need complete and accurate personal information on defendants to help them in making bail decisions. Once judicial officers are supplied with this information, they should be in a better position to establish a defendant's risk of nonappearance. In addition, the use of blanket conditions of release imposed without regard to the defendant's danger of flight and excessive reliance on financial conditions of release need to be eliminated.

Because the bail process dramatically affects the lives and families of defendants and society, concerted efforts are needed to better assure that this process is carried out as uniformly and as fairly as possible.

RECOMMENDATIONS

We recommend that the Chief Justice, in his capacity as Chairman of the Judicial Conference, work with the Conference; the Director, Administrative Office of the U.S. Courts; and the Director, Federal Judicial Center, to develop and implement a program to assist judicial officers in making sound and consistent bail decisions. Such a program, at a minimum, needs to clarify the legitimate purposes of bail; present information and guidance on how the criteria listed in the Bail Reform Act relate to determining appropriate conditions of release; develop ways to promote greater use of secured appearance bonds rather than corporate surety bonds; and eliminate the practice of placing blanket restrictions on all defendants without regard to a defendant's danger of nonappearance.

We also recommend that the Judicial Conference provide the means for judicial officers to have more complete and accurate information on defendants in making bail decisions.

CHAPTER 3

BETTER MANAGEMENT INFORMATION CAN IMPROVE THE FEDERAL BAIL PROCESS

The Federal judiciary has not established a system to (1) provide judicial officers feedback on the results of their bail decisions in relation to the results of other judicial officers and (2) monitor and evaluate the bail process. Without these tools, problems such as those discussed in chapter 2 go undetected and uncorrected.

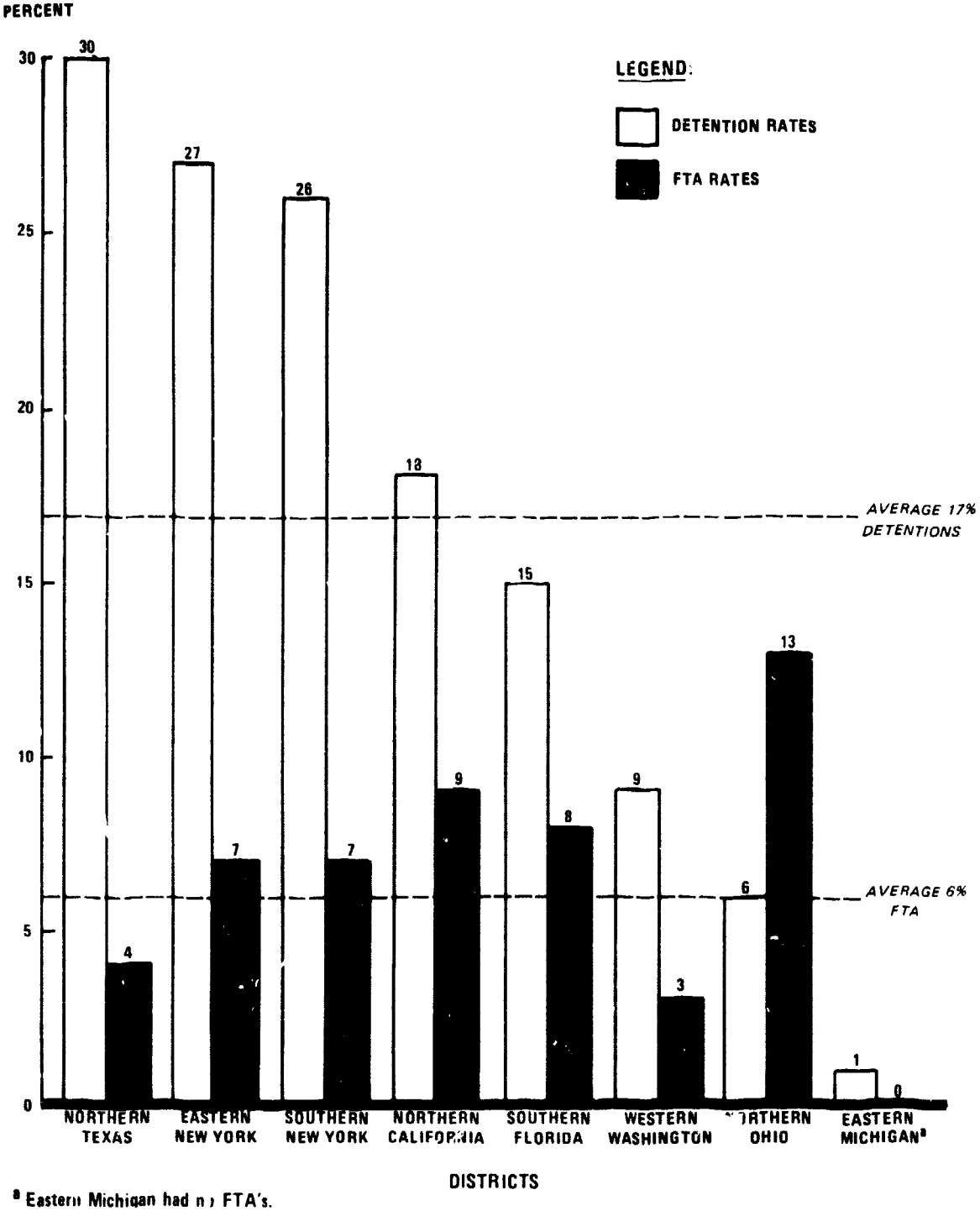
JUDICIAL OFFICERS NEED TO EVALUATE THE RESULTS OF THEIR BAIL DECISIONS

Judicial officers need information on the results of bail decisions. Such information, coupled with guidance from the Federal judiciary, would enable them to evaluate their efforts in relation to other judicial officers and would promote more consistent bail decisions. Without this information, judicial officers and the Federal judiciary do not have any means to assess the results of their decisions and narrow the wide range of release conditions and detention levels that exist because of the substantial discretion inherent in the law.

Information developed during our review shows that the rates at which judicial officers detain and release drug defendants vary considerably. Defendants detained in one district might be released in another.

The following chart on drug defendants illustrates the varying detention and failure to appear rates experienced in districts covered in our review. The data represents activity for the 12-month period of our samples.

DETENTION AND FTA RATES FOR DRUG DEFENDANTS
(12-MONTH PERIOD)



[a] Eastern Michigan had no FTA's.

As shown in the chart, northern Ohio detains about 6 percent of all defendants charged with drug crimes and incurs an FTA rate of 13 percent. This contrasts sharply with northern Texas, eastern New York, and southern New York where 26 to 30 percent of the defendants are detained. The FTA rates in those districts run from 4 to 7 percent. Thus, judicial officers in northern Ohio appear to take more risks with their drug defendants than judicial officers in northern Texas, eastern New York, and southern New York.

Without information on the FTA and detention rates that result from their bail decisions, judicial officers cannot evaluate their performance nor relate it to the decisions of their colleagues. Consequently, judicial officers do not know the results of their decisions nor the risks involved.

Another example of inconsistent treatment of defendants is evident in the difference in detention and release rates among districts when defendants, initially detained because they cannot make bail, eventually meet bail and are released before trial. Southern Florida detains, then releases, 12 percent of all defendants charged with drug crimes and incurs an FTA rate of 8 percent on these defendants. This contrasts with northern Ohio where 42 percent are initially detained, then released, resulting in an FTA rate of 11 percent. In other words, defendants charged with similar crimes are detained and released at widely varying rates depending on the level of risk each judicial officer is willing to accept.

A SYSTEM IS NEEDED TO MONITOR AND EVALUATE THE BAIL PROCESS

The Federal judiciary has not established a system to assess the impact of bail decisions on defendants and society. Without such a system, the judiciary cannot identify problems with the bail system, develop strategies for improvements, or collect data needed for program assessment.

To monitor and evaluate the performance of judicial officers and the effectiveness of their bail decisions, the judiciary needs a reporting system to collect information on bail operations of individual judicial officers and on districts as a whole. This reporting system should, as a minimum, have information on defendant characteristics, the type of bail set, and the detention and FTA rates. This information would enable the judiciary to analyze bail results in terms of defendant characteristics, FTA rates, detention levels, and monitor compliance with established policies and the law. It would also provide each district and the

individual judicial officers with information regarding their past performance and alert them to areas where they can improve.

Administrative Office officials agree that a reporting system is needed to inform judicial officers of their performance and highlight areas needing improvement. To monitor and evaluate the PSA pilot program, the Administrative Office's Pretrial Services Branch established a system to collect information on detention, FTAs, release conditions set, and defendant characteristics. Information from this system has enabled the Administrative Office to identify problem areas, such as high detention rates and inconsistent bail decisions, and make judicial officers aware of these problems.

For example, this information appears to have had positive impacts in two districts with relatively high detention rates. In the northern district of Texas, detention rates have dropped since inception of the PSA program. The chief of the Pretrial Services Branch believes the detention information presented to the judicial officers in that district was important in prompting this reduction. In the central district of California, the Administrative Office's information on detention rates and the PSA's information on disparate bail decisions stimulated judicial officers to collect information to confirm whether these problems exist and, if necessary, develop appropriate corrective actions. The chief magistrate told us that this information should also help them identify other bail areas needing improvement.

Most judicial officers told us that information on the results of bail decisions would be useful in improving their decisions. At least two districts have established information systems on their own initiative which allow them to monitor the results of their bail operations and identify needed improvements. PSA information systems are discussed further in chapter 4.

CONCLUSIONS

The Federal judiciary needs to develop a system to monitor and evaluate the Federal bail system to better assure that bail decisions are being made fairly and are consistent with the policies of the Bail Reform Act. Without such a system, the judiciary is not able to evaluate performance, identify such problem areas as those discussed in chapter 2, and develop strategies to make improvements.

Judicial officers also need information on the results of their bail decisions to evaluate their efforts against the

performance of other judicial officers and the system as a whole. Such information, coupled with guidance from the Federal judiciary, should promote more consistent bail decisions and narrow the wide range of release conditions and detention levels that exist because of the substantial discretion inherent in the law.

Various judicial officers have recognized that information on the results of their bail decisions is needed and in isolated cases have attempted to obtain information about their own performance. We believe these efforts are commendable and a step in the right direction; however, the judiciary should provide all its judicial officers with information on their performance.

RECOMMENDATIONS

We recommend that the Chief Justice, in his capacity as Chairman of the Judicial Conference, work with the Conference and the Director, Administrative Office of the U.S. Courts, to:

--Develop a system to monitor and evaluate bail activities. This system should include information on defendants and bail decisions and should provide procedures for evaluating district court and judicial officer bail practices to identify areas needing improvement.

--Provide information to judicial officers on the results of bail decisions so that they may evaluate their performance against the performance of other judicial officers and the systemwide results.

--Receive periodic reports on the status and problems in the bail area to assist in developing improvements in the bail process.

CHAPTER 4

OBSERVATIONS ON PRETRIAL SERVICES AGENCIES

Title II of the Speedy Trial Act of 1974 required the Director, Administrative Office of the U.S. Courts, to establish 10 demonstration pretrial services agencies within the Federal judicial system to ascertain their value in reducing detention, failures to appear, and crime while on bail. PSAs generally interview defendants and verify information about them, make bail recommendations to judicial officers, supervise defendants released to their custody, and help selected defendants obtain needed social services. The Administrative Office is required to report to the Congress annually on the accomplishments of PSAs and to prepare a comprehensive final report by July 1979.

As discussed in chapter 2, we believe that better defendant-related information is needed to improve bail decisions in all courts. Because PSAs are now providing this information, we support the continuation and expansion to other districts of this particular PSA function. This chapter discusses (1) the usefulness of supervision and social services in improving the bail process, (2) the usefulness of the Administrative Office's evaluation and (3) some issues which will have to be addressed to promote efficient operation if PSAs are continued.

USEFULNESS OF SUPERVISION AND SOCIAL SERVICES HAS NOT BEEN DEMONSTRATED

Our review of PSA supervision and social services functions indicates that the need for and benefits of these activities have not yet been clearly established. Therefore, unless the Administrative Office's final report demonstrates their value in improving the bail process, resources should not be provided for them on a large scale. Our review also shows supervision practices vary substantially among PSA districts, resulting in defendants being treated inconsistently and perhaps inequitably.

Supervision

We cannot say whether supervision helps reduce detention, FTA, or new arrest rates. However, there does not appear to be a strong relationship between relatively high amounts of supervision and lower rates. For example, the eastern district of Michigan contacts defendants or those who know them about three times more often (2 times per month) than the southern district of New York (0.6 times per month). Yet

these two districts have similar detention (11 percent and 14 percent, respectively), FTA (2 percent each), and new arrest (7 percent and 10 percent, respectively) rates. Unless the Administrative Office's final report demonstrates that supervision lowers these rates, we believe that resources should not be provided for supervision on a large scale.

The amount of supervison given to pretrial defendants varies substantially from district to district. For example, the northern district of Texas supervises all defendants released before trial and classifies about 52 percent of them as maximum risks. Maximum risks in this district require four personal contacts a month. In contrast, the northern district of Georgia also supervises all persons released but classifies only about 2 percent as maximum risks. In that district, maximum risks require the PSA to contact the defendant once a month and contact persons who know the defendant twice a month. Furthermore, PSA officials in four districts told us they supervise only selected defendants and classify only a few of these as maximum risks.

Thus, defendant treatment may be inconsistent. Defendants in one district may be supervised heavily, whereas similar defendants in another district may not be supervised at all. For example, a 40-year-old defendant in northern Texas was charged with filing false tax returns. PSA classified the defendant as a maximum risk. He had no prior record and no drug or alcohol problems but had strong community and employment ties. He was released on his own recognizance with PSA supervision. During the 31 days before the defendant was sentenced, the PSA made a total of 23 contacts with the defendant, his employer, and others. According to PSA chiefs and supervisors in other districts, this defendant probably would not have been supervised or would have been given minimum supervision.

We discussed these matters with officials in the Administrative Office's Pretrial Services Branch. They agreed that guidelines are needed to help PSAs recommend who should be supervised and the amount of supervision required. They also agreed to try to determine whether PSA supervision is worth its cost in terms of reducing detention, failures to appear, and new arrests and to address this in the Administrative Office's final report to the Congress.

Social services

Social services (drug and alcohol treatment programs, counseling, etc.) have been provided to so few defendants that any meaningful evaluation of their effectiveness in

reducing FTAs and new crimes is nearly impossible. Only 11 of 481 defendants in our PSA district samples were required to receive social services as a condition of release. Apparently, judicial officers do not believe that social services should be required to assure that defendants appear for court dates. For example, judicial officers in the eastern district of Michigan usually do not require social services for defendants before the trial. They said such a requirement might violate a defendant's presumption of innocence. Instead of requiring services, they believe it is better for the PSA to persuade certain defendants to participate in service programs when needed. They would rarely revoke bail if defendants did not participate since participation in services is supposed to be a help rather than a punishment.

Until the effectiveness of social services is reasonably demonstrated, resources should not be provided for them on a large scale. In those few cases where the judicial officer believes a social service is needed to assure appearance, appropriate arrangements can be made on an ad hoc basis, either through the probation office or by a pretrial services officer. Officials in the Administrative Office's Pretrial Services Branch agreed to comment in their final report to the Congress on the impact social services have had on defendants.

THE ADMINISTRATIVE OFFICE'S EVALUATION OF PSAs WILL BE USEFUL BUT HAS LIMITATIONS

We believe the Administrative Office's final report will provide useful and valid insights about PSA operations in the 10 demonstration districts. There are, however, certain limitations and assumptions underlying the PSA evaluation which the Congress should be aware of in deciding the future of PSAs. Because the 10 districts were not selected at random, the results of the study cannot be generalized statistically to other Federal districts. Also, the evaluation assumes that PSAs caused any changes observed in detention, FTA, and new crime rates. This assumption may not be valid as other events, such as changes in judicial officers, could also contribute to changes in these rates. Further, the Administrative Office must comment on the effectiveness of PSAs operated by boards of trustees as compared to PSAs operated by probation offices. We believe this comparison would not be meaningful because differences in PSA management policies and practices weren't developed to characterize a "board" versus a "probation" approach.

The Administrative Office's evaluator recognizes these limitations and has attempted to control the study accordingly.

We believe that if the evaluation is carried out as designed, the study should provide useful information. In addition, the observations in this chapter and in chapter 2 should provide the Congress further insight into PSA operations.

The Administrative Office's evaluation results cannot be projected statistically to all Federal courts

To have statistical validity for all courts, the 10 demonstration PSA districts should have been selected at random. The Administrative Office, however, felt that the random selection of districts was precluded because of the language of the act. The act states that the 10 districts shall be selected on the basis of:

> "* * * the number of criminal cases prosecuted annually in the district, the percentage of defendants in the district presently detained prior to trial, the incidence of crime charged against persons released pending trial * * *, and the availability of community resources to implement the conditions of release which may be imposed * * *."

In the Administrative Office's view, these requirements precluded the random selection of districts, since not all districts possess these characteristics.

The 10 PSA districts include medium and large districts and are geographically distributed across the country. Thus, we believe that even though the results of the Administrative Office study cannot be statistically generalized in all Federal districts, the results will provide useful information to the Congress on the benefits of PSAs.

A critical assumption underlies the Administrative Office study

When preparing the strategy for evaluating PSAs, the Administrative Office recognized that classical research designs would require the random assignment of defendants to treatment (receive PSA services) and nontreatment (control) groups. The advantage of this approach is that by comparing the two groups one can infer with high confidence that any differences in performance are attributable to PSAs.

The Administrative Office and the Judicial Conference decided not to use the classical design because

--they interpreted the language of the act to require PSAs to consider all defendants in a district, 1/ thus ruling out control groups, and

--they believed it would be impossible to maintain the integrity of the classical design for 4 years in view of the number of defendants who would be processed, the inability to make judicial officers comply with a research control design, and the potentially beneficial impact such a program can have on individual lives.

Instead of the classical design, the Administrative Office is using other research approaches to compensate for not having control groups. These other approaches are meant to provide a statistical basis for determining whether PSAs caused changes in detention, FTA, and new crime rates. These approaches include (1) gathering data in five non-PSA districts to provide a basis of comparison with PSA districts, (2) gathering data on conditions existing in each district prior to PSA startup and comparing it with data gathered after PSAs were established, and (3) performing various statistical analyses on the data collected.

The Administrative Office's approach assumes that any significant changes observed in the variables being measured are caused by the PSAs. Such factors as (1) changes in district judges or magistrates, (2) changes resulting from speeding up trials as mandated by title I of the Speedy Trial Act, and (3) changes in the type of cases emphasized for prosecution by the U.S. attorney, among others, could affect the variables being measured.

Administrative Office officials are aware of the difficulties involved with this assumption. They believe, however, that most of the factors which could produce changes will be controlled by the approaches they are using. We believe it is possible to control for most of these factors, but there is always an unknown degree of risk taken when the classical design is not used.

1/Title II of the Speedy Trial Act states:

> "Each Pretrial Services Agency shall * * * collect, verify, and report promptly to the judicial officer information pertaining to the pretrial release of each person charged with an offense * * *." (emphasis added).

Board vs. probation control--not a valid comparison

Title II of the Speedy Trial Act requires the Administrative Office to comment on the relative accomplishments of PSAs managed by probation offices and those managed by boards of trustees. We believe this comparison would not be meaningful to the Congress because differences among PSA policies and practices cannot be characterized as "board" versus "probation." The Administrative Office's second annual report to the Congress supports this observation by stating that:

> "Since both types of agencies are administered by the Administrative Office of the United States Courts with the same general operational guidelines * * * no major differences between Boards of Trustees and Probation districts would be expected."

The Administrative Office prescribed the general operating procedures to be followed by all 10 PSA districts, and each PSA chief has been left to manage his PSA in accordance with the procedures. Neither the boards of trustees nor the Administrative Office's Probation Division have issued instructions significantly modifying or amplifying these generally prescribed procedures.

Furthermore, the boards have not been actively involved in overseeing PSA activities, as evidenced by their infrequent meetings. The following table shows the number of times the boards had met at the time of our audit (February 1978).

District	Months operational	Number of meetings
Eastern New York	22	1
Maryland	25	3
Eastern Michigan	24	2
Eastern Pennsylvania	23	a/13
Western Missouri	25	2

a/Meetings dealt primarily with personnel rather than operational matters.

Because no outward differences exist among PSAs to characterize them as "board" or "probation," the Congress will have to consider other factors in determining who will manage PSAs if they are established permanently. These factors would include:

--The extent to which boards could be expected to actively participate in directing PSA activities.

--The resources (people and money) available and needed to effectively carry out PSA activities. (Probation officers are on duty in locations where bail hearings are held.)

--The attitudinal differences among probation officers and others engaged in pretrial work. For example, does the fact that probation officers deal mainly with convicted persons on probation or parole affect their treatment of pretrial defendants or affect the way defendants relate to them? The Administrative Office plans to make attitudinal surveys which may provide insight into such questions.

--The extent to which central guidance and oversight is needed to assure that PSA activities are carried out uniformly and fairly. (See the following sections of this chapter.)

--The availability and feasibility of options other than "board" or "probation." The chief of the Administrative Office's Pretrial Services Branch recommends a third alternative; namely, making the PSAs independent units within the district courts reporting to a unit within the Administrative Office.

ISSUES REQUIRING ATTENTION TO PROMOTE EFFICIENT PSA OPERATION

If PSAs are established permanently

--a concerted effort will be needed to provide more time for PSAs to affect bail hearings,

--guidelines will be needed for making more consistent bail recommendations, and

--procedures will be needed to monitor and evaluate PSAs' internal operations.

PSAs need more time to present verified information

The full benefits of PSA-verified information were not realized in most districts. Statistics show that the 10 PSAs have been able to present verified information at only about 70 percent of initial bail hearings. In two districts

PSAs were effective in only about 54 percent of bail hearings. When a PSA cannot present verified information on a defendant, then the judicial officer's ability to make an informed bail decision suffers. As discussed in chapter 2, the lack of sound information can result in defendants being jailed or released who should not be.

There are two basic reasons why certain PSAs have been unable to deliver verified information at more initial bail hearings. First, arresting agencies in those districts often do not routinely give PSAs adequate time to interview defendants and verify information on them. Even though the average time from a defendant's arrest to his initial bail hearing is 18 hours, arresting agents in five districts do not routinely notify the PSA of the arrest until immediately before the hearing. Second, judicial officers in six districts do not allow PSAs to set the times of bail hearings. PSA officials in these districts said that without control of the court calendar, they cannot routinely provide adequate information at initial bail hearings.

One of the Administrative Office's criteria for selecting the 10 PSA districts was whether the districts would accept the PSA concept. The districts selected supposedly had a high regard for the concept. While most judicial officers and U.S. attorney officials interviewed favor the PSA concept, our review indicates that PSAs have not routinely been given the opportunity to contribute.

Because providing verified information to judicial officers is essential to improving bail decisions (see ch. 2), judicial officers should be encouraged to give PSAs adequate time to verify information. This can be done by requiring enforcement agencies to give PSAs more timely notification of defendants' arrests and allowing PSAs to set reasonable times at which bail hearings can be held.

PSA bail recommendations should be more consistent

PSAs make recommendations on defendant release conditions as part of their reports to judicial officers. If they are to continue doing this, their recommendations should be more consistent and should attempt to provide equal treatment of defendants. In the four PSA districts we reviewed, we asked 41 pretrial services officers (PSOs) to make bail recommendations on six hypothetical defendants whose profiles were based on actual cases. (These are the same cases given to judicial officers, as discussed in ch. 2.) The recommendations varied widely both within and among districts and

ranged from nonmoney to highly restrictive money bail. The following table shows the range of bail recommendations made by PSOs in two of the hypothetical cases.

Defendant case	Southern New York	Northern Texas	Eastern New York	Eastern Michigan
Drug offender	$5,000 US with PSA supervision to $15,000 SB with PSA supervision	PR with PSA supervision and employment counseling to $25,000-10% with PSA supervision and group counseling	$10,000-10% with PSA supervision to $40,000 SB	$1,000 US with PSA supervision to $50,000 CB with PSA supervision
Treasury check forger	$1,000 US with PSA supervision to $5,000 SB with PSA supervision	PR with PSA supervision to $10,000 SB with PSA supervision and group counseling	$1,000 US with PSA supervision to $10,000-10%	$5,000 US with PSA supervision and restricted travel to $10,000 SB with PSA supervision

PR = Personal recognizance bond
US = Unsecured bond
10% = Appearance bond with 10% deposit
SB = Cash or corporate surety bond
CB = Collateral bond

We believe the variations in bail recommendations on the hypothetical cases indicate the need for more consistency. This situation is similar to that discussed in chapter 2, where judicial officer bail decisions varied substantially among the hypothetical defendants. PSOs are recommending bail to accomplish various purposes, weighing factors in the Bail Reform Act differently, and disagreeing on whether money, and how much money, is needed on a given defendant. We asked PSOs to rank the Bail Reform Act factors they believed were most important in setting release conditions. We gave them a list of 13 factors. The following table summarizes the range of weights PSOs gave to 4 of these factors (most important was ranked number 1; least important number 13). The ranges on these 4 factors are typical of the ranges on all 13 factors.

District	Nature of offense	Family ties	Conviction record	FTA record
Southern New York	2 to 11	1 to 4	4 to 10	1 to 10
Northern Texas	2 to 7	3 to 9	2 to 10	3 to 10
Eastern New York	1 to 10	1 to 8	2 to 10	1 to 8
Eastern Michigan	1 to 13	1 to 8	1 to 13	1 to 6

In the course of our review, we briefed chief and supervising pretrial services officers on the variances in their bail recommendations. As a result of this and other discussions, the PSA in the southern district of New York developed guidelines to help assure more consistent recommendations by experienced PSOs and to aid new PSOs with limited knowledge of what constitutes a suitable recommendation. The PSA chief said it is too early to assess the impact of the guidelines, but from a comparison with preguideline cases, he believes more consistent recommendations are now being made.

The district's chief judge approved the guidelines. Similarly, the PSA chief told us that the district's magistrates, U.S. attorneys, and Legal Aid Society (public defenders) are also supportive of the guidelines. We believe that such guidelines are necessary to help assure that PSA bail recommendations are consistent.

PSAs need ways to identify problems and evaluate their performance

We believe it is important for each PSA to clearly define what it is trying to do and establish ways to determine whether what is planned is actually getting done. Seven of the 10 PSAs, however, have not yet established procedures to monitor and evaluate their performance. As a result, these PSAs do not know whether they are making consistent bail recommendations or how much they are affecting bail decisions. Nor do they have timely information on whether they are contributing to reduced detention, FTA, and new crime rates.

Performance monitoring and evaluation are important in helping PSAs identify problems in their operations and in developing corrective strategies. For example, the PSA in the eastern district of New York established a system to monitor results of its operations. From its monitoring efforts, it determined that the district had a relatively high detention rate and, accordingly, established a program to help defendants gain release who might otherwise have been detained.

Similarly, the PSA in the central district of California established a system for gathering information on the detention, FTA, and new arrest rates. The chief of the PSA told us that without this information, he would be unable to improve PSA practices. As an example of an improvement, he said they reduced the supervision level on certain defendants who had been previously considered high risks. This action was taken after the information gathered showed that the high-risk defendants appeared for trial at about the same rate as defendants considered lower risks.

Four other PSAs recognized the need to evaluate their operations but had not developed ways to do so at the time of our audit. We believe that because PSAs are making recommendations that often influence bail decisions, they should be concerned about the impact their recommendations have on defendants and the courts. Accordingly, if PSAs are established permanently, they should establish ways to monitor and evaluate their performance in making consistent bail recommendations and in reducing detention, FTAs, and new crimes.

CONCLUSIONS

As discussed in chapter 2, we believe that judicial officers need better defendant-related information to improve the bail process. Thus, we support the continuation of this particular PSA function and its expansion to other Federal districts. Our review of the PSA supervision and social services functions, however, shows that their usefulness has not been clearly demonstrated. Administrative Office officials told us that their final report to the Congress will address the question of whether these functions have helped to reduce detention, FTA, and new crimes by persons on bail. Unless the Administrative Office's final report clearly demonstrates that these activities improve the bail process, resources should not be provided for them on a large scale. We believe the final report will provide the Congress useful information on PSAs if it is carried out as planned.

Our review also indicates that there is no clear operational distinction between PSAs managed by probation offices and those managed by boards of trustees. Accordingly, if the Congress elects to implement the PSA concept nationwide, it will have to consider nonoperational factors, such as attitudinal differences and the availability of existing resources.

Finally, if PSAs are established permanently, problems with their acceptance, consistency of bail recommendations, and evaluation of operations will have to be addressed.

CHAPTER 5

AGENCY COMMENTS AND OUR EVALUATION

The Administrative Office of the United States Courts and the Federal Judicial Center said that this report is interesting and provocative and that it provides a generally good and useful evaluation of the Federal bail process and the functions and purposes of the pretrial services agencies. (See apps. II and III.) They did raise certain issues, however, which warrant further emphasis and discussion.

JUDICIAL DISCRETION

The Administrative Office and the Federal Judicial Center both commented that the draft report does not give sufficient recognition to the fact that setting bail conditions is a judicial action. As such, it is subject to review only through appeals--initially to district judges and, if further appeals are deemed necessary, to appellate courts. Both the Administrative Office and the Federal Judicial Center said that it would be wholly inconsistent with the process of judicial decisionmaking for them to tell judges and magistrates how to make their decisions or engage in some kind of administrative review of those decisions.

Both agencies did say, however, that they could provide judicial officers with research data and statistical information to assist them in their decisionmaking. The Federal Judicial Center added that it could provide educational programs for analyzing not only the data but also the underlying problems and issues.

We fully concur with the Administrative Office and the Federal Judicial Center about their concerns over the nature of the judicial process and their role in reviewing bail decisions. We do not recommend that their review consist of any type of oversight of individual judicial officer decisions. Rather, we envision this review function as being a broad examination of the operation of the entire Federal bail process. From this broad examination, specific fundamental problems and issues in the bail-setting process can be identified and educational programs and policy guidance could then be developed to address these problems. An effective system of review should also generate the data necessary for judicial officers to evaluate their efforts against the performance of other judicial officers and the system as a whole. Without a systematic review, program management, measurement, and direction are severely hampered.

The Administrative Office has recognized the need for improvements in the bail area and commented that they have previously addressed bail issues. They said training has been provided in cooperation with the Federal Judicial Center to lessen the disparity in judicial officers' interpretations of the Bail Reform Act. For example, members of the General Counsel staff, as Federal Judicial Center faculty, have held orientation and advanced training seminars for pretrial services officers on those legal issues. Also, the Chief of the Pretrial Services Branch has advised all 10 PSAs by memorandum to make their bail recommendations in accordance with the interpretation of the purpose and intended application of the Bail Reform Act approved by the Administrative Office's General Counsel.

According to the Administrative Office, all of the Federal Judicial Center's orientation seminars for magistrates discuss the conduct of initial appearances, including the setting of bail conditions. In addition, an updated chapter of the Legal Manual for United States Magistrates has been prepared and will be distributed shortly. This chapter deals specifically with the initial appearance and should provide magistrates and other court officers with additional guidance and information on the bail-setting process. Court decisions on bail also are circulated as they become available under their Information Memoranda program. These court decisions are intended to keep magistrates abreast of developments in the law relating to bail.

INCONSISTENT RELEASE CONDITIONS ARE UNDESIRABLE

Although the Federal Judicial Center agrees that inconsistent release conditions are undesirable, it believes our emphasis on the importance of consistent bail treatment could lead to insufficient consideration of the content of standards that judicial officers are to consistently apply. The Center said that any standards should reflect a reasonable balance between assuring that a defendant appears for trial and permitting him to remain at liberty until his guilt has been established. The Center believes that before such standards can be established--thereby avoiding the creation of a system in which bail decisions may be consistent but unwise--certain policy questions must be answered.

--How good is the courts' ability to assess a defendant's likelihood of fleeing while on bail?

--How great must the probability of flight be to justify pretrial incarceration?

We agree that these are complex problems. However, when information becomes available on the results of release or detention decisions, it will form the basis for an analysis of such issues. Indeed, assessing the probability of making future court appearances does involve trade-offs. No one can ever be certain of the chance of flight a defendant poses. In our view, however, a judicial officer would be in a much better position to assess this probability if he knew the results of his previous decisions, as well as the results of other judicial officials' decisions. It should provide a better perspective and a basis to exercise the judicial discretion inherent in the position.

FEEDBACK ON THE RESULTS OF BAIL DECISIONS

The Federal Judicial Center believes that providing judicial officers with feedback on the results of their bail decisions may bias their decisionmaking process. They point out that bail is an area where collectible data is one sided. Judicial officers could receive information showing the results of all release decisions, such as the percentage of defendants who make and who do not make required appearances. But it would not be possible to show corresponding data on detained defendants who might have met their appearance obligations had they been released. Thus, a judicial officer, who receives information showing his "errors" of one kind but no information on his "errors" of the other kind, would not really have a balanced basis for evaluating his own performance. The Federal Judicial Center believes that this could create a danger of encouraging judicial officers to become unduly restrictive in setting release conditions.

We do not believe the lack of factual data on the likelihood of whether detained defendants would have met their appearance obligations would make the feedback to individual judicial officers totally one sided. A judicial officer could get a reasonable indication of such a likelihood by comparing the detention and failure to appear rates which resulted from his bail decisions with those from the decisions of other judicial officers for similarly charged defendants. Thus, while no one knows if detained defendants would appear if released, evaluation of the experience of others may provide some insight about whether lower detention rates do or do not affect FTA rates.

We believe that the more information magistrates have about a defendant and about the results of their and other

magistrates' decisions, the better will be their abilities to exercise judicial discretion and make bail decisions.

OPERATIONAL ISSUES

The Federal Judicial Center suggested we include a discussion of how the Federal bail system operates in the postarrest period. The Center seems to imply that by encouraging judicial officers to give PSAs adequate time to verify information about defendants, and allowing PSAs to determine the timing of bail hearings, the average 18-hour interval from arrest to the initial bail hearing might be increased. The Center expressed surprise over the length of this period in light of rule 5 of the Federal Rules of Criminal Procedure which states that an officer making an arrest should "take the arrested person without unnecessary delay before the nearest available magistrate," who among other duties, "shall admit the defendant to bail." The Center said that the duration of this interval is of considerable importance and caused it to raise the following questions:

--Does the 18-hour average suggest that there is unreasonable delay by enforcement agencies?

--How long is it appropriate to hold an accused person while routine inquires are being made about his background?

--Is the accused entitled at some point to have a bail hearing even though the background check is not complete, and to be given the benefit of the presumption in favor of release on unsecured bond or personal recognizance?

Our review did not deal extensively with the interval from arrest to initial bail hearing. Thus, we do not have enough information in this area to give us valid insight into these questions. The Administrative Office's evaluation study of PSAs, however, does have more data on these matters which may be useful in addressing these issues.

Our belief that PSAs should be allowed adequate time to verify information on defendants and be allowed to set reasonable times for bail hearings is based on the results of our review. We found that verified defendant related information improves a judicial officer's ability to make bail decisions.

Also, as stated on page 31, one of the reasons PSAs are unable to affect a greater percentage of initial bail hearings is that arresting agencies often do not routinely give PSAs adequate leadtime to interview defendants and verify information on them. If the coordination between the arresting agency and the PSA is improved, it appears opportunities would exist to shorten the duration of the postarrest interval and still allow PSA input on bail decisions. Thus we do not necessarily believe as the Center implies that PSAs could further stretch out this period.

We do believe the questions posed by the Federal Judicial Center demonstrate the value of implementing an information system similar to the one we are recommending in chapter 3. Without such an information system, these and other problems will continue to go undetected and unresolved.

PRETRIAL SERVICES AGENCIES

The Administrative Office commented that the inconsistency in bail recommendations and types of supervision noted in the report are inherent and intended in the PSA experimental project. As a pilot program, experimentation in such areas was desired.

We recognize the experimental nature of the PSA program; we merely wish to highlight for the Congress some matters that should be clarified if the PSA concept, in its existing form, is implemented nationally.

The Administrative Office also said that it was aware of only two PSA districts initially using blanket supervision and travel restrictions and not the six indicated by our report. The Administrative Office added that it disapproved of such practices and had taken steps to eliminate them.

Our review showed that six PSA districts--northern Illinois, northern Georgia, eastern Michigan, northern Texas, western Missouri, and southern New York--had blanket supervision requirements as a condition of release. This was reported to the Administrative Office by memorandums from each of the PSA districts in June 1977. Also, during our review 12 of the 14 districts we visited had various forms of travel restrictions imposed on all defendants without regard to whether they posed a danger of nonappearance.

Finally, the Administrative Office said its research methodology for the PSA evaluation does not assume that any significant changes in bail variables result from the PSA operation. Their study has built-in controls to account for changes due to other factors, such as the impact of title I of the Speedy Trial Act.

Any type of research strategy involves certain assumptions. Even the Federal Judicial Center recognized this fact in its comments on the Administrative Office's proposed evaluation design in 1975. It said:

> "* * * [the proposed design strategy] requires the assumption that the introduction of a PSA is the only event that could cause the observed rates to differ materially from the predicted rates; only if that assumption is accepted can it be inferred that the PSA was the cause of any difference between the observed (PSA) rates and the predicted (non-PSA) rates."

As noted in chapter 4, the Administrative Office is using an accepted research strategy and has installed controls to account for factors that might affect the bail variables being measured to assess the impact of PSAs. The built-in controls should reduce the chances of factors, other than PSAs, affecting the evaluation results. Nevertheless, the study still is based on the assumption that PSAs will have caused any observed changes and there is no way to assess the risk of uncontrolled factors affecting the study's results.

CHAPTER 6

SCOPE OF REVIEW

Our findings and conclusions on the Federal bail system are based on detailed work done in eight Federal district courts, limited work in six other district courts, and work at the Administrative Office of the United States Courts in Washington, D.C.

To determine the results of Federal bail decisions, we randomly selected 1,555 cases (see following table) in the eight district courts. These districts represent a cross section of the Federal bail system in terms of geography, criminal caseload size, and PSA versus non-PSA districts.

	Number of defendants (note a)					
	District sample		Drug sample		Robbery sample	
District	Population	Sample	Population	Sample	Population	Sample
Non-PSA:						
Western Washington (Seattle)	414	104	137	70	28	28
Northern California (San Fransisco)	649	119	112	60	129	70
Northern Ohio (Cleveland)	672	114	79	51	49	37
Southern Florida (Miami)	1,085	121	465	107	22	22
PSA:						
Probation-operated:						
Southern New York (New York City)	1,329	124	320	96	80	51
Northern Texas (Dallas)	691	115	105	40	12	12
Board of trustees-operated:						
Eastern New York (Brooklyn)	956	121	216	85	114	62
Eastern Michigan (Detroit)	1,014	121	264	90	77	48
Total	6,810	940	1,698	599	506	330
Total of all samples	b/1,869					

a/The numbers shown in this table include defendants detained who were charged concurrently with Federal and non-Federal offenses. The statistics in the body of this report exclude these defendants because we could not determine whether the detention was the result of a Federal bail decision.

b/Although our statistics are based on this total, we reviewed case files of only 1,555 defendants as 238 drug defendants appeared in both the district and drug samples and 76 robbery defendants appeared in both the district and robbery samples. 1,869 - (238 + 76) = 1,555 total defendants sampled.

In the non-PSA districts, our samples included those defendants whose initial bail was set during calendar year 1976. In the PSA districts, the period sampled was from July 1, 1976, through June 30, 1977. We selected this period for the PSA districts because they began their operations in early 1976 and this allowed several months startup time. We used Federal Bureau of Investigation, State, and local crime information to determine which defendants were arrested during their bail periods.

In the six remaining PSA districts (shown below) we interviewed judicial officers and PSA officials about bail and PSA activities, but did not perform statistical samples of defendant case files for review.

PSA District
Probation-operated
Georgia Northern (Atlanta)
Illinois Northern (Chicago)
California Central (Los Angeles)
Board of trustees-operated
Pennsylvania Eastern (Philadelphia)
Missouri Western (Kansas City)
Maryland (Baltimore)

We discussed bail policy, procedures, and practices with judges, magistrates, officials in the Administrative Office of the U.S. Courts, clerks of the district courts, U.S. attorney representatives of the Department of Justice, and public defender organizations. We also contacted various State and local officials involved in bail and pretrial activities.

To determine the various factors which judicial officers consider in setting bail and how they weigh the factors, we asked 50 magistrates to rank in priority order the factors in the Bail Reform Act and five other factors (defendant's threat to the community; U.S. attorney and defense counsel bail recommendations; PSA recommendation, where applicable; and adequacy of detention facilities). Forty-one of the 50 magistrates responded. To get an idea of the extent to which bail decisions vary on similar cases, we asked 50 magistrates to set bail on six hypothetical defendants whose profiles were based on actual cases. Forty-one magistrates responded. We also asked 41 pretrial services officers to make bail recommendations on the same cases to help us determine the extent to which their bail recommendations vary on the same cases.

We reviewed the Bail Reform Act of 1966 and title II of the Speedy Trial Act of 1974 and their legislative histories. We also reviewed various court and U.S. attorney files on defendants in our samples, Administrative Office annual reports relating to bail and PSA activities, and various studies and research relating to bail in non-Federal courts.

APPENDIX I

Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515
Telephone: 202-225-3951

August 3, 1977

The Honorable Elmer B. Staats
Comptroller General of the
United States
General Accounting Office
Washington, D. C. 20548

Dear Mr. Staats:

My Subcommittee is responsible for exercising oversight jurisdiction on the implementation of the Speedy Trial Act of 1974. Title II of this act established pilot pretrial service agencies (PSA's) for the purpose of providing better defendant information to magistrates who decide bail conditions under which defendants may obtain pretrial release. The PSA's, scheduled to be in existence until July 1979, also provide various services to select pretrial defendants while on release.

Under the Bail Reform Act of 1966, criteria were established for magistrates to use in determining release conditions that would reasonably assure the defendants appearance for trial. The intent of Congress in establishing PSA's was to improve bail decisions and also by assisting defendants, reduce detention rates and new crimes committed while out on bail.

To assist us in our oversight and legislative responsibilities, we are requesting that the General Accounting Office conduct a study on the pretrial release and detention practices that are now being carried out. This study would be consistent with the one we requested in our letter of August 3 on the implementation of Title I of the Speedy Trial Act. We are concerned about how the PSA is being implemented and operated,

APPENDIX I

and how the activities of PSA's are being evaluated by the Administrative Office of the U.S. Courts (AO) pursuant to Title II of the 1974 Speedy Trial Act.

We understand you have begun a self-initiated study on the matter and that your results will be useful to all members of Congress and specifically to our Subcommittee. We will be pleased to receive any data and findings you collect in reference to the Bail Reform Act. In addition, we are hopeful we will receive specific conclusions concerning the PSA projects. Particularly we would like you to evaluate the organizational structure of the Board of Trustees operated SPA's versus the Probation Office operated PSA's and discuss any problems identified. It is expected you will determine whether PSA's have operational goals and objectives and a system of measurement to evaluate the extent to which they are being met. In addition, we will want to know if the PSA's are effectively providing magistrates information for bail decisions and to what extent are PSA's supervising defendants prior to trial. It is expected that you will identify other problems hindering effective PSA operations.

In the course of your study, we would like you to review the Administrative Office of the Courts and discuss with its officers the progress and problems being made in their evaluation effort of PSA's and comment on any matters Congress should be aware of in considering the evaluation results. We recognize that GAO has already completed survey work in the area and expects to issue a report to Congress when its final work efforts are completed. The questions we have outlined should comprehensively cover the substance of your survey. Also, we have no objection to the report being issued to the Congress but would like GAO to be ready to testify on its findings, should hearings be scheduled before the report is issued.

Thank you very much for your cooperation.

Sincerely,

John Conyers, Jr.
Chairman
Subcommittee on Crime

APPENDIX II

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

August 11, 1978

Mr. Victor L. Lowe
Director, General Government Division
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

Thank you for your courtesy in extending us an opportunity to comment on your draft report on the bail-setting process and the ten Demonstration Pretrial Services Agencies in the federal courts. I have circulated the report among pertinent segments of the judiciary for review.

I would like to make several comments about the draft report's conclusions and recommendations and certain textual matters. We found the report interesting and provocative. It raises a number of valuable questions about the operation of the bail system. We believe the report reflects a generally good and useful evaluation of the federal bail process and the function and purpose of the Pretrial Services Agencies. There are several areas, however, in which we believe it might be strengthened.

I. The Federal Bail Process

The draft does not give sufficient recognition to the fact that under the Bail Reform Act the setting of conditions of release is a judicial act. As a judicial act, it is subject to review only through appeals to appellate courts from decisions of district judicial officers. It would be wholly inconsistent with the process of judicial decision-making for the administrative organs of the Judicial Branch--the Judicial Conference, the Administrative Office and the Federal Judicial Center--to tell judges and magistrates how to make their decisions or to engage in some kind of administrative review of those decisions. We can appropriately provide judicial officers with research data and statistical information that will assist them in their decision making.

APPENDIX II

The report would be greatly strengthened by eliminating any possible implication that the General Accounting Office is recommending a role for us that judges and lawyers would universally regard as unauthorized, improper, and perhaps unconstitutional.

Concerning the inconsistency and possible unfairness of the federal bail process, we agree that there is a need for judicial officers to have more complete and reliable information, such as can be provided by the Pretrial Services Agencies. The report's reliance on results of questionnaires provided magistrates and pretrial service officers might be supported by inclusion of the questionnaires in an appendix to the report.

Disparity in judicial officers' interpretation of the purpose of the Bail Reform Act and the Act's intended implementation may also contribute to inconsistency or unfairness in the bail process. We agree with the report's conclusions that the sole legitimate purpose of pretrial bail in a non-capital case is to assure the defendant's appearance at trial; the defendant's possible danger to the community or the defendant's willingness to cooperate with the prosecution are improper criteria for bail. Furthermore, the judicial officer must consider the enumerated release conditions set forth in section 3146(a) of title 18, United States Code, in order, on a case-by-case basis. Thus blanket supervision or travel restrictions are in direct conflict with the Bail Reform Act.1/ Also we agree that in every case where a bond condition is deemed necessary, preference should be given to a secured personal bond rather than a corporate surety bond.

The recommendations for further training for judges, for magistrates, and pretrial service officers regarding these issues has much merit. Since prosecution and defense attorneys have a part in the bail setting process, they too should receive training. The Criminal Law Committee of the Judicial Conference has cognizance over the bail area. It is actively studying proposals to amend the present bail statute. Also the member judges would be available for seminars for judicial officers on bail issues.

It would be helpful if the report reflected that the Administrative Office has previously addressed these bail

---

1/ The Administrative Office, through the General Counsel's office, has distributed standard bail forms to be used by all districts, which emphasize that construction of the Bail Reform Act. A copy is enclosed.

APPENDIX II

subjects and in cooperation with the Federal Judicial Center, provided training to lessen the disparity in judicial officer's construction of the Bail Reform Act. For example, staff members of the General Counsel's office, as Federal Judicial Center faculty, have conducted orientation and advanced training seminars for pretrial service officers on those legal issues. Also, the Chief of the Pretrial Services Branch has distributed memoranda advising all ten Pretrial Services Agencies to base their bail recommendations in accordance with the above noted interpretation of the purpose and intended application of the Bail Reform Act.2/

Likewise, all of the Federal Judicial Center's orientation seminars for magistrates discuss the conduct of initial appearances, including the setting of bail conditions. In addition, a newly updated chapter of the Legal Manual for United States Magistrates has been prepared and will be distributed shortly. That chapter deals specifically with the initial appearance and should provide magistrates and other court officers, to whom it will be available, with additional guidance and information on the bail-setting process. Court decisions on bail are circulated as they become available under our Information Memorandum program. These court decisions help keep magistrates abreast of developments in the law relating to bail.

The report's conclusion that guidelines establishing priority and weighting for the factors the judicial officer is to consider in determining the release conditions would reduce inconsistency in bail decisions is well taken. We have an extensive data collection system in the ten Pretrial Services Agency districts which could assist in establishing such guidelines. Sufficient information should be forthcoming. The report notes that the Southern District of New York is using criteria guidelines. The Chief of the Pretrial Services Branch will encourage the other nine districts to experiment with such guidelines for use in Pretrial Services Agency recommendations.

In the report's chapter on the federal bail process, it concludes that Pretrial Services Agencies need more time to collect and verify information. Greater cooperation by the arresting agent and the judicial officer is imperative to

---

2/ See Pretrial Services Agency memoranda dated December 7, 1977 (Blanket Supervision) and March 3, 1978 (Danger to the community as a bail criterion). Copies are enclosed.

APPENDIX II

provide Pretrial Services Agencies with sufficient time to collect and verify bail information. We agree with this observation. The Pretrial Services Agencies data will permit us to provide feedback to each district regarding the length of time from arrest to pretrial interview and from the pretrial interview to the initial bail hearing. We are unsure whether Pretrial Services Agencies calendar control is the proper method to achieve this goal. The report might be improved if additional alternatives were considered.

II. Management Information

A system to monitor and evaluate federal bail activities in order to provide a judicial officer with information about his bail decisions relative to those of other judicial officers has merit. While such a system might help narrow the range of release conditions and the degree of detention, the cost of such a system would need to be considered in terms of the scope of the problem. The monitoring system currently in effect in the ten Pretrial Services Agency districts may provide a model in this regard. Alternatively, this information system requirement might be met efficiently by redesigning the Administrative Office's present system to include bail information.

III. Pretrial Services Agencies

We concur with the report's favorable evaluation of the important function Pretrial Services Agencies are serving and its recommendation that the Pretrial Services Agencies be expanded. The prevalent attitudes among magistrates in the Pretrial Services Agency districts is that the Pretrial Services Agencies function of providing verified bail information is extremely helpful and should be continued in some form.

A few issues concerning the report's observation on Pretrial Services Agencies merit clarification. The report's conclusions about Pretrial Services Agencies' social services will continue to be studied by the Pretrial Services Branch. At this time it is gathering information on this subject and will report its findings to Congress. We understand section 3154(7) of title 18, U.S.C., to require Pretrial Services Agencies to make social services available to defendants in a Pretrial Services Agency district, but not to impose participation. Social service participation is recommended

APPENDIX II

as a bail condition, consistent with section 3146(a), only when it is deemed necessary to assure the defendant's appearance at trial.

Some of the inconsistency in bail recommendations and types of supervision which the report notes, are inherent and intended in the Pretrial Services Agency project. As a pilot program, Congress set up the Pretrial Services Agency districts with a desire for experimentation in such areas.

By contrast we are concerned with any Pretrial Services Agency inconsistency in application of the mandates of the Bail Reform Act. This is in legal rather than policy matters. The General Counsel's office responds to Pretrial Services Agency inquiries on legal issues pertaining to the bail statutes and encourages such inquiries. The General Counsel's office also serves as legal counsel to the Chief of the Pretrial Services Branch to assure that Pretrial Services Agencies' practices conform to the legal requirements of the Bail Reform Act. The report states that six of the ten demonstration districts employ blanket supervision and travel restrictions. To our knowledge, of the districts involved, only two Pretrial Services Agency districts initially used blanket supervision or travel restrictions. We disapprove of such practices and have taken steps to eliminate them. At this time none of the Pretrial Services demonstration districts follows those practices.

(See GAO note, p. 64.)

The report concludes that the Administrative Office's evaluation design assumes that any significant changes in bail variables result from the Pretrial Services Agencies' operation. The research methodology does not make this

APPENDIX II

assumption, since it has built-in controls to account for changes due to other factors, such as the impact of Title I of the Speedy Trial Act.

The report observes that there are variations in the frequency of contacts and the risk classifications made by various Pretrial Services Agencies, but fails to explain the many reasons for these variations. For example, the nature of the contacts affects the frequency rate. Also, to some extent the Pretrial Services Agency project has permitted variations in both areas as part of necessary experimentation, until sufficient data allow us to determine the most effective approach.

(See GAO note, p. 64.)

I appreciate your sharing the draft report with us and giving us this opportunity to comment on it. I look forward to reading the final product.

Sincerely yours,

William E. Foley
Director

APPENDIX II

[99(10/76)]

BAIL REFORM ACT FORM NO. 2

UNITED STATES DISTRICT COURT

_____ District of _____

United States of America

v.

_____
Defendant

Magistrate's Docket No. _____

Case No. _____

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Part I.—Preferred Methods of Release

It is hereby ORDERED that the above-named defendant be released, provided

Check one

Personal Recognizance

( ) that he promises to appear at all scheduled hearings as required.

Unsecured Bond

( ) that he will execute a bond* binding himself to pay the United States the sum of _____ dollars ($) in the event that he fails to appear as required.

[NOTE: The judicial officer is required to release the defendant by one of the above methods unless he determines that such a release will not reasonably assure the appearance of the defendant as required. In the event such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first condition of release listed below which will reasonably assure the appearance of the person for trial. If no single condition gives that assurance, any combination of conditions may be used.]

Part II.—Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant, it is hereby FURTHER ORDERED that the defendant be released on the condition(s) checked below:

Third Party Custody

( ) (1) The defendant is placed in the custody of
(Name of person or organization) _____
(Address) _____
(City and State) _____ Tel. No. _____
who agrees (a) to supervise the defendant in accordance with conditions 2 and 5 as checked below, (b) to use every effort to assure the appearance of the defendant at all scheduled hearings before the United States Magistrate or Court, and (c) to notify the Magistrate or Court immediately in the event the defendant violates any condition of his release or disappears.

Signed: _____
Custodian or Proxy

Restrictions on Travel, Association or Place of Abode

( ) (2) The defendant will comply with each of the following conditions: _____

10% Deposit

( ) (3) The defendant will execute a bond* binding himself to pay to the United States the sum of _____ dollars ($) and will deposit in the registry of the court the sum of _____ dollars ($), in _____ (cash or security), being not more than 10% of the amount of the bond, such deposit to be returned upon the court's determination that the defendant has performed the conditions of his release.

Cash or Surety Bond

( ) (4) The defendant will execute a bond* in the amount of _____ dollars ($) either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof.

*This form is not a bond and does not create in the defendant or surety a binding financial obligation to the United States. The execution of an Appearance Bond (D.C. Form No. 17) is necessary in order for such an obligation to attach.

APPENDIX II

199(Sheet 2)(10/76)

Part-time Release

( ) (5) (a) The defendant will be released from _____ a.m./p.m. to _____ a.m./p.m. on _____ (Specify days of week) on condition that he return to custody at the specified time at such place of confinement as the United States Marshal shall designate.

Other Conditions

( ) (5) (b) The defendant agrees that he will comply with the following other conditions of release: _____

(NOTE: A defendant for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them.)

Part III.—Appearance and Penalties

Appearance

It is hereby FURTHER ORDERED that the defendant shall appear next at _____ (Place) _____ (Date and Time) and at such other places and times as the United States Magistrate or Court may order or direct.

Penalties

It the defendant violates any condition of his release, a warrant for his arrest will issue immediately. After arrest, the terms and conditions of any further release will be redetermined.

If the defendant fails to appear before any court or judicial officer as required, an additional criminal case may be instituted against him. If the failure to appear is in connection with a charge of felony, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than $5,000 or imprisonment for not more than five years, or both; if he fails to appear after being released on a misdemeanor charge, the penalty is a fine of not more than the maximum provided for the misdemeanor or imprisonment for not more than one year, or both.

Part IV.—Acknowledgment by Defendant

Acknowledgment

I _____ (Defendant) understand the methods and conditions of my release which have been checked above and the penalties and forfeitures applicable in the event I violate any condition or fail to appear as required.

I agree to comply fully with each of the obligations imposed on my release and to notify the Magistrate or Court promptly in the event I change the address indicated below.

_____
Defendant

_____
Address

_____
City and State Tel. No.

RELEASE ORDERED:

_____
United States Magistrate
or
United States District Judge

Date: _____

TO THE UNITED STATES MARSHAL:

Your copy of the Order Specifying Methods and Conditions of Release (Bail Reform Act Form No. 2) constitutes your authority for the commitment of the defendant until such time as all conditions of release are complied with. You are authorized to process the defendant for release upon notification from the clerk or United States magistrate that the defendant has posted bond.

You are directed to produce the defendant before the appropriate judge or magistrate at the time and place specified above, if the defendant is still in your custody.

_____
United States Magistrate
or
United States District Judge

APPENDIX II

December 7, 1977

MEMORANDUM TO ALL CHIEF PRETRIAL SERVICE OFFICERS AND SUPERVISORS

Subject: Legal Aspects of PSA Operations

Enclosed for your information is a copy of a letter from Daniel B. Ryan, Chief Pretrial Service Officer, Brooklyn, New York to General Counsel regarding verification of certain data obtained by the PSA and the practices of supervising all persons released on bail. Attached you will also find Mr. Imlay's response to these questions.

Guy Willetts
Chief, Pretrial Services Branch

Enclosure

GWilletts/sg

APPENDIX II

RECEIVED 11/23/77

UNITED STATES GOVERNMENT

memorandum

DATE: November 23, 1977

REPLY TO ATTN OF: Judd D. Kutcher

SUBJECT: Pretrial Service Agency Supervision of All Persons Released on Bail

TO: Guy Willetts

There are many pertinent comments on the subject made in the materials that you forwarded to me concerning the policies of the various districts. I recognize that supervision as a philosophical and practical matter may increase the likelihood of the appearance of the defendant for court matters and may also have other salatory results such as the reduction of pretrial crime. Also, to some extent the procedure of putting all persons on supervision may be helpful in preparing the statistics required under § 3155 of title 18. However, I remain of the opinion that the practice of placing all defendents released on bail under PSA supervision on its face ignores and appears in conflict with the statutory mandate of § 3146(a) of title 18. The provisions of title II of the Speedy Trial Act should be implemented in concert with § 3146. Thus, § 3154(3) provides that a PSA will "supervise persons released into its custody under this chapter" (Emphasis added). The wording of § 3154(3), particularly in reference to "under this chapter," suggests that supervision should be in accordance with § 3146(a).

Section 3146(a), by its express terms, requires that the defendant be released under personal recognizance or unsecured bond, unless the judicial officer determines that such a release with no other conditions will not reasonably insure the appearance of the person. Case law has interpreted § 3146(a) to require that the judicial officer make a threshhold determination that personal recognizance or unsecured bond will not reasonably insure appearance. Only after that determination should the court consider whether other conditions should be imposed alternatively or in addition to personal recognizance or unsecured bond -- including supervision. United States v. Cramer, 451 F.2d 1198, 1200 (5th Cir. 1971); United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); United States v. Gillin, 345 F. Supp. 1145, 1146-47 (S.D. Tex. 1972).

APPENDIX II

Judicial officers in each district may decide, as a matter of practice, to put all defendents under PSA supervision. Notwithstanding that possibility, in my opinion it is inappropriate for a PSA to recommend that all persons be placed under supervision since such recommendation is legally in conflict with the statutory requirements of § 3146(a). Also, as I read § 3154(7), there are certain services which PSAs may provide defendants released on bail, such as assistance in securing employment, medical, or legal help, which are not restricted to defendants who are under PSA supervision. Thus, some of the advantages PSAs may represent need not be dependent upon the defendant being under their supervision.

In sum, I believe that it is important that the Pretrial Service Division clarify that it is the opinion of this office that we construe § 3146(a) to require an initial determination that personal recognizance or unsecured bond is in itself insufficient to secure the defendant's appearance, and that placing all defendants under PSA supervision appears to conflict with the statutory mandate of § 3146(a).

APPENDIX II

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WAYNE P. JACKSON
CHIEF OF THE DIVISION
OF PROBATION

March 3, 1978

MEMORANDUM TO ALL CHIEF PRETRIAL SERVICE OFFICERS, SUPERVISORS, AND JUDGES AND MAGISTRATES INVOLVED IN PRETRIAL SERVICES AGENCIES

Subject: Use of Danger to the Community as a Criteria to Release of a Defendant Prior to Conviction of a Noncapital Offense.

I have attached for your information a recent memorandum from the General Counsel's Office regarding the Use of Danger to the Community as a Criteria to Release of a Defendant Prior to Conviction of a Noncapital Offense. The issue of danger is being discussed more and more by persons involved in the bail process. I am sure this information will be of help to you as it relates to the bail process in your jurisdiction.

Guy Willetts
Chief, Pretrial Services Branch

Attachment

UNITED STATES GOVERNMENT

memorandum

DATE: February 16, 1978

REPLY TO ATTN OF: Judd D. Kutcher

SUBJECT: Use of Danger to the Community as a Criteria to Release of a Defendant Prior to Conviction of a Noncapital Offense

TO: Guy Willetts

In the most recent Pretrial Services Agency orientation program, the above subject brought forth considerable discussion and controversy. In general, opinion may differ regarding the advisability or constitutionality of using "danger to the community" as a bail criteria; 1/ such questions may be pertinent to a specific state bail scheme or a proposed change in the Bail Reform Act of 1966. But there is no question that considering danger or likelihood of recidivism when recommending pretrial release conditions violates the controlling federal bail statute, section 3146 of title 18.

The plain language of § 3146 provides that assurance of "the appearance of the person as required," is the only criteria to be considered in the pretrial release in noncapital cases. Federal case law on this issue emphatically supports that conclusion. See, e.g., United States v. Bigelow, 544 F.2d 904, 907-08 (6th Cir. 1976); United States v. Leathers, 412 F.2d 169 (D.C.C. 1969) (per curium); United States v. Melville, 305 F. Supp. 124, 127 (S.D.N.Y. 196[illegible]. But see United States v. Wind, 527 F.2d 672, 674-75 (6th Cir. 1975). 2/

1/ Compare Pugh v. Rainwater, 557 F.2d 1189, 1197-98 (5th Cir. 1977) vacated for rehearing en banc, 22 Cr.L.Rptr. 2199 (1977) (preventive detention violates presumption of innocence, equal protection, and defendant's right to prepare his defense) with Blunt v. United States, 322 A.2d 579 (D.C. App. 1974) (pretrial detention not violative of presumption of innocence or Eighth Amendment). See Note, "Preventive Detention Before Trial, 79 Harv.L.Rev. 1489 (1966); Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va.L.Rev. 1223 (1969); Meyer, "Constitutionality of Pretrial Detention," 60 Georgetown L.J. 1382 (1972).

2/ A court possesses the inherent authority to deny bail where a defendant threatens or injures a witness or otherwise tampers with the trial process itself -- which is a different proposition. See, e.g., United States v. Kirk, 534 F.2d 1262, 1280-81 (8th Cir. 1976); United States v. Wind, 527 F.2d 672, 674-75 (6th Cir. 1975.; United States v. Gilbert, 425 F.2d 490, 491-92 (D.C.C. 1969).

APPENDIX II

The Leathers opinion is instructive. While recognizing the "disquiet a judge may feel in releasing a person charged with a dangerous crime because the Bail Act requires it," and the unpopularity of that requirement, the court nevertheless felt compelled to observe:

> But when the statute and its legislative history are unambiguous, as is the case with the Bail Reform Act [e.g., compare § 3146 with § 3148 which expressly gives the court the discretion to impose conditions of release necessary to protect the public from danger from the defendant], none of us on the bench has any serious alternative but to put aside his personal doubts and to apply the Act as Congress has written it.

412 F.2d at 170. See United States v. Bishop, 537 F.2d 1184, 1186 (4th Cir. 1976).

Just like the judges referred to in Leathers, pretrial services officers have an obligation "to apply the Act as Congress has written it," in formulating bail recommendations for their respective judicial officers. That obligation of the ten pretrial districts is unaltered by the references in the legislative history of title II of the Speedy Trial Act indicating a goal of reducing crime. See Ryan, "The Federal Pretrial Services Agencies," 35 Fed.Prob.Q. 15, 20-21 (1977). Applying a different criterion in those ten districts would appear constitutionally infirm. A criterion based on the mere geography of the alleged offense clashes with the principle of equal protection. Id.; see United States v. Thompson, 452 F.2d 1333, 1340-41 (D.C.C. 1971). Moreover, if Congress intended that result it could have spoken through the language of title II.

The legislative history of title II and § 3146 can and should be harmonized. The seriousness of the alleged crime, or a serious prior criminal record may well reflect upon the defendant's likelihood of flight, as well as, suggesting a danger to the community. Such information should be used to assess the former issue, not the latter. See Allen v. United States, 386 F.2d 634, 636 (D.C.C. 1967) (dissenting opinion of Bazelon, C.J.). A by-product of conditions gauged to curtail a defendant's opportunity to flee, may be a reduction of his danger to the community. Leathers, supra, 412 F.2d at 173.

APPENDIX II

The PSA's will be judged on whether they improve the effectiveness of the Bail Reform Act -- as it is presently written. If PSA's, in adhering to the Act, fail to reduce pretrial release crime, the case for changing the Bail Act may be strengthened. Using danger as a criterion under the Act, as it is presently worded, covers up the issue rather than exposing it to scrutiny it may deserve.

JDK:pdg
Mr. Foley
Daybook
Memo
Bail - Gen. Prob.
Pretrial Services

APPENDIX III

THE FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D. C. 20005

A. LEO LEVIN
DIRECTOR

TELEPHONE
202/633-6311

August 11, 1978

Victor L. Lowe, Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Lowe:

Thank you for the opportunity to comment on the draft of the proposed G.A.O. report to Congress on the federal bail process.

We found the report interesting and provocative and we feel confident that it will make a significant contribution. We do believe, however, that there are several areas in which it could be strengthened and, in accordance with your request, I suggest them for your consideration.

First and foremost, it seems to us that the draft does not give sufficient recognition or perhaps sufficiently explicit recognition, to the fact that, under the Bail Reform Act, the setting of conditions of release is a judicial act. As a judicial act, it is subject to review only through appeals to district judges from the decisions of United States Magistrates and through appeals to appellate courts from decisions of district judges. It would be wholly inconsistent with the process of judicial decision-making for the administrative organs of the Judicial Branch --the Judicial Conference, the Administrative Office, and the Judicial Center--to tell judges and magistrates how to make their decisions or to engage in some kind of administrative review of those decisions. We can appropriately provide judicial officers with research data and statistical information that will assist them in their decision-making; we can appropriately provide educational programs analyzing not only the data, but the underlying problems and issues. It would, however, be utterly improper for any of us to purport to speak authoritatively about what the Bail Reform Act means or how it should be applied by a particular judge or magistrate in a particular case. When the draft report suggests that judicial officers should be given "guidance" or that their decisions should be "reviewed" (both on page i, among other places) there is at best an ambiguity as to

APPENDIX III

whether the Judicial Conference, the Administrative Office, and the Judicial Center are being urged to intrude upon the judicial function. I believe the report would be greatly strengthened by eliminating any possible implication that the General Accounting Office is recommending a role for us that virtually all judges and lawyers would regard as unauthorized, improper, and perhaps unconstitutional. If we appear unduly sensitive about avoiding ambiguity on questions of this kind, be assured that the distinction is one which is found both necessary and useful in a number of areas and our utility is much enhanced by the fact that federal judges are aware of the care we take to remain sensitive to our obligations and our limitations in this regard.

A second area in which we think the report could be improved is in its emphasis on the desirability of consistency in the setting of release conditions. Admittedly, inconsistency--in the sense that a defendant's release conditions turn on which judicial officer he happens to come before--is undesirable. However, one can imagine a system in which decisions are both consistent and unwise. Beyond mere consistency, it is important to seek standards that reflect a reasonable balance between the need to assure a defendant's appearance for trial, on the one hand, and the interest in permitting defendants to remain at liberty unless and until their guilt has been established, on the other. I do not suggest that anything in the draft report is erroneous in this regard; merely that a greater attention to policy issues beyond mere inconsistency might lead the authors to raise some questions that they did not. How good, for example, is our ability to assess the likelihood that a particular defendant will flee? And, considering that any prediction of flight will at best be a statement of probabilities, how great must the probability of flight be to justify pretrial incarceration? If there were a group of defendants for whom we could at best predict that half would flee and half would not, what would be the appropriate decision about detention? And what do we know about the efficacy of the various release conditions permitted by section 314(a) in changing the probabilities? It seems to us that the emphasis on inconsistency of treatment as an evil in itself may lead a reader of the report to give insufficient consideration to the problems of determining the content of the standards that are to be consistently applied.

APPENDIX III

May I also suggest that you give very careful consideration to the proposed recommendation that individual judicial officers be provided with feedback about the results of their bail decisions? Bail is one of those areas in which the data that can be routinely collected is necessarily one-sided. It would be possible to provide judicial officers with data showing the percentage of released defendants who fail to make required appearances or who go fugitive. It would not be possible to show the number of detained defendants who would in fact have met their obligations had they been released. A judicial officer who received information showing his "errors" of one kind but no information showing his "errors" of the other would not really have a balanced basis for evaluating his own bail-setting performance. There is danger, however, that an officer receiving such data regularly would be induced to give greater emphasis than warranted to correcting the one kind of "error" disclosed by the data, and would become unduly restrictive in setting conditions of release. We are inclined to think that it would be a better approach to provide judicial officers with such information of predictive value as can be generated nationally, without inviting each of them to evaluate his own performance in terms of a skewed and partial picture of the "results" of his decisions.

Finally, we think the value of your report might be substantially enhanced by a somewhat more analytical treatment of the interval in which a defendant is in custody after apprehension but before the bail decision. The report hints at a number of fascinating questions, but does not explore them fully. Rule 5 of the Federal Rules of Criminal Procedure requires that an officer making an arrest under a warrant issued on a complaint "take the arrested person without unnecessary delay before the nearest available federal magistrate," who, among other duties, "shall admit the defendant to bail as provided by statute or in these rules." On page 46 of the draft report, it is stated that the average time from arrest to initial bail hearing is 18 hours, a figure that seems surprisingly high to us. On page 47, it is recommended that judicial officers should be encouraged to give pretrial services agencies adequate time to verify information about defendants, and further that the pretrial services agencies be allowed to determine the timing of bail hearings. Considering that most defendants are released at their bail hearings, it seems to us that the appropriate duration of the interval between arrest and bail hearing is a matter of considerable importance. Does the

APPENDIX III

18-hour average suggest that there is unreasonable delay by the enforcement agencies? How long is it appropriate to hold an accused person while routine inquiries are being made about his background? Is the accused entitled at some point to have a bail hearing even though the background investigation is not complete, and to be given the benefit of the presumption in favor of release on unsecured bond or personal recognizance? And what obligation does the prosecutor have to assist in gathering data relevant to the release decision, particularly if the government is urging that personal recognizance or unsecured bond are insufficient to assure the appearance of the accused? In view of the fact that your staff has apparently gathered data bearing on some of these questions, we think it would be most appropriate if the report included a more complete discussion of how the system operates in this immediate post-arrest period. To the best of our knowledge, this would be breaking new ground.

I very much appreciate your sharing the draft report with us, and giving us this opportunity to comment on it. I look forward to reading the final product. I am sure it will be a significant contribution.

Sincerely,

A. Leo Levin

A. Leo Levin

ALL/flbc

cc: Mr. William Foley, A.O.
Mr. Guy Willetts, A.O.

GAO note: The deleted comments relate to matters which were discussed in the draft report but were either omitted from or changed in this final report. Page references refer to the draft report and are not applicable to this report.

(18842)