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Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982

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THE PRETRIAL SERVICES ACT of 1982 (Act) began a process of inserting pretrial services into the fabric of the federal criminal justice system. That act followed the humble beginnings of the Speedy Trial Act of 1974. Title II of the 1974 Act authorized the Director of the Administrative Office of the U.S. Courts to establish in 10 judicial districts "demonstration" pretrial services agencies to help reduce crime by persons released to the community pending trial and to reduce unnecessary pretrial detention. Five of the Agencies were to be administered by the Probation Division (now the Office of Probation and Pretrial Services) and five by boards of trustees appointed by the chief judges of the district courts. Title II also instructed the Director to compile a report on the effectiveness of pretrial services in these demonstration districts.

The fourth and final report on the *Implementation of Title II of the Speedy Trial Act of 1974* was published on June 29, 1979. Essentially that report concluded that pretrial services was a good thing and should be expanded throughout the federal system. That report is quoted often in Committee and Subcommittee hearings and publications on passage of the Pretrial Services Act of 1982. For those of you with long memories, there were many questions and impassioned feelings on the subject of institutionalizing pretrial services. Therefore, I wanted to research what other work was done on the topic, independent of this agency. Although the studies I found were done later, they do confirm the conclusion that was presented to Congress, that expansion of pretrial services would enhance the federal system. That research revealed some excellent studies funded by NIJ and concluded:

> The conclusion of this research suggests that the experimental pretrial programs did help judges change their decision making patterns, and the observed increase in the use of non-financial release conditions and the number of defendants released provide evidence of this change. Furthermore an increased rate of pretrial misconduct did not accompany this change. Moreover, a greater number of factors appear to have influenced the pretrial decision after the intervention than before. Finally, judicial decisions showed a higher level of consistency after program intervention with more factors influencing the decision...Our results suggest that combining

> legislation to create agencies to help carry out the law in the Bail Reform Act proved an effective method for reforming pretrial release decisions. [1]

The purpose of this article is to look at the impact of the ACT on this its 25th anniversary. In preparation I went back and read testimony and committee reports to determine what it was Congress hoped to accomplish, and it was in fact very clear what they hoped to accomplish with passage of the ACT. Specifically, they sought to: ensure pretrial services investigations and reports for all defendants; reduce unnecessary detention; reduce crime on bail and the number of defendants who do not appear for subsequent proceedings; and reduce the federal system's reliance on surety bonds. [2]

Unfortunately, data from the earliest days of pretrial services is not available. The first year of available data is 1983 and the various pieces of the process—for example, pretrial services supervision counts—have been added slowly, beginning in 1984. Therefore, the full 25 years of data are not available to track various trends and some elements will have fewer years of data than other elements, depending on the evolution of that variable over time. Even given those limitations, the following trends should be illuminating to readers.

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I. Investigations/Criminal Charges

In the legislative history and various committee reports prepared on the ACT, it is apparent that the sponsors of this legislation felt that the most important first step in implementing pretrial services was to get pretrial services reports into the hands of judges at the time of the pretrial release decision. In fact, in the infancy of the federal pretrial services system, pretrial services "activations" were compared regularly to criminal filings as a measure of our success in implementing pretrial services in the federal system. (Activations reflect for the most part pretrial services investigations and reports.) As the program matured we have gotten away from that comparison.

Under Title 18 U.S.C. Section 3154 pretrial services investigations "should" be performed on all felony and class A misdemeanor defendants, with the stipulation that a particular district can decide to eliminate class A misdemeanor cases as well. Under 18 U.S.C. 3559 (a) class A misdemeanor cases involve a potential penalty of 6 months to one year in custody. Given that all class A misdemeanors and felonies are to be reported through the criminal filings system, comparing those filings to the pretrial services activations in the Pretrial Services Act Information System (PSAIS) should provide useful feedback on the issues raised. To make the comparisons useful we must exclude diversion cases from the PSAIS numbers, because diversion cases are not included in criminal filings.

As Table 1 demonstrates, although it took a significant number of years, beginning in 1998, the pretrial services system achieved the ability to complete an investigation and report in virtually all cases. Thus, the pretrial services system was able to meet the first of several goals for the Act, set by the legislators who passed the legislation, specifically "to get accurate information about defendants into the hands of judges at the release hearing." To this day the system continues to place written reports into the hands of judicial officers charged with making pretrial released decisions in the vast majority of cases.

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II . Reduce Unnecessary Detention

A large majority of the text in committee and subcommittee reports and testimony concerns the reduction of unnecessary detention. In fact, several senators and representatives influential in ultimately passing the ACT, including Biden, Kennedy, and Hughes, cited the reduction of

unnecessary detention as their primary motivation in voting for the ACT and subsequently passed legislation, including the Bail Reform Act of 1984.

The ACT and subsequent actions by the Administrative Office of the U.S. Courts led, whether directly or indirectly, to the creation of pretrial services in the District of New Jersey, which in turn led to my hiring as a pretrial services officer many years ago. Therefore, I have always felt directly indebted to the ACT for my federal career. As a young officer that feeling manifested itself by my reading virtually everything I could get my hands on about what Congress wanted pretrial services officers to do. If you go back and read all the reports and testimony, to borrow a line from James Carville, you realize that "It's the unnecessary detention, stupid." Yet when I travel to pretrial services offices today, I hear over and over again that "It's not like it's my job to reduce detention." In fact, my all-time favorite comment came from an officer at least ten years ago: "It took me all day but I finally got that guy detained." I don't fault those officers, because this is part of a larger problem that the system needs to address, but as a system we have lost focus on the primary mission Congress meant us to address, the reduction of unnecessary pretrial detention.

Many factors have caused the detention rate to rise so dramatically and I explore and detail those in subsequent sections. In fact, a significant percentage of the pretrial services population cannot and probably should not be released. However, there is another group, located in the middle of our population in terms of risk of FTA/rearrest if released, that could and should be released. We as a system need to begin to identify those individuals and develop the necessary tools and programs so that judicial officers are comfortable in releasing those defendants. Doing that in the next 25 years would leave a legacy to be proud of.

Pretrial detention rates are clearly rising again, particularly in the last two years (see Table 2). In fact, in FY 2004 we achieved the unprecedented rate of 60 percent of all cases closed having been held in detention throughout the pendency of the case. Prior to the recent surge, rates had been stable at about 52 percent. Those rates are rising for a variety of factors: 1) illegal immigrants comprise a larger percentage of the federal defendant population than ever before and those defendants are more likely to be detained than categories of legal immigrants or even unknown categories; and 2) immigration and drug offenses continue to rise, both of which have high detention rates.

A. The Changing Federal Defendant

The defendants appearing in federal court have changed dramatically over the 25-year history of pretrial services in the federal system. A number of significant factors in the pretrial release/detention decision seem particularly pertinent, but let's begin by looking more generally at the changing demographics of those defendants. The Administrative Office of the U.S. Courts publishes annual profiles of the defendants that appear in federal court. The first year for which data is available is 1987, so we employ that as the benchmark of where the system started. That year 76 percent of defendants were U.S. citizens; 24 percent had a substance abuse problem, with 6.7 percent unknown; 57 percent were employed; and 65 percent lived in the area of their arrest for more than 60 months. In 2007 57 percent were U.S. citizens; 26 percent had a substance abuse problem, with 31 percent unknown; 36.3 percent were employed, and 32.3 percent lived in their area more than 60 months. All of these categories, which are relevant to the release decision, have changed in arguably a negative direction, with citizenship down 19 percent; substance abuse problems seemingly steady except for the unknown factor, which is up significantly; employment down 21 percent; and residence stability down 33 percent.

B. Effects of the Bail Reform Act of 1984

The Bail Reform Act of 1984, which permits judicial officers to consider the danger to the community posed by a particular defendant in setting pretrial release conditions, also created rebuttable presumptions in favor of detention. Thus, it expanded the ability of judicial officers to hold defendants in preventive detention. Three studies of relevance have been conducted that reveal the impact of the Bail Reform Act on the federal criminal justice system.

In October, 1987 the General Accounting Office issued a study on the effect of the Bail Reform

Act of 1984 in selected district courts. Criminal Bail: How Bail Reform is Working in Selected District Courts examined the effect of the Bail Reform Act of 1984 on various aspects of the pretrial release system in four federal districts.

The study reached several relevant conclusions: 1) the rate of pretrial detention rose overall in the four districts from 26 percent under prior law to 31 percent under the current statute, 2) the "rebuttable presumption" provision of the Bail Reform Act of 1984 was invoked 39 percent of the time that the GAO thought it was applicable, and 3) the failure to appear rates and rearrest rates in all four districts were very low under both the former and current bail laws.

In February, 1988 the Bureau of Justice Statistics published a report titled *Pretrial Release and Detention: The Bail Reform Act of 1984*. That study employed the Administrative Office pretrial services database to compare the percentage of defendants detained whose pretrial services investigations began between August 1 and December 31, 1983, with those whose investigations commenced in the same time frame in 1985. Since the Bail Reform Act of 1984 was passed in November of 1984, the first group in the study was processed under the Bail Reform Act of 1966 and the second group was subject to the 1984 Act. The study concluded that, "The percent of federal defendants held for the entire time period prior to trial, either on pretrial detention or for failure to make bail, increased from 24% before the Act to 29% after the Act."

In November, 1989 the General Accounting Office published another report entitled, *Criminal Justice: Impact of Bail Reform in Selected District Courts*. This report looked at the same four districts as the GAO report of 1987, but it focused on different issues. As in the 1987 study, the 1989 report found a five percent increase in the rate of detention under the Bail Reform Act of 1984.

In addition to the above studies, the Office of Probation and Pretrial Services has compiled data from the pretrial services database to further assess the effect of the Bail Reform Act of 1984 on pretrial detention rates.

The three studies discussed above all show that the Bail Reform Act of 1984 likely had a significant impact on increasing the rates of pretrial detention in the federal system. This, coupled with the increasing federal caseload, has resulted in substantially higher numbers of actual defendants currently being held in pretrial detention.

C. Effects of the Expanded Federal Role in Drug Prosecutions

The increasing federal role in drug prosecutions is significant to the discussion of pretrial detention for several reasons. First, as the federal courts became more involved in narcotics prosecutions, the rates of pretrial detention were likely to increase due to the "rebuttable presumption" provisions of the Bail Reform Act for certain drug charges. Second, as drug prosecutions increased in the federal system (see Table 3), given the substantial penalties that most drug offenses carry, the Bureau of Prisons took custody of ever increasing numbers of convicted drug offenders for substantial periods of time. About 60 percent of federal drug defendants adjudicated were detained between arrest and adjudication during 1999.

The presumption in favor of detention that exists in drug offenses, which carry a term of imprisonment of 10 years or more, in conjunction with the increase in drug prosecutions makes it reasonable to conclude that the federal criminal justice system will continue to experience significant increases in pretrial detention in the future, absent more direct programming to deal with the special needs of drug defendants.

D. Effects of Sentencing Measures on Prison Population

Sentencing legislation, including the Sentencing Reform Act of 1984 which led to the development of the sentencing guidelines, and the ever increasing use of mandatory minimum penalties, have helped to magnify the problems resulting from the increase in detention rates. The promulgation of the sentencing guidelines and the expanded use of mandatory minimum penalties have both had a substantial effect in increasing the federal prison population. Those increases impact pretrial services release/detention in a variety of ways. Both the likelihood of

incarceration following conviction in such cases and the potential length of incarceration following conviction exert an impact on the defendant and the judicial officer making the detention decision.

The greatly increased likelihood of going to prison if convicted in federal court has an immeasurable but immense impact on pretrial detention. Before the passage of the Pretrial Services Act of 1982, only four in ten federal offenders went to prison; by 1997 that number had climbed to 7.4 in 10 and by 2006 it had climbed to 9.5 in ten. [3] In other words, currently virtually every defendant will receive a prison sentence. That certainty likely impacts a defendant while on pretrial services release and accordingly could impact the judicial officer deciding whether that defendant should be released or detained while awaiting trial.

Table 4 displays the most recent prison population information from the Bureau of Prisons for the fiscal years 1978 through 2007. The current population of 198,656 indicates that the prison population continues to increase substantially.

Determining the root cause of the substantial increase in the federal prison population is more problematic. The U.S. Sentencing Commission estimates that implementation of the sentencing guidelines resulted in a net increase in the federal prison population of between 6 and 12 percent. The Commission states that the increase in federal prison population beyond 12 percent is attributable to the increased use of mandatory minimum penalties and not to the sentencing guidelines. For purposes of this discussion it is sufficient to note that the federal prison population is expanding at a substantial rate and is likely to continue to do so. This expansion, coupled with the increasing number of pretrial detainees and the decreasing number of facilities outside of the Bureau of Prisons willing to house federal pretrial detainees, exacerbates an already serious detention housing problem.

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III . Reduce Crime on Bail and Failure To Appear

The federal pretrial services system has since its inception maintained some of the lowest failure rates (rearrest and failure-to-appear) in the history of pretrial services in the United States. The rates are so low that I have often heard accusations in the larger pretrial services community that we do various unsavory things with the data to maintain those rates. In fact, they are so low that I and others have often wondered if we do something unbeknownst to us to keep them so low. At least as far as I can tell, we do not and thus these rates are clearly one of the highlights of the federal pretrial services program.

In tracking those rates back to the beginning of the federal program in 1982, it is difficult to consistently establish the appropriate divisor, released cases closed. That number was not calculated or counted until 1989. Therefore, to have continuity in those rates from the beginning we employed the larger divisor of cases closed. As Table 5 shows, the rates are relatively small through the life of the program. While they do not go down, as Congress had originally hoped, maintaining such low rates given the many factors in today's criminal justice system that could escalate such rates enables us to conclude that the spirit of Congress's goal—to minimize failure-to-appear and re-arrest while on pretrial release—has in fact been met. Table 5 above provides the actual rates, which show that after an initial rise the rates have been steadily declining.

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IV. Reduce Reliance on SuretyBonds

One of the primary motivations of Congress in adding dangerousness to the judicial officers' pretrial release detention considerations in the Bail Reform Act of 1984 was the elimination of what was known as "sub rosa detention." Sub rosa detention occurs when a decision maker, who is legally unable to take into consideration a defendant's dangerousness, nonetheless concludes

that the defendant presents some serious risk of danger to the community and thus sets a financial bond that is higher than the defendant's ability to pay, ensuring that the defendant will be held in detention on that high bond. Therefore, Congress inserted language into the legislation that specifically spoke to reducing all financial bonds as a way to move the system toward ensuring that "sub rosa detention" was eliminated.

As Table 6 demonstrates, the use of bail bondsmen, corporate sureties, or insurance companies posting bail bonds in federal court has declined significantly over the 25-year history of the ACT and has for the most part been eliminated in federal court.

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V. Conclusion andRecommendations

The four trends we looked at that were identified by the Senators and Congressmen as important to the passage of the ACT demonstrate that for the most part the ACT has successfully achieved its major goals. Specifically, it has vastly increased the number of pretrial services reports provided to judicial officers; maintained the low rates of failure-to-appear and re-arrest that have existed in the federal system for many years; and reduced the federal system's reliance on financial surety bonds. The one issue that the ACT did not successfully address is unnecessary pretrial detention. However, it was not charged per se with reducing detention; it was charged with reducing unnecessary detention and therefore its actual impact in that area is open to interpretation. Clearly during the first 25 years of the ACT pretrial detention in the federal system has increased greatly. There are significant reasons, separate from the ACT, as to why that may have occurred. Those reasons include significant changes in the defendants that are charged with offenses in federal court; significant changes in the bail laws themselves, including the institution of preventive detention; expansion of the federal role in drug prosecutions; and changes in the sentencing laws that are likely to negatively impact release rates. Even given those factors, the degree of significant escalation of pretrial detention in the federal system over the past 25 years seems to warrant a focused analysis from the pretrial services system itself. The following recommendations could address the various problems presented by the increase of pretrial detention in the federal judicial system:

1. Support the establishment of a Pretrial Detention Task Force to further assess the problems presented by pretrial detention and develop a long-term plan to assist the federal judiciary in addressing those issues. The Task Force should assess and question all aspects of pretrial services from its focus on interviewing all defendants through the usefulness of its current supervision policies. The Pretrial Detention Task Force should also be staffed with a recognized pretrial services academic expert who is charged, through appropriate contract vehicles, with supporting the work of the Task Force with research and analysis services. The primary focus of their assessment should be the current needs of the judiciary and how pretrial services could best meet them, with an intense focus on pretrial detention issues.
2. Support the Office of Probation and Pretrial Services in focusing on the effectiveness of district compliance with the Pretrial Services Act of 1982, as measured by the development and employment of outcome measurement methodology focused on assessing the use of alternatives aimed at reducing the rate of unnecessary pretrial detention.
3. Implement a Best Practices program that focuses on districts that—despite confounding factors (i.e., high drug caseload, border districts, urban populations and problems)—continue to maintain effective release rates. An example is the Eastern District of Michigan.
4. Continue and enhance the Office of Probation and Pretrial Services' cooperative program with the Office of Federal Detention Trustee, which focuses on the sharing of costs and personnel in the development and testing of legitimate alternatives to detention.

Table 7 presents data from the ten original pretrial services demonstration districts that were established under the Speedy Trial Act of 1974. The data is for the twelvemonth periods ending

September 30, 1984 and September 30, 2005. The 1984 data was collected prior to the implementation of the Bail Reform Act of 1984 and the 2005 data is obviously from cases processed subsequent to its passage. In addition the data is culled only from the demonstration districts, so that pretrial services was clearly established in these districts and had been operating for many years prior to the passage of the Bail Reform Act of 1984.

As Table 7 clearly demonstrates, the pretrial release rate at the defendant's initial appearance in the 10 demonstration districts decreased from 62.7 percent in 1984 to 33.2 percent in 2005. While this data indicates that a greater percentage of defendants were held in pretrial detention after their initial appearance, it does not address the issue of whether or not the rate of detention pending disposition of cases has increased. Table 8 looks at the rates of detention for those defendants who were never released pending the disposition of their cases. The table reflects the 12-month period immediately preceding the effective date of the Bail Reform Act (October 1, 1983 to September 30, 1984) and the 12-month period ending June 30, 2007. The table utilizes data from eight of the ten demonstration districts. [4] The rate at which defendants were detained from arrest through disposition of the case increased from 22 percent to 49 percent.

While overall the charts reflect the same trends obvious in the national data, showing that detention is increasing significantly, closer examination reveals that some districts, for example Michigan Eastern and to a lesser extent Maryland, while also showing increases, seem to be handling the factors previously identified better than other districts. Therefore, it appears likely that there are practices in those and possibly other districts that could be identified and replicated nationally and have an impact in potentially reducing detention nationally.

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Table 1: Reports Provided

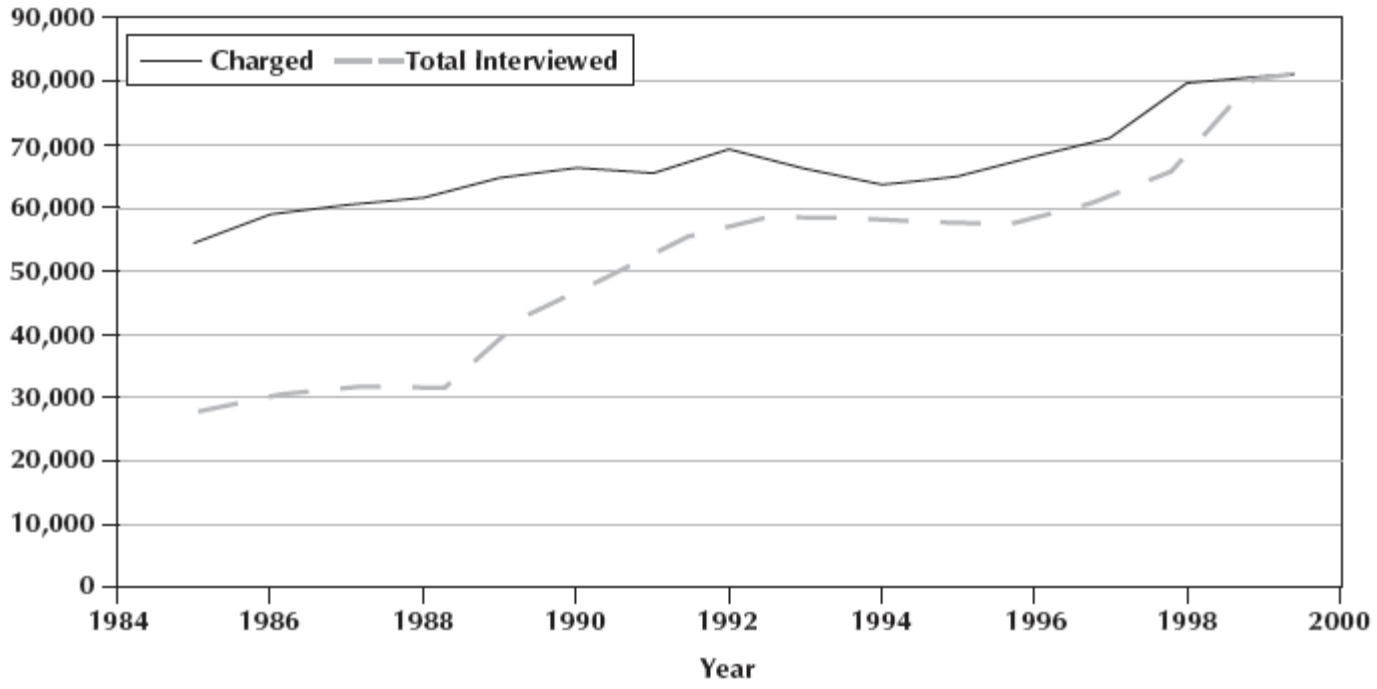

Table 2: U.S. District Courts Pretrial Release & Detention Rates FY 1992–2006

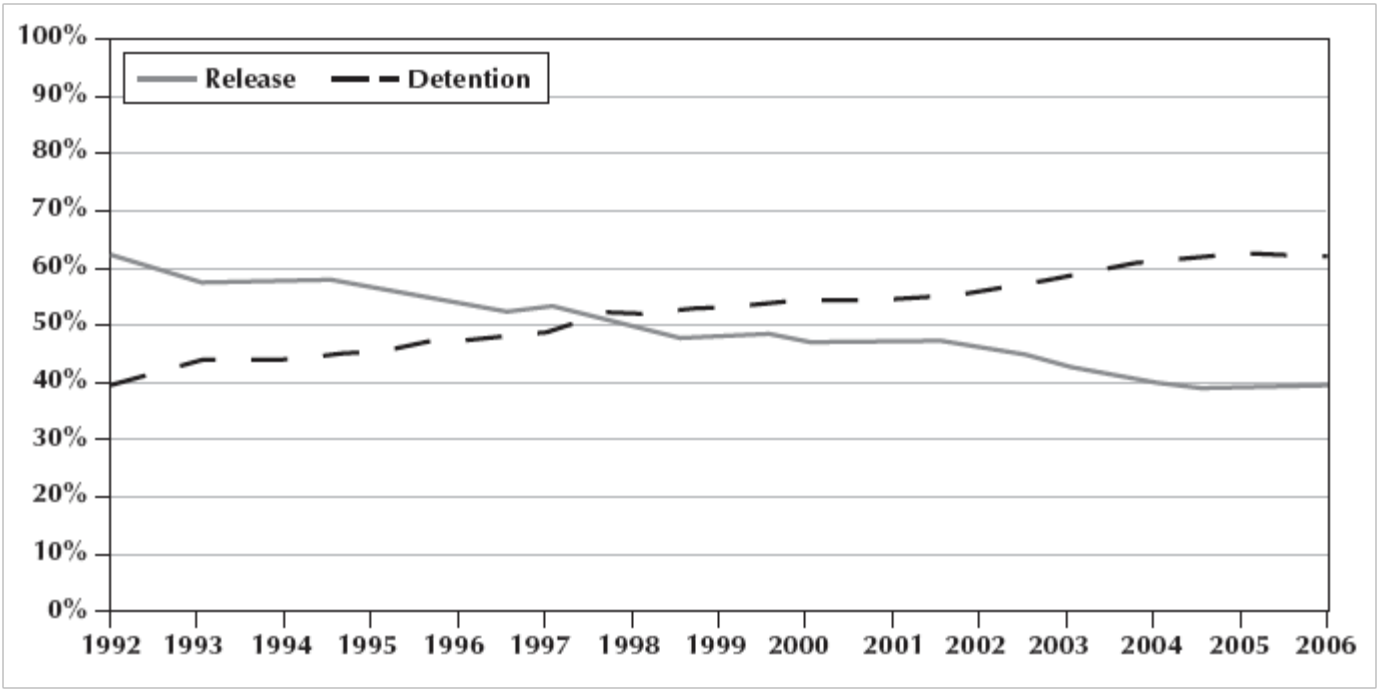

Table 3: Drug Prosecutions			
Year	Defendants Charged	Defendants Charged	Percentage of Cases
1984	35,911	5,611	15.6
1988	59,977	19,466	32.5
1992	47,472	12,833	27.0
1996	47,146	12,092	25.7
2000	62,152	17,505	28.2
2004	70,397	18,440	26.2
2006	87,699	30,567	34.9

Table 4: Bureau of Prison Annual Population Figures	
Year	Total Population
1978	27,674
1979	24,810
1980	24,252
1981	26,195
1982	28,133
1983	30,214
1984	32,317
1985	36,042
1986	39,551
1987	43,682
1988	43,399
1989	56,637
1990	63,928
1991	71,111
1992	79,095
1993	88,336
1994	94,445
1995	100,199
1996	104,953
1997	111,832
1998	121,834
1999	133,124
2000	144,750
2001	156,011
2002	162,893
2003	171,981
2004	179,412
2005	186,912

2006	191,876
2007	198,656

Table 5: FTA and Rearrest Rates, 1985–2006

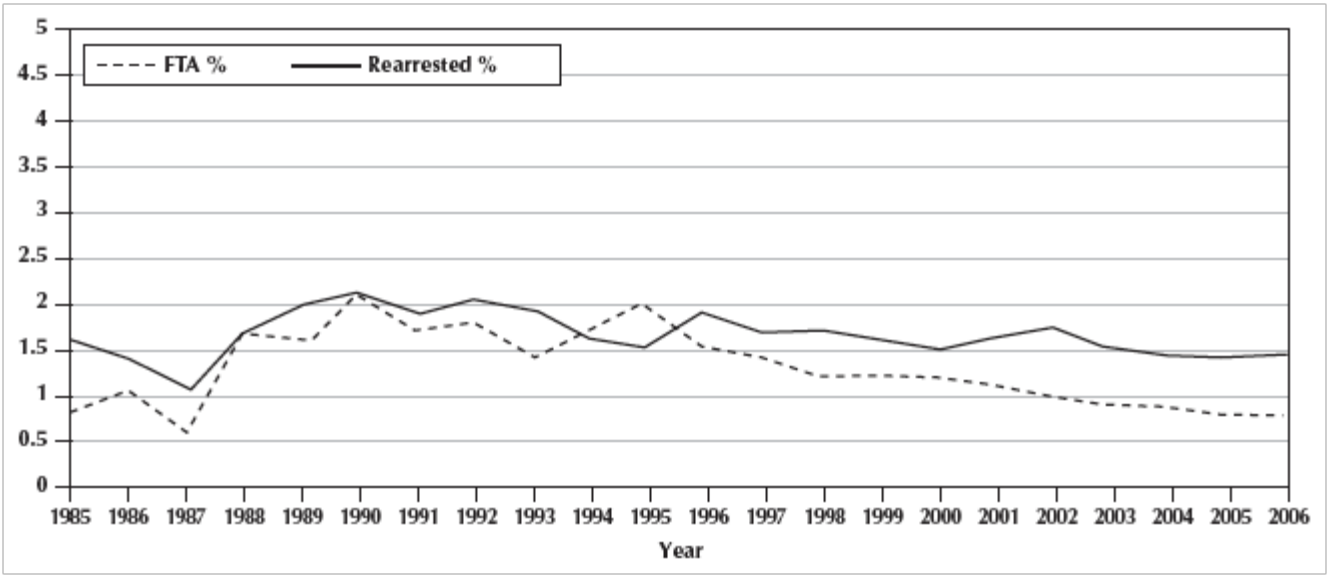

Table 6: Surety Bonds Imposed			
Year	Defendants Appearing	Surety Bonds	Percentage of Cases
1984	26,866	6,766	25.2
1988	38,461	3,482	9.1
1992	50,173	2,506	5.0
1996	63,467	2,725	4.3
2000	85,617	1,448	1.7
2004	98,152	1,377	1.4
2007	94,080	736	0.8

Table 7: Pretrial Release at Initial Appearance

	1984			2005		
	Release			Release		
District	Opened	Cases at Initial Appearance	%	Opened	Cases at Initial Appearance	%
NY/S	1,673	1,000	59.8	2,379	820	34.5
NY/E	1,093	657	60.1	1,591	474	29.8
PA/E	615	463	75.3	1,110	360	32.5
MD	1,051	788	75.0	792	284	35.9
GA/N	380	211	55.5	988	322	32.6
MI/E	1,044	844	80.8	1,191	644	54.1
IL/N	863	668	77.4	1,515	631	41.7
TX/N	607	316	52.1	1,562	329	21.1
MO/W	356	226	63.5	1,182	493	417
CA/C	1,850	808	43.7	2,864	686	24.0
TOTALS	9,532	5,981	62.7	15,174	5,043	33.2

Table 8: “Never Released” Rates In Eight Pretrial Services Districts

	1984			2005		
	Closed	Never		Closed	Never	
District	Cases	Released	%	Cases	Released	%
PA/E	246	34	14	894	41	246
MD	608	133	22	702	28	340
GA/N	237	53	22	682	36	153
MI/E	770	73	9	1,062	26	225
IL/N	603	90	15	1,022	47	647
TX/N	383	92	24	1,141	78	369
MO/W	264	47	18	930	49	553
CA/C	972	393	40	1,581	87	655
TOTALS	4,083	915	22	8,014	3,948	49

Pretrial Services in the Federal System: Impact of the Pretrial Services Act of 1982

[1] Sherwood-Fabre, Liese, "An Evaluation of Federal Pretrial Services Agencies Impact on Pretrial Decisions and Outcomes." NIJ October 1988.

[2] Senate Judiciary Committee "Report on the Pretrial Services Act of 1981," 97-77 (1981) p. 2.

[3] U.S. District Courts Table D-5 Defendants Sentenced (1982, 1997, 2006)

[4] New York Southern and New York Eastern have been eliminated due to the fact that they closed out very few of their activated cases in the 1984 time period and thus relevant data was not available.

Our Journey Toward Pretrial Justice

[1] Portions of this article were reprinted with permission from the monograph authored by Marie VanNostrand, Ph.D., *"Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services"* (Crime and Justice Institute, 2007).

[2] Although the term "pretrial justice" has been used for decades and can be found in print as early as 1973, a thorough literature search did not identify a definition of pretrial justice. The definition of pretrial justice provided by the authors was inspired by the United States Probation and Pretrial Services Charter for Excellence.

[3] Pretrial Services Resource Center, *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999) p. 10.

[4] *United States v. Edwards*, 430 A.2d 1321, (1981), cert. denied, 455 U.S. 1022 (1982).

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

[6] Supra note 3, p. 12.

[7] *Coffin v. United States*, 156 U.S. 432 (1895) at 545.

[8] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).

[9] *Stack v. Boyle*, 342 U.S. 1 (1951).

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

[11] See National Institute of Justice, *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2001), pp. 7-13 and Appendix A for a thorough review of the history of bail and pretrial services.

[12] Ibid, p.8

[13] Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2002* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) p. 1.

[14] Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005* (Washington, D.C.: U.S. Department of Justice, U.S. Government Printing Office, 2006) pp. 1 & 8.

[15] Marie VanNostrand, Ph.D. *"Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services"* (Crime and Justice Institute, 2007).