

Examining Federal Pretrial Release Trends over the Last Decade

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WHEN A PERSON (i.e., a defendant) is charged with committing a federal offense, judicial officials have the discretion to determine whether that defendant should be released pretrial, subject to the criteria required by the Eighth Amendment and under 18 U.S.C. §3142 of the federal statute. Under both guiding documents, the right to bail is clear and paramount, with detention reserved only for rare cases where “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.” (see 18 U.S.C. §3142). When ordering release, judicial officials are required to determine why a personal recognizance bond will not suffice and what conditions, if any, should be set to allow for federal pretrial release (18 U.S.C. §3142).

The decision to release a defendant into the community or detain the defendant until his or her case is disposed is of crucial importance. Not only can a defendant’s liberty, and therefore, constitutional rights, be constrained by the detention decision, but research has shown that subsequent case outcomes

(including the likelihood of conviction, severity of sentence, and long-term recidivism) can be negatively affected when pretrial detention is mandated (Gupta, Hansman, & Frenchman, 2016; Heaton, Mayson, & Stevenson, 2017; Oleson, VanNostrand, Lowenkamp, Cadigan, & Wooldredge, 2014; Lowenkamp, VanNostrand, & Holsinger, 2013). Additionally, the pretrial release decision is often the defendant’s first interaction with the federal criminal justice system and can set a positive or a negative tone that may affect his or her cooperation with the system and attitude going into post-conviction supervision, if ultimately convicted. Hence, the process by which federal defendants are released or detained pretrial represents an important component of the federal criminal justice system.

Since the early 1980s, the federal criminal justice system has undergone numerous changes that have influenced pretrial release decisions and patterns. Specifically, it has moved from a system that primarily focused on fraud, regulatory, or other offenses within the original jurisdiction of the federal government to one directed at prosecuting defendants for crimes involving drug distribution, firearms and weapon possession, and immigration violations (VanNostrand & Keebler, 2009). As the offenses charged within the federal system changed, so too did the legal structure that undergirded pretrial release and detention decisions. The advent of the Pretrial Services Act of 1982 and more

importantly the Bail Reform Act of 1984 constructed a legal framework where judges were instructed to weigh several elements when considering a defendant’s flight risk; in addition, for the first time in federal law, judges were allowed to weigh potential danger to the community (AO, 2015). Moreover, the 1984 Act contained provisions involving the presumption of detention that shifted the burden of proof from the prosecution to the defendant in proving the appropriateness of pretrial release for certain offenses (Austin, 2017). How and to what extent these changes manifested themselves in federal pretrial release decisions and violation outcomes has been periodically examined, but there has been little recent research on this topic.

In this article we will update recent federal pretrial trends by examining key patterns within the federal pretrial system during a ten-year period spanning fiscal years 2008 through 2017. Initially, this paper will detail major legal/structural changes that occurred within the federal pretrial system since the 1980s that have influenced the pretrial release process. Next, a brief summary of prior studies examining federal pretrial trends will be provided for background purposes. Included in this overview will be a discussion of how rising pretrial detention rates led to the development of an actuarial tool—the federal Pretrial Risk Assessment (PTRA) instrument—meant to guide release recommendations and decisions. Afterwards, we will explicate research questions and the data used to examine federal

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pretrial trends. Major findings will then be presented and the report will conclude by discussing the study's implications for the federal pretrial system. It should be noted that, for the most part, illegal aliens will be omitted from the study, since most of these defendants are never released pretrial (see Table 1).

Overview of Federal Pretrial Legislation

In 1982, following the perceived success of the 10 pretrial demonstration districts, Ronald Reagan signed the Pretrial Services Act of 1982 (Byrne & Stowel, 2007). This legislation established pretrial services agencies within each federal judicial district (with the exception of the District of Columbia) and authorized federal pretrial and probation officers to collect and report on information pertaining to release decisions, make release recommendations, supervise released defendants, and report instances of noncompliance (see 18 U.S.C. §3152). The Act's primary purpose was to increase pretrial release rates by diverting defendants who would ordinarily have been detained into pretrial supervision programs (Byrne & Stowel, 2007).

Shortly after the passage of the Pretrial Services Act of 1982, Congress passed the Bail Reform Act of 1984 (see 18 U.S.C. §3141-3150). This Act marked a significant turning point in the federal pretrial system and laid the groundwork for current detention rates. The Bail Reform Act of 1984 included two major modifications: 1) the inclusion of the danger prong, in addition to flight risk, as a consideration in making the release decision, and 2) two presumptions for detention where, instead of assuming a defendant would be granted pretrial release, the assumption was that he or she would be detained (Austin, 2017). Moreover, the 1984 Act identified several factors federal judges should consider when making pretrial release/detention decisions; many of these factors became integrated into the federal bail report.²

² The factors are: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence; (3) the financial resources of the defendant; (4) the character and physical and mental condition of the defendant; (5) family ties; (6) employment status; (7) community ties and length of residency in the community; (8) record of appearances at court proceedings; (9) prior convictions; (10) whether, at the time of the current offense, the defendant was under criminal justice supervision; and (11) the nature and seriousness of the danger to the community or any person that the defendant's release would pose. (AO, 2015); see also 18 U.S.C. §3141 - 3150 for a detailed list of factors courts

Crucially, the Bail Reform Act of 1984 created two scenarios in which the assumed right to pretrial release was reversed, with the burden shifting to the defendant to prove he or she was not a risk of nonappearance or danger to the community. Creating the presumptions—before the advent of actuarial pretrial risk assessment—was Congress' effort to identify high-risk cases in which defendants would be required to overcome an assumption in favor of pretrial detention (Austin, 2017). It should be noted that the presumptions were also created in the midst of the "War on Drugs"; therefore, the cases targeted by these presumptions were largely drug offenses. At the time the presumptions were created, cases in the federal system were primarily fraud and regulatory and therefore, the presumptions did not affect a majority of cases (VanNostrand & Keebler, 2009). However, as drug prosecutions increased to the point where they became the largest case category in the federal system besides immigration, the presumption evolved into a more important component of the detention decision (Austin, 2017).

Overview of Prior Studies Examining Federal Pretrial Trends

Since the passage of the Pretrial Services Act of 1982 and the Bail Reform Act of 1984, little research has been conducted into whether the objectives of these laws were met and what potential unanticipated consequences might have arisen. The limited research conducted to date has been primarily initiated by the Administrative Office of the U.S. Courts (AO) Pretrial and Probation system itself, the Bureau of Justice Statistics (BJS) under the Department of Justice, and a few outside academic sources.

In 2007, James Byrne and Jacob Stowell published a paper in *Federal Probation* analyzing the impact of the Federal Pretrial Services Act of 1982. In their paper, they observed that the Act led to significant increases in the number of people under federal pretrial supervision. The authors concluded that this result occurred because of defendants being placed on pretrial supervision who would previously have been released on their own recognizance. Second, they concluded that the Act failed to reduce the rate of pretrial detention. In fact, between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent (including illegals). In explaining

should consider.

these changes, the authors hypothesized that the risk profile for federal defendants changed significantly in the intervening years, with large increases in drug and immigration cases. However, the detention rates went up across all sub-categories, including defendants with no prior criminal record and those who were employed. The authors concluded that the rising detention rate cannot be explained by the changing risk profile, but rather by changes in how the system regarded pretrial release and those entitled to it (Byrne & Stowel, 2007).

In 2013, BJS published a special report on pretrial detention and misconduct from 1995 to 2010. The findings were similar to those reported by Byrne and Stowell. Notably, from 1995 to 2010, the federal detention rate rose from 59 percent to 75 percent (including illegals). The study concluded that the rise in detention was driven primarily by a 664 percent increase in immigration cases, from 5,103 in 1995 to 39,001, in 2010 (Cohen, 2013). Despite this increase in immigration cases, the study also found that detention rates went up across case types, with detention rates for immigration cases increasing from 86 percent to 98 percent, from 76 percent to 84 percent for drug offenses, and from 66 percent to 86 percent for weapons offenses.

Development of the Federal Pretrial Risk Assessment Instrument

As these and other similar studies emerged, various entities within the federal system became concerned with the rising federal detention rate. In response to this concern, the Office of the Federal Detention Trustee, in collaboration with the AO, embarked on a project to "identify statistically significant and policy relevant predictors of pretrial risk outcome [and] to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community ..." (VanNostrand & Keebler, 2009: 3).

One of the key recommendations of this study was that the federal system create an actuarial risk assessment tool to inform pretrial release decisions (Cadigan, Johnson, & Lowenkamp, 2012; VanNostrand & Keebler, 2009). The aim of the tool was to assist officers in making their recommendations by cutting through beliefs and implicit biases and presenting an objective assessment of an individual defendant's risk of nonappearance, danger to the community, and/or committing a technical violation that resulted in

revocation (VanNostrand & Keebler, 2009). The tool also had to be short enough to be completed as part of the pretrial investigation process, which was often limited to a few hours from start to finish.

The Pretrial Risk Assessment Tool (PTRA) was created in 2009 by analyzing about 200,000 federal defendants released pretrial between fiscal years 2001 and 2007 from 93 of the 94 federal districts (Cadigan et al., 2012; Lowenkamp & Whetzel, 2009). Using a variety of multivariate models, the final tool included 11 questions measuring a defendant's criminal history, instant conviction offense, age, educational attainment, employment status, residential ownership, substance abuse problems, and citizenship status.³ Responses to the questions generates a raw score ranging from 0-15 which then translates into five risk categories, with Category 1 being the lowest risk and Category 5 the highest. Once trained and certified, a federal pretrial services officer could complete the tool in under five minutes.

Although the PTRA was initially deployed to the field in fiscal year 2010 and both the initial and revalidation studies showed this tool to be an excellent predictor of pretrial violation outcomes (see Cadigan et al., 2012; Lowenkamp & Whetzel, 2009),⁴ implementation by the districts was slow, as it was perceived to be replacing, not augmenting, officer discretion. For example, the percentage of defendants (excluding illegals) with PTRA assessments rose from 35 percent in fiscal year 2011 to 77 percent in fiscal year 2013 (data not shown in table). However, by 2014, implementation of the tool had grown sufficiently to be used for outcome measurement purposes. At present, nearly 90 percent of defendants with cases activated in federal district courts have PTRA assessments. While the PTRA is now used nearly universally in the federal pretrial system, it is unclear whether its deployment has been associated with changes in federal pretrial release patterns. We intend to explore whether previously documented trajectories of increasing detention rates have changed with the PTRAs implementation.

³ For a list of specific items in the PTRA, see Cadigan et al. (2012) and Lowenkamp and Whetzel (2009).

⁴ It should be noted that the PTRA was recently revalidated off a larger sample of officer-completed PTRAs assessments ($n = \text{approx. } 85,000$). Findings from this study are highlighted in the current *Federal Probation* issue (see Cohen, Lowenkamp & Hicks, 2018).

Present Study

The present study will detail major trends occurring within the federal pretrial system over a 10-year period encompassing fiscal years 2008 through 2017. Specifically, we will explore the following research issues about the decision to release defendants charged with federal crimes:

- What percentage of federal defendants are being released pretrial and how have federal release patterns changed over the last 10 years? To what extent are federal pretrial release decisions influenced by citizenship status? How do pretrial officer and U.S. Attorney release recommendations align with actual release decisions?
- Are defendants more or less likely to be released depending upon their most serious offense charges (e.g., drugs, weapons/firearms, financial, sex, etc.), and have release rates changed over time within the specific offense categories? Relatedly, have the types of offenses associated with higher release rates increased or decreased during the study time frame?
- Have the criminal history profiles of federal defendants (e.g., prior arrest and/or conviction history) become more or less severe since 2008? To what extent does criminal history influence release decisions, and have release rates changed or remained the same over time for defendants with similar criminal history profiles?
- Has implementation of the PTRA been associated with an increasing, decreasing, or stabilizing pretrial release rate? If national federal pretrial release rates have remained stable or continued to decline, have districts incorporating this instrument in their bail reports witnessed increases in their release rates?
- Last, this study will investigate trends in the percentage of released defendants who committed pretrial violations. Defendants are considered to have garnered a pretrial violation if they were revoked while on pretrial release, had a new criminal rearrest, or failed to make a court appearance (i.e., FTA). The next section examines the data used in the current study.

Data and Method

Data for this study were obtained from 93⁵

⁵ It should be noted that although there are 94 federal judicial districts, the District of Columbia (D.C.) has its own separate pretrial system. Hence, the federal judicial district in D.C. is omitted from

U.S. federal judicial districts and comprised 531,809 defendants, excluding illegals, with cases activated within the federal pretrial system between fiscal years 2008 through 2017. These pretrial activations were drawn from a larger dataset containing 1.1 million pretrial defendants with cases opened between fiscal years 2008 and 2017. From this larger dataset, all pretrial defendants classified as illegal immigrants were excluded from the analysis ($n \text{ lost} = 459,442$). The illegal aliens were removed because, as will be shown, very few illegal aliens were placed on pretrial release. Non-citizen defendants considered legal aliens, however, were included in the study. Legal aliens encompass non-citizen defendants with the status of humanitarian migrant (e.g., refugee), permanent resident (e.g., green card), or temporary resident (e.g., in U.S. for travel, educational, or employment purposes). In addition, we removed all courtesy transfer cases ($n \text{ lost} = 72,183$) with the exception of rule 5 cases with a full bail report. Last, we omitted cases that fell into the following classification categories: collaterals, diversions, juveniles, material witnesses, and writs ($n \text{ lost} = 41,975$). The transfers and these other cases were removed because they did not involve defendants being charged with new offenses within the federal system. Rather, they encompass case events in which the defendant was transferred from another district, was serving as a material witness, was placed into a diversion program, or was currently incarcerated on a prior conviction, nullifying the bail decision on the current federal matter. Hence, the report focuses on only those defendants prosecuted by U.S. Attorneys for new offenses in the federal court system and who had a reasonable expectation of bail.⁶

Data for this study were extracted from the Probation and Pretrial Services Automated Case Tracking System (PACTS), the case management system used by federal probation and pretrial officers. PACTS provides a rich dataset containing detailed information on the most serious offense charges, criminal history profiles, release/detention decisions, and violation outcomes for released defendants. The current study primarily uses descriptive statistics to explore pretrial release and violation trends in federal district courts.

this analysis.

⁶ Because of the use of these filters, the pretrial release rates displayed in this report will most likely differ from those published by other federal statistical agencies.

Results

Overall Pretrial Trends

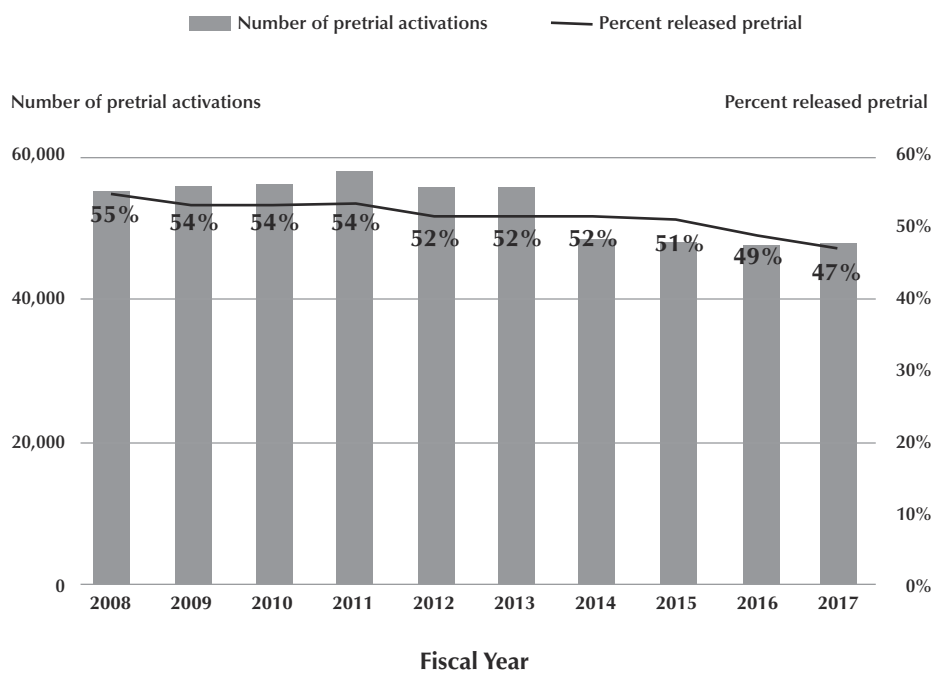
In general, the number of defendants with pretrial activations and the percentage released pretrial has declined during the 10-year period spanning fiscal years 2008 through 2017. Between fiscal years 2008

through 2017, the number of defendants with pretrial activations declined by 13 percent, from 55,578 cases in 2008 to 48,181 cases in 2017 (see Figure 1). Interestingly, most of this decline occurred between fiscal years 2013 and 2014, when budget sequestration cuts were enacted. In this report, defendants with

pretrial activations include U.S. or naturalized citizens or legal aliens charged with federal offenses. Illegal aliens are omitted from most of this analysis, with the exception of Table 1.

In addition to declining caseloads, the percentage of defendants released pretrial decreased by 8 percentage points from 55 percent in 2008 to 47 percent in 2017. As will be shown, many factors can influence pretrial release trends, including defendant criminal history profiles and most serious offense charges. If the criminal history profiles of federal defendants are becoming more serious, for example, that trend could exert downward pressures on federal pretrial release rates. Hence, we calculated an adjusted pretrial release rate that accounts for changes in the criminal history profiles and most serious offense charges filed in the federal courts. When adjusted by criminal history and offense severity charges, the federal pretrial release rates declined from 54 percent in 2008 to 50 percent in 2017, representing a 4-percentage point decrease (data not shown in table).

FIGURE 1
Number of federal defendants (excluding illegals) with pretrial activations and percent released pretrial in U.S. district courts, FY 2008–2017



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

TABLE 1.
Percent of U.S. or naturalized citizens, legal aliens, or illegal aliens released pretrial in cases activated within U.S. district courts, FY 2008–2017

Fiscal year	U.S. or naturalized citizen		Legal aliens		Illegal aliens	
	Number of defendants	Percent released	Number of defendants	Percent released	Number of defendants	Percent released
2008	50,366	55.9%	4,300	44.9%	38,931	--
2009	51,348	55.2%	3,887	39.9%	46,599	4.5%
2010	51,040	55.8%	4,405	37.1%	52,206	2.6%
2011	53,111	55.6%	4,769	34.6%	52,274	2.3%
2012	50,917	53.2%	4,641	35.3%	50,086	1.6%
2013	51,075	53.3%	4,311	36.5%	49,777	1.5%
2014	44,911	52.6%	3,742	37.5%	48,184	1.4%
2015	44,353	52.0%	3,436	38.0%	43,714	1.6%
2016	43,319	50.2%	3,850	36.4%	40,602	1.8%
2017	43,768	48.1%	3,380	33.8%	37,069	1.7%

Note: The release rates for illegal aliens for fiscal year 2008 not shown because of a change in the way pretrial release was coded for these cases. Prior to 2009, some border districts were coding illegal aliens released to U.S. Immigration and Customs Enforcement (ICE) as released even if they remained detained until deportation. After 2008, the coding methodology was changed so that only illegal aliens released into the community were coded as released.

Pretrial Release and Defendant Citizenship Status

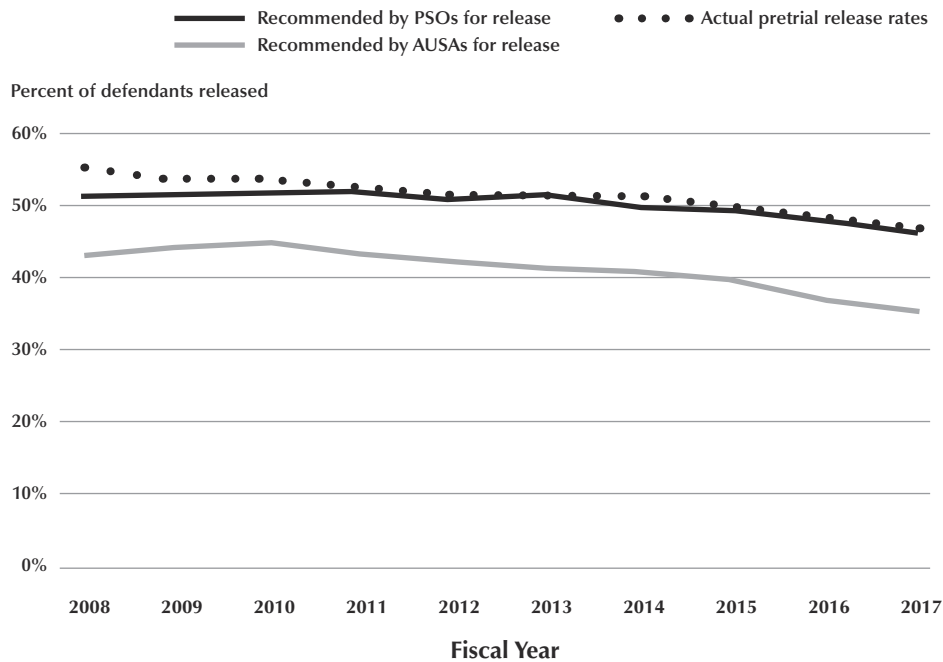
A defendant's citizenship status, including whether they are a U.S. or naturalized citizen, legal alien, or illegal alien, is strongly associated with the release decision. As shown in Table 1, very few illegal aliens are released pretrial; the release rates for illegal aliens has remained unchanged at about 2 percent since 2011. Given their low release rates, illegal aliens are excluded from the remainder of this report. If illegal aliens were included, the overall release rate would have declined from 38 percent in 2008 to 28 percent in 2017 (see table H-14 at the Administrative Office of the U.S. Courts statistics webpage: <http://www.uscourts.gov/data-table-numbers/h-14>).

In comparison to illegal aliens, the release rates for legal aliens or U.S. born and naturalized citizens are substantially higher, although these release rates have also declined over the past decade. For example, over half of U.S. born or naturalized citizens were released pretrial between fiscal years 2008 through 2015, while by 2017, the release rate for these defendants had dropped to 48 percent.

Pretrial Release Recommendations

At the bail hearing, pretrial officers (PSOs) and U.S. Attorneys (AUSAs) make recommendations to release or detain defendants pretrial and these recommendations can influence release decisions. Over the past decade, PSOs

FIGURE 2
Percent of federal defendants (excluding illegals) recommended for release by PSOs and AUSAs and actually released pretrial in cases activated within U.S. district courts, 2008–2017



Note: Includes U.S./naturalized citizen defendants or legal aliens with cases opened between fiscal years 2008 - 2017.

have consistently recommended defendants for release at higher rates than AUSAs (see Figure 2). In 2008, PSOs recommended 51 percent of defendants for release, while the release recommendation rate for AUSAs was 43 percent. By 2017, 48 percent of defendants were recommended for release by PSOs compared to 36 percent of defendants recommended for release by AUSAs. The actual release rates have generally tracked the PSO release recommendation rates between 2008 to 2017.

Pretrial Release and Most Serious Offense Charge

The decision to release a defendant pretrial varies substantially by the most serious offense charges. For instance, about four-fifths of defendants charged with financial crimes were released pretrial, and this release rate has remained relatively stable over the past decade (see Table 2). By comparison, approximately a third or less of defendants charged with weapons/firearms or violence offenses were released pretrial during the study coverage period. While financial offenses have higher release rates than most federal offenses, it is notable that fewer of these cases are being activated within the federal pretrial system. From 2008 through 2017, the number of

pretrial activations involving financial offenses declined by 34 percent. Conversely, there were increases in pretrial activations among several offense categories with relatively low or declining release rates, including weapons/firearms and sex offenses.

Some offense categories have witnessed appreciable decreases in their pretrial release rates. For example, from 2008 through 2017, defendants charged with sex offenses saw a 15-percentage-point decline in their pretrial release rates, from 55 percent to 40 percent. In addition, defendants charged with weapons/firearms offenses have witnessed an 8-percentage-point drop in their release rates, from 36 percent to 29 percent.

While drug cases continue to remain one of the largest offense categories within the federal system, the number of pretrial activations involving these offenses has declined by 15 percent between 2008 and 2017. Interestingly, the percentage of drug defendants released pretrial decreased by 4 percentage points, from 45 percent in 2008 to 41 percent in 2016 and 2017.

Pretrial Release and Defendant Criminal History Profiles

According to the 1984 Bail Reform Act,

judges and magistrates are required to consider a defendant's criminal history when making pretrial release decisions. Following the Act's guidance, defendants with more serious criminal histories should have a lower probability of pretrial release than those with less serious criminal histories. Hence, a worsening criminal history profile for federal defendants could influence the overall federal pretrial release rates.

There is mixed evidence that the criminal history profiles of federal defendants have become more serious during the last 10 years. This is displayed by figures 3 and 4, which show changes in the arrest and conviction history of federal defendants from 2008 through 2017. The percentage of defendants with 5 or more prior felony arrests increased from 21 percent in 2008 to 26 percent in 2017 (see Figure 3). Moreover, between 2008 and 2017, the percentage of defendants with 5 or more prior felony convictions increased from 8 percent to 10 percent (see Figure 4). Although the portion of defendants with extensive criminal histories has grown in the federal system, there have been few changes in the overall percentages of defendants with any prior felony arrest or conviction history. For example, since 2012, the percentage of defendants with no prior felony arrest history has remained stable at about 45 percent to 46 percent. Similar patterns are manifested when examining trends in the percentage of defendants without any prior felony convictions.

The relationship between criminal history and pretrial release is illustrated by the federal data, which show defendants with serious or lengthy criminal histories having lower pretrial release rates than those with less serious criminal backgrounds. In 2008, 77 percent of defendants with no felony arrest history were released pretrial, 40 percent of defendants with two to four prior felony arrests were released pretrial, and 23 percent of defendants with five or more prior felony arrests were released pretrial (see Table 3). By 2017, the percentage of defendants released pretrial was 64 percent for defendants with no prior felony arrests, 54 percent released for defendants with two to four prior felony arrests, and 21 percent released for defendants with 5 or more prior felony arrests.

An interesting pattern involves the steeper declines in pretrial release rates for defendants with less severe criminal history profiles between 2008 and 2017. There was a 13-percentage-point decline in the pretrial release rates for defendants with no prior felony arrest

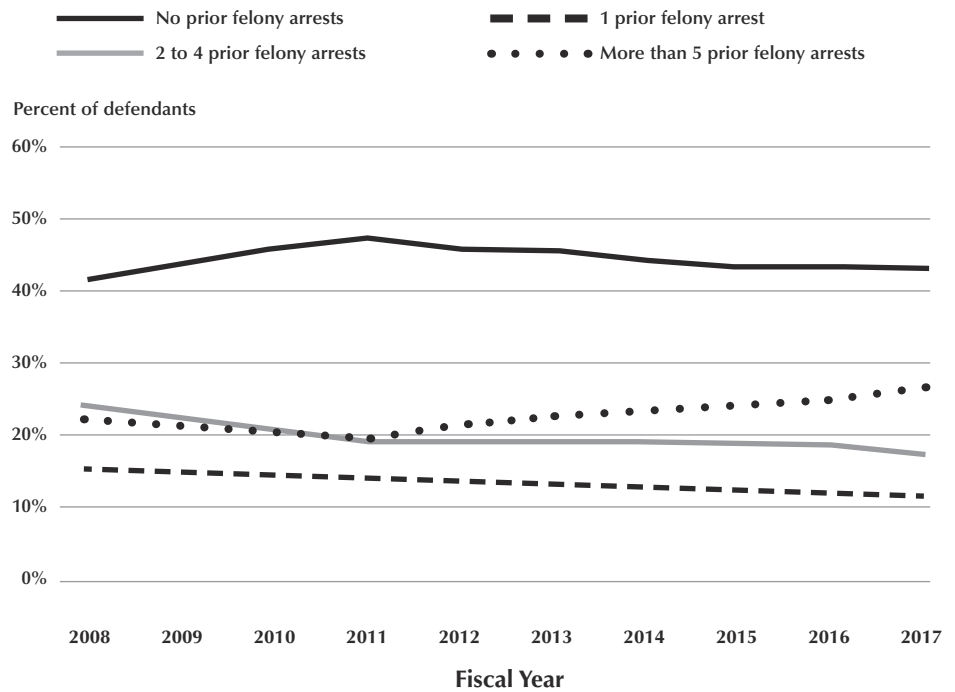
history, from 77 percent in 2008 to 64 percent in 2017. In comparison, the probability of being released pretrial for defendants with 5 or more prior felony arrests declined from 23 percent in 2008 to 21 percent in 2017, representing a 2-percentage-point decrease. The larger declines in pretrial release rates for defendants with less serious criminal histories also occurred among the other criminal history measures, including number of prior felony convictions, most serious conviction history, and court appearance record.

Table 4 examines pretrial release trends by the defendant's most serious offense charges and criminal history profile. In a pattern similar to that shown in the previous table, the release rates declined to a greater extent for defendants with less serious criminal histories than for their counterparts with more severe criminal histories. This finding was particularly apparent for defendants charged with weapons/firearms, sex, or drug offenses. The percentage of defendants charged with weapons/firearms offenses with no felony arrest history released pretrial decreased from 75 percent in 2008 to 49 percent in 2017. In contrast, the pretrial release rates for weapons/firearm defendants with five or more prior arrests declined from 19 percent in 2008 to 17 percent in 2017. A similar trend occurred for defendants charged with sex offenses. Sex offenders without any prior felony arrests saw their pretrial release rates decline from 70 percent in 2008 to 52 percent in 2017. In

comparison, the percentage of sex offenders with five or more prior felony arrests released pretrial decreased from 19 percent to 12 percent between 2008 and 2017. Last, the percentage of drug defendants without any record of prior felony arrests released pretrial

declined by 10 percentage points from 63 percent in 2008 to 53 percent in 2017, while their counterparts with 5 or more prior felony arrests were released at comparable rates (21 percent in 2008 vs. 20 percent in 2017) during the study coverage period.

FIGURE 3
Felony arrest history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017



Note: Includes U.S. or naturalized citizens or legal aliens.

TABLE 2.
Percent of federal defendants (excluding illegals) released pretrial for cases activated in U.S. district courts by most serious offense charge, FY 2008 - 2017

Fiscal year	Drugs		Financial		Weapons/Firearms		Violence		Immigration/a		Sex Offenses	
	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
2008	22,557	44.6%	13,419	81.6%	6,676	36.3%	--	--	2,996	48.4%	2,544	54.6%
2009	23,145	43.8%	12,334	82.0%	6,591	36.3%	3,707	34.5%	2,791	47.3%	2,559	53.7%
2010	22,522	43.6%	13,304	84.4%	6,307	33.8%	3,477	35.0%	3,092	47.8%	2,409	51.9%
2011	24,564	43.3%	13,482	83.9%	6,473	35.4%	3,519	35.3%	2,800	50.9%	2,654	53.4%
2012	23,070	42.2%	12,438	82.6%	6,911	32.5%	3,540	31.4%	2,732	52.8%	2,518	47.9%
2013	22,736	42.4%	12,739	82.9%	6,599	31.7%	3,532	36.0%	2,919	50.5%	2,847	44.8%
2014	19,287	43.2%	11,225	82.7%	5,932	29.5%	3,359	32.1%	2,853	53.7%	2,692	41.5%
2015	18,850	42.9%	10,398	83.8%	6,136	29.6%	3,285	29.7%	2,978	52.3%	3,050	42.0%
2016	18,678	40.6%	9,397	83.1%	6,455	29.1%	3,646	32.9%	3,221	50.7%	2,806	41.5%
2017	19,244	40.8%	8,820	80.3%	7,228	28.6%	3,490	30.5%	3,228	49.4%	2,799	40.0%
Percent change pretrial activations												
2008-2017	-14.7%		-34.3%		8.3%		-5.9%		7.7%		10.0%	

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Obstruction, traffic/DWI, and public-order offenses not shown. Most serious offense charges sorted by most to least frequent among cases activated in FY 2017. Percent changes in violent activations covers period from 2009 to 2017.

-- Data not available.

a/ Includes only U.S. or naturalized citizens or legal aliens charged with immigration offenses. Illegal aliens not included in these rates.

Pretrial Release in Districts that Have Placed the PTRA in the Bail Report

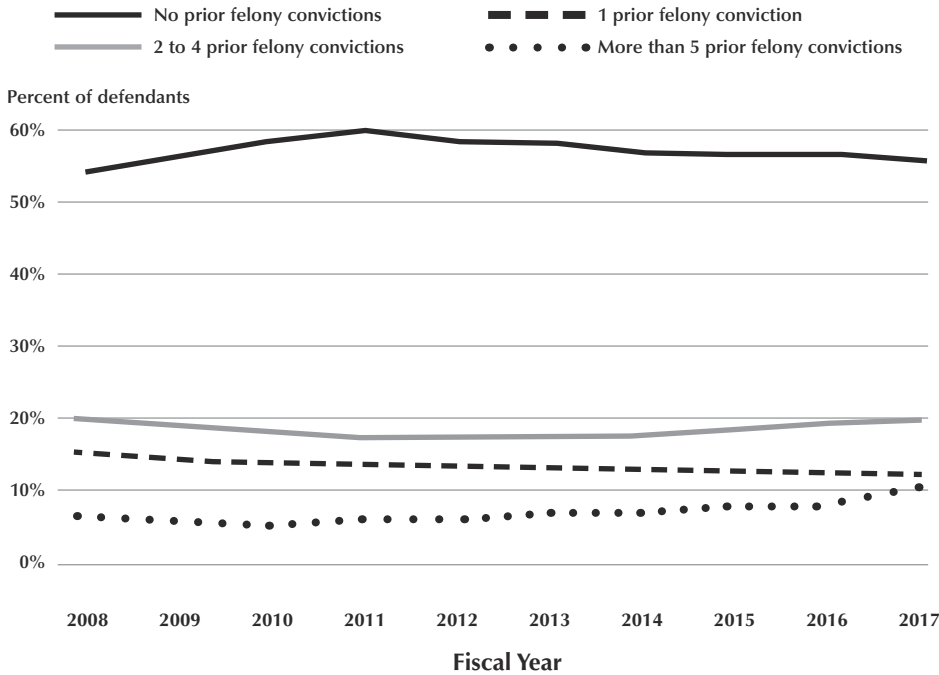
The above documented declines in federal pretrial release took place during a period in which federal officers began using a risk

assessment instrument (i.e., the PTRA) to inform pretrial release recommendations and decisions. Although the PTRA was developed to bring evidence-based practices into the federal pretrial system, federal judges or

magistrates are not required to consider this instrument when making release decisions (Cadigan & Lowenkamp, 2011). In five federal districts, however, the decision was made to include the PTRA assessment score in the bail report. Bail reports are prepared by pretrial officers and provide judges with information about the risk of flight and dangerousness to the community for persons charged with federal crimes.

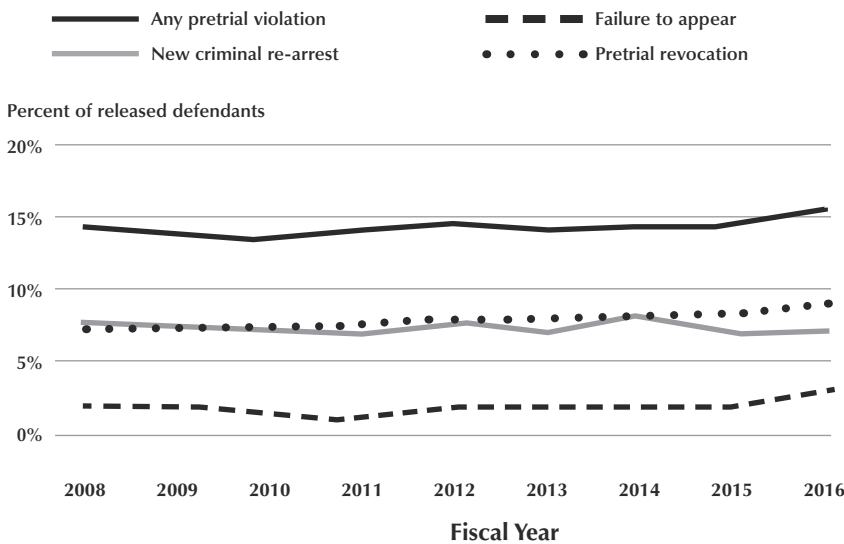
An examination of release rates for districts that included the PTRA in their bail reports shows a general trend of these districts initially experiencing some increases in their overall release rates, which are then followed by declines. In one district,⁷ for example, the release rates increased by 12 percentage points, from 45 percent to 57 percent, during the first year this district included PTRA assessments in their bail reports; since then, the release rates in this district have trended downwards (data not shown in table). Similar trends have manifested in other districts using the PTRA in the bail reports.

FIGURE 4
Felony conviction history of federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008 - 2017



Note: Includes U.S. or naturalized citizens or legal aliens.

FIGURE 5
Percent of federal defendants (excluding illegals) released pretrial who committed pretrial violations for cases closed FY 2008 - 2016



Note. Includes U.S. or naturalized citizens or legal aliens released pretrial. Unlike previous tables/figures, this figure uses the closed rather than activation date as the case anchor.

*Percentages won't sum to pretrial violation totals as defendants can commit multiple types of pretrial violations.

Pretrial Violation Trends

Last, we explored the percent of release defendants who violated their terms of pretrial release through a revocation, new criminal arrest, or FTA. Unlike the previous analyses, this part investigates violations for defendants released pretrial with cases closed between fiscal years 2008 through 2016. We used the closed rather than activation date because that allowed for an examination of pretrial violations during a case's life course. Since the closed date anchored this component of the study, we could only report on pretrial violation activity up until 2016. Violation data were unavailable for fiscal year 2017.

From 2008 to 2015, the percentage of released defendants with any pretrial violation remained fairly stable at about 14 percent (see Figure 5). In 2016, there was a slight rise in the overall violation rates, which increased to about 16 percent. The percentage of released defendants revoked from pretrial supervision rose incrementally from 7 percent in 2008 to 9 percent in 2016. Importantly, the percent of released defendants arrested for new criminal conduct ranged from 7 percent to 8 percent during the study coverage period. Relatively few released defendants (about 2-3 percent) FTA between 2008 and 2016.

⁷ Given that these districts are still experimenting with methods that allow for the most beneficial and informative use of the PTRA in their bail decisions, we kept their names out of this report.

Conclusions and Implications

Our examination of federal pretrial trends over the last decade revealed several key findings. Specifically, the federal pretrial release rates have declined during the period spanning 2008 through 2017, and this trend holds even adjusting for the changing composition of the federal defendant population. Generally, release rates have tracked the release recommendation decisions by PSOs; moreover, PSOs have consistently recommended defendants for release at higher rates compared to AUSAs. Another important finding involves changes in the most serious offenses filed in the U.S. court system. There are fewer cases associated with higher release rates (i.e., financial offenses) filed in federal courts at present than in the past. Conversely, several case types with low or declining pretrial release rates, including weapons/firearms and sex offenses, have increased during the ten-year timeframe.

We also examined the criminal history profiles of federal defendants and found some evidence that they have worsened over time. Interestingly, the percentage of defendants released pretrial has declined to a greater extent among defendants with less severe

criminal profiles than among defendants with more substantial criminal histories. The pattern of falling pretrial release rates for defendants with “light” criminal histories mostly centers on those charged with weapons/firearms, sex, and drug offenses. Another key component involved an examination of whether districts including the PTRAs in their bail reports witnessed any increases in their release rates. While these districts experienced some increases in their overall release rates, these changes were not sustaining, as release rates fell over time. Last, there has been stability in the proportion of released defendants committing pretrial violations involving revocations, new criminal arrests, and FTAs.

This article shows that the federal system has become more oriented towards pretrial detention than release over the last 10 years. Federal statutes, including the 1984 Bail Reform Act and the presumption of detention, most likely laid the groundwork for the reported increases in federal pretrial detention. While there is some evidence that the profiles of defendants have become more severe, these trends do not completely explain the downward trajectories of federal pretrial release rates.

For some offense types, particularly defendants charged with sex offenses, the decreases in pretrial release occurred concurrently with extensive media coverage of sex offenders committing violent crimes (see O’Brien, 2015). Nevertheless, even defendants charged with non-sex-related crimes have witnessed growing rates of pretrial detention, especially those with light criminal history profiles.

When the PTRAs were initially deployed, there was some hope that the instrument could influence federal pretrial release decisions (Cadigan & Lowenkamp, 2011). If officers could base their decisions and release recommendations on an actuarial instrument, that might lead to an increase in release rates for defendants classified as either low (e.g., PTRAs ones or twos) or moderate risk (PTRAs threes) by the PTRAs. While defendants placed into the lower risk categories are more likely to be released than their higher risk counterparts (Austin, 2017), the PTRAs implementation has not been associated with rising pretrial release rates. Rather, release rates have declined during the period coinciding with PTRAs implementation.

There are a variety of reasons why the

TABLE 3.
Relationship between criminal history and pretrial release for federal defendants (excluding illegals) with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017

Defendant criminal history	2008		2011		2014		2017	
	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
Number of prior felony arrests								
None	23,087	77.1%	27,366	71.4%	22,401	69.9%	21,657	64.4%
1	8,521	58.3%	8,163	56.0%	6,263	57.5%	5,407	53.9%
2 to 4	12,133	40.3%	11,430	40.2%	9,524	39.0%	8,814	37.3%
5 or more	11,663	23.2%	11,403	23.3%	10,889	21.3%	12,303	20.7%
Number of prior felony convictions								
None	30,932	72.3%	34,959	68.3%	28,759	66.8%	27,727	62.0%
1	8,822	45.1%	8,396	44.0%	6,608	42.4%	6,083	38.4%
2 to 4	11,224	29.0%	10,626	28.5%	9,316	27.0%	9,355	25.4%
5 or more	4,426	17.0%	4,381	17.6%	4,394	17.0%	5,016	15.9%
Most serious prior convictions								
None	21,018	74.2%	24,773	69.3%	20,745	67.2%	20,795	62.0%
Misdemeanor-only conviction	9,914	68.3%	10,186	65.7%	8,014	65.8%	6,932	61.9%
Felony conviction	24,472	32.6%	23,403	32.0%	20,318	29.9%	20,454	26.9%
Court appearance history								
None	43,416	60.1%	46,674	58.1%	38,305	55.9%	37,212	52.0%
1	4,870	40.2%	4,626	40.8%	4,046	41.5%	3,944	35.7%
2 or more	7,118	32.3%	7,062	33.3%	6,726	32.5%	7,025	27.8%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017.

PTRA has not been associated with rising pretrial release rates. Specifically, this instrument was developed without any judicial involvement, impeding its potential adoption (Cadigan & Lowenkamp, 2011). In addition, there is no requirement that federal judges

consider PTRA assessments when making release decisions (PJI, 2018). Rather, the Bail Reform Act of 1984 and federal statutes detail specific processes and elements judges must take into consideration when making pretrial release decisions, none of which involve the

PTRA. The inability to integrate the PTRA into the judicial decision-making process has resulted in this risk tool having a relatively minimal role in federal judicial release decisions (PJI, 2018). Moreover, release rates have not changed appreciably even among those

TABLE 4.

Relationship between criminal history, most serious offense charges, and pretrial release for federal defendants with cases activated in U.S. district courts, FY 2008, 2011, 2014, & 2017

Defendant criminal history and most serious offense charges	2008		2011		2014		2017	
	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released	Number of activations	Percent released
Drugs								
Number of prior felony arrests								
None	7,578	62.8%	9,928	56.1%	7,798	56.5%	8,067	52.7%
1	3,898	53.0%	3,830	49.4%	2,595	54.3%	2,223	51.1%
2 to 4	5,847	36.1%	5,700	36.5%	4,232	37.3%	3,771	37.0%
5 or more	5,187	21.1%	5,106	21.4%	4,662	20.2%	5,183	20.4%
Financial								
Number of prior felony arrests								
None	7,988	92.0%	8,759	91.8%	7,098	90.8%	5,476	88.6%
1	1,856	81.3%	1,675	82.5%	1,362	84.1%	1,020	82.3%
2 to 4	1,878	69.8%	1,650	73.4%	1,478	72.3%	1,157	70.5%
5 or more	1,654	45.7%	1,398	48.9%	1,287	49.0%	1,167	48.9%
Weapons/Firearms								
Number of prior felony arrests								
None	931	75.1%	1,295	65.1%	1,235	55.8%	1,588	49.0%
1	717	59.0%	649	55.5%	490	48.4%	526	47.3%
2 to 4	2,032	36.2%	1,709	34.0%	1,423	28.7%	1,604	28.8%
5 or more	2,961	18.5%	2,820	18.1%	2,784	14.9%	3,510	16.6%
Violence								
Number of prior felony arrests								
None	1,342	59.3%	1,344	57.6%	1,248	55.6%	1,311	50.1%
1	572	36.4%	531	35.4%	426	36.4%	416	37.5%
2 to 4	854	22.1%	773	24.1%	756	19.3%	758	22.0%
5 or more	935	9.1%	871	10.9%	929	8.8%	1,005	8.6%
Immigration								
Number of prior felony arrests								
None	1,506	66.8%	1,561	63.4%	1,440	70.7%	1,639	66.3%
1	526	43.0%	429	51.5%	445	53.3%	488	48.2%
2 to 4	612	28.9%	508	31.5%	594	33.3%	617	31.3%
5 or more	346	11.0%	302	18.2%	374	20.9%	484	16.9%
Sex offenses								
Number of prior felony arrests								
None	1,517	70.2%	1,690	65.1%	1,612	55.0%	1,655	52.2%
1	482	42.1%	488	44.1%	469	32.2%	424	35.1%
2 to 4	360	23.9%	305	22.6%	379	16.1%	397	17.1%
5 or more	181	18.8%	171	19.3%	232	8.2%	323	12.1%

Note: Includes U.S. or naturalized citizens or legal aliens with cases opened between fiscal years 2008 - 2017. Defendants charged with traffic/DWI, public-order, and escape/obstruction not shown.

few districts that have included the PTRAs scores in their bail reports. In sum, this report shows that changing court culture is a difficult task and developing and implementing a risk assessment instrument is not sufficient when attempting to make systematic changes to complex systems such as pretrial decision processes (Stevenson, in press).

Despite the challenges inherent in reforming the federal pretrial system, more effort should be placed on attempting to reduce unnecessary pretrial detention because of the crucial role the release decision can have both for the individual defendant and for the system as a whole. Specifically, the bail decision is the opportunity for the court system to conserve financial resources, uphold the individual's constitutional right to bail and the presumption of innocence, set a positive, rehabilitative tone for the individual and his or her families, and, in low-risk cases where it is merited, divert individuals altogether from incarceration. Moreover, and perhaps even more importantly, a growing number of research studies have shown pretrial detention being associated with higher rates of failure at the post-conviction stage (Gupta et al., 2016; Heaton et al., 2017; Oleson et al., 2014). Given the resources being expended on supervising federal offenders at the post-conviction stage with the aim of reducing recidivism—including education programs, vocational training, halfway house and other transitional housing, specialized probation officers who use cognitive behavior training, and motivational interviewing—it is important to understand and accept the fact that any reentry effort meant to affect recidivism should take into consideration maximizing pretrial release rates.

Taken together, this study shows that systematic and permanent changes in the federal pretrial system can only occur if all key actors, including judges, U.S. Attorneys, federal defenders, and pretrial officers, are involved in an effort to actively and continuously integrate evidence-based practices into federal pretrial decision-making and view release as a favorable option whenever it can be established

that the risk of flight or danger to the community are not overtly present. Recently, the AO initiated the Detention Reduction Outreach Program (DRO), whose purpose is to safely reduce pretrial detention in federal districts. This effort involves outreach and collaboration with all stakeholders in the federal system, including the U.S. Attorney's Office, the Federal Defenders Office, the U.S. Marshals Service, the Probation and Pretrial Services Office, and other actors. Over the past few years, AO staff began visiting individual districts and initiating discussions with all pertinent stakeholders on the importance of integrating the PTRAs into the pretrial decision and encouraging districts to use alternatives to detention (such as special conditions) as a mechanism for increasing release rates. If DRO can help bridge the gap between these various court actors, we may be able to work together to find compromises in cases that previously would have been detained and encourage a move to higher release rates. Additionally, these consultations encourage officers to make better use of their data by closely monitoring release and release recommendation rates to try to forestall any downward trends in these rates after a DRO consultation. The hope is that over time the DRO program will begin altering current release and detention trends.

References

- Administrative Office of the U.S. Courts (AO) (2015). *Detention Reduction Outreach Program (DRO): Risk Assessment as the Foundation*. Washington, D.C.: Administrative Office of the U.S. Courts.
- Administrative Office of the U.S. Courts (AO). (2018). *Table H-14: Defendants Released and Detained—During the 12-Month Periods Ending: Selected years 1998 through 2017*. Retrieved from <http://www.uscourts.gov/statistics/table/h-14/judicial-business/2017/09/30>
- Austin, A. (2017). The presumption for detention statute's relationship to release rates. *Federal Probation*, 81(2), 52-63.
- Byrne, J., & Stowell, J. (2007). The impact of the Federal Pretrial Services Act of 1982 on the release, supervision, and detention of pretrial defendants. *Federal Probation*, 71, 31-38.
- Cadigan, T. P., & Lowenkamp, C. T. (2011). Implementing risk assessment in the federal pretrial system. *Federal Probation*, 75(2), 30-34.
- Cadigan, T. P., Johnson, J. L., & Lowenkamp, C. T. (2012). The re-validation of the federal pretrial services risk assessment (PTRAs). *Federal Probation*, 76(2), 3-9.
- Cohen, T. H. (2013). *Pretrial detention and misconduct in federal district courts, 1995-2010*. Washington, D.C.: Bureau of Justice Statistics.
- Gupta, A., Hansman, C., & Frenchman, E. (2016). The heavy costs of high bail: Evidence from judge randomization. *Journal of Legal Studies*, 45, 471-505.
- Heaton, P., Mayson, S. G., & Stevenson, M. (2017). The downstream consequences of misdemeanor pretrial detention. *Stanford Law Review*, 69(3), 711-794.
- Lowenkamp, C. T., & Whetzel, J. (2009). The development of an actuarial risk assessment instrument for U.S. pretrial services. *Federal Probation*, 73(2), 33-36.
- Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). *Investigating the impact of pretrial detention on sentencing outcomes*. Houston, TX: Laura and John Arnold Foundation.
- O'Brien, J. (2015, September 28). David Renz: Probation's inattention emboldened me before murder and rape (videos). *Syracuse.com*. Retrieved from http://www.syracuse.com/crime/index.ssf/2015/09/david_renz_probations_inattention_emboldened_me_before_murder_and_rape_videos.html.
- Oleson, J. C., VanNostrand, M., Lowenkamp, C. T., Cadigan, T. P., & Wooldredge, J. (2014). Pretrial detention choices and federal sentencing. *Federal Probation*, 78(1), 12-18.
- Pretrial Justice Institute. (2018). *False equivalence: Local, state, and federal detainees*. Rockville, MD: Pretrial Justice Institute.
- Stevenson, M. (in press). Assessing risk assessment in action. *Minnesota Law Review*.
- VanNostrand, M., & Keebler, G. (2009). Pretrial risk assessment in the federal court. *Federal Probation*, 73(2), 3-29.

Federal Statutes

- Pretrial Services Act of 1982, 18 U.S.C. §§ 3152.
- Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150