

The Rising Federal Pretrial Detention Rate, in Context

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THE FEDERAL PRETRIAL detention rate has been steadily increasing. Twenty years ago, less than half of defendants were held pending trial; now the figure is nearly 75 percent (Figure 1).³ The cost of this detention, in monetary terms, is approaching \$1.5 billion a year (Department of Justice), and there are human costs as well. Researchers have connected pretrial detention to wrongful convictions, potentially longer-than-necessary prison sentences and higher recidivism rates (Gupta, Hansman & Frenchman) (Oleson, VanNostrand & Lowenkamp).⁴

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² The views expressed in this article are the author's alone and do not necessarily reflect those of the AO, the Judicial Conference of the United States, its committees, or the federal probation and pretrial services system.

³ All AO data cited in this article, unless otherwise noted, refers to cases processed in the 12-month period ending March 31, 2018 or of the year indicated. All race demographic data excludes Hispanics as Hispanics, and non-Hispanics are reported separately.

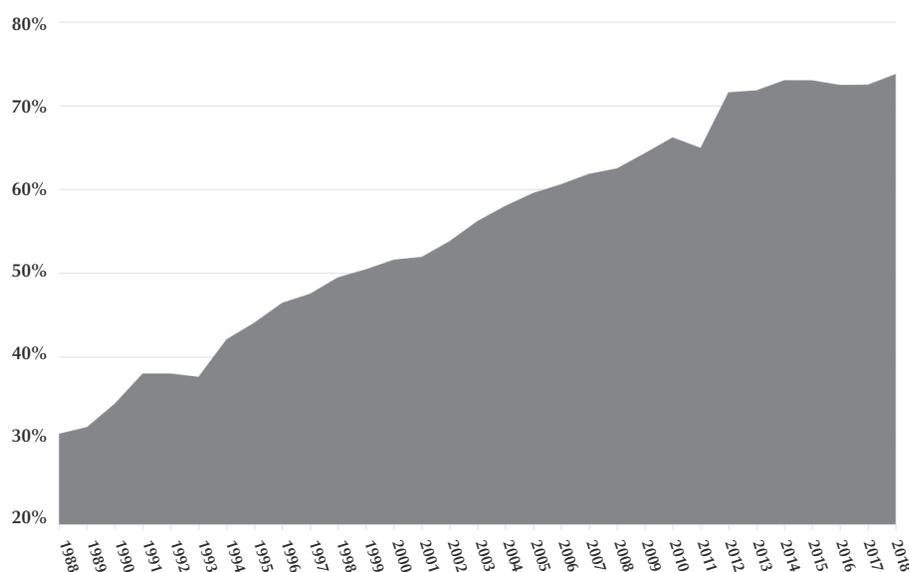
⁴ It is often difficult in research to distinguish

between correlation and causation, and that is true in terms of the relationship between pretrial detention and subsequent outcomes in criminal cases. Clearly, one interpretation is that pretrial detention has a corrosive effect on defendants—separating them from their legal team, family, and other potentially prosocial connections in the community. Detention also forces defendants, ironically, to associate with others involved in the criminal justice system, potentially creating negative peer networks. Another argument, however, is that judges are identifying those at higher risk at the pretrial stage, observing risk not fully captured by actuarial assessment devices. Consequently, the noted detention, sentence, and recidivism issues

The demographic disparity among those detained is yet another concern. Men are detained twice as often as woman. Blacks and Native Americans are detained more often than Asians, Pacific Islanders, and whites. Hispanics are detained at substantially greater rates than non-Hispanics. Similarly, non-citizens are detained at much greater rates than U.S. citizens (Figure 2). Those differences may raise concerns regarding judges' objectivity,

may flow from defendants' preexisting level of risk rather than from the detention itself.

FIGURE 1
Federal Pretrial Detention Rate



Source: *Judicial Business of the United States Courts and AOUSC Decision Support System*

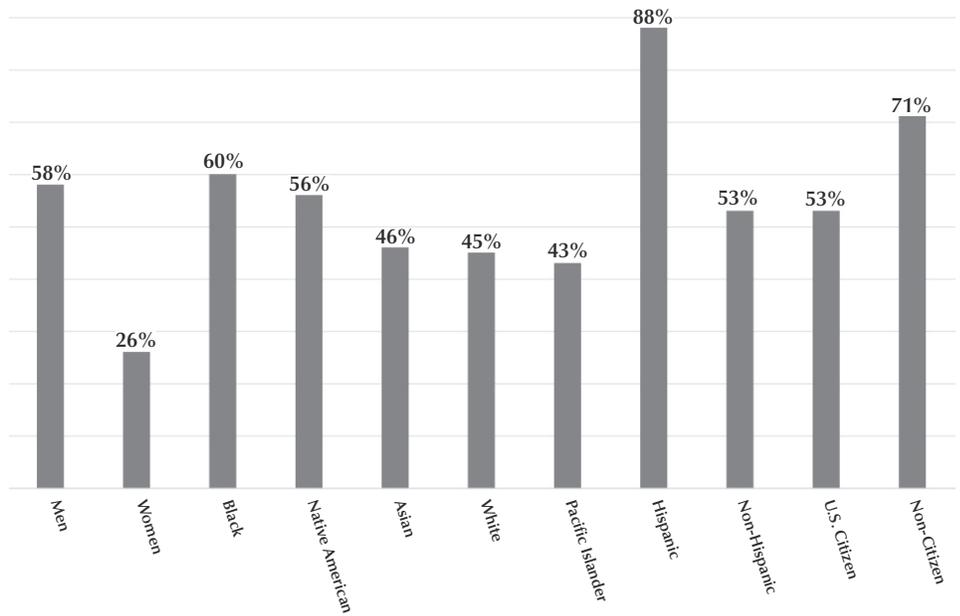
but like the overall pretrial detention rate, it is important to examine judges' decisions in context.

Judges are required by statute to consider specific factors when making release and detention decisions. Those factors, on their face, objectively relate to defendants' risk of flight and danger to the community.⁵ They include the nature and circumstances of the crime charged; the strength of the evidence against the defendant and likelihood of conviction; the defendant's criminal history, including prior failures to appear for court proceedings; personal history; physical and mental condition; ties to the community; financial condition and employment record. In taking these factors into account, judges are required to be impartial and are precluded from discriminating against defendants based on gender, race, or other protected classification (Judicial Conference of the United States).

The demographic disparity may, therefore, be a byproduct of the courts' objective application of statutory required factors rather than invidious discrimination. At the heart of the statutory factors is the offense charged.⁶ Although there is a presumption of innocence for people accused of crimes, the Supreme Court has upheld consideration of the charges lodged for detention purposes. The Court concluded that within the federal statutory framework, pretrial detention is reasonably designed to further the legitimate goal of public safety, not to punish defendants (*United States vs. Salerno*).

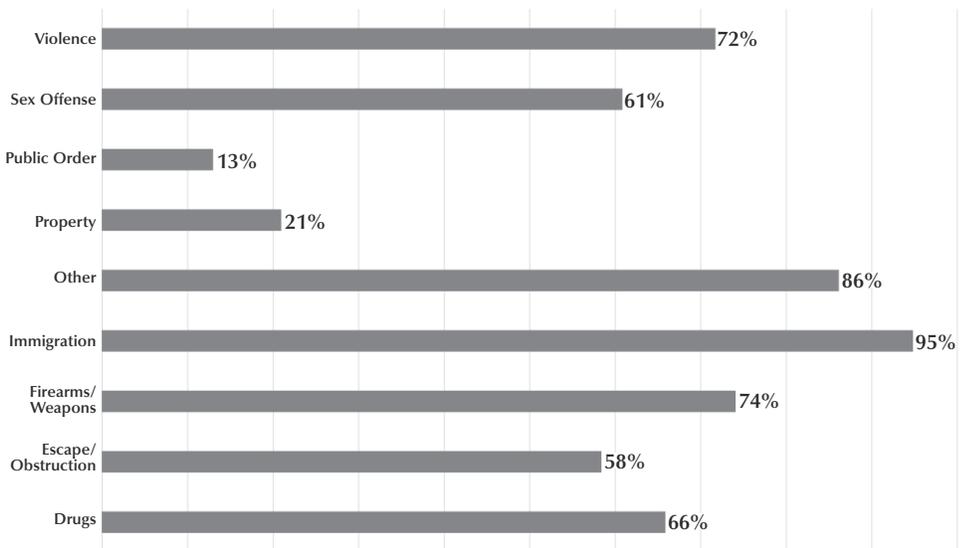
Some offenses inherently produce greater concerns about risk of flight and danger to the community than do others. For example, often those charged with illegal entry into the United States have acknowledged or obvious ties to other countries. Such ties increase the defendant's flight risk. Similarly, when defendants are charged with violence, weapons, and sex offending, concerns for community safety increase, another factor relevant to pretrial

FIGURE 2
Federal Pretrial Detention Rate



Source: AOUSC Decision Support System; race categories do not include Hispanics

FIGURE 3
Federal Detention Rate by Offense



Source: AOUSC Decision Support System

⁵ See, 18 U.S.C. § 3142. Note, not everyone considers the statutory factors to be unbiased. Some civil rights organizations argue that factors such as prior failures to appear and rearrest are more reflective of police and prosecutors' decisions than the conduct of defendants (Pretrial Justice).

⁶ It should be noted that prosecutors, not judges, decide which charges are to be brought against a defendant. Prosecutors, like judges, are ethically prohibited from discriminating against defendants based on demographic characteristics (American Bar Association), and their prosecutorial decisions are subject to published guidelines (Department of Justice).

detention. Therefore, it is not surprising that defendants charged with different offenses have different release rates (Figure 3).

What may be surprising is that there are distinct demographic patterns in terms of who is charged with different types of crimes. While drug charges are the most common across the majority of demographic groups, there is substantial variation. For example, property offenses are the second

most common for women, Asian, Pacific Islander, and white defendants. In contrast, the second most common group of offenses for males and blacks relate to firearms and weapons. Native Americans are charged most frequently with violent offenses, while Hispanics and non-citizens are most frequently charged with immigration crimes (Figure 4). The unique federal jurisdiction provided by the Constitution and consistent

FIGURE 4
Prevalence of Federal Offenses Charged within Each Demographic Category

	Female	Male	Asian	Black	Pacific Islander	Native American	White	Hispanic	Non-Hispanic	U.S. Citizen	Non-Citizen
Drugs	39%	34%	21%	38%	36%	19%	33%	21%	34%	40%	13%
Escape/Obstruction	3%	3%	2%	2%	4%	6%	3%	1%	3%	2%	0%
Firearms/Weapons	5%	22%	4%	28%	16%	9%	13%	3%	19%	18%	1%
Immigration	4%	3%	7%	2%	1%	4%	4%	62%	3%	6%	75%
Other	3%	2%	21%	1%	1%	2%	1%	7%	2%	1%	9%
Property	36%	17%	33%	16%	21%	7%	24%	3%	17%	16%	2%
Public Order	3%	3%	2%	2%	6%	3%	4%	0%	3%	3%	0%
Sex Offenses	2%	8%	5%	2%	5%	13%	12%	1%	8%	6%	0%
Violence	6%	9%	4%	9%	9%	37%	6%	1%	9%	8%	0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Source: AOUSC, Decision Support System

policy determinations across Presidential administrations have led to more prosecutions for illegal entry into the country, violence—particularly in “Indian Country,” and weapons offenses. In turn those prosecutions have contributed to the demographic differences in release rates.

Another statutory consideration for pretrial detention release is prior criminal history. It is generally thought that minorities, blacks in particular, have more documented criminal histories than do whites (Gase, Glenn et al.). In the federal system, we do not have a uniform measure of criminal history at the pretrial stage. We can, however, derive such a measure by borrowing the criminal history scoring system used at sentencing. Developed by the United States Sentencing Commission, the scoring system relies primarily on the number of convictions and the length of custody terms imposed on defendants (United States Sentencing Commission). Looking at the current post-conviction supervision population for which we have criminal history scores, there are indeed significant demographic differences in terms of criminal histories.

Only 12 percent of women score within the most severe criminal history categories, compared to 33 percent of men.⁷ There is also large variation among defendants of different races (Figure 5), with 11 percent of Asians in the most severe categories, 39 percent of Black defendants, 17 percent of the Native Americans, 15 percent of the Pacific Islanders,

⁷ The United States Sentencing Commission criminal history scoring system provides six categories, I-VI. The highest referred to in this article relates to those defendants in categories III-VI. The least severe category is I and includes defendants with no criminal history.

and 19 percent of the whites. Hispanic and non-citizens have roughly half the criminal histories of non-Hispanics and United States citizens. Notably, however, the Commission’s system does not take foreign convictions into account, so the criminal histories of defendants with ties to other countries may be understated.

Consequently, it appears that the demographic differences in the charges against, and criminal history of, defendants may explain at least some of the difference in release rates.⁸ To further explore that possibility, the Administrative Office of the United States Courts (AO) examined records related to 210,000 defendants charged in the federal system between 2012 and 2016. Focusing on United States citizens, cases were matched based on most serious offense, criminal history, and other empirical risk factors for which there was available data.⁹ The results were analyzed by gender, the two largest race categories (black and non-Hispanic whites), and Hispanic origin and reported in an internal PPSO memo. With the stated controls in place, release rate differences between men and woman declined by 70 percent, going from 28 to 9 percentage points. The matching process eliminated the statistically significant differences between blacks and whites altogether,

⁸ For more information about the correlation of offense charge, criminal history, and release rates in the federal system, see Cohen and Austin.

⁹ There is not discrete data currently available for each of the factors specified by statute relative to pretrial release. Consequently, all research in this area is inherently limited. The additional factors are those included in the Pretrial Risk Assessment device or PTRR. See, Cadigan, Johnson & Lowenkamp, “The Re-validation of the Federal Pretrial Services Risk Assessment (PTRR).”

FIGURE 5
Pretrial Detention Rate

	2008	2018	Pct. Point Change
Men	48%	58%	10%
Women	19%	26%	7%
Black	55%	60%	5%
Native American	45%	56%	11%
Asian	35%	46%	11%
White	33%	45%	12%
Pacific Islander	39%	43%	4%
Hispanic	79%	88%	9%
Non-Hispanic	43%	53%	10%
U.S. Citizen	42%	53%	11%
Non-Citizen	61%	71%	10%

Source: AOUSC, Decision Support System

going from 17 percentage points to 1 percentage point. Nearly 60 percent of the difference between Hispanics and non-Hispanics could be explained by the controls, going from 11 to 7 percentage points. Of course, different models and datasets can be used to further explore the question of equity in release decisions, but the analysis already undertaken makes clear that many factors influence release rates and looking at one factor alone, such as demographics, would be incomplete.

So available data indicate that demographic disparity in detention may not stem from the release decision itself but rather from the characteristics of those being charged in federal court. That observation does not negate the fact that pretrial detention rates are at record high levels and on an upward trend for all demographic groups (Figure 5).

Countervailing Costs and Concerns

Just as there are costs and concerns related to detaining people pending trial, there are costs and concerns related to supervising defendants during court proceedings. In most cases, to reduce risk of flight and danger to the community, the court imposes a term of community supervision monitored by a pretrial services or probation officer. That supervision, and the treatment programming it often entails, costs \$177 million a year (AO). Another cost to pretrial release is that defendants have a greater opportunity to abscond, intimidate witnesses, and commit other crimes compared to those defendants who are detained (Alexander). The federal government spends \$450 million a year on fugitive apprehension, and a portion of that is dedicated to searching for federal pretrial defendants who abscond before trial (Department of Justice). And while there is not an exact figure for the cost of crimes committed by persons released pending trial (General Accountability Office), conservative estimates put it in the hundreds of millions of dollars.¹⁰

What Should Be Done?

In light of the escalating federal pretrial detention rate and related concerns, some observers have suggested the federal system should model itself after state and local systems with lower detention rates and better release outcomes. For example, a keynote speaker at a National Association of Pretrial Services Agencies (NAPSA) conference¹¹ suggested that the federal system adopt the practices of the District of Columbia Superior Court.¹²

¹⁰ Using one published method on just 10 percent of the new charges filed against released defendants in fiscal year 2017 related to violence produced a loss figure of \$147 million alone (McCollister, French, & Fang, 2010).

¹¹ Hon. Truman Morrison, National Association of Pretrial Services Agencies 44th Annual Conference and Training Institute, Salt Lake, Utah. September 11-14, 2016.

¹² The Superior Court of the District of Columbia was created by Congress in 1970 "to assume responsibility for local jurisdiction, similar to that exercised by state courts." (Federal Judicial Center). The Pretrial Services Agency for the District of Columbia that supports the Superior Court, as well as the U.S. District Court for the District of Columbia, is a federal entity as well, but operates separate and apart from the "federal system" supporting all the U.S. district courts outside the nation's capital. In the business vernacular and for purposes of this article, the "federal system" and "federal pretrial system" refers to the operations

That court has repeatedly posted an impressive 90 percent release rate, with an equal percentage of released defendants making court appearances and remaining free from rearrest. The pretrial agency supporting the court has been praised in the media (Marimow), even being favorably satirized on the popular television show *Last Week Tonight with John Oliver* (Avery, Carvell & Gondelman).

Unfortunately, the differences in size and operations between the two jurisdictions makes large-scale transfer of practices difficult.¹³ For example, the Superior Court deals, relatively, with a homogenous defendant population concentrated in a small geographic area. Most of the charges filed in Superior Court are misdemeanors and infractions. In contrast, the federal system deals with a highly diverse defendant population and covers the entire country plus the federal protectorates of Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands. Moreover, federal prosecutions overwhelmingly involve felonies and can be based on any one of 3,000 different statutory provisions (Cali). The alleged criminal conduct is often sophisticated (Wright), and associated with multi-year prison term upon conviction (United States Sentencing Commission) (Federal Bureau of Prisons).

The Purpose of This Article

The federal system is so unique that this article seeks to better contextualize its release rate and influencing factors. Hopefully, with that context, those of us within the system and outside observers can better identify opportunities for improvement. The discussion is organized as follows: (1) the structure of the

in the 93 United States District Courts outside the District of Columbia.

¹³ Geographically, the jurisdiction of the Superior Court is a fraction of one percent of the federal system (Deloitte and Data Wheel). While the defendant population in Superior Court has historically been predominately African Americans charged with non-violent, public order-type offenses (Washington Lawyers' Committee for Civil Rights and Urban Affairs), African Americans make up less than 30 percent of the defendants charged in the federal system, and drug possession and public order offenses are extremely rare in the federal system (AO). In terms of caseload volume, the Superior Court deals with about one-fifth of the new pretrial cases handled by the federal system, and more of its cases are misdemeanors or deal with traffic offenses (76 percent) than is the case in the federal system (7 percent). Felonies constitute most of the federal system docket (DC Courts) (Probation and Pretrial Services Decision Support System).

federal pretrial system and the roles of those who are part of it; (2) the changing profile of defendants charged in federal court; (3) institutional incentives leading some defendants to acquiesce to, rather than contest, pretrial detention; and (4) the potential impact of legislative reform and judicial discretion in terms of the future of federal pretrial detention.

1. The Structure of the Federal Pretrial System

In fiscal year 2017, there were 77,000 criminal filings (AO, Judicial Business of the United States Courts). That caseload is handled by a "system" that is really more of a collaboration between the judiciary, the defense bar, prosecutors, and the United States Marshals Service. Although not often thought of as part of the system, defendants, their families, and friends greatly influence how processes work and the outcomes that are achieved. Each of the participants is independent, but their actions work interactively with the others.

Judges are responsible for pretrial release determinations under 18 U.S.C. § 3142. The judges hear from the parties and consider information and recommendations from judicial employees, specifically pretrial services officers, who are responsible for gathering, verifying, and communicating information relevant to the release decision and potential alternatives to detention under 18 U.S.C. § 3154¹⁴

Defense attorneys "serve as the accused's counselor and advocate" and file "motions seeking pretrial release of the accused" (American Bar Association). Prosecutors are responsible for timely and just charging decisions, and for seeking detention when needed to protect individuals and the community and ensure the return of defendants for future proceedings (American Bar Association) (Department of Justice). The U.S. Marshals Service houses defendants ordered detained and executes arrest warrants for those released who violate the conditions of their release (The United States Marshals Service).

Defendants and those who know them

¹⁴ Courts have the option to create a separate pretrial services office or to empower its probation office to provide pretrial services. See, 18 U.S.C. § 3152. Presently, 19 judicial districts maintain a separate pretrial office. Courts are required to periodically consider consolidation of pretrial and probation offices for economic and operational efficiency (Judicial Conference of the United States). Either way, officers are subject to the same statutes, policies, and procedures. For purposes of this article, the term "pretrial services officers" is used to refer to any officer carrying out the pretrial function.

provide information relevant to the release decision; for example, they offer details about potential third-party custodians and verify residential and employment information. Without that type of information, the courts are often left with just charge and prior record information to make release determinations.

The federal system does not operate as a monolithic whole but rather through 94 judicial districts that have autonomy and discretion to deal with local issues. Once more, the different entities involved in the system have their own priorities and objectives. Needed consistency on material issues comes from adherence to the United States Constitution, federal statutes, the Federal Rules of Criminal Procedure, applicable case-law, and the principle of comity. Another melding factor is the existence of professional standards for pretrial work and organizations.

Standards in relation to making the pretrial decision making and operations have been developed by the National Institute of Corrections, Pretrial Justice Institute, National Association of Pretrial Services Agencies, and American Bar Association (Pilnik) (Pretrial Justice Institute) (National Association of Pretrial Services Agencies) (American Bar Association). The standards basically call for (1) a legal framework that supports pretrial release based on the least restrictive conditions possible; (2) release decisions that are grounded in objective assessments of defendants' risk of flight and danger to the community; and (3) the availability of meaningful alternatives to detention, especially options that are researched and "evidence-based."

The legal framework in the federal system affords defendants procedural safeguards through the Fifth Amendment of the United States Constitution¹⁵ and protection from excessive bail under the Eighth Amendment (Department of Justice). In addition, there are statutes favoring defendants' release. For example, 18 U.S.C. §§ 3142 requires the defendant's automatic release when he or she is not charged with a particularly serious offense and

the government does not contest or meet its burden of proof showing why the defendant should be detained. Where the government does seek detention, it has the burden of proof in many cases and must demonstrate the defendant is a risk of flight by a preponderance of the evidence and show danger to the community by an even greater standard, clear and convincing (Boss).

There is an exception, however, that is growing larger than the rule in favor of release. The exception is found in 18 U.S.C. §3142(e) and flips the burden of proof for release onto the defendant when the defendant is charged with offenses said to involve violence, drugs, and sex offending. A presumption of detention also extends to some predicate felons. The "presumption was created with the best intentions: detaining the 'worst of the worst' defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases." (Austin 61). Unfortunately, research indicates that the enumerated offenses may not be the best predictors of risk of flight or danger to the community (Austin 60). Consequently, the Judiciary has suggested that Congress reexamine the presumption provisions (Judicial Conference of the United States).

As to the standard for effective pretrial work that calls for informed and objective assessments of defendants' risk of flight and danger to the community, pretrial release decisions are made by United States magistrate judges and United States district judges. Magistrate judges are appointed to eight-year terms by the district court and, in turn, district judges are appointed by the U.S. President for a period of "good behavior," sometimes called life tenure, with consent of the United States Senate, and often after vetting by the American Bar Association (Quality Judges Initiative). By design, federal judges are not subject to the pressures of election and campaigning. In fact, they are ethically required to refrain from political activity, just as they are required to execute their duties fairly, impartially, and diligently (Judicial Conference of the United States).

The federal system has also added an empirical component to the release decision process. Specifically, pretrial services officers calculate and consider an actuarial score when fashioning a recommendation to the court. The tool, called the Pretrial Risk Assessment or "PTRA," is based on study of more than half

a million federal cases from districts across the system. The PTRA has been statistically validated and revalidated (Cadigan, Johnson & Lowenkamp); it also continues to track release rates and release outcomes very well (Graphics 6 and 7). The officers responsible for the recommendations are particularly well qualified and trained.¹⁶

In regard to the third test for an effective pretrial services system, the federal system is progressively adopting innovative and evidence-based interventions as alternatives to detention. The most common alternative to detention is release conditioned on supervision in the community by pretrial services officers. It is common for the supervision term to also require substance abuse testing and treatment, as well as mental health evaluation and treatment, depending on the facts of the case. Home detention, usually enforced through electronic and GPS monitoring devices, is common in higher risk cases as well. While some services are rendered directly to defendants by pretrial services officers, over the past five years the federal judiciary spent \$134 million on contract services to assist defendants with basic life necessities, needed medical and addiction treatment, and employment services. Notably, those goods and services were in addition to anything defendants could have afforded on their own or that would have been available to them as ordinary members of the public.

The approach taken by pretrial services officers is inspired by the "evidence-based" Risk, Needs and Responsivity Model (Serin & Lloyd). That model, and Judicial Conference policy, calls for officers to assess defendants' strengths and weaknesses relative to their compliance with the court-ordered conditions of release. The PTRA, mentioned earlier, is one of the factors considered by officers in the assessment stage. Once the assessment is made, officers tailor programming to maximize responsivity in the defendant, which will promote a successful outcome in the case. In undertaking these efforts, officers can only operate within the conditions of release imposed by the court, must seek to minimize the burden of the intervention, and always uphold the defendant's presumption of innocence (AO, Supervision of Federal Defendants).

¹⁵ U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

¹⁶ Pretrial services officers average more than a decade of professional experience and at least 400 hours of related training. More than half exceed the requirement of a bachelor's degree with a master's degree or doctorate (AO).

Officers use a variety of “evidence-based techniques” in their interactions with defendants. Most relate to helping defendants acquire and use prosocial life skills with a focus on cognitive and choice awareness, recognition of the motive and influence of others, problem solving and deductive reasoning (Miyashiro) (Cadigan, 2009). The federal pretrial system continues to leverage technology and training of its staff (train-the-trainer) to maximize positive outcomes (AO Expanding Supervision Capabilities in Probation and Pretrial Services). In addition, the system is constantly studying data and monitoring outcomes in the effort to improve.

One area where, on the surface, the federal pretrial system is not following “best practices” is in use of summons rather than arrest to secure initial appearance (Pretrial Justice Institute). Although associated with a pretrial release rate of more than 90 percent in the federal system, summons were not commonly used. Instead, they were reserved for minor property, traffic, and drug possession, which are a small part of the federal docket, and typically involve defendants presenting little or no risk of flight or danger to the community.

2. The Risk Profile of Federal Defendants

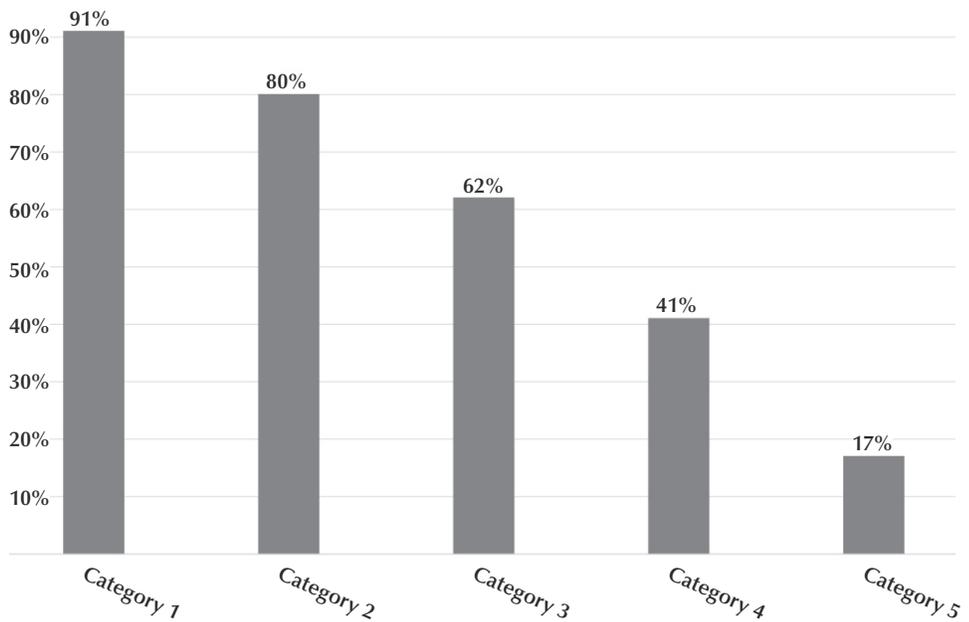
The risk of flight and criminogenic profile of defendants in the federal system has steadily worsened over the years, in part because of the focus of federal prosecutions. As acknowledged by the Department of Justice, “federal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources to achieve an effective nationwide law enforcement program, from time to time the Attorney General may establish national investigative and prosecutorial priorities” (Department of Justice). The priorities have generally focused on repeat offenders and offenses involving drug and human trafficking, violence, weapons, sex crimes, and illegal entry into the United States (Rowland). Between 1997 and 2017, the percentage of defendants charged with the crimes most associated with pretrial detention increased from 60 percent to 79 percent.¹⁷

There is a correlation between the nature of the charges and the use of pretrial detention. Over the past four years, the detention rates for

those charged with immigration offenses has been about 95 percent and for those charged with drug and weapons offenses 75 percent. In contrast, the detention rate for property and financial offenses has been less than 30 percent, and for offenses such as DWI even less—13 percent. The offenses with the higher detention rates make up a greater proportion of the overall federal docket; hence they contribute to the higher overall detention rate.

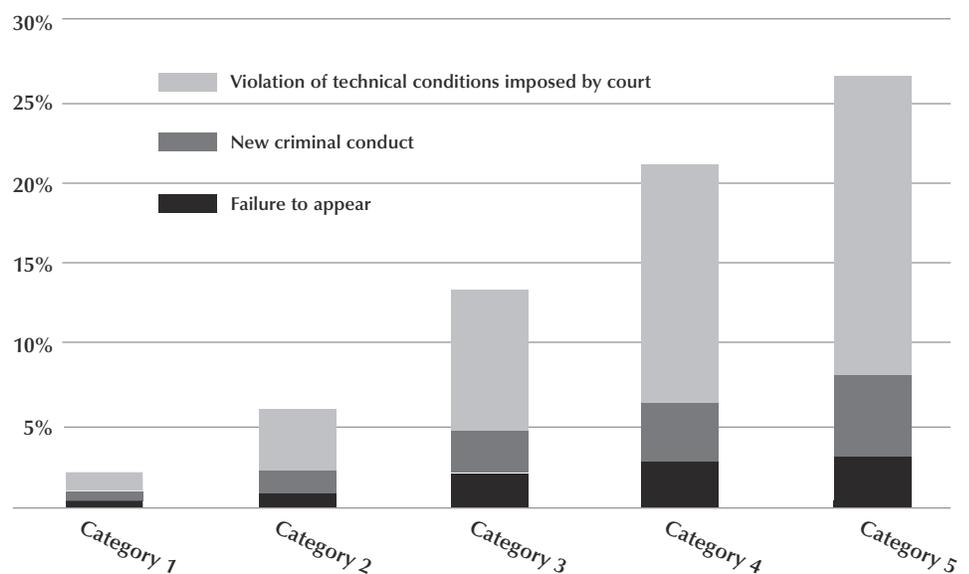
The high detention rate for immigration cases is in large part because the defendants have ties outside the United States and usually no verifiable connections to the district of prosecution. Therefore, the risk of flight is escalated. Moreover, even if those defendants were released pending trial, most would simply be taken into custody by U.S. Immigration and Customs Enforcement (ICE) for deportation proceedings. The percentage

FIGURE 6 Pretrial Release Rates by PTRR Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

FIGURE 7 Pretrial Release Outcomes, Violation Rates by Type and PTRR Risk Category



Source: AOUSC Decision Support System for Cases in the 12-Month Period Ending March 31, 2018

¹⁷ The offenses most associated with pretrial detention are: immigration, weapons, violence, sex offenses and drug trafficking (AO).

of defendants who are not United States citizens has increased, mirroring the overall increase in detention rate.

It is not only the type of charge brought in federal court that relates to release rates, however, but the nature of the underlying conduct. The media has expressed concern that many defendants are being incarcerated for simple possession and drug use: “[d]uring the period from 1993 to 2011, there were three million admissions into federal and state prisons for drug offenses. Over the same period, there were 30 million arrests for drug crimes, 24 million of which were for possession” (Rothwell). In the federal system, however, 91 percent of the defendants prosecuted for drug crimes in 2016 were charged with distribution-related offenses, not simple possession. Moreover, 99.5 percent of those drug offenders in federal prison were guilty of drug trafficking (Taxy, Samuels & Adams). This is not to say that federal defendants don’t use or abuse drugs themselves, but it is not typically the reason they are charged federally.

In addition, the amount of drugs involved in federal offenses is usually large. Since the drug amount is a primary factor in determining the custody term under federal law, it is natural to consider it when assessing risk of flight pending trial. For every person arrested by the U.S. Drug Enforcement Administration, the agency seizes approximately 7.5 pounds of illicit drugs (Drug Enforcement Administration).

Similarly, the average loss amount in federal fraud cases is substantial. In cases where defendants are sentenced to imprisonment, the median loss is close to \$800,000 (USSC, Quick Facts on Offenders in the Bureau of Prisons). Moreover, most defendants’ relationship to the other contraband they are charged with, whether it be guns, child pornography, or counterfeit items, is generally substantive. Only 8 percent are considered minor or minimal participants in the offense as defined by the United States Sentencing Guidelines (USSC, Annual Sourcebook).

As noted above, immigration charges are also commonly prosecuted in federal courts. As with drug prosecutions, there are concerns that the wrong people are being targeted for immigration prosecution and treated too harshly in the process (Planas). Nonetheless, prosecutions continue, with a particular emphasis on illegal “reentry” cases, meaning people charged with repeatedly illegally entering the country (Light, Lopez &

Gonzalez-Barrera).¹⁸ About half of the people charged with and sentenced for immigration violations have one or more prior convictions in this country countable under the sentencing guidelines (USSC, Interactive Source Book of Federal Sentencing Statistics). Of those charged with illegal reentry, prior records tend to be even more serious. Nearly three quarters of the reentry defendants received a sentencing enhancement because of the gravity of their prior criminal record. A third of those defendants had one or more prior convictions related to violence, weapons, drug trafficking, or other type of aggravated felony (USSC, Illegal Reentry Offense).

The criminal history of defendants entering the federal system globally has been worsening, in terms of prior arrests, prior convictions, and previous prison terms. This is not only because of who is increasingly targeted for criminal prosecutions but because of the nature of federal offenses themselves. Many federal crimes have as an essential element of the crime that the defendant have a prior criminal record. For example, 18 U.S.C. § 922 makes it a federal crime for convicted felons to possess a firearm, so a prior felony is a precursor to the federal crime. Similarly, the federal offense of engaging in interstate commerce after failing to register as a sex offender, a violation of 18 U.S.C. §2250, requires an existing prior sex offense conviction.

Having prior arrests is associated with higher recidivism and having prior convictions foreshadows it even more. (USSC, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*). It logically follows that it is appropriate for courts to consider the existence and nature of defendants’ prior criminal record when making determinations of danger to the community at the pretrial stage. One study has found that the majority of federal defendants, 68 percent, have not just prior arrests but convictions (USSC, Quick Facts on Offenders in the Bureau of Prisons). The severity of the sentences imposed on prior criminal convictions, measured by the federal sentencing guidelines, has increased steadily over the years, going from an average of 2.82 points

¹⁸ Jose Ines Garcia Zarate is one of the more well publicized cases of a repeat immigration violator. A Mexican native, he had seven drug and immigration prior felony convictions in the United States. He was deported to Mexico five times and was facing a sixth when a jury found that he possessed a stolen firearm and had accidentally shot and killed a tourist in San Francisco (Jose Ines Garcia Zarate Wiki: The Death of Kate Steinle).

per defendant in 1992 to 4.11 points in 2016. In the past 20 years, the number of defendants designated under the guidelines as “career offenders,” including armed career offenders, has increased 54 percent, going from 1,368 defendants in 1997 to 2,108 defendants in 2017. The Sentencing Commission has more recently established a classification “repeat and dangerous sex offender”; in the past five years the number of defendants assigned that classification has increased 64 percent, going from 182 defendants to 298 (United States Sentencing Commission).

3. Changing Incentives for Federal Defendants in Relation to Pretrial Release

The last time sweeping criminal justice reform was enacted in the federal system was in the mid-1980s. At the time, crime rates were at record highs, concerns about the corrosive effects of cocaine epidemics were intense, and the effectiveness of rehabilitative programming was seriously in question (Harty). As a result, Congress, like many state legislatures, adopted “a tough on crime” approach. That approach included adding potential danger to the community to risk of flight as grounds for pretrial detention, presumptive pretrial detention for certain defendants perceived as particularly dangerous, increased prison time for those convicted of crimes, and limits on judicial discretion at sentencing while abolishing parole (Deaton).

The statutory provisions allowing for detention on grounds of danger to the community and the presumption of detention in certain cases had a direct impact on pretrial release rates. So too did the changes providing for increased use of imprisonment and decreased judicial discretion at sentencing. Of the defendants who reached disposition in 1980, before the “tough on crime” reform went into effect, the federal conviction rate was 78 percent, and less than half (46 percent) of those convicted were sentenced to imprisonment. The average prison term was 52 months, but with parole and more generous good behavior rules many served one-third of their custody term or 17 months on average (AO) (Sabol & McGready).

By 2000, when the tough on crime approach was in full swing, the conviction rate had climbed 11 percentage points, imprisonment was part of the sentence for 9 out of 10 those convicted, and the average prison term imposed increased by 5 months (AO); defendants had to serve at least 85 percent of

their time regardless of their behavior while an inmate, and regardless of the risk they presented for recidivism.

The increased likelihood that they will be convicted and sentenced to prison and for a longer period creates a practical dilemma for federal defendants. The time spent by a defendant in pretrial detention is credited, under 18 U.S.C. § 3585(b), against any imprisonment term to be imposed in the case. Consequently, defendants can get a proverbial head start on a likely prison term and avoid the emotional trauma of having to leave their family not once but twice—staying in custody following original arrest. Another consideration for defendants is that Bureau of Prisons institutions, where most federal custody terms are served, are dispersed across the United States. This may mean that defendants will be separated from family and friends, as well as legal counsel, by hundreds of miles—if not more (Vigne) (Arons, Culver & Kaufman). Pretrial detention facilities, in contrast, tend to be closer to the district of prosecution and presumably to defendants' homes, making it easier for defendants to retain ties.

Defendants' involvement with the pretrial report process is voluntary, and they can decline to be interviewed by pretrial services officers (Criminal Justice Standards Committee). In fact, the percentage of defendants not interviewed by pretrial services has increased steadily over the years, nearly doubling to 44 percent of defendants between 1997 and 2016. In addition, it has become common for defendants who are interviewed to decline to answer specific questions that they fear may incriminate them or otherwise be detrimental to their interests.

4. Emerging Trends in the Federal Pretrial System

The federal pretrial system prides itself on upholding the presumption of innocence, despite the reality that the vast majority of defendants will ultimately plead guilty and be sentenced to imprisonment. One adjustment made in many judicial districts is the creation of voluntary pretrial programs offering defendants and their loved ones information on how the federal criminal justice system works and strategies on how to best manage the stress of prosecution (U.S. Probation Office for the District of Wyoming). Some jurisdictions, again recognizing the high conviction and imprisonment rate, have expanded to "preentry programs."

A more recent phenomenon, as judges have

been afforded more discretion at sentencing (with the guidelines now being advisory rather than binding), is for courts to support sentencing mitigation programs. In all, 24 districts now have formal judge-involved intervention and treatment programs, with even more informal programs of various sizes. For example, the pretrial services office in the Eastern of New York maintains various programs for different types of defendants in different situations and with varying needs (Pretrial Services Office, Eastern District of New York).

Conclusion

Structurally, the federal system has the hallmarks of a quality pretrial program. The system is led by qualified and independent judges who consider recommendations from talented defense attorneys and prosecutors. The court also has the support of an agency that has specific authority on pretrial matters and provides a range of detention alternatives. Why then has the federal pretrial detention rate increased? The answer seems to rest on a combination of factors, including "tough on crime" federal statutes, severity of the crimes prosecuted in federal court, the increased risk of flight and danger to the community, and strategic choices by defendants and their attorneys not to engage in the pretrial process.

Courts are innovating in light of broader sentencing discretion afforded judges, and sentencing mitigation, preentry, and preparation programs are developing in a pretrial context. Also, Congress has been considering criminal justice reform that may directly impact pretrial release rates. So is it possible that federal pretrial release trends will change, and more people will be released without compromising community safety or impeding justice? Time will tell.

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