The Costs of Preventive Detention

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The Costs of Preventive Detention

Under the spur of "law and order," Congress may soon move decisively in an attempt to protect society against the hardened criminal who commits crime while on bail.¹ Alarming rates of pretrial recidivism have recently been documented.² Courts cannot constitutionally detain defendants on the basis of dangerousness,³ and the traditional sub rosa method—through imposing high bail—has been steadily criticized by bail reformers.⁴ Proponents of preventive detention believe we must legitimize detention of the likely recidivist.

The purpose of this Note is to identify the administrative costs of ensuring that a system of preventive detention in the federal courts meets the requirements of due process. To protect the rights of the defendant fully, Congress may have to construct a system so cumbersome, expensive and open to abuse that preventive detention is less attractive than other means of preventing pretrial recidivism.

For purposes of this Note, it is assumed that the Eighth Amendment is not an obstacle to preventive detention; that is, Congress has power to deny bail to classes of defendants other than those charged with capital offenses.⁵ The only constitutional hurdle faced by pre-


². See Hearings on Amendments to the Bail Reform Act of 1966 Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st Sess., 585-675, 696-98 (1969) [hereinafter cited as HEARINGS]. See also note 9 infra.

³. Stack v. Boyle, 342 U.S. 1, 5 (1951); United States v. Motlow, 10 F.2d 657, 659 (Butler, Circuit justice, 1926). See also Reynolds v. United States, 80 S. Ct. 30, 32, 4 L. Ed. 2d 46, 48 (Douglas, Circuit Justice, 1959): "The purpose of bail is to insure the defendant's appearance and submission to the judgment of the Court. It is never denied for the purpose of punishment."


⁵. Most discussions of preventive detention have concentrated on the question of whether, even with safeguards against abuse, such a scheme would pass constitutional objections. Some observers have felt that the prohibition against excessive bail in the Eighth Amendment is a backhanded guarantee of the right to bail in non-capital cases. See, e.g., Foote, The Coming Constitutional Crisis in Bail: I & II, 113 U. Pa. L. Rev. 959, 1125 (1965); Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489 (1966); Note, Preventive Detention, 36 Geo. Wash. L. Rev. 178 (1967).

The arguments supporting an absolute right to bail in non-capital offenses are based
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Preventive detention is the due process clause of the Fifth Amendment, which "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." The variegated history of the due process clause shows that notions of reasonableness shift widely. But where personal liberty is at stake, as in the case of preventive detention, courts consistently demand great protection for the rights of the individual; statutes may not be overly vague, and the means selected to accomplish the state's object may not be unnecessarily restrictive of the individual's freedom. These ill-defined but mainly on favorable dicta, as in Stack v. Boyle: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." 342 U.S. 1, 4 (1951). The historical basis for such an absolute right rests in the provision in the Judiciary Act of 1789, now continued in Federal Rules of Criminal Procedure, Rule 46(a)(1), that persons arrested for non-capital offenses shall be admitted to bail. But since most crimes of violence and robbery were capital offenses in 1789, Congress was in fact providing a right to bail only for relatively minor offenses. According to Sen. Robert C. Byrd, English law during this same period listed more than 240 offenses punishable by death. Cong. Rec. S. 1252, Feb. 4, 1969. And although Carlson v. Landon, 342 U.S. 524 (1952), may be distinguished on the basis that it was a civil action, the Court there clearly implied that the excessive bail clause does not confer an absolute right to bail in criminal prosecutions. So Justice Black's complaint voiced in Carlson v. Landon is probably right, that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." 342 U.S. 524, 557 (dissenting opinion).

6. In most states, a scheme of preventive detention would face specific state constitutional guarantees of the right to bail in non-capital cases; constitutional amendments would be necessary in these states before legislation authorizing preventive detention would be possible. This Note will deal only with preventive detention in the federal system.

7. Nebbia v. New York, 291 U.S. 502, 525 (1934). Although the Supreme Court in recent decades has been reluctant to invalidate statutes through invocation of "substantive due process," a coherent argument may be made under this doctrine that preventive detention is illegal. The fact that only a small segment of the defendant population is demonstrably dangerous, and the uncertainty of predicting recidivism, may persuade the Court that preventive detention would violate substantive due process. See notes 9 & 11 infra. The imprecision of prediction in relation to the small percentage of defendants who are "dangerous" may suggest that the law is "unreasonable," especially if the offense categories which will render detention possible are not restricted to those showing high recidivism rates. See pp. 928-33 infra. Or the lack of predictability in itself may suggest that the "means selected" for detention have no real and substantial relation to the object sought; that is, if recidivism cannot be adequately predicted, the machinery of preventive detention may be inadequately related to its goal, the elimination of a major threat to the safety of the community. But the historical development of procedural due process in regulating criminal law, and the reluctance of the Court to tamper with the goals of the police power which this development mirrors, suggest that the substantive due process question would be answered in favor of preventive detention; the problem of whether the means chosen are insufficiently related to the end would probably be dealt with under the auspices of procedural due process. Hence this Note will emphasize primarily the constitutional problems of preventive detention under the guarantee of procedural due process.

8. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960). In recent decades the Supreme Court's inspection of legislatively selected means, in light of alternative, less restrictive methods, has been most
fundamental principles inform the history of due process adjudication where the police power demands restrictions on personal rights.

I. Standards for Detention

Preventive detention is aimed at only a small segment of the defendant population. It would certainly be unreasonable to allow vigorous in first amendment disputes. "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964).

But the range of the Court's use of the least restrictive means rule extends beyond the first amendment. The criteria enunciated in Shelton v. Tucker were explicitly applied to a Congressional attempt to restrict the right of Communists to travel in Aptheker v. Secretary of State, 378 U.S. 506, 509 (1964): "The Constitution requires that the powers of government ‘must be so exercised as not, in attaining a permissible end, unduly to intrude’ a constitutionally protected freedom. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)." The Court in Aptheker emphasized that "precision must be the touchstone of legislation so affecting basic freedoms." 378 U.S. at 514, citing NAACP v. Button, 371 U.S. 415, 438 (1963).

Thus whether or not any constitutional rights occupy a doctrinally “preferred position,” United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), it is clear that the Supreme Court, in practice, gives special weight to certain fundamental freedoms; legislative restrictions on these rights come under special scrutiny. This stringent standard has precedential roots extending to Lawton v. Steele, 152 U.S. 133 (1894): the due process clause, the Court said, requires that the means employed be “reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Id. at 137. See also Quin v. United States, 298 U.S. 347, 356 (1915) (a more stringent standard is to be applied “on a subject like the one under consideration involving the establishment of a right [voting] whose exercise lies at the very basis of government . . . .”); United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955), citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821). See generally M. D. Forrosch, CONSTITUTIONAL LAW 392 (1963); Womrth & Mirkin, The Doctrine of the Reasonable Alternative, 9 UAH L. REV. 284 (1964).

9. A detailed study of the problem is the 1966 survey of the District of Columbia Ball Project, which covered a period of two years, 1964-1966, and about 5,000 defendants. This survey showed a 9.2 per cent re-arrest rate for released defendants, who were charged with committing crimes during the release period. R. R. MOLLEUR AND STAFF OF THE D. C. BAIL PROJECT, BAIL REFORM IN THE NATION'S CAPITAL 44 (1966). A subsequent District of Columbia study showed similar results. Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, HEARINGS, supra note 2, at 507, Appendix C, 551, 556. Since the Bill Reform Act was instituted, the rate of pretrial release has risen from about 58 per cent to 75 per cent of bailable defendants; thus more defendants are now at liberty pending trial. Statement of Mrs. Patricia M. Wald, HEARINGS, supra note 2, at 138.

But these statistics may be misleading in at least three ways. First, the figures cannot reflect undetected crime; for the professional criminal the gap between number of arrests and number of crimes committed may be substantial. Second, and also tending to suggest a greater potential danger, the effective detention of large numbers of defendants through high money bail must prevent a certain amount of pretrial recidivism. However, as long as the present practice of money bail continues, the effect of this detention will continue; preventive detention is not necessary to eliminate these defendants' opportunities to commit crimes.

But it is also very likely that the statistical rates of the surveys give an inflated picture of pretrial recidivism. Chief Judge Harold H. Greene has analyzed this aspect of the statistical picture admirably. The 1966 survey by the District of Columbia Crime Commission showed 207 persons (or 7.5%) charged with committing a new crime while on bail; but of these, only 124 (4.5%) were charged with a crime of actual or potential violence, the sort of pretrial crime which the more responsible of the preventive detention measures
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judicial officers to eliminate pretrial recidivism by detaining virtually
every defendant;10 hence restraints on judicial discretion are necessary.
If preventive detention is not prohibited on the ground that predic-
tion of recidivism is too uncertain,11 due process at least demands a
limit upon the offense categories for which detention is possible, and a
minimal showing that the previous behavior of a particular defendant
suggests likely recidivism.12 The degree of danger to the community
ought to be substantial and the probability of recidivism ought to be
high in view of the grave consequences of a detention order.

Degree of Danger. The danger which a potential recidivist poses
to society is measured first by the type of crime he is likely to commit.
If the degree of danger is small, because only a minor crime is foreseen,
the interest of society in detaining the defendant would be outweighed
by the cost and burden of detention; and due process is a bar to deten-
tion in such de minimis cases.13 For this reason, most commentators
have agreed that preventive detention is permissible only where the
crime anticipated is a serious felony or a crime of violence.14

The crime at issue, from the point of view of protecting society, is
the offense expected to be committed upon release. But the crime
which triggers the detention decision is the immediate charge against
the defendant. If defendants with similar serious recidivist histories
are charged with jaywalking and rape, respectively, only the defendant

seek to deter. In addition, "[t]he conviction rate in the District Court is approximately
75 per cent; so that in actuality only about 3 per cent of all those released on bail during
the survey period were found to have committed a violent crime while out on bail."
Statement of Chief Judge Harold H. Greene, District of Columbia Court of General
Sessions, HEARINGS, supra note 2, at 35.
10. See, e.g., Note, Preventive Detention Before Trial, supra note 6, at 1506-07; Foote,
supra note 6, at 1167-69.
11. See Dershowitz, Preventing "Preventive Detention," The New York Review of
12. See Report of the Judicial Council Committee to Study the Operation of the Bail
Reform Act in the District of Columbia, HEARINGS, supra note 2, at 554.
The uncertainties implicit in such a broad concept as "due process," especially when
applied to a proposition novel both in theory and practice, are immense; and a court
favorably disposed toward the concept of preventive detention easily might feel that a
simple direction to the court to consider a defendant's dangerousness is sufficient pro-
tection. Most commentators, however, have felt that the decision to detain ought to be
to some degree formally limited to defendants whose past behavior indicates probable
recidivism; and this consensus that formal safeguards are necessary includes even those
writers most persuaded that dangerous defendants must be detained. See, e.g., Goldfarb,
at 28.
14. See, e.g., Statement of Harry I. Subin, Associate Director of the Vera Institute
of Justice, HEARINGS, supra note 2, at 231; Note, Preventive Detention Before Trial, supra
note 5, at 1505.
charged with the crime of violence ought to be eligible for preventive detention; to allow detention in the jaywalking case is to invite the police to harass exconvicts with fabricated charges for minor offenses.

The defendant charged with rape might argue that to base detention on his present offense category, an unproven charge, is to violate due process by contradicting the presumption of his innocence. But once dangerousness is admitted as a consideration in pretrial disposition, preventive detention is analogous to detention of a defendant charged with a capital offense; while the actual determination of dangerousness is made on the basis of the defendant's history, the possibility of detention is limited to those charged with serious crimes. The extent to which the presumption of "innocence" is violated is no greater than in the detention of a defendant charged with a capital offense. Most congressional proposals simply direct the judicial officer to measure dangerousness under the broad guidelines of the Bail Reform Act. Detention could be ordered for a person charged

15. Compare note 5 supra.

16. Several of the measures before Congress in fact ask no more than that danger to the community be considered in setting the conditions of pretrial release under the Bail Reform Act. See, e.g., S. 288, 91st Cong., 1st Sess. (1969); H.R. 1033, 91st Cong., 1st Sess. (1969). Detention would not be allowed; but a dangerous defendant would be subject to stringent release conditions, even though he were able to establish that his risk of flight would be minimal. In such a case, of course, the court may now use the arsenal of release conditions vigorously, under the guise of preventing flight. But such a use of release conditions is no more than a subtle variation of the sub rosa practice of detention through high, but not "excessive," money bail. The aim of these measures is to stop the pretense and allow courts explicitly to impose strict release conditions on dangerous defendants.

As an analogy to the consideration of dangerousness in setting conditions for release, the seldom used "peace bond" is often cited. See, e.g., Note, "Preventive Justice"—Bonds to Keep the Peace and for Good Behavior, 88 U. PA. L. REV. 331 (1940). The peace bond provides a convenient, if obscure, device for bridging the gap between the theory that pretrial release systems can only consider risk of flight and the theory that dangerousness to the community can also be considered. Courts are allowed to require suspect persons, such as "outside agitators" in civil rights movements, to post such a bond to ensure their "good behavior." If the persons cannot post the bond, they are jailed. This power may be interpreted to support the theory that the purpose of systems of pretrial release may be determined, within the limits of due process, by the legislature.

17. The detention of defendants charged with capital offenses is based solely on the present charge; even though no trial has taken place, the presumption of a defendant's innocence does not prohibit detention. To this extent, detention pending a capital trial is "anticipatory." Preventive detention would be limited by the present offense category with which the defendant is charged, just as detention without bail for risk of flight has been limited by statute to capital offenses. But in addition to the present charge, preventive detention would require an "historical" component, based on the defendant's past criminal behavior.

18. See, e.g., H.R. 323, 91st Cong., 1st Sess. (1969); H.R. 335, 91st Cong., 1st Sess. (1969); H.R. 2781, 91st Cong., 1st Sess. (1969). "In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings." 18 U.S.C. § 3146(b).
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with even the most minor offense, so long as he appeared dangerous to the magistrate. This lack of standards is unreasonable. Only those proposals which limit detention to defendants charged with specific dangerous crimes, in particular narcotics offenses or crimes of violence,\textsuperscript{19} are sufficiently restrictive of judicial discretion to assure conformity with the requirements of due process.

\textit{Probability of Recidivism.} Even if the feared recidivist offense is quite serious, detention is not justified unless it can be shown that there is a high probability that the defendant will commit the offense if released. The most objective index of this probability is a "history of habitual or compulsive lawbreaking while on bail or parole."\textsuperscript{20} Under this standard, few potential recidivists would be detained.\textsuperscript{21} Since a history of convictions for serious crimes suggests a probability of dangerous recidivism, even if the crimes were not committed on bail, it appears that due process would require no more than such a history to establish the requisite probability.\textsuperscript{22}

\textsuperscript{19} Rep. Miller's bill (H.R. 4189) limits detention orders to cases where the defendant is charged with a crime of violence or a crime involving narcotics. H.R. 4189, 91st Cong., 1st Sess. (1969). Sen. Tydings' proposal requires a felony involving bodily violence, armed robbery or offenses under Chapter 105, S. 546, 91st Cong., 1st Sess. (1969). An explicit list of crimes of violence is found in Sen. Byrd's bill, S. 292, 91st Cong., 1st Sess. (1969); this degree of specificity would at least allow no mistake in the type of crime for which an accused person might be detained. A "crime of violence," as defined by Sen. Byrd's bill, includes "voluntary manslaughter, murder, rape, mayhem, kidnaping, robbery, burglary, housebreaking, extortion accompanied by threats of violence, assault with a dangerous weapon, assault with intent to commit any felony, arson punishable as a felony, or an attempt to commit any of the foregoing." Narcotics offenses, even though they may, standing alone, indicate insignificant danger to the community, are seen as a special problem area. These offenses show a particularly high rate of recidivism; and the high cost of addiction maintenance forces most addicts to commit repeated burglaries and robberies. See Statement of Hon. Charles W. Halleck, Judge of the District of Columbia Court of General Sessions, Hearings, supra note 2, at 91, 121; Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, Hearings, supra note 2, at 554. The Administration proposal makes special provision for the detention of narcotics addicts. S. 2600, 91st Cong., 1st Sess. § 2 (1969), adding a new § 3146B: "Pretrial detention for certain persons addicted to narcotics." A narcotics charge in itself would not be sufficient ground for detention, however; the provision would merely make detention easier for a defendant charged with a crime of violence who appeared to be an addict. See S. 2600, 91st Cong., 1st Sess. § 2 (1969), proposed § 3146B(a).

\textsuperscript{20} National Conference on Bail and Criminal Justice, Bail and Summons 166 (1965).

\textsuperscript{21} Records relating prior offenses to bail and parole violations are not maintained; thus the research required to establish such a history would require a great deal of effort.

\textsuperscript{22} See Note, Preventive Detention Before Trial, supra note 5, at 1565-66; model statute for preventive detention considered, but not recommended by the Advisory Committee on Pretrial Proceedings of the American Bar Association Project on Minimum Standards for Criminal Justice, in Standards Relating to Pretrial Release 85 (tentative draft, 1968). The committee felt, as a practical matter, that on the basis of present predictive techniques too many defendants would be detained and that the use of restrictive conditions on release has not been fully explored. Id. at 85-87.
The elements to be considered in a defendant's criminal history include the number and seriousness of previous convictions, as well as their similarity to the offense charged. The seriousness of the defendant's recidivist history required to justify preventive detention should vary according to the particular offense charged. Some history of serious lawbreaking would always be required, but a detention order could issue more easily in offenses which were particularly dangerous or which showed very high recidivism rates. A less dangerous offense or a lower recidivism rate would demand a more extensive personal history of serious lawbreaking before detention would be possible.23

The single most glaring weakness of the congressional proposals is their failure to require a personal history which would indicate likely recidivism. Only one bill would require a past conviction;24 all others simply rely on the list of personal considerations of the Bail Reform Act.25 Without the showing of a history of serious lawbreaking, the imposition of detention would be unreasonable.

Experience under the Bail Reform Act in the District of Columbia may show why the Congressional proposals have bypassed this requirement. Under the provisions of the Act, the judicial officer is expected to make a significant inquiry into the facts in determining the appropriate pretrial release conditions for an accused person; the defendant's attorney and the prosecutor are expected to play adversary roles in uncovering relevant facts which would influence the court's decision. There is, however, a wide gap between theory and practice in the setting of pretrial release conditions.26 Although the final decision remains in the magistrate's hands, the actual determination of the defendant's status seems to be made by the Bail Agency; the Bail

23. Since such a "sliding scale" measure for preventive detention is extremely unlikely to be forthcoming, the problems with it need only be outlined. Foremost would be the enormous administrative burden of keeping the macro-statistics for all dangerous offense categories up to date. Further, the difficulty of obtaining adequate information about a given defendant would also suggest that such an ideal system is unworkable in the real world.

24. Senator Byrd's bill, S. 289, 91st Cong., 1st Sess. (1969), stipulates that an accused person cannot be detained without a previous conviction for a crime of violence, as defined by the list contained in the bill. See note 19 supra. One conviction would be sufficient, and the crime with which the defendant is charged need not be related to the crime for which he was previously convicted, except insofar as they are both "crimes of violence." Nor is there a time limit for the past conviction; a person convicted of arson in his youth could be subject to detention 40 years later on a charge of housebreaking.

25. See note 18 supra.

26. Statement of Mrs. Barbara Allen Bowman, Director of the Legal Aid Agency of the District of Columbia; member, Judicial Council Committee to Study the Bail Reform Act, Hearings, supra note 2, at 291.
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Agency recommends whatever conditions it deems appropriate after such hasty investigations as time and resources will allow. In practice this procedure amounts only to making a telephone call to establish the presence of community ties. The judges depend heavily on the Agency's recommendations; defense attorneys named for indigents often have little time to investigate their clients' past histories in the brief period before bail or release conditions are set. Proponents of preventive detention may feel that an unreasonable amount of resources would be necessary adequately to show a recidivist history. The prosecuting attorney would be required to search court records in his and other jurisdictions to establish the requisite pattern of serious lawbreaking. The administrative burden upon the prosecution would be sufficiently great to cause grave questions about the feasibility of preventive detention, but this burden clearly must be undertaken if detention is to be lawful.

II. Procedures for Detention

Even where a defendant fulfills the criteria of "dangerousness," he must be protected against arbitrary administration of the standards. The detention hearing and subsequent incarceration must be administered according to clear rules, to protect the right of due process. Specific procedural safeguards may be necessary at three stages: the imposition of detention, judicial review of the detention order, and the duration of the detention period. Again, proponents of preventive detention are faced with the problem of the high cost of protecting rights: the greater the degree of protection afforded the defendant, the more cumbersome and less desirable the system of preventive detention. Probably for this reason, the proposals before Congress provide few formal procedural safeguards, despite the insistence in academic discussions and model statutes that they are required by the Constitution.

27. Id. at 293-94.

28. Judge Charles AV. Halleck, District of Columbia Court of General Sessions, made dear this problem of short time and little information. The court, he said, is obliged to rely in large measure upon fragmentary reports furnished by the District of Columbia Bail Agency. HEARINGS, supra note 2, at 99-100. Yet he was quite critical of the Agency, even while he admitted relying on their recommendations: "[E]ither the Bail Agency personnel are extremely naive and unrealistic, or else the [Bail Reform] Act requires release on personal bond of defendants of this [dangerous] type." Id. at 109. Whether a detention order could constitutionally issue under this procedure seems doubtful.
The Detention Hearing. The logical forum for the detention decision is the preliminary examination, at which bail is normally set. If the judicial officer found that no restrictive release condition would provide sufficient protection against the dangerous defendant, preventive detention would be at his disposal, providing the defendant met the criteria of danger previously outlined. The immediacy and gravity of a detention order, as opposed to the normal bail-setting consequences, however, require two alterations in the regular procedure of preliminary examinations where detention is contemplated. These alterations involve the right to counsel and the right to cross-examine witnesses. Although a defendant has a right to counsel at the preliminary examination, it is not certain that the presence of counsel is mandatory for the setting of bail. One of the congressional proposals provides for the appointment of counsel, but none requires counsel at the hearing. Incarceration is a far graver measure than are release conditions; since immediate loss of freedom is at stake, the absence of an attorney at the detention hearing would be as consequential as his absence at the trial itself, and could not be reasonable.

The defendant's right to cross-examine witnesses at the preliminary hearing is limited in most Circuits. Since immediate detention is at stake, in addition to the determination of probable cause, denying the right of cross-examination to the defendant faced with preventive detention would also be of doubtful constitutionality. The Supreme Court has held that witnesses for the prosecution must submit to cross-examination when they testify at the preliminary examination if the transcript of testimony is to be used at trial. However, in the District of Columbia, it has been held that the accused is entitled to confront and cross-examine all witnesses upon whose testimony the prosecution relies at the hearing. The District of Columbia rule ought to apply in all Circuits whenever preventive detention is at issue.

30. The setting of bail by the United States Commissioner before the arrival of defendant's attorney was not ground for vacation of sentence in Marcella v. United States, 344 F.2d 876, 881-82 (9th Cir. 1965), cert. denied, 382 U.S. 1016 (1966). See also Moore v. United States, 260 F. Supp. 315, 317 (E.D. Mo. 1966), aff'd, 376 F.2d 32 (8th Cir. 1967).
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In addition to these two changes in ordinary pretrial procedure, three others have been proposed by sponsors of the two most important congressional bills for preventive detention. The motives for proposing these further changes are complicated. First, the sensitivity of the detention issue makes the addition of any safeguard for the defendant a wise political move, even if the safeguard is largely illusory. Second, and perhaps more important, these changes may ease administration of preventive detention. Although none of these changes is required by due process, all may be politically necessary and administratively desirable.

The first of these changes is that preventive detention would be limited to cases in which it was formally requested by the prosecuting attorney. On one side, this provision may be seen as a safeguard for the defendant against arbitrary detention by an eager magistrate; but the value of such a safeguard is doubtful. It is extremely unlikely that a magistrate would seek to impose preventive detention absent a recommendation from the prosecutor. The requirement of prosecutorial initiation can hardly compensate for the absence of adequate criteria of dangerousness.

Another feature of the congressional proposals is a separate, quite formal hearing to be held for decisions on preventive detention. Since any procedural elements adopted for this "special evidentiary hearing" could be imposed on the regular preliminary examination, such a hearing would not be required to protect due process. A separate hearing, however, might be desirable from both the defendant's and the prosecutor's perspectives. The prosecution would have sufficient time to establish its case for detention. For the defendant population as a whole, the separate hearing would act as a limitation on both judicial discretion and prosecutorial fervor in the imposition of preventive detention.

35. S. 546, 91st Cong., 1st Sess. § 3146A(a) (1969); S. 2600, H.R. 12806, 91st Cong., 1st Sess. § 3146A(c)(1), (2) (1969). Under the Administration proposal, however, "The judicial officer may detain for a period not to exceed five calendar days a person who comes before him for a bail determination charged with any offense, if it appears that such person is presently on probation, parole, or mandatory release pending completion of sentence for any offense under State or Federal law and that such person may flee or pose a danger to any other person or the community if released." S. 2600, H.R. 12806, 91st Cong., 1st Sess. Sec. 2, § 3146A(e) (1969).
36. See pp. 928-33 supra.
38. Cf. note 27 supra.
of detention; the limited resources of the prosecutor would force him to bypass marginal cases.

Under the two important bills, testimony given by the accused at a detention hearing would be inadmissible at trial. Under the present rules for the preliminary examination, "any statement made by [the defendant] may be used against him" at trial. The aim of the restriction on admissibility clearly is to forestall due process objections; such a restriction, however, is probably not constitutionally required. The hearing for probable cause, to which the present rule applies, is much more likely to elicit incriminating testimony than a hearing for preventive detention; the testimony relevant to the detention decision concerns the defendant's past criminal record, rather than his present crime. Much less than in a hearing for probable cause would the defendant be torn between incriminating himself and proving his lack of dangerousness. And the Fifth Amendment safeguard against self-incrimination would not be waived. The sensitive politics of preventive detention, however, may result in the retention of the provision to bar use of the hearing testimony at trial.

39. S. 546, 91st Cong., 1st Sess. § 3146A(d) (1969). The Nixon Administration proposal is that "Testimony of the [accused] person given during the hearing shall not be admissible in proceedings pursuant to sections 3150, 3150A, and 3150B of this title [18 U.S.C.], in perjury proceedings, and as impeachment in any subsequent proceedings." S. 2600 and H.R. 12806, 91st Cong., 1st Sess. 3146A(c)(6) (1969). And, under the Nixon proposal, "Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." Id. at § 3146A(c)(5).


Further, "[h]earsay evidence is considered, leading questions are permitted, and insufficient opportunity is given for cross-examination." Id. at 82. Cf. People v. Johns, 173 Cal. App. 2d 38, 343 P.2d 92 (1959); People v. Woolsey, 13 Cal. App. 2d 54, 56 P.2d 557 (1936); Bergen v. State, 234 Md. 394, 199 A.2d 381 (1964). Strict rules of evidence do not apply at the preliminary hearing. See, e.g., State v. Earley, 192 Kan. 167, 386 P.2d 189 (1964). But for a limit to this doctrine, possibly heralding a stricter rule, see Washington v. Clemmer, 339 F.2d 725 (D.C. Cir. 1964). Since it is the defendant's past behavior that is at issue for preventive detention, however, the due process measure of rules of evidence probably ought to be the same as for the ordinary determination of probable cause.

41. One other procedural aspect of preventive detention which might be subject to a due process challenge is the identity of the judicial officer who makes the decision whether or not to detain. "All federal judges, and a great variety of state officers, are authorized to commit persons for federal offenses, 18 U.S.C.A. § 3041, . . . but in practice the United States magistrates are almost always used." 1 C. Wright, FEDERAL PRACTICE AND PROCEDURE § 71, n.2 (1969). A defendant may be committed to custody at the preliminary examination by "any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found." 18 U.S.C. § 3041 (1964). It may be argued that, because preventive detention involves such a major decision—depriving the defendant of the right to bail—a fully qualified federal judge ought to decide the question; a justice of the peace, for example, may be felt to be of too slight judicial stature to make such a grave decision.
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The threat of invoking preventive detention would undoubtedly strengthen the prosecutor's hand in a plea-bargaining situation, especially in the case of a defendant who could meet ordinary release conditions. An elaborate procedure for imposing detention would, from a system-wide perspective, reduce the occurrence of detention orders. Yet the mere existence of the power as a prosecutorial tool would be a powerful incentive for a guilty plea by a defendant facing the risk of months of pre-trial incarceration.

Appeal of the Detention Order. A defendant detained for dangerousness would have a right to appeal the detention order, just as a defendant now may appeal the setting of bail. The state would be required to bear the expense of producing a transcript of the preventive detention hearing for indigent defendants, under Griffin v. Illinois. A more serious cost would be the considerable resources necessary to hear the appeal. A federal judge, rather than a magistrate, would be required; in Washington, D.C., a system "which has literally collapsed under its caseload," the wisdom of imposing this additional burden is highly questionable.

All appeals must be entertained except those which are clearly frivolous. The complicated criteria necessary to impose preventive detention will ensure that few of these appeals can be disposed of as frivolous. Thus considerable time and resources will be spent in providing for the defendant to go up and down the court system; such costs have caused the federal system assiduously to avoid a regular right of interlocutory appeal. Again, due process restrictions may be

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This contention, while perhaps desirable from a practical viewpoint, has little constitutional basis; since this spectrum of judicial officers is deemed qualified to make the probable cause decision, it seems likely that any one of these designated officers could make all decisions appurtenant to pretrial disposition, including the decision to detain.

42. 18 U.S.C. § 3147. Several bills make explicit provision for appellate review of the detention order. S. 546, 91st Cong., 1st Sess., § 3146A(7) (1969); H.R. 12806, 91st Cong., 1st Sess., Sec. 2, § 3146A(d)(7) (1969). If a statute for preventive detention were construed to deny appellate review, it would be a denial of equal protection to the detainee class; and the grave consequences of a detention order suggest that the due process guarantee would also be violated. The silence of most of the proposals for preventive detention on the point of appellate review probably cannot be taken as a denial of the right.

43. 351 U.S. 12 (1956).

44. Statement of Mrs. Barbara B. Bowman, Legal Aid Society for the District of Columbia; Member, Judicial Council Committee to Study the Bail Reform Act, HEARINGS, supra note 2, at 298.

45. See 28 U.S.C. § 2106; cf. Moulas v. The s/s Markab, 252 F.2d 240 (4th Cir. 1958); Jimenez v. Barber, 252 F.2d 550 (9th Cir. 1958); Wilson v. Dixon, 251 F.2d 338 (9th Cir. 1958), cert. denied, 358 U.S. 856 (1958). See also Rule 38, FEDERAL RULES OF APPELLATE PROCEDURE (1967); Rule 46a(2), FEDERAL RULES OF CRIMINAL PROCEDURE.
so great as to give the court system a greater burden than the expected benefits of preventive detention justify.

**Duration of Detention.** Court dockets at present are notoriously crowded, especially in the District of Columbia; the time between arrest and trial is inordinately long. This situation presents a difficult question for proponents of preventive detention: even if detention is imposed under adequately rigid criteria of dangerousness, must there be a limit on the detention period? A defendant may argue that an “excessive” detention period is a violation of due process. One natural limit on the detention period is the maximum sentence which the detainee might receive for the charged offense; but since preventive detention must be limited to serious offenses, which generally carry lengthy maximum sentences for repeating offenders, in practice this standard would offer virtually no protection.

Defendants who are “preventively” detained should not be subject to the administrative vicissitudes of the criminal court system; the seriousness of detention ought to require a stricter standard than mere administrative convenience to ensure that incarceration is held to the minimum feasible period. Several congressional proponents of preventive detention have responded adequately to this problem by setting firm time limits on detention, ranging from 30 to 60 days. A defen-

46. “The average time between indictment and final disposition of all criminal cases terminated in December, 1968 [in the District of Columbia] was 162 days or almost five and one half months. In the other months of 1968 it was longer.” Statement of Hon. Edward M. Curran, Chief Judge, U.S. District Court for the District of Columbia, HEARINGS, supra note 2, at 538. However, the length of time between indictment and trial in felony cases is a good deal longer; in the District of Columbia in 1968, it took “almost a year to bring a felony defendant to trial.” Statement of Mrs. Patricia M. Wald, Washington, D.C., attorney; member, Judicial Council Committee to Study the Bail Reform Act; Commissioner, President’s Commission on Crime in the District of Columbia, HEARINGS, supra note 2, at 138.


If “dangerous” defendants were brought to trial 60 days after arrest, the need for preventive detention would be greatly reduced. In the District of Columbia, half of the pretrial recidivist offenses occur more than 60 days after a defendant is indicted. Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, HEARINGS, supra note 2, at 555. Further, the psychological effect of a delayed trial on a released defendant promotes recidivism; if the trial were to occur within 60 days, the defendant would feel a greater impetus to “stay clean.” Statement of Patricia M. Wald, HEARINGS, supra note 2, at 141. See also Statement of Hon. Charles S. Halleck, Judge of the District of Columbia Court of General Session, HEARINGS, supra note 2, at 92. Chief Judge Harold H. Greene of the District of Columbia Court of General Sessions has argued that any large-scale project to speed up trials for crimes of violence would be “at best a desperate stopgap,” with the result that “non-violent crimes would be tried only after even longer periods of delay than exist at present.” Statement of Chief Judge Greene, HEARINGS, supra note 2, at 35. But the effect of such a program would not be so disruptive
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dant would then be released, unless his trial had begun or unless the defendant himself had caused the delay of the trial. These limits appear to strike a reasonable balance between the need to protect the community, the interest in defendants' freedom, and the capacity of the system of criminal justice to process a "dangerous" defendant rapidly.

Several of the measures before Congress take the position that a time limit on detention is the only safeguard for the defendant demanded by due process; a 60-day limit is accompanied by few other formal safeguards. While a time limit is necessary and important, it is not a substitute for a means of identifying dangerous defendants. The clearly defined criteria for dangerousness previously discussed must also be met for preventive detention to survive constitutional attack.

The goal of preventive detention, to guard the community against dangerous pretrial recidivism, could be reached by other, less controversial methods. A program of speedy trials would eliminate most of these crimes. A comprehensive bail agency, effectively using condi-

if the unusually expedited trials were limited to the relatively small number of dangerous defendants at which preventive detention is aimed.


49. Several proposals carry provisions for an "expedited trial calendar," in which the cases of defendants "preventively detained" would be heard on an accelerated schedule. S. 546, 91st Cong., 1st Sess., § 3146A(h) (1969); S. 2600 and H.R. 12806, 91st Cong., 1st Sess., Sec. 2, § 3146A(d)(1) (1969); H.R. 232, 91st Cong., 1st Sess., § 3146(b)(a)(B) (1969). These provisions, admirably designed to limit the detention period, may cause some unforeseen difficulties. The provisions are notably vague; there is no standard for expedition, except for the convenience of the court. In practice, this vagueness may result in virtually no expedition at all. Further difficulty may arise out of the demand, however vague, that some expedition be granted. An astute defense attorney might later claim a due process violation on the grounds that the "expedited trial calendar" provision was violated; that is, the defendant was held too long before trial in view of the demand for an accelerated schedule. Unwanted additional administrative costs would clearly ensue in handling claims under this undefined standard.

50. H.R. 323, 91st Cong., 1st Sess. (1969); H.R. 2781, 91st Cong., 1st Sess. (1969); H.R. 4189, 91st Cong., 1st Sess. (1969). The limited detention period might cause a further procedural tangle where the defendant sought to appeal the detention order. A laggard appellate court would cause the defendant to serve his detention period before an appeal was heard; a contentious defendant might charge a violation of due process on the basis of this statutorily granted, but administratively denied appeal.

It is unlikely that a defendant would have a right to pursue his appeal of a detention order once the detention period has elapsed. The federal rule is that a point is not moot if legal disabilities attach to the judgment. See Carafas v. La Vallee, 391 U.S. 234 (1968); cf. Parker v. Ellis, 362 U.S. 574 (1960); United States v. National Plastikwear Fashions, Inc., 368 F.2d 845 (2d Cir. 1966). A defendant could, of course, claim that to be branded "dangerous" is a stigma of such dimensions as to amount to a legal disability; however, the Supreme Court has held that "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." St. Pierre v. United States, 319 U.S. 41, 49 (1943).

51. See note 47 supra.

52. See Statement of Mrs. Barbara B. Bowman, Legal Aid Agency for the District of
tional release methods, could maintain substantial control over the activities of the dangerous defendant, especially if his trial were scheduled for the immediate future. Compared with preventive detention, the costs of such a program, in both money and human suffering, would be low. But because such a program would be less attractive politically, Congress is likely to choose preventive detention.

The practical problems of preventive detention will be numerous and complicated. Most of the proposals before Congress provide inadequate safeguards for the rights of the defendant and are clearly unconstitutional. Other proposals, for administrative reasons, go beyond the demands of due process in limited areas, for example in providing for a separate detention hearing; yet even these proposals are inadequate in failing to establish minimum standards of dangerousness.

Congress, if it chooses the course of preventive detention, may well be caught on the horns of an irresolvable dilemma. A constitutional program of preventive detention will be unworkable in the real world unless enormous resources are devoted to its operation. If, however, these new resources for criminal justice are available, they could more effectively attack the problem by being dedicated to expansion and improvement of the present means of pretrial surveillance and to an increase in criminal court personnel.

Columbia, HEARINGS, supra note 2, at 291, 301; Statement of Mrs. Patricia M. Wald, id. at 127, 146.

53. See Statement of Hon. Charles W. Halleck, Judge, District of Columbia Court of General Sessions, HEARINGS, supra note 2, at 91, 101-102. "In short, while the [Ball Reform] act contemplates that Judges will go to great lengths to establish a variety of conditions of release other than money bail, the act provides no method of enforcement and no penalty for violation of such conditions of release." Id. at 102.

54. "The court should, in the future, set release conditions which will effectively protect the community from the commission of offenses by persons on bail." Statement of Chief Judge Harold H. Greene, District of Columbia Court of General Sessions.