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Bail: An Abridged Overview of Federal Criminal Law

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Summary

This is an overview of the federal law of bail. Bail is the release of an individual following his arrest upon his promise—secured or unsecured; conditioned or unconditioned—to appear at subsequent judicial criminal proceedings. An accused may be denied bail if he is unable to satisfy the conditions set for his release. He may also be denied bail if the committing judge or magistrate concludes that no amount of security or any set of conditions will suffice to ensure public safety or the individual’s later appearance in court.

The federal bail statute layers the committing judge’s or magistrate’s bail options after arrest and before trial. He may release the individual upon his promise to return—that is, on personal recognizance or under an unsecured appearance bond. Alternatively, the judge or magistrate may condition the individual’s release on the least restrictive possible combination of individual or statutory conditions. The statute, however, creates a presumption against release when the individual has been charged with a serious drug, firearms, or terrorist offense. In the case of these and other serious offenses, the judge or magistrate may deny release on bail if he decides, after a hearing, that no set of conditions will guarantee public safety or the individual’s return to court. The judge or magistrate may also deny the individual bail in order to transfer him for bail, parole, or supervised release revocation proceedings. Bail is available to a more limited extent after the individual has been convicted and is awaiting a pending appeal.

Federal law also authorizes the arrest, bail, or detention of individuals with evidence material to the prosecution of a federal offense. With limited variations, federal bail laws apply to arrested material witnesses.

Although not specifically mentioned in the federal bail statute, bail is available in extradition cases under a long-standing Supreme Court precedent which holds that “bail should not ordinarily be granted in cases of foreign extradition” except under “special circumstances.”

This report is an abridged version of CRS Report R40221, *Bail: An Overview of Federal Criminal Law*, by Charles Doyle—without footnotes, appendices, most of the citations to authority, and some of the discussion found in the longer report.

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Introduction

In a criminal law context, bail is most often thought of as the posting of security to ensure the presence of an accused at subsequent judicial proceedings—that is, “to obtain the release of (oneself or another) by providing security for future appearance.” The term itself is less frequently used now, however, due in part to the practice of release on personal recognizance, which consists of permitting an individual to pledge his word, rather than his property, for his future appearance. Moreover, today, an individual’s release pending subsequent criminal proceedings is often predicated on conditions other than, or in addition to, the posting of an appearance bond, secured or unsecured. As a consequence, rather than speaking of bail, existing federal law refers to release or detention pending trial, to release or detention pending sentencing or appeal, and to release or detention of a material witness. This is an overview of federal law in each of these areas, as well as in the area of extradition from the United States to another country.

Pretrial

An individual released prior to trial remains free under the same conditions throughout the trial until conviction or acquittal, subject to modification or revocation by the court. For that reason, the term *pretrial release* is understood to include all pre-conviction release, both before and during trial. Under existing federal law, an individual arrested under federal authority must be brought before a magistrate or judge without unnecessary delay. Any federal or state judge or federal or state magistrate may qualify. The magistrate judge may order an individual accused of a federal crime either released or detained prior to trial and conviction.

The law affords the judge or magistrate four options, which it places in descending order of preference. First, he may release the accused on personal recognizance or under an unsecured appearance bond, subject only to the condition that the accused commit no subsequent federal, state, or local crime and that he submit a sample for DNA analysis. Second, he may release the accused subject to certain additional conditions. Third, he may order the accused detained for bail revocation, parole revocation, probation revocation, or deportation proceedings. Fourth, he may order the accused detained prior to trial.

If the magistrate or judge does not initially release the accused on personal recognizance or conditions, a hearing on the release of the accused must be held “immediately” upon the individual’s first appearance before the judge or magistrate. The accused or the government may request that the hearing be postponed for up to five days—up to only three days when the postponement is granted at the government’s behest. The accused is entitled to assistance of counsel at the hearing and to the appointment of counsel if necessary. The accused may testify at the hearing and present and cross-examine witnesses. Evidence may be introduced at the hearing without deference to the rules that apply at a criminal trial.

Personal Recognizance

The decision to release an accused on personal recognizance or unsecured appearance bond rests upon a determination that the accused poses no risk of flight and no risk of danger to the community or any of its inhabitants. The decision requires consideration of four factors: (1) “the nature and circumstances of the offense . . . ; (2) the weight of the evidence against the person; (3) the history and characteristics of the person . . . ; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person’s release . . .”

Conditional Release

If the judge or magistrate concludes that personal recognizance or an unsecured appearance bond is insufficient to overcome the risk of flight or to community or individual safety, he may condition the individual's release on a refrain from criminal activity, collection of a DNA sample, and the least restrictive combination of 14 conditions. Under the appropriate circumstances, the "community" whose safety is the focus of the judge's or magistrate's inquiry need not be limited geographically to either the district or even the United States. The 14 statutory conditions are third-party supervision; seeking or maintaining employment; meeting education requirements; observing residency, travel, or associational restrictions;* avoiding contact with victims or witnesses;* maintaining regular reporting requirements;* obeying a curfew;* adhering to firearms limitations;* avoiding alcohol or controlled-substance abuse; undergoing medical treatment; entering into a personally secured appearance agreement; executing a bail bond; submitting to afterhours incarceration; and complying with any other court-imposed condition.

Section 3142 requires the judge or magistrate to impose electronic monitoring and several of these conditions (noted with an asterisk above) when the accused is ineligible for release on personal recognizance or an unsecured bond and is charged with one of several sex-related offenses against children. Several defendants have successfully challenged this mandatory requirement on Due Process Clause or Excessive Bail Clause grounds.

Notwithstanding the explicit conditions that seem to contemplate requiring an accused to post security for his release or face detention, Section 3142 provides that "the judicial officer may not impose a financial condition that results in the pretrial detention of the person." The courts have resolved the apparent conflict by essentially construing the provision to apply when the financial condition is not calculated to result in pretrial detention but is a collateral consequence of the court's determination of the amount necessary for safety and to prevent flight. As the Ninth Circuit explained:

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

Rebuttable Presumption

The accused, however, may have to overcome the statutory rebuttable presumption of flight or dangerousness to secure his release on personal recognizance or an unsecured appearance bond. A rebuttable presumption attaches under either of two circumstances. The first occurs when, following a hearing, the judge finds probable cause to believe that the accused has committed one of the serious crimes classified as either (1) a 10-year drug offense; (2) an offense involving possession of a firearm in furtherance of a crime of violence or serious drug offense; (3) a 10-year federal crime of terrorism; (4) a 20-year human trafficking offense; or (5) a designated sex offense committed against a child.

The second set of circumstances giving rise to a rebuttable presumption occurs when, following a hearing, the judge finds probable cause to believe that the accused previously committed a qualifying offense, much like those just described, while on bail, and for which he was convicted or released from imprisonment within the last five years.

“[T]he presumption reflects Congress’ substantive judgment that particular classes of offenders should ordinarily be detained prior to trial.” An accused must present some rebuttal evidence, no matter how slight, in order to escape the presumption. Nevertheless, the prosecution bears the ultimate burden of establishing that no series of conditions is sufficient to negate the risk of the accused’s flight or dangerousness—by a preponderance of the evidence in the case of flight and by clear and convincing evidence in the case of dangerousness.

Unless he holds the accused for revocation or deportation proceedings, the judge or magistrate may decline to release the accused on conditions only if he finds that no condition or series of conditions will provide reasonable assurance against flight or dangerousness.

Detain for Revocation or Deportation

The third option available to the judge or magistrate if the accused poses a flight or safety risk is to order him detained for up to 10 days to allow for a transfer of custody for purposes of bail, probation or parole, or deportation revocation proceedings. Otherwise applicable bail provisions come into play if the accused has not been transferred within the 10-day deadline.

Pretrial Detention

Finally, having exhausted the other options—release of personal recognizance, release under conditions, and release for other proceedings—the judge or magistrate may order the accused detained prior to trial. Although pretrial detention is the least statutorily favored alternative in the federal pretrial bail scheme, 72.7% of those accused of federal crimes and presented to a federal judge or magistrate are detained prior to trial.

The judge or magistrate may order pretrial detention upon determining, after a hearing, that no combination of conditions will be sufficient to protect against the risk of flight or threat to safety. The government has the option of petitioning for pretrial detention under two circumstances. The first consists of instances in which the accused is charged with one or more designated serious federal offenses, that themselves create a rebuttable presumption that no set of conditions will guarantee public safety or prevent the flight of the accused. The second consists of instances in which the defendant poses a serious safety or flight risk, regardless of the crime with which he is charged.

Offense-Driven Detention. The government may seek pretrial detention when the accused is charged with any of nine categories of federal crime: (1) crimes of violence; (2) sex trafficking involving a child or the use of force, fraud, or coercion; (3) federal crimes of terrorism with a maximum term of imprisonment of 10 years or more; (4) offenses punishable by death or one punishable by life imprisonment; (5) controlled-substance offenses with a maximum term of imprisonment of 10 years or more; (6) felonies, if the accused has previously been convicted of two or more of such crimes of violence, crimes of terrorism, capital offenses, controlled substance violations, or their equivalents under state law; (7) nonviolent felonies committed against a child; (8) felonies involving the use of firearms, explosives, or other dangerous weapons; and (9) failure to register as a sex offender.

The categories obviously overlap and reinforce each other. For example, many of the federal crimes of terrorism are also crimes punishable by life imprisonment or death.

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

Section 3156 provides still further clarification. It defines “crimes of violence” for purposes of Section 3142 and several other provisions of the bail chapter to mean not only a crime with a violent element and a crime that involves the risk of violence, but also various federal sex offenses including interstate prostitution and possession or distribution of child pornography—that is, any felony under chapter 109A (sexual abuse), 110 (sexual exploitation of children), or 117 (interstate travel of illicit sexual purposes).

Risk-Driven Detention. The judge or magistrate may also order pretrial detention when the accused is charged with other offenses, but the judge or magistrate finds, after a hearing, that the accused poses a serious risk of flight or obstruction of justice.

Detention and Release Orders

Section 3142 dictates what the judge or magistrate must include within his release or detention order. Release orders, whether issued following a detention hearing or upon conditional release without such a hearing, provide the accused with written notification of the conditions of his release, the consequences of violating a condition of release, and of the prohibitions on obstruction of justice. Detention orders contain written findings and justifications. They also direct custodial authorities to hold the accused apart from other detainees to the extent possible, to permit him to consult with his attorney, and to deliver him up for subsequent judicial proceedings.

After the issuance of an order, the court is free (1) to amend a release or detention order; (2) to reopen the detention hearing to consider newly discovered information or changed circumstances; or (3) to permit an accused under a detention order to assist in the preparation of his defense or to be temporarily released for other compelling reasons. Release orders and detention orders are final orders for appellate purposes, and either the government or the accused may appeal them.

Bail Pending Sentencing

Federal law treats bail following conviction but prior to sentencing in one of three ways depending upon the crime of conviction. First, a defendant may not be detained prior to sentencing for an offense for which the U.S. Sentencing Guidelines do not recommend a sentence of imprisonment. Second, when the defendant has been convicted of a capital offense, a 10-year federal crime of terrorism, a 10-year controlled substance offense, a crime of violence, or a violation of 18 U.S.C. §1591 (commercial sex trafficking), the defendant must be detained unless the court finds that the defendant is not likely to flee or pose a safety concern, and either that a motion for acquittal or a new trial is likely to be granted, or that the prosecution has recommended no sentence of imprisonment be imposed, or that exceptional reasons exist for granting bail. Third, in any other case, the defendant must be detained, unless the court concludes that the defendant is unlikely to flee or pose a safety concern if released conditionally or on his own recognizance.

Bail Pending Appeal

When a defendant appeals following conviction, the judge or magistrate may release him on condition or recognizance, if the judicial official is convinced that the defendant poses neither a flight risk nor a safety concern and that his appeal raises substantial questions that offer the prospect of success. “A question is substantial if the defendant can demonstrate that it is ‘fairly debatable’ or is ‘debatable among jurists of reason.’”

An additional requirement applies when the defendant has been sentenced to prison upon conviction for a capital offense, a 10-year federal crime of terrorism, a 10-year controlled substance offense, or a crime of violence. In such cases, bail is available only under exceptional circumstances. The circumstances considered exceptional have been variously described as uncommon, unusual, unique, and rare.

When the government alone appeals, the pretrial bail provisions of Section 3142 apply, unless the government is simply appealing the sentence imposed. When the government appeals the sentence imposed, the defendant must be detained if he has been sentenced to a term of imprisonment; otherwise, Section 3142 applies.

Consequences of Failure to Appear or Otherwise Honor Conditions

A number of consequences flow from an individual’s failure to appear or to honor the conditions imposed upon his release. He may be prosecuted for contempt of court; he may be prosecuted separately for failure to appear; his release order may be revoked or amended; security pledged for his compliance may be forfeited; he may be subject to arrest by his surety; and he may be prosecuted for any crimes that constituted a violation of his bail conditions.

Criminal Penalties

It is a separate federal crime to fail to appear for required judicial proceedings or for service of sentence. “To establish a violation of 18 U.S.C. §3146, the government ordinarily must prove that the defendant (1) was released pursuant to Title 18, Chapter 207 of the U.S. Code, (2) was required to appear in court, (3) knew he was required to appear, (4) failed to appear as required, and (5) was willful in his failure to appear.” An individual enjoys an affirmative defense if he fails to appear through no fault of his own. An individual who fails to appear for his supervised release revocation hearing is liable only if he was released on bail in anticipation of the hearing. The penalty for violation of Section 3146, which ranges from imprisonment for not more than one year to imprisonment for not more than 10 years, is calibrated to reflect the seriousness of the underlying offense. When an individual is convicted for failure to appear for a supervised release revocation hearing, the sentence for violation of Section 3146 is governed by the offense with respect to which supervised release was granted. An individual who violates a condition of his release on bail may also be prosecuted for contempt of court.

When an individual commits a crime while on bail, federal law provides an additional penalty: “A person convicted of an offense committed while released under this chapter shall be sentenced, in addition to the sentence prescribed for the offense, to (1) a term of imprisonment of not more than ten years if the offense is a felony; or (2) a term of imprisonment of not more than one year if the offense is a misdemeanor.” The lower federal appellate courts have held that the penalty enhancement under Section 3147 may be imposed based on a failure to appear in violation of

Section 3146. It may also be imposed when the post-bail offense was a continuation of the offense that occasioned the individual's original release on bail.

Amended or Revoked Release Orders

Faced with failure to comply with a condition of release, the judge or magistrate may amend an individual's release order amending existing conditions or adding new ones. The judge or magistrate may also order revocation of the release order and detention of the individual after a hearing, if he finds either probable cause to believe that the individual has committed a new offense or by clear and convincing evidence that the individual has breached some other condition of his release. The new detention order must be premised on a finding that the individual is unlikely to abide by the conditions imposed for his release or that there is no combination of conditions sufficient to guard against the individual's flight or danger to the public or any member of the public. A finding of probable cause that the individual has committed a new offense triggers a presumption that no combination of conditions will dispel concerns for public safety.

Forfeiture of Security

The judge or magistrate may order any bail bond or other security forfeited, if the individual fails to appear at judicial proceedings as required or fails to appear to begin service of his sentence. The court must do so if he fails to abide by any condition imposed for his release. The prosecution begins the process with a motion to enforce. If the surety returns the individual to the custody of the court, or if not contrary to interests of justice, the court may set aside, mitigate, or remit the forfeiture or may exonerate the surety and release the bail. A surety on an appearance bond is entitled to notice and to be heard on any material amendment to the conditions of release.

Pretrial Service Agency

The U.S. Probation and Pretrial Service Office conducts preliminary investigations and otherwise assists the courts in their administration of federal bail law. Its officers enjoy statutory authority to

- provide judges and magistrates with information relevant to initial bail determinations;
- prepare reports relevant for the review of release and detention orders;
- supervise bailees released into its custody;
- operate halfway houses, treatment facilities, and the like for those released on bail;
- inform the court and prosecutors of release order violations;
- advise the court on the availability of third-party custodians;
- help bailees secure employment, medical, legal, and social services;
- prepare reports on supervision of pretrial detainees;
- prepare reports on the bail system;
- prepare pretrial diversion reports for prosecutors;
- contract for the performance of its responsibilities;
- supervise and report on prisoners conditionally released following hospitalization for mental disease or defect;

- carry firearms;
- provide services for juveniles; and
- perform other functions assigned to it by the bail laws.

Material Witnesses

Federal law authorizes the arrest and detention or bail of individuals with evidence material to the prosecution of a federal offense. With limited variations, federal bail laws apply to material witnesses arrested under Section 3144. Thus, arrested material witnesses are entitled to the assistance of counsel during bail proceedings and to the appointment of an attorney when they are unable to retain private counsel. Release is generally favored; if not, release with conditions or limitations is preferred, and finally as a last option detention is permitted. An accused is released on his word (personal recognizance) or bond unless the court finds such assurances insufficient to guarantee his subsequent appearance or to ensure public or individual safety. A material witness, however, need only satisfy the appearance standard. A material witness who is unable to do so is released under such conditions or limitations as the court finds adequate to ensure his later appearance to testify. If neither word nor bond nor conditions will suffice, the witness may be detained. The factors a court may consider in determining whether a material witness is likely to remain available include his deposition, character, health, and community ties.

Extradition

Federal bail laws make no mention of bail in extradition cases. The federal courts instead adhere to the doctrine announced by the Supreme Court over a century ago that “bail should not ordinarily be granted in cases of foreign extradition” except under “special circumstances.” The doctrine has withstood constitutional challenge.

There is no precise definition of what constitutes “special circumstances”; the category is reserved for those extraordinary characteristics of a case which the court feels merit the designation. In addition, the individual must establish that if released, he will not flee or pose a danger and may be made subject to whatever relevant conditions the court deems to impose.

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