BAIL BOND FAIRNESS ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 2286

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BAIL BOND FAIRNESS ACT OF 2007

THURSDAY, JUNE 7, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m., in Room 2141, Rayburn House Office Building, the Honorable Robert C. "Bobby" Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Delahunt, Forbes, Sensenbrenner, Coble, and Lungren.

Staff Present: Bobby Vassar, Chief Counsel; Ameer Gopalani, Majority Counsel; Veronica Eligan, Professional Staff Member; Caroline Lynch, Minority Counsel; and Allison Beach, Minority Counsel.

Mr. SCOTT. The Subcommittee will now come to order.

And I am pleased to welcome you to the hearing before the Subcommittee on Crime, Terrorism, and Homeland Security on H.R. 2286, the "Bail Bond Fairness Act of 2007."

[The bill, H.R. 2286, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 2286

To amend title 18, United States Code, and the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

IN THE HOUSE OF REPRESENTATIVES

MAY 10, 2007

Mr. WEXLER (for himself, Mr. KELLER of Florida, Mr. SENSENBRENNER, Ms. CASTOR, Mr. POE, Mr. LARSON of Connecticut, and Mr. WALBERG) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, and the Federal Rules of Criminal Procedure with respect to bail bond forfeitures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Bail Bond Fairness Act of 2007''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress makes the following findings:

(1) Historically, the sole purpose of bail in the United States was to ensure the defendant's physical presence before a court. The bail bond would be declared forfeited only when the defendant actually failed to appear as ordered. Violations of other, collateral conditions of release might cause release to be revoked, but would not cause the bond to be forfeited. This historical basis of bail bonds best served the interests of the Federal criminal justice system.

(2) Currently, however, Federal judges have merged the purposes of bail and other conditions of release. These judges now order bonds forfeited in cases in which the defendant actually appears as ordered but he fails to comply with some collateral condition of release. The judges rely on Federal Rule of Criminal Procedure 46(f) as authority to do so.

(3) Federal Rule of Criminal Procedure 46(e) has withstood repeated court challenges. In cases such as United States v. Vaccaro, 51 F.3d 189 (9th Cir. 1995), the rule has been held to authorize Federal courts specifically to order bonds forfeited for violation of collateral conditions of release and not simply for failure to appear. Moreover, the Federal courts have continued to uphold and expand the rule because they find no evidence of congressional intent

to the contrary, specifically finding that the provisions of the Bail Bond Act of 1984 were not intended to supersede the rule.

(4) As a result, the underwriting of bonds for Federal defendants has become virtually impossible. Where once the bail agent was simply ensuring the defendant's physical presence, the bail agent now must guarantee the defendant's general good behavior. Insofar as the risk for the bail agent has greatly increased, the industry has been forced to adhere to strict underwriting guidelines, in most cases requiring full collateral. Consequently, the Federal criminal justice system has been deprived of any meaningful bail bond option.

(b) PURPOSES.—The purposes of this Act are—

(1) to restore bail bonds to their historical origin as a means solely to ensure the defendant's physical presence before a court; and

(2) to grant judges the authority to declare bail bonds forfeited only where the defendant actually fails to appear physically before a court as ordered and not where the defendant violates some other collateral condition of release.

SEC. 3. FAIRNESS IN BAIL BOND FORFEITURE.

(a)(1) Section 3146(d) of title 18, United States Code, is amended by inserting at the end ''The judicial officer may not declare forfeited a bail bond for violation of a release condition set forth in clauses (i)–(xi), (xiii), or (xiv) of section 3142(c)(1)(B).''.

(2) Section 3148(a) of title 18, United States Code, is amended by inserting at the end ''Forfeiture of a bail bond executed under clause (xii) of section 3142(c)(1)(B) is not an available sanction under this section and such forfeiture may be declared only pursuant to section 3146.''.

(b) Rule 46(f)(1) of the Federal Rules of Criminal Procedure is amended by striking ''a condition of the bond is breached'' and inserting ''the defendant fails to appear physically before the court''.

○

Mr. SCOTT. I recognize myself for 5 minutes for the purpose of making an introductory statement.

Representatives Wexler and Keller introduced H.R. 2286 on May 10 of this year, and the legislation is largely based on other bipartisan bills introduced in the previous three Congresses.

Historically, bail has been issued for the sole purpose of ensuring a defendant's appearance in court as ordered. In recent years, however, Federal judges have ordered bail bonds forfeited when defendants violated even collateral conditions of pretrial release. Judges and opponents of 2286 cite several reasons supporting the practice for ordering bond forfeiture when the defendant violates any condition of pretrial release.

First, they maintain that the potential for bond forfeiture is an added incentive for defendants on pretrial release to comply with bail bond conditions, particularly when the forfeiture would mean loss of assets for family or friends. Without this added incentive, proponents maintain that judges would be less apt to grant pretrial release and, consequently, more defendants would actually remain in pretrial detention.

Second, opponents find that the actual forfeiture of bond for violating collateral pretrial release is rare.

Third, some Federal judges allow defendants to deposit their own funds as bonds in amounts that would be equal to the premium that a commercial bail bond underwriter would charge, making commercial bail bond underwriters unnecessary, which is the actual reason for the decline in commercial bond underwriting in the Federal system.

Finally, opponents find that the direct change to the Federal rules circumvents the process that Congress established by empowering the judiciary to be governed by the Federal rules of criminal procedure.

In contrast, supporters of the bill maintain that this practice has created a barrier to pretrial release because the risk of bond forfeiture has forced commercial bond underwriters to avoid the Federal system. They find that the commercial bond underwriters opt to offer their services to defendants in the State systems where the risk of loss is lower.

Opponents find that friends and family of defendants are similarly reticent to post bond for defendants because they cannot risk their homes or their life savings not only on the appearance, but also on the good behavior of their loved one.

Supporters of H.R. 2286 also state that bond forfeiture based on violations of collateral conditions is unreasonable. They assert that while the commercial underwriter or family or friend may be able to compel a defendant to appear, they have no control over the defendant's personal activity.

In essence, they maintain that the practice is unnecessary because the judges have a remedy to ensure compliance with bail conditions, namely ordering a pretrial defendant to detention if the defendant violates those conditions. Thus, ordering the bond forfeiture is simply a burden on the bond underwriter, not on the defendant.

Finally, supporters maintain that pretrial release is a vital part of one's ability to assist in his or her defense, as they contend that

bond forfeiture is an unreasonable and unnecessary barrier to pretrial release. They find that the practice is fundamentally unfair.

H.R. 2286 would return the use of bail bonds to their historic purpose by limiting the judges' authority to order a bond forfeiture due to a defendant's failure to appear physically in order. The bill does, however, preserve a judge's authority to revoke pretrial release and order pretrial custody, should the defendant violate any of the conditions of pretrial release.

Now that being said, it is my pleasure to recognize the Ranking Member of the Subcommittee, my colleague from Virginia, the Honorable Randy Forbes, who represents Virginia's Fourth Congressional District.

Mr. FORBES. Thank you, Chairman Scott, and I appreciate you holding this legislative hearing on H.R. 2286, the Bail Bond Fairness Act of 2007.

H.R. 2286 limits the circumstances for which bail can be forfeited. Bail set by a judge in Federal court typically includes provisions that require a defendant to make all court appearances and comply with other conditions, including requirements that the defendant refrain from traveling out of the jurisdiction, stay away from a victim, witnesses or a victim's neighborhood or that the defendant not violate any other laws.

There are two fundamental issues that we need to examine. The first issue is the extent to which Federal judges have ordered the forfeiture of bail for violations of conditions of release, other than appearance in court.

And if the answer to the first question is that Federal judges have forfeited a bond for violations of conditions of release, then the second issue is whether existing law provides a remedy for that or whether the law should be changed to prohibit Federal judges from ordering such forfeiture.

The Crime Subcommittee has held hearings on this issue in 2002 and 1998, and I am glad that we are taking another look at the issue to see if circumstances have changed and what possible steps Congress may need to take.

I want to commend my Judiciary Committee colleagues, Congressman Wexler and Congressman Keller, for their leadership on this issue, and I look forward to hearing from them and the other witnesses today.

And, Mr. Chairman, before I yield back my time, I would request unanimous consent to insert in the record a letter dated June 6, 2007, from the Deputy Assistant Attorney General, Department of Justice, on this matter, and also testimony offered by Congressman Ted Poe dated June 7, 2007.

Mr. SCOTT. Without objection, the statements will be received for the record.

[The information referred to follows:]

LETTER FROM RICHARD A. HERTLING, PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 6, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2286, the "Bail Bond Fairness Act of 2007." The Justice Department opposes this bill.

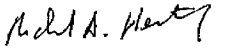
Under the current federal pretrial services system and the bail options available under current law, courts have the means to allow defendants to remain in the community, to manage them, and to compel them to remain law abiding. Pretrial services officers enforce court-ordered conditions of release and monitor defendants in the community; they ensure public safety and manage the risk posed by released defendants. This bill would undermine these efforts and pose new risks to the community. More specifically, H.R. 2286 would eliminate the power of Federal courts to forfeit bail, including a bail bond, when a defendant failed to satisfy a condition of release, other than by failing to appear before the court. This change would seriously limit the ability of Federal courts to enforce important conditions of pretrial release. As a result, the bill would either unnecessarily endanger public safety or increase unnecessarily the use of pretrial detention of defendants and thereby costs to the Federal government, or both.

Section 3142 of title 18 of the United State Code addresses the conditional pretrial release of defendants in the federal criminal justice system. If a court determines that unsecured release will not reasonably assure a defendant's appearance or will endanger the safety of anyone in the community, the court is authorized to set conditions for release. These conditions can include: the posting of bail or a bail bond; restrictions on possession of weapons; use of alcohol or drugs; contact with victims or witnesses to the crime; or the keeping of a curfew. If these conditions are not met, the court can order the defendant detained and also can revoke and forfeit any bail or bail bond executed in the case. Rule 46 of the Federal Rules of Criminal Procedure sets out the procedures relating to the forfeiture of bail or bail bonds and to the setting aside or remission of any forfeiture.

We believe that putting the assets of the defendant or those of a friend or relative of the defendant at risk should the defendant violate a condition of release significantly increases the probability that the defendant will comply with such conditions. By eliminating that risk, enactment of H.R. 2286 would have two possible consequences. Either it would increase the risk of harm to the community - by increasing the risk that a released defendant would violate one or more conditions of release tied to public safety - or it would cause courts to refuse to release defendants who might otherwise be candidates for release (out of a reluctance to expose the court and innocent members of the public to the greater risk that the defendant would violate a significant condition of release). For example, good public policy dictates that a defendant charged with a crime of violence, if not detained, be released pending trial with every possible incentive not to possess a weapon and to stay away from the victim and witnesses of the charged crime. Under current law, a court can order the defendant's bail summarily forfeited if the defendant breaches either of these critical conditions of release. Imposing such conditions is appropriate, because it fosters both public safety and appropriate use of pretrial detention. If H.R. 2286 were enacted, the court would be powerless to forfeit any bail, regardless of the seriousness of the defendant's breach of a non-appearance condition of release.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of further assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's views, there is no objection to submission of this report.

Sincerely,



Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith.
Ranking Minority Member

PREPARED STATEMENT OF THE HONORABLE TED POE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Prepared Testimony of
Congressman Ted Poe
Hearing on H.R. 2286,
the Bail Bonds Fairness Act of 2007
Before the
Subcommittee on Crime, Terrorism, and Homeland Security
Thursday, June 7, 2007

Good Morning. I would like to thank the Chairman Scott, Ranking Member Forbes, and the Subcommittee on Crime, Terrorism, and Homeland Security for allowing me the opportunity to discuss H.R. 2286 – Bail Bonds Fairness Act of 2007.

Introduced by Congressman Wexler, and of which I am an original cosponsor of, H.R. 2286 will restore bail bonds to their original intent – to ensure solely the defendant's physical presence before the court. It will also grant judges the authority to declare bail bonds forfeited only when the defendant fails to physically appear before a court as ordered – not when the defendant violates other collateral condition(s) of release.

Surety Bonds vs. Pretrial Release

In my previous life, I was a prosecutor for 8 years and felony court judge for 22 years in the state of Texas. As a judge, I heard over 20,000 cases. I have witnessed thousands of felony defendants appear in the courthouse, in the pursuit of justice. As the Chairman and the Committee Members well know, in federal cases a person can be released generally on a pretrial release bond or a surety bond. Bail is set by the judge in order to release the defendants from jail and ensure their reappearance at a later trial date. Failure to appear by the defendant at said later date allows the judge to forfeit the surety bond, and a warrant is issued to re-arrest the defendant. The bail agent is liable on the bond to the court. The defendant is liable to the court for his appearance and the defendant is liable to the bail agent monetarily. The potential loss of the

surety bond to the defendant is a great incentive to ensuring their presence at trial. When a defendant is released on a pretrial bond, his incentive to appear is less since he is not monetarily liable on his pretrial release bond. Also, if private surety bonds are forfeited, the bail agent uses their resources and the Marshal Service to re-arrest the defendant. In pretrial release bonds, there is no agent except the Marshal Service to recapture the defendant.

The alternatives to surety bond are other forms of pretrial release, including non-financial "released on own recognizance" and unsecured bonds. Some individual – including some judges, will argue that these methods of pretrial release are better suited for the criminal justice system rather than the surety bond. A study conducted by the Bureau of Justice Statistics looking at the state court systems, and slated for release on July 22, 2007, studied the difference between surety bond and other forms of pretrial release in regards to the defendant's later reappearance at court. The findings of the study at the state level showed that felony defendants who are released on surety bonds are more likely to appear in court and are less likely to become fugitives. The study also showed that individuals who are released on unsecured bonds were the most likely to not appear in court, thus becoming fugitives.

Failure to appear costs resources and the criminal case is still pending and the defendant is at large. Surety bonds are also the way to prevent the defendant from becoming the American taxpayers' problem. If the defendant does not show in court and is on a surety bond, he or she becomes a fugitive. Individuals such as bail bondsmen, who are holding the bond for the defendant, are charged with locating and bringing in the defendant, or risk losing the bond to the court. This method is entirely taxpayer free; if the bondsman is unable to locate the defendant, then it is the bondsman who must forfeit the money to court.

As a former judge and prosecutor, it is my opinion that the best method for ensure a defendant shows in court is to guarantee there is some form of incentive to appear or consequence for their failure to appear.

Other methods such as pretrial release shift the burden of the defendant's inability to appear in court, and the subsequent costs, to the taxpayers. We, as legislators, owe it to the American people to institute effective, efficient methods to ensure defendants will appear at trial without shifting the burden of the costs to the people. Surety bonds are one way to achieve that method.

Pretrial release should be used for indigent defendants, the defendants who cannot afford a surety bond. It would be unfair and against the interests of justice to require individuals to post a surety bond when there would be no way for them to afford it. The current problem with pretrial release is that in the federal court, some judges are ignoring surety bonds, in favor of pretrial release, which is creating problems in the federal justice system. In my court, I saw the successful numbers of defendants released on a surety bail bond, who did show up, and witnessed that those who failed to appear were sought after by the bondsman and returned to the custody of the courts. We should also appreciate that releasing a defendant on a surety bail bond often safeguards collateral posted by family and friends. Who – other than a bail agent – would seek out and return a defendant to court at no cost to a family or a community? When releasing a defendant on a surety bail bond, the possibility exists that they could fail to appear in court. If the defendant is a no-show, one of two things would occur: 1) the bail agent who posted the surety bond will do everything their resources allow to locate and return the defendant to the care and custody of the courts; or 2) the bail agent will pay the defendant's forfeiture. Indeed, these

bail agents provide this service of locating and returning defendants to the custody of the court at no cost to the family or to the community.

Conditions of Bail

I understand that there maybe some resistance to this legislation fearing it will impose restrictions on a judge. This is not the case. This bill clearly states that a surety bail bond is about appearance and only about appearance. Should a judge wish to impose conditions on that bond, then they should. I imposed numerous conditions of bail when I was judge. Judges might wish to limit the defendant's travel opportunities to remain in a particular jurisdiction, to not use alcohol or drugs, or to avoid contact with certain individuals. All of these may be viewed as reasonable performance conditions. Should the defendant ignore a condition of release, then revoke the bond and place them back in custody - do not forfeit the bond. Do not ask a bail agent to ensure a performance condition that we, ourselves, could not ensure. It has been my experience, however, that bondsmen who know that their clients are violating the terms of release, will inform the court of these violations and may ask to surrender the defendants.

Mr. Chairman, thank you for the opportunity to present my testimony to the Subcommittee on Crime, Terrorism, and Homeland Security and for holding this hearing today. The Bail Bond Fairness Act of 2007 will introduce more measures to ensure more defendants appear in court. I strongly urge the Subcommittee's support of this legislation.

Mr. FORBES. And, Mr. Chairman, I yield back the balance of my time.

Mr. SCOTT. The gentleman yields back.

Are there other statements?

We will now go to the witnesses. We have a distinguished panel of witnesses here today to help us consider the important issue before us.

Our first witness will be the gentleman from Florida, Robert Wexler, who represents the 19th Congressional District of Florida. Serving his sixth term in Congress, he is a Member of the Foreign Affairs Committee where he Chairs the Europe Subcommittee. He is also a Member of the Financial Services Committee and the Judiciary Committee. As part of his work on judiciary-related issues, he co-founded the Caucus on Intellectual Property, Promotion and Piracy Prevention.

Prior to coming to Congress, he served in the Florida Senate for 6 years. He holds a B.A. in political science from the University of Florida, a law degree from George Washington University.

Our second witness is the gentleman from Florida, Ric Keller, who represents the Eighth Congressional District of Florida. Serving his fourth term, he is a Member of the Education and Labor Committee where he serves as the Ranking Member on the Subcommittee on Higher Education. He is also a Member of the Judiciary Committee where he is a strong advocate of the COPS program, the Community Oriented Policing Services program, to put more law enforcement officers on our streets.

He was raised in Orlando, Florida, a graduate of East Tennessee State University where he graduated first in his class. He received his law degree from Vanderbilt University.

Our third witness is Ms. Linda Braswell. She is currently the president of the Professional Bail Agents of the United States.

She is a master certified bail agent and has been licensed as a bail bond agent for more than 30 years. In fact, when she obtained her license back in 1974, she enjoyed the distinction of serving as the youngest ever licensed female bail agent in the state of Florida at that time.

She has been a board member of the Professional Bail Agents of the United States since 1990 and is a past President of the Florida Surety Agents Association. In 1995, she was inducted to the Professional Bail Agents of the United States Hall of Fame. She received a distinguished honor as the 2003 Bail Agent of the Year.

She has also served on the Florida Department of Insurance Bail Bond Blue Ribbon Panel and is a certified Florida prelicensing instructor, certified Florida continuing education instructor and a certified bail agents program instructor.

Our final witness is the Honorable Tommy Miller, magistrate judge for the United States District Court in the Eastern District of Virginia. He has served in that capacity since 1987, having previously served as an assistant U.S. attorney and assistant commonwealth attorney for the City of Norfolk. He is the past president of the Federal Magistrates Association and has served as a member of the Judicial Conference Advisory Committee on Criminal Rules.

He attended the University of Virginia and obtained his law degree from William and Mary Law School.

Each witness's written statement will be made part of the record in its entirety.

I would ask that each witness summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing device on your table. When you have 1 minute left, the light will switch from green to yellow and, finally, to red when your 5 minutes are up.

With that, we will begin the testimony with the gentleman from Florida.

TESTIMONY OF THE HONORABLE ROBERT WEXLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. WEXLER. First, thank you, Chairman Scott, thank you, Ranking Member Forbes, Members of the Subcommittee, for giving me the privilege of testifying in support of H.R. 2286.

Since its first introduction in the 105th Congress, this bill has enjoyed bipartisan support. And I am quite pleased to join my Florida colleague, Congressman Keller, who has been a leader on this issue for several years.

Essentially, this bill seeks to restore realistic expectations for the Federal bail bond system, which was disturbed following a judicial interpretation in the 1980's. Since then, Federal judges have been ordering bail bonds to be forfeited even when the defendant appears in court if the defendant fails to behave in certain ways.

Bail agents who underwrite Federal bonds now must not only ensure appearance, but also other conditions, such as ensuring that the defendant will not consume alcohol, over which the bail agent obviously has little or no control. While bail agents do accept responsibility for a defendant, they cannot and should not be expected to be full-time nannies for each defendant.

The Bail Bond Fairness Act preserves the authority of the judge to grant or refuse bail. The judge will continue to make a determination of the defendant's flight risk and threat to the community. Judges will still have the discretion to determine who is eligible for pretrial release, what conditions accompany that release, and whether or not a suspected criminal is a considerable flight risk. We all agree that if a suspected criminal is a serious threat to society, he or she must stay in jail.

That said, the bail bond system on which the judicial system relies will fail if it is not reformed. For example, nonviolent individuals who are no real threat to our society will not be able to get bonds at all. Without reform, we run the risk of losing the services bail bond agents provide and forgetting the original purpose of the bail bond, which is to ensure the appearance of a defendant for a later court date.

The bottom line is bail bonds should primarily be involved in guaranteeing appearance in court. Any other valid conditions set by the judge, such as alcohol or drug consumption, should not be tied to the bond, or the system will collapse. It makes much more sense to revoke the bail bond but not forfeit the bond if the defendant violates a condition set by the judge.

Federal Rule of Criminal Procedure 46(e)(1) has withstood repeated court challenges. In cases such as *United States v. Vaccaro,* the rule has been held to authorize Federal courts specifically to

order bonds forfeited for violations of collateral conditions of release and not simply for failure to appear.

Moreover, the Federal courts have committed to uphold and expand the rule because they find no evidence of congressional intent to the contrary, specifically finding the provisions of the Bail Reform Act of 1984 were not intended to supersede the rule.

It is important to note that even without the authority of the Federal Rule of Criminal Procedure 46(e)(1), judges have authority to declare a bail bond forfeited for a failure to appear as required by the conditions of release.

It appears that Federal judges have merged the purposes of bail and others conditions of release. I understand that judges have come to order bonds forfeited in cases in which the defendant actually appears as ordered, but fails to comply with some collateral conditions of release. As a result, the underwriting of bonds for Federal defendants has become virtually impossible.

The Bail Bond Fairness Act of 2007 will amend sections 3146(a) and 3148 of the BRA to provide, essentially, that a judge could not declare a bond forfeited based on a violation of any condition of release, other than actual failure to appear physically before the court. The bill would also provide that forfeiture of a bail bond is not an available sanction for violation of a release condition.

Where once the bail agent was simply ensuring the defendant's physical presence, he or she now must guarantee the defendant's general good behavior. This is simply unrealistic.

Insofar as the risk for the bail agent has greatly increased, the industry has been forced to adhere to strict underwriting guidelines, in most cases requiring full collateral. Consequently, the Federal criminal justice system has been deprived of any meaningful bail options and bail agents have been effectively locked out of the Federal system since the 1980's.

I genuinely hope the Subcommittee will join Congressman Keller and I in supporting this much needed reform of the Federal bail bond system and allow professional bail agents to return to the Federal court system.

I thank you very much for your consideration.

[The prepared statement of Mr. Wexler follows:]

PREPARED STATEMENT OF THE HONORABLE ROBERT WEXLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Good morning. Chairman Scott, Ranking Member Forbes, members of the subcommittee, thank you for allowing me to testify in support of my bill, H.R. 2286, "The Bail Bonds Fairness Act." Since its first introduction in the 105th Congress, this bill has enjoyed bipartisan support; and I am pleased to join Congressman Keller, who has been a leader on this issue for years, to testify before the subcommittee this morning.

Essentially, this bill seeks to restore realistic expectations for the federal bail bonds system, which was thrown off following a judicial interpretation from the 1980's. Since then, federal judges have been ordering bail bonds to be forfeited even when the defendant appears in court if the defendant fails to behave in a certain way. Bail agents who underwrite federal bonds now must ensure not only appearance, but also other conditions—such as ensuring that the defendant will not consume alcohol—over which the bail agent obviously has no control. While bail agents do accept responsibility for a dependent, they cannot, and should not be expected to be, full-time nannies for each defendant.

The Bail Bond Fairness Act preserves the authority of the judge to grant or refuse bail. The judge will continue to make a determination of the defendant's flight risk

and threat to the community. Judges will still have the discretion to determine who is eligible for pretrial release, what conditions accompany that release, and whether or not a suspected criminal is a considerable flight risk. We all agree that if a suspected criminal is a serious threat to society, he or she should stay in jail.

That said, the bail bonds system—on which the judicial system relies—will fail if it is not reformed. For example, nonviolent individuals—who are no threat to our society—will not be able to get bonds. Without reform, we run the risk of losing the services bail agents provide and forgetting the original purpose of the bail bond—to ensure the appearance of a defendant for a later court date.

The bottom line is bail bonds should be primarily involved in guaranteeing appearance in court. Any other valid conditions set by the judge such as alcohol or drug consumption should not be tied to the bond, or the system will collapse. It makes much more sense to revoke the bail bond but not forfeit the bond if the defendant violates a condition set by the judge.

Federal Rule of Criminal Procedure 46(e)(1) has withstood repeated court challenges. In cases such as *United States v. Vaccaro,* the rule has been held to authorize federal courts specifically to order bonds forfeited for violations of collateral conditions of release and not simply for failure to appear. Moreover, the federal courts have continued to uphold and expand the rule because they find no evidence of Congressional intent to the contrary, specifically finding the provisions of the "Bail Reform Act of 1984" (BRA) were not intended to supersede the rule.

It is important to note that even without the authority of Federal Rule of Criminal Procedure 46(e)(1), judges have authority under the BRA to declare a bail bond forfeited for a failure to appear as required by "the conditions of release." It appears that federal judges have merged the purposes of bail and others conditions of release. I understand that judges have come to order bonds forfeited in cases in which the defendant actually appears as ordered, but fails to comply with some collateral conditions of release. As a result the underwriting of bonds for federal defendants has become virtually impossible.

By way of history, in 1997 Congressman Bill McCollum, who now serves as Florida's Attorney General, introduced legislation addressing this problem. The "Bail Bond Fairness Act of 1997" proposed amending Federal Rule of Criminal Procedure 46(e) to divest judges of their authority to order bonds forfeited based simply on the defendant's violation of a collateral condition of release. This alone would not solve the problem of judge's using their authority to forfeit bonds for non-compliance with collateral conditions. A 2001 revision of the original bill clarified that federal judges would also be authorized only to declare bail bonds forfeited where a defendant actually failed to appear physically before a court as ordered and not when a defendant had simply failed to comply with other collateral conditions of release. Subsequently, the "Bail Bond Fairness Act of 2003" added provisions amending the "Bail Reform Act of 1984" (BRA) to clarify the issue of Congressional intent.

The "Bail Bond Fairness Act of 2007" will amend sections 3146(a) and 3148 of the BRA to provide, essentially, that a judge could not declare a bond forfeited based on a violation of any condition of release, other than actual failure to appear physically before the court. The bill would also provide that forfeiture of a bail bond is not an available sanction for violation of a release condition.

Where once the bail agent was simply ensuring the defendant's physical presence, he or she now must guarantee the defendant's general "good behavior." This is simply unrealistic. Insofar as the risk for the bail agent has greatly increased, the industry has been forced to adhere to strict underwriting guidelines, in most cases requiring full collateral. Consequently, the federal criminal justice system has been deprived of any meaningful bail bond options and bail agents have been effectively locked out of the federal system since the 1980's.

I hope the subcommittee will join me and Congressman Keller in supporting this needed reform of the federal bail bonds system and allow professional bail agents to return to the federal court system. I thank you for your time and consideration of the Bail Bond Fairness Act of 2007.

Mr. SCOTT. Mr. Keller?

TESTIMONY OF THE HONORABLE RIC KELLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. KELLER. Well, thank you, Mr. Chairman, for holding this hearing. I want to thank my colleagues, Congressman Forbes and Congressman Lungren, for appearing as well.

Some may be tempted to think that with Wexler and Keller supporting this bill, one of us has not read it. The truth of the matter is we have both read this great little bill, and we are wholeheartedly in support of it, and I am so proud that Congressman Wexler is the author and lead sponsor of this bill.

It was previously before this Judiciary Committee where it was passed unanimously by a voice vote, enjoying the support of then Chairman Sensenbrenner and now Chairman Conyers.

Let me just give you a real life example of why I think this bill is important.

Imagine a man is arrested and he is given a $100,000 bail. He is not a particular flight risk or a danger to others. So he goes and gets a bail bond to secure his release.

The bail bondsman has an obligation to make sure that he is physically there in court at each appearance, and he fulfills that, and yet after making sure this man is there at every appearance, the judge just says, "You know, I am going to have to forfeit your $100,000 bond because I heard that you traveled to your favorite restaurant just a mile outside of the county line," or "I heard that you came home late, half an hour after the 10 p.m. curfew I gave you," or "I heard that you got a speeding ticket for going six miles over the speeding limit."

Under those circumstances, the $100,000 bond can be forfeited, even though the bail bondsman did his job and made sure the defendant is there.

Now that has some pretty terrible consequences, and the consequences are the bail bonds company will no longer give bail to people who do not have substantial assets to cover the $100,000 bond, and so the question that the bail bond agent will ask, if we do not pass this bill, is, "Let me ask you a question, Mr. Defendant. Do you own a Mercedes? No? Do you own a BMW? No? Do you have $100,000 in your checking account? No? Do you have $100,000 in equity in your home? No? I am sorry. You are just going to have to stay in jail."

Now Martha Stewart can leave. She has plenty of assets, and we can give her a bond. But you cannot. And that disproportionately impacts in a negative way low-income folks and many minorities, and we think that is basically unfair.

This bill preserves, however, the ability of judges to have serious consequences for those who do not follow their conditions, whether it be traffic tickets or jurisdictional boundaries or going to drug counseling. All the judge has to do is to revoke the bail bond and put the defendant in jail, which is a pretty powerful incentive. What he will not be able to do under this bill is to forfeit the bail bond.

The gist of this bill is that bail bondsmen must guarantee the physical appearance of a defendant in court, and if they do, the bond will not be forfeited. That makes it fair for the defendant and fair for the surety companies, and it is fair for America because it puts two-and-a-half bail bondsmen out there as a sort of private security force to make sure that there is someone looking after them and that these folks appear in court.

So for those solid reasons, you have broad bipartisan support and a great bill, and I would urge my colleagues to support it, and I would yield back the balance of my time.

Mr. SCOTT. Thank you.

Ms. Braswell?

TESTIMONY OF LINDA BRASWELL, MCBA, BRASWELL SURETY SERVICES, INC., STUART, FL

Ms. BRASWELL. Thank you, Mr. Chairman and Members of the Committee.

I am president of the Professional Bail Agents of the United States. PBUS is the national professional association representing the nation's 14,450 licensed bail agents.

You do have a copy of my written statement, and I would like to summarize that for you this morning.

The historic purpose of the constitutional right to reasonable bail in the United States is to guarantee the appearance of a defendant for his or her court appearances. A bail bond is forfeited by a court if the defendant fails to appear as ordered. In essence, a bail bond guarantees the appearance of an accused person in court until his or her case has reached final disposition.

In 1995, the 9th Circuit Court handed down an opinion in the *United States v. Vaccaro* that changed the Federal court's interpretation of what a bail bond guarantees. The traditional guarantee of appearance was changed to include a guarantee of the personal good conduct of the defendant who was out on bail. Since the Vaccaro opinion, bail agents and corporate surety bond insurers have been limited in executing bail bonds in the Federal court system due to excess risk.

H.R. 2286 seeks to remedy the result of the 9th Circuit's 1995 opinion in the *United States v. Vaccaro.* The court ordered the $100,000 corporate surety bond forfeited because the defendant violated the personal conditions of his release imposed by the presiding judge. At no time did Mr. Vaccaro fail to appear at his scheduled court dates. He chose rather to travel outside the jurisdiction and commit a new offense.

I as a bail agent can quantify the risk of non-appearance, but no one—no one—has the ability to predict a defendant's performance or compliance with regard to personal conditions set forth for his or her release, for example, non-abuse of alcohol, drugs or whether they will commit an additional offense.

H.R. 2286 is narrowly based. It reads that bail in the Federal court will be forfeited for non-appearance only, which conforms to the historic basis for bail. A Federal court can always require all kinds of conditions for a defendant when they are out on bail. It might consist of home monitoring, random urinalysis or other types of conditions. Those are conditions of bail that are levied directly on the individual defendant. The defendant is responsible for his behavior, not the surety who is guaranteeing his appearance.

The real issue comes down to whether a surety is, in fact, a family member, be it a set of parents or grandparents who have put up cash, real estate or other items to guarantee the appearance of a defendant. Do these individuals who guarantee bonds really understand that they are liable for the defendant's conduct, that they

are required to make sure that their child or grandchild abides by the conditions of release when, in fact, most of them truly believe that they are only responsible for his or her appearance?

The Bail Bond Fairness Act would restore appearance as the sole basis for the forfeiture of a bail bond posted in the Federal court system. It will not hinder, it will not impede, nor will it restrain a Federal court from levering other types of conditions, but if a defendant violates the personal conditions of release, the court at its discretion can impose additional conditions, can revoke the bail, can remand the defendant back into custody, which is the personal penalty that the defendant will pay. A surety, on the other hand, will guarantee that the defendant appears in court, the traditional role of the surety in the United States.

I ask that you support H.R. 2286 because it will allow bail agents and individuals to once again take up their traditional role of guaranteeing the appearance without threatening bail agents or individual families with catastrophic loss because a defendant violates a condition imposed by the court. I believe that a violation of conditions is something that the defendant should pay for and that the non-appearance in court is something that a surety should pay for.

I appreciate your time. I ask for your support of H.R. 2286, the Bail Bond Fairness Act, so that I, as a professional bail agent, can once again serve the Federal court system in the traditional way of appearance.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Braswell follows:]

PREPARED STATEMENT OF LINDA BRASWELL

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Prepared Statement
of
Linda Braswell, MCBA, President
Professional Bail Agents of the United States

on

H.R. 2286,
The Bail Bond Fairness Act

Before the Committee on
Crime, Terrorism and Homeland Security

Room 2141,
The Rayburn House Office Building

June 7, 2007

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PREPARED STATEMENT OF LINDA BRASWELL

Good Morning, Chairman Scott, Members of the Committee. On behalf of the Professional Bail Agents of the United States, I wish to thank you for inviting us to appear before the Subcommittee today to discuss H.R. 2286, the "Bail Bond Fairness Act of 2007." My name is Linda Braswell and I am a Licensed Bail Agent in Florida. I am the elected President of the Professional Bail Agents of the United States, the national professional association of the nation's 14,450 bail agents.

The historic use of the constitutional rights to reasonable bail in the United States is to guarantee the appearance of a defendant for all of his or her court hearings. A bail bond is forfeited by a court if the defendant fails to appear as ordered. In essence, a bail bond guarantees the appearance of a criminally accused person in court until his or her case is finally resolved.

H.R. 2286 seeks to remedy the result of the Ninth Circuit's 1995 opinion in *United States* v. *Vaccaro* (51 F. 3d 189) which allowed the court to forfeit the $100,000 corporate surety appearance bond posted by a bail agent (even though the defendant never missed a court date) because Vaccaro had violated his *personal* conditions of pretrial release by traveling outside of the jurisdiction and committing a new offense.

In *Vaccaro*, a federal district court held that the separate order specifying the conditions of the defendant's release was incorporated into the corporate surety appearance bond posted by the bail agent. In that case, at the bottom of the bail bond face sheet supplied by the government were the words, "see also, the order specifying methods and conditions of release attached hereto and made a part hereof." Thus, the court determined that the two documents should be read together, and actually constitutes one complete order. Then, using Rule 46(e), the court determined that a condition had been violated and that the entire bond should be forfeited. It is important to note that the *Vaccaro* court also added that Congress could have chosen to amend or alter Rule 46(e), and its failure to make such a change "is an indication of the continued viability of the 46(e) forfeiture sanction."

It is important to make the distinction that the traditional guarantee of appearance was changed by the Vaccaro decision to the extent that a bail bond came to guarantee both appearance and adherence of the defendant to the conditions of bail set by the court. Even though a defendant appeared for all of his or her court dates, bail could be forfeited for violation of conditions through the use of drugs or alcohol, a curfew or travel violation, re-arrest, and the like.

Since the *Vaccaro* opinion, bail agents and corporate surety bail bond issuers have essentially been eliminated from the federal pretrial release system, for obvious excessive risk reasons. Federal defendants are therefore faced with reduced means of pretrial release, and the federal system is deprived of a vehicle which returns an errant defendant to the court at no cost to the public sector. When commenting on this issue in 1998 before the House Crime Subcommittee, Congressman Bill McCollum noted that there were

some 7,000 warrants outstanding for federal defendants' failure to appear in court. I can assure you that few, if any, of those 7,000 fugitives were released pretrial on appearance bonds issued by professional bail agents.

A conditions or performance based bail bond (guaranteeing both appearance and personal conduct) is particularly hard on individuals and families who post bail directly with a federal court. In these cases, families, be it parents or grandparents, run the risk of loosing their life savings or homes simply because a defendant has failed a urine test or traveled outside a geographically defined area. Even if the defendant appears at every single one of his or her court hearings, the family can loose their cash or their property because a random urine test came back positive. This is inherently unfair to people who believe that they are merely guaranteeing that their child or grandchild will appear in the federal court.

In state court systems, bail bonds are appearance bonds. If a defendant fails to appear the bond is forfeited and the bail bond agent must either produce the defendant or pay the forfeiture to the court. This is considered as a defined risk. I know that the bail bond executed by me will only be forfeited in a state court if the defendant fails to appear. Therefore, the underwriting of a bail bond for a defendant in state court is based on the likelihood of a defendant to appear in court. Once the bail agent has assessed that risk, he or she can take whatever additional steps are necessary to assure the defendant appears in court. For example, the family or an indemnitor may be asked to co-sign on the bail bond or place collateral with the bail agent.

In the United States, bail agents post approximately 2.5 million state bail bonds each year, guaranteeing the appearance of defendants in court. Two and a half million defendants are being supervised, and being produced in court by the private sector, at no cost to the government and its tax payers. Imagine how difficult it is to underwrite a bail bond for a defendant detained in the Federal Court system when the risk is not solely appearance? How can a bail agent or the insurance company guarantee the behavior of a defendant released on bond? How can a mother or grandmother guarantee the behavior of her child or grandchild released on bond?

A federal court can require a defendant released on bail to adhere to a curfew, random urine testing, take an educational program, remain employed full-time, and much more. None of these conditions has anything to do with the most basic aspect of a bail bond which is the *appearance* of the defendant in court on his or her appointed day. The Vaccaro decision has transformed the traditional *appearance* bond into a *performance* bond, a wholly unfair and improper transition.

Historically, a bail bond guarantees appearance. When the bond is breached, a surety cures that breach by producing the defendant in court. If a bail bond is defined as a performance bond and a defendant violates a condition of the bond, by failing a urine test, there is no way that a surety can cure this type of breach. A surety must be given the opportunity to cure a breach. This can only be done by defining and utilizing a bail bond as an appearance bond.

The "Bail Bond Fairness Act of 2007" does not interfere with a court's ability to directly penalize a defendant who has violated his or her conditions of release. A defendant who fails to report to pretrial services or who fails urine screening, or who temporarily leaves the jurisdiction without court permission, may still be subject to more stringent conditions—even revocation—of bail. He or she may be remanded to custody. But if he or she is not remanded to custody, and if he or she shows up for trial on time, his or her bail will not be forfeited.

The increased "fairness" which the "Bail Bond Fairness Act of 2007" proposes is neither fairness to the defendant nor fairness to the prosecution, but fairness to the Surety. The Surety who produces his or her principal for trial in a timely manner has fulfilled his or her obligation to the courts and is entitled to discharge of his or her obligation under the bond. The Surety need not be penalized because, while released on bail, the defendant ran a traffic light, went across a jurisdictional line for the weekend, or quit his or her job. The consequences of these acts of misconduct will remain where they belong—with the defendant.

Passage of HR 2286 will allow for the release of defendants to be supervised by professional bail agents who can appropriately guarantee to the court that the defendant will appear in court as directed. Sureties—particularly corporate sureties—will be willing to accept the risk of a given defendant's nonappearance in circumstances in which they would not accept the risk of the same defendant's violation of personal performance conditions. It is in society's interest for private sector surety release to once again be an available means of pretrial release. The Ninth Circuit's Vaccaro ruling, a judicial territorial muscle flex, needs to be remedied by passage of this bill.

The "Bail Bond Fairness Act of 2007" would restore a defendant's failure to appear in court as the sole reason for forfeiture of a bail bond in Federal Court. This bill *would not* impede, hinder, constrain or interfere with the court's ability to penalize defendants who have personally violated conditions of bail, nor would it cause the release of defendants the courts feel should be detained pretrial. This bill *would* enable bail agents to be responsible for more Federal bonds which would assist the Federal court system in supervising defendants, reduce the pretrial detention populations, and result in the return of non-appearing defendants to custody in an efficient fashion, without cost to the public treasury. Thank you for your consideration of H.R. 2286, which our industry believes is good public policy that enhances public safety.

Mr. SCOTT. Thank you.
Judge Miller?

TESTIMONY OF THE HONORABLE TOMMY E. MILLER, UNITED STATES DISTRICT COURT, EASTERN VIRGINIA

Judge MILLER. We occasionally have these problems in our court also.

Thank you, Chairman Scott and Congressmen Forbes and Lungren. I represent the Judicial Conference of the United States, which opposes this legislation.

I would first like to comment that I found an error this morning in our commentary. The cite to the rule should be Rule 46(f), not 46(e), in our testimony, and I think that every single other statement miscites it also. The rules were restyled in 2002, and the error has been carried over.

Ms. Braswell has talked about the historical purpose of the bail bondsman, and I think it was not the Vaccaro case, but the Bail Reform Act of 1984 which has changed that historical purpose.

I was an assistant U.S. attorney in 1984, and prior to the Bail Reform Act of 1984, we had to ask for outrageously high bonds that we knew the defendant could not meet in order to detain dangerous persons or persons likely to flee because there was no provision for detention.

The Bail Reform Act of 1984 plus subsequent statutes have provided for detentions, and today approximately 50 percent of the defendants that appear in Federal court are detained, many of them based on the rebuttable presumption that Congress has presented to detain the defendant.

So many of those individuals who had high bonds many years ago are being detained now, so the bonds simply are not available to be written because the defendants are detained without bonds.

Congress directed that we are not to set financial conditions so high that a defendant not be able to meet bonds. My colleagues and I in setting a bond have an investigative report from the pretrial services officer, a very detailed report that deals with the family, the possibility of placement in a residence, third-party custodian, their job history, their financial status, drug use, alcohol use, criminal history, and we look at that in weighing what conditions should be met.

In the Bail Reform Act, Congress has directed that we look through these various conditions before we select the least restrictive ones to ensure appearance and to prevent danger to the community, which, I think, is very important in this discussion.

Least favored among these restrictions are financial surety bonds, according to the courts and the Bail Reform Act of 1984. So, as we deal with the 50 percent of the defendants who eventually are released on conditions, as we go through this list of 12 or 13 or 15, depending how you count it, conditions that we have, a surety bond is at the bottom.

Less than 1,000 surety bonds a year are set by my 500 magistrate judge colleagues in the United States. So that is 1-point-some-odd bonds per year per magistrate judge for corporate surety, according to some figures I have received. So there are very few corporate surety bonds even established. Some of them are for ap-

pearance. Some of them are for the appearance and compliance. That is the way the bond form reads. Ms. Braswell terms it performance.

So there are very few of these to start with. The last time this proposal was before the Congress, the administrative office did a search of the bonds that were forfeited in the United States for appearance and compliance—in other words, a failure to comply. In 2000, there were 23 bond forfeitures in the 10 districts that used corporate sureties the most. In 2001, there were 14 in those same 10 districts and 19 bonds forfeited in 2002 in the 10 districts that use corporate surety the most.

I have been advised in preparing for this by the administrative office that they discovered some coding errors in some of the statistical information provided to Congress in 2002. These errors appear to have overstated the number of cases in which a corporate surety bond was issued in some judicial districts. I am advised that the errors are not likely to materially affect your deliberation on this issue because reported forfeiture numbers were accurate.

The administrative office intends to work with your staff over the next few weeks to provide the Committee with fresh data in this area.

Thank you.

[The prepared statement of Judge Miller follows:]

PREPARED STATEMENT OF THE HONORABLE TOMMY E. MILLER

JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF

HONORABLE TOMMY E. MILLER
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

FOR THE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON H.R. 2929, THE "BAIL BOND FAIRNESS ACT OF 2001"

JUNE 7, 2007

Administrative Office of the United States Courts, Office of Legislative Affairs
Thurgood Marshal Federal Judiciary Building, Washington, DC 20544, 202-502-1700

STATEMENT ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Good morning Mr. Chairman. I appreciate the invitation to testify today on behalf of the Judicial Conference of the United States, regarding H.R. 2286, the "Bail Bond Fairness Act of 2007." My name is Tommy Miller. I am a United States magistrate judge in the Eastern District of Virginia with my chambers in Norfolk. I was a member of the Conference's Advisory Committee on Criminal Rules ("advisory committee") from 1997 to 2003.

United States magistrate judges are the front-line judicial officers who conduct the vast majority of initial appearance proceedings, determining whether an accused should be released or retained in custody. My own district handles a large volume of such matters. Approximately 1,200 defendants were prosecuted in my district for the commission of felony criminal offenses last year. We have nine magistrate judges in the district. We held more than 1,930 initial appearance proceedings last year in felony cases, determining whether defendants should be retained in custody or released, and if released on what conditions, including on condition that the defendant post a bail bond. I was appointed to the bench in 1987, and I literally have presided over thousands of initial appearance proceedings. During the past twelve months, I have handled nearly 200 initial appearances and more than 90 bail review hearings in felony cases.

The Judicial Conference of the United States opposes H.R. 2286. The legislation would restrict a federal court's flexibility to impose added safeguards to ensure a defendant's compliance with release conditions and impair the court's authority to enforce conditions of release prior to trial. The legislation would adversely affect the proper functioning of the federal criminal justice system, either by needlessly increasing the number of defendants retained in custody before trial or reducing the incentive for some defendants to abide by their release conditions, jeopardizing public safety. We also oppose H.R. 2286 because it directly amends the Federal Rules of Criminal Procedure, thereby overturning the results of the rulemaking process, a process that was established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071-77. My

statement will be similar to an earlier statement given by Judge Edward Carnes to the Subcommittee on Crime, Terrorism, and Homeland Security at a hearing on October 8, 2002, on a similar predecessor bill. The discussion remains timely with only a few adjustments.

Bail Reform Acts of 1966 and 1984

The Bail Reform Acts of 1966 and 1984, codified at 18 U.S.C. § 3142 et seq., set out the Congressional policy governing the pretrial release of an accused. Both Acts disfavor pecuniary bail and the existing law instead favors other safeguards that *both* ensure the public safety and the defendant's appearance at court proceedings when required. Both Acts provide wide discretion to courts in setting pretrial conditions of release. Consistent with the expressed policy of these Acts, commercial bail bondsmen have been used in only a small fraction of cases.

Section 2 of the Bail Reform Act of 1966 revised bail practices to assure that all persons, regardless of their financial condition, would not needlessly be detained pending their appearance in court, when detention served neither the ends of justice nor the public interest. The former standard promoted the release of defendants pending trial. Under the 1966 Act, "[d]anger to the community and the protection of society were not to be considered as release factors." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3187.

The 1984 legislation amended the Bail Reform Act, reversing this standard and directing judges to consider the safety of the community in addition to the defendant's appearance in setting release conditions. The Senate Judiciary Committee reported that: "Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal bail laws must address the alarming problem of crimes committed by persons on release and *must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.* The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial

proceedings." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185-3186 (emphasis added).

The Bail Reform Act, as amended in 1984, requires a court to determine whether there is any condition or combination of conditions that will reasonably assure that the defendant will appear in court as required, and at the same time assure the safety of others in the community while the defendant is free pending trial. It contains a Congressionally mandated preference for imposing the least restrictive bail condition on a person charged with a non-capital offense who must be released "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b).

The Bail Reform Act sets out 13 specific conditions of release, which can be imposed by a court separately, in combination, or as hybrid versions, but only if the court finds that release on personal recognizance or on an unsecured appearance bond is inadequate. In fact, the majority of the defendants are released on the two least restrictive conditions, either personal recognizance or an unsecured appearance bond.

Accordingly, unless a court imposes other conditions, an accused is released on personal recognizance by promising only to make all further court appearances as required and not to commit crimes while on bond. There are no financial conditions. If not released on personal recognizance, an accused may be released on an unsecured personal bond. This is not a commercial bond. Rather, an unsecured personal bond is a promise by the accused to pay into court a specified sum of money if the accused fails to appear as required. A court's determination to release an accused on an appearance bond of this type means that the accused will be released without deposit of cash bail or collateral in most cases. Release on personal

recognizance or on an unsecured appearance bond were available prior to 1966, but the 1966 legislation created a strong policy in favor of their use.

In practice, the requirement of obtaining a co-signer for an unsecured bond often serves as an upgraded form of release preferable to one of the other alternatives listed in the Act. A co-signer may be a family member or a friend, preferably employed or owning sufficient assets to make the financial undertaking of the bond a meaningful undertaking. It is particularly in these cases in which the forfeiture of a bond for breach of a condition of release, other than for failing to appear, becomes an important additional tool for the judge to protect the public safety.

Commercial bail bond is listed in the Act as the twelfth condition of release. A court has noted that the structure of the statute makes the conventional bonds of professional bondsmen the least desired condition. *United States v. Gillin,* 345 F. Supp. 1145, 1147 (S.D. Tex. 1972). Defendants are sometimes hard pressed to satisfy the significant premiums that commercial bail bondsman charge. Others have advocated the abolishment of this alternative condition altogether, which was seriously considered during Congressional debate of the 1984 legislation. (*ABA Standards for Criminal Justice*, 2ed. 1980, § 10-5.5 says: "Compensated sureties should be abolished. Pending abolishment, they should be licensed and carefully regulated.") If used, the "obligation of commercial sureties to assure the appearance of their clients, and, if necessary, *actively to maintain contact with them during the pretrial period, is emphasized*." S. Rep. No. 225, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. Code Cong., & Adm. News 3182, 3185-3198.

I have attached copies of standard forms used in the federal courts when releasing defendants pending trial, which illustrate the different types of release conditions.

The Present System and What H.R. 2286 Would Do to It

Section 3142 of Title 18 authorizes the conditional pretrial release of defendants in the federal criminal system. When a federal judicial officer determines that release of the defendant on personal recognizance or on an unsecured appearance bond will not reasonably assure that

defendant's appearance or will endanger the safety of anyone in the community, § 3142(c) expressly provides for conditions on release, and it lists as examples 13 types of conditions that may be imposed. Among the conditions that may be imposed are that the defendant not possess a firearm, avoid all contact with the victim and witnesses to the crime, refrain from the use of alcohol and illegal drugs, stay away from certain places and people, and observe a curfew. One available condition is that the defendant, or others acting on the defendant's behalf, execute a property or secured bail bond. The statute also provides that the judge may order the defendant to "satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person in the community." Rule 46(e) of the Federal Rules of Criminal Procedure sets out the procedure relating to forfeiture of surety bonds and to setting aside or remitting of any forfeiture.

Section 3 of H.R. 2286 would eliminate the power of a federal judge to forfeit bail, including a bail bond, for failure to satisfy a condition of release, other than failure to appear before the court. It would rule out the use of forfeiture or the threat of forfeiture to enforce conditions of release that are necessary to assure the safety of innocent people and the community as a whole. Though the impetus for this legislation comes from professional bail bond interests, its provisions are not limited to cases in which they put up the surety bond, or even to cases in which there is a surety bond.

The Judicial Conference opposes legislation that would amend Rule 46 to restrict a judge's power to forfeit a bail bond to instances where the defendant fails to appear before the court. The Conference position followed a careful examination by the advisory committee of Rule 46(e) and of the consequences of removing the authority of judges to forfeit bonds for reasons other than failure to appear, as H.R. 2286 would do.

In 1998, the advisory committee undertook a study of a similar proposal regarding an earlier version of this bill.[1] As part of that study, we conducted a survey of my colleague magistrate judges, the front-line judicial officers who preside over virtually all of the proceedings governing the pretrial release of defendants in the federal system. The study revealed that Rule 46(e) is working well in its current form.

In a large majority of the 94 federal districts, bonds are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts do incorporate conditions of release as part of the bail bond and may forfeit bonds for violations of those release conditions. In those districts, the magistrate judges believe that subjecting the posted assets of the defendant, or of a friend or relative of the defendant, to risk if the defendant violates a non-appearance condition of release significantly increases the probability that the defendant will comply with all the release conditions. **Absent this added assurance, these magistrate judges would be more reluctant to release a particular defendant**. They report that they might well decide to retain a defendant in custody instead of exposing the court and innocent members of the community to the greater risk that the defendant will violate a significant release condition, such as refraining from drug use. In fact, some defendants themselves have suggested that their bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them. Amending Rule 46(e), as H.R. 2286 proposes, could have the unintended consequence of causing some defendants who would otherwise have been released without endangering the public to be detained instead.

Magistrate judges report that they routinely impose a condition of release that prohibits the defendant from contacting specific individuals. This release condition is often essential to protect the safety of witnesses in large drug cases, ex-spouses and domestic partners of

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[1] H.R. 2134, 105th Cong., 1st Sess. (1997).

defendants with prior histories of drug abuse, spouses and family of defendants charged with felony sexual abuse, child abuse, or domestic violence. The current Rule 46(e) provides judges with the valuable flexibility to impose added safeguards in appropriate cases ensuring a defendant's compliance with these and other conditions of release by subjecting a bail bond to forfeiture on a breach of these conditions of release. Judges have found that the added supervision provided by the friend, family member, or bondsman whose posted bond becomes subject to forfeiture if the defendant breaches a condition of release is an effective insurance deterring the defendant's misbehavior.

Some defendants gain their release by posting their own cash or property as bail. Others have relatives or close friends post their property or act as sureties for the defendant. As the Bail Reform Act intended, significantly more federal defendants secure their release by putting at risk their own money or property or persuading a relative or friend to do so, than use corporate sureties or bail bonds firms. When defendants themselves or their families or friends put up the collateral, and it is at risk of forfeiture for failure to comply with non-appearance conditions, the defendant has a powerful incentive to comply with those incentives. The defendant has a powerful incentive to observe a curfew or travel restriction, to stay away from a victim, or to stay away from alcohol, drugs, or convicted felons, and to obey whatever other conditions a judge has imposed for the safety of the community. H.R. 2286 would remove that powerful incentive by amending Rule 46(e)(1), which now provides for forfeiture of the bail if there is a breach of any condition of the bond, so that bail could be forfeited only if the defendant fails to appear. And that would be true no matter what the bail is or who put it up.

Consider, for example, a defendant who puts up his own cash or property as bail, and among the conditions imposed are that he not possess a firearm and that he stay away from the victim of the charged crime or any witnesses. Would we not want the defendant's own posted cash or property to be at risk if he threatened with a firearm the victim or a witness? Under the

existing rule, a judge could order that the cash or property the defendant posted be forfeited if the defendant committed that kind of serious breach. If H.R. 2286 is enacted, the judge will be powerless to forfeit any bail bond regardless of who put it up and regardless of how serious the defendant's breach of a non-appearance condition is.

The effects of the proposed legislation extend to third-party custodian sureties, such as family members. If their property is at risk when the defendant violates curfew or starts using drugs or begins carrying a firearm, they will often exert pressure on the defendant to straighten up, or they may surrender a misbehaving defendant into custody to avoid jeopardizing their property. By insulating their property from any risk for the defendant's failure to adhere to non-appearance conditions, H.R. 2286 would remove a major incentive for third-party custodian sureties to exert influence over a released defendant's behavior.

Even with corporate sureties, who obviously lack a custodial or family relationship with the defendant, the threat of forfeiture of the bond can provide an incentive to keep tabs on the defendant to insure that he does not leave the territory to which he is confined, obeys a curfew, and so forth. To the extent that corporate sureties or third-party sureties cannot effectively police a defendant's compliance with non-appearance conditions, their inability to do so can be taken fully into account by the judge in deciding whether to set aside or remit some or all of any forfeiture. Rule 46(e)(2) & (4) provide for the setting aside or remission in whole or part of any forfeiture "if it appears that justice does not require the forfeiture."

In summary, Rule 46(e) as it now exists provides federal judges with the important flexibility to impose added safeguards to ensure a defendant's compliance with conditions of release. Removing that flexibility, which is what H.R. 2286 would do, may jeopardize public safety and the proper functioning of the federal criminal justice system. It would also increase the number of defendants retained in custody, because judges will be more reluctant to release

them under these circumstances. Federal courts should retain their full authority to enforce all conditions of pretrial release.

The Rules Enabling Act

Because H.R. 2286 would directly amend one of the Federal Rules of Practice and Procedure, its enactment would contravene the rulemaking process established by Congress under the Rules Enabling Act, 28 U.S.C. §§2071-77. Under that important Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, are carefully considered by the Judicial Conference, and then are presented after approval by the Supreme Court to Congress. It is an exacting and deliberate process designed to ensure that careful thought and consideration is given to any proposed amendment of the rules so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. Direct amendment of the federal rules through legislation, even when the process is complete, circumvents the careful safeguards that Congress itself has established.

I am pleased to note that an earlier justification for this legislation's predecessor has been omitted. It had been claimed by some previously that thousands of defendants were failing to show up for court appearances, because there was no meaningful bail-bond option. The facts did not support the statement. The federal pretrial services officers investigate defendants and their reports assist the court in determining whether to release the defendants and on what conditions. These officers also supervise defendants after their release. The outstanding work of these officers is a primary reason for the few nonappearances by defendants.

Once again, I thank you for the opportunity to appear before you today. I would welcome any questions you might have about this issue.

UNITED STATES DISTRICT COURT

_____ District of _____

UNITED STATES OF AMERICA
V.

APPEARANCE BOND

_____
Defendant

Case Number:

☐ Non-surety: I, the undersigned defendant acknowledge that I and my . . .
☐ Surety: We, the undersigned, jointly and severally acknowledge that we and our . . .
personal representatives, jointly and severally, are bound to pay to the United States of America the sum of
$ _____ , and there has been deposited in the Registry of the Court the sum of
$ _____ in cash or _____ (describe other security.)

The conditions of this bond are that the defendant _____
(Name)
is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment, may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on _____ at _____
Date Place

Defendant _____ Address _____

Surety _____ Address _____

Surety _____ Address _____

Signed and acknowledged before me _____
Date

_____
Judge/Clerk

Approved _____

JUSTIFICATION OF SURETIES

I, the undersigned surety, say that I reside at _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence on _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

I, the undersigned surety, state that I reside at _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence on _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

Justification Approved: _____
Judge

AO 98A (12/03) Includes violations of Conditions of Release as well as non-appearance as grounds for forfeiture.

UNITED STATES DISTRICT COURT

_____ District of _____

UNITED STATES OF AMERICA
V.

APPEARANCE AND COMPLIANCE BOND

_____
Defendant

Case Number:

☐ Non-surety: I, the undersigned defendant acknowledge that I and my . . .
☐ Surety: We, the undersigned, jointly and severally acknowledge that we and our . . .
personal representatives, jointly and severally, are bound to pay to the United States of America the sum of
$ _____ , and there has been deposited in the Registry of the Court the sum of
$ _____ in cash or _____ (describe other security.)

The conditions of this bond are that the defendant, _____
(Name)
is to (1) appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States District Court to which the defendant may be held to answer or the cause transferred; (2) comply with all conditions of release imposed by the court, and (3) abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this bond, then this bond is to be void, but if the defendant fails to obey or perform any of these conditions, payment of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment, may be entered upon motion in such United States District Court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on _____ at _____
Date Place

Defendant _____ Address _____

Surety _____ Address _____

Surety _____ Address _____

Signed and acknowledged before me _____
Date

_____
Judge/Clerk

Approved _____
Judge

AO 98A (12/03)

JUSTIFICATION OF SURETIES

I, the undersigned surety, say that I reside at _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

I, the undersigned surety, state that I reside _____

_____ ; and that my net worth is the sum of

_____ dollars ($ _____).

I further state that

_____
Surety

Sworn to before me and subscribed in my presence _____
Date

at _____ .
Place

_____ _____
Name and Title Signature of Judge/Clerk

Justification Approved: _____
Judge

AO 100 (Rev. 12/03) Agreement to Forfeit Property

UNITED STATES DISTRICT COURT

_____ DISTRICT OF _____

UNITED STATES OF AMERICA
V.

_____
Defendant

AGREEMENT TO FORFEIT PROPERTY

CASE NUMBER:

I/we, the undersigned, acknowledge pursuant to 18 U.S.C. §3142(c) (1) (B) (xi) in consideration of the release of the defendant that I/we and my/our personal representatives jointly and severally agree to forfeit to the United States of America the following property:

and there has been posted with the court the following indicia of my/our ownership of the property:

I/we further declare under penalty of perjury that I am/we are the sole owner(s) of the property described above and that the property described above is not subject to any lien, encumbrance, or claim of right or ownership except my/our own, that imposed by this agreement, and those listed below:

and that I/we will not alienate, further encumber, or otherwise willfully impair the value of my/our interest in the property.

The conditions of this agreement are that the defendant _____
(Name)
is to appear before this court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of defendant's release as may be ordered or notified by this court or any other United States Court to which the defendant may be held to answer or the cause transferred. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing agreement (including any proceedings on appeal or review) which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of this agreement, then this agreement is to be void, but if the defendant fails to obey or perform any of these conditions, the property described in this agreement shall immediately be forfeited to the United States. Forfeiture under this agreement for any breach of its conditions may be declared by any United States District Court having cognizance of the above entitled matter at the time of such breach, and if the property is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each debtor jointly and severally for forfeiture of the property together with interest and costs, and execution may be issued and the property secured as provided by the Federal Rules of Criminal Procedure and any other laws of the United States of America.

This agreement is signed on _____ (Date) at _____ (Place)

Defendant _____ Address _____
Owner(s)/ _____ Address _____
Obligor(s) _____ Address _____
_____ Address _____

Signed and acknowledged before me on _____
(Date)

_____
(Judge/Clerk)

Approved: _____
(Judge)

UNITED STATES DISTRICT COURT

_____ **District of** _____

United States of America

V.

ORDER SETTING CONDITIONS OF RELEASE

_____
Defendant

Case Number:

IT IS ORDERED that the release of the defendant is subject to the following conditions:

(1) The defendant shall not commit any offense in violation of federal, state or local law while on release in this case.

(2) The defendant shall immediately advise the court, defense counsel and the U.S. attorney in writing before any change in address and telephone number.

(3) The defendant shall appear at all proceedings as required and shall surrender for service of any sentence imposed as directed. The defendant shall appear at (if blank, to be notified) _____
Place

_____ on _____
Date and Time

Release on Personal Recognizance or Unsecured Bond

IT IS FURTHER ORDERED that the defendant be released provided that:

(✔) (4) The defendant promises to appear at all proceedings as required and to surrender for service of any sentence imposed.

( ) (5) The defendant executes an unsecured bond binding the defendant to pay the United States the sum of _____ dollars ($ _____) in the event of a failure to appear as required or to surrender as directed for service of any sentence imposed.

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Additional Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant and the safety of other persons and the community.

IT IS FURTHER ORDERED that the release of the defendant is subject to the conditions marked below:

( ) (6) The defendant is placed in the custody of:

(Name of person or organization) _____

(Address) _____

(City and state) _____ (Tel. No.) _____

who agrees (a) to supervise the defendant in accordance with all the conditions of release, (b) to use every effort to assure the appearance of the defendant at all scheduled court proceedings, and (c) to notify the court immediately in the event the defendant violates any conditions of release or disappears.

Signed: _____ _____

Custodian or Proxy Date

( ) (7) The defendant shall:

( ) (a) report to the _____, telephone number _____, not later than _____.

( ) (b) execute a bond or an agreement to forfeit upon failing to appear as required the following sum of money or designated property: _____

( ) (c) post with the court the following indicia of ownership of the above-described property, or the following amount or percentage of the above-described _____.

( ) (d) execute a bail bond with solvent sureties in the amount of $ _____.

( ) (e) maintain or actively seek employment.

( ) (f) maintain or commence an education program.

( ) (g) surrender any passport to: _____

( ) (h) obtain no passport.

( ) (i) abide by the following restrictions on personal association, place of abode, or travel: _____

( ) (j) avoid all contact, directly or indirectly, with any persons who are or who may become a victim or potential witness in the subject investigation or prosecution, including but not limited to:

( ) (k) undergo medical or psychiatric treatment and/or remain in an institution as follows:

( ) (l) return to custody each (week) day as of _____ o'clock after being released each (week) day as of _____ o'clock for employment, schooling, or the following limited purpose(s): _____

( ) (m) maintain residence at a halfway house or community corrections center, as deemed necessary by the pretrial services office or supervising officer.

( ) (n) refrain from possessing a firearm, destructive device, or other dangerous weapons.

( ) (o) refrain from ( ) any ( ) excessive use of alcohol.

( ) (p) refrain from use or unlawful possession of a narcotic drug or other controlled substances defined in 21 U.S.C. § 802, unless prescribed by a licensed medical practitioner.

( ) (q) submit to any method of testing required by the pretrial services office or the supervising officer for determining whether the defendant is using a prohibited substance. Such methods may be used with random frequency and include urine testing, the wearing of a sweat patch, a remote alcohol testing system, and/or any form of prohibited substance screening or testing.

( ) (r) participate in a program of inpatient or outpatient substance abuse therapy and counseling if deemed advisable by the pretrial services office or supervising officer.

( ) (s) refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or electronic monitoring which is (are) required as a condition(s) of release.

( ) (t) participate in one of the following home confinement program components and abide by all the requirements of the program which ( ) will or ( ) will not include electronic monitoring or other location verification system. You shall pay all or part of the cost of the program based upon your ability to pay as determined by the pretrial services office or supervising officer.

( ) (i) **Curfew.** You are restricted to your residence every day ( ) from _____ to _____, or ( ) as directed by the pretrial services office or supervising officer; or

( ) (ii) **Home Detention.** You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the pretrial services office or supervising officer; or

( ) (iii) **Home Incarceration.** You are restricted to your residence at all times except for medical needs or treatment, religious services, and court appearances pre-approved by the pretrial services office or supervising officer.

( ) (u) report as soon as possible, to the pretrial services office or supervising officer any contact with any law enforcement personnel, including, but not limited to, any arrest, questioning, or traffic stop.

( ) (v)

( ) (w)

( ) (x)

DISTRIBUTION: COURT DEFENDANT PRETRIAL SERVICES U.S. ATTORNEY U.S. MARSHAL

Advice of Penalties and Sanctions

TO THE DEFENDANT:

YOU ARE ADVISED OF THE FOLLOWING PENALTIES AND SANCTIONS:

A violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for your arrest, a revocation of release, an order of detention, and a prosecution for contempt of court and could result in a term of imprisonment, a fine, or both.

The commission of a Federal offense while on pretrial release will result in an additional sentence of a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be in addition to any other sentence.

Federal law makes it a crime punishable by up to 10 years of imprisonment, and a $250,000 fine or both to obstruct a criminal investigation. It is a crime punishable by up to ten years of imprisonment, and a $250,000 fine or both to tamper with a witness, victim or informant; to retaliate or attempt to retaliate against a witness, victim or informant; or to intimidate or attempt to intimidate a witness, victim, juror, informant, or officer of the court. The penalties for tampering, retaliation, or intimidation are significantly more serious if they involve a killing or attempted killing.

If after release, you knowingly fail to appear as required by the conditions of release, or to surrender for the service of sentence, you may be prosecuted for failing to appear or surrender and additional punishment may be imposed. If you are convicted of:

(1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, you shall be fined not more than $250,000 or imprisoned for not more than 10 years, or both;
(2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, you shall be fined not more than $250,000 or imprisoned for not more than five years, or both;
(3) any other felony, you shall be fined not more than $250,000 or imprisoned not more than two years, or both;
(4) a misdemeanor, you shall be fined not more than $100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be in addition to the sentence for any other offense. In addition, a failure to appear or surrender may result in the forfeiture of any bond posted.

Acknowledgment of Defendant

I acknowledge that I am the defendant in this case and that I am aware of the conditions of release. I promise to obey all conditions of release, to appear as directed, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions set forth above.

_____
Signature of Defendant

_____
Address

_____
City and State Telephone

Directions to United States Marshal

( ) The defendant is ORDERED released after processing.
( ) The United States marshal is ORDERED to keep the defendant in custody until notified by the clerk or judge that the defendant has posted bond and/or complied with all other conditions for release. The defendant shall be produced before the appropriate judge at the time and place specified, if still in custody.

Date: _____

_____
Signature of Judge

_____
Name and Title of Judge

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Mr. SCOTT. Thank you.

We have been joined by the gentleman from Massachusetts, Mr. Delahunt, and the gentleman from California, Mr. Lungren.

I will now begin the questioning of the witnesses.

Judge Miller, did I understand that only 1 percent, one bond per year per magistrate on average, is the surety bond?

Judge MILLER. It is less than 2 percent. There are about 800 and some. Well, the figures were given to me yesterday for 2006 as they were restudying these numbers. There were less than 900. I think he said 888 bonds using corporate surety either for appearance or appearance and compliance.

Mr. SCOTT. You indicated that 50 percent of the defendants that you see kind of on average are released.

Judge MILLER. On conditions, yes. Various conditions.

Mr. SCOTT. About 50 percent are detained.

Judge MILLER. Most of them are either drugs or guns or child pornography where the Congress has created a rebuttable presumption that they be detained.

Mr. SCOTT. And so of those released, they are all on recognizance?

Judge MILLER. They are on various conditions of release. As you go through the language of the statute, we are supposed to release on personal recognizance, then unsecured bonds, supervision by pretrial services, put them in a halfway house and various other conditions. Each individual is treated separately and investigated separately by the folks from pretrial services.

Mr. SCOTT. Now do you know what the situation is in State court?

Judge MILLER. Well, I tried to get statistics myself on Tuesday, and I was unable to find forfeiture statistics or conditions. I did talk to the clerk of court of the general district court in Norfolk, just out of curiosity.

He tells me they have about 140,000 traffic and criminal cases per year, and that would be from speeding tickets to preliminary hearings for murder, and they have about 25 corporate bail forfeitures per month in the general district court in Norfolk, a city of a population, as you know, under 200,000.

So that is all I could find on this very short notice. So there are as many forfeitures in the general district court in Norfolk in a month of corporate sureties as there are in the Federal courts in a year for these types of violations.

Mr. SCOTT. Now the standard in State courts is the bond is just to guarantee the appearance?

Judge MILLER. That is correct.

Mr. SCOTT. Why should there be a difference in standard between the State court and the Federal court?

Judge MILLER. I think the courts that have upheld the Vaccaro and the other courts that have upheld the appearance and compliance bond were actually trying to follow the mandate of Congress to, as we interpreted it or as they interpreted it—I have not written an opinion on this—work with the least restrictive conditions.

When you get to having a surety bond that requires appearance and compliance, that is about the least favorite or least preferred, statutory or case law, condition, and if this bill passes, those folks

that are in the final category, the appearance and compliance bond, that a judge is sitting there looking at them thinking that, "Okay. We need a guarantee by surety that they will not use drugs, not threaten a witness. Otherwise they are detained," they will not be released on bond. They will be detained, if it was in front of me.

Mr. SCOTT. Okay. Let's be clear. As you go down the list, if you have gotten down to surety plus conditions, the alternative is not surety because they already flunked that condition. The result will be detention. Is that——

Judge MILLER. I would say that is a probable outcome.

Mr. SCOTT. And if you could release them on just appearance, bonded for appearance only, if you could have done that, you would have done that?

Judge MILLER. Yes.

Mr. SCOTT. And since you cannot do that, you go down to one more condition, you lose that possibility, and the alternative is going to be detention.

Judge MILLER. Most likely, depending on the individual.

Mr. SCOTT. Ms. Braswell, in the Federal system, is it true that there are very few bonds that are written on the Federal system right now?

Ms. BRASWELL. Yes, sir.

Mr. SCOTT. And did that start because of the conditions or did that start because of the Bond Reform Act 20 years ago?

Ms. BRASWELL. To my knowledge, it is basically the conditions. The bail agent cannot assume that risk.

Mr. SCOTT. Were they assuming the risk before that?

Ms. BRASWELL. For the appearance, yes, sir.

Mr. SCOTT. And were bonds issued in greater numbers prior to the conditions being imposed?

Ms. BRASWELL. I can only speak from my personal knowledge. But of my personal knowledge, yes, sir, I wrote many more bonds in days prior than I do now.

Mr. SCOTT. Okay.

Mr. Forbes?

Mr. FORBES. Thank you, Mr. Chairman.

And, Judge Miller, we thank you for being here and certainly appreciate what you do and what the other judges do.

Ms. Braswell, we appreciate what your industry does.

And, certainly, we are appreciative of Mr. Keller and Mr. Wexler trying to find a fix for this problem.

But, Judge Miller, I want to kind of follow up with what the Chairman was asking to see if I can get a handle on it. As I understand what you are saying, in this small number of people where there is required a corporate surety, by the time you get there, that is the least favorite that you would have.

Is it your opinion—and I know you probably have not had time to get all the statistics on this—that the reason that is such a small number is not because of an unwillingness of bondsmen to write the bond, but because that is simply the smaller set of people that you are willing to release in that particular category? Is it because people are just not willing to write the bonds?

Judge MILLER. I am speaking from personal experience——

Mr. FORBES. I understand. That is all you can do.

Judge MILLER [continuing]. And also talking with some of my colleagues around the country about this issue. I did research it in 1998, and in 2002. I was on the Criminal Rules Committee at the time.

My colleagues and I are at this last point, and generally what happens in court—and it has only happened to me four or five items. I rarely use this compliance condition—is that the defendant and defense counsel come up and say, "Judge, his mother and father, his grandmother, whomever, willing to put up the house. He will live at the house. They will monitor him as a third-party custodian, and they will look out for him, and they agree to come in and report if he violates the conditions."

Well, I do not just release the defendant on the defense attorney's say-so. I make sure the surety is there, the grandmother, the mother, father. I bring them up to the podium. I read to them what the conditions are of the third-party custodian. I was on the Education Committee, and this is what Magistrate Judges are trained to do. I read them to the conditions, and I go over the possibility of forfeiture of the house.

Usually then, I will ask the parents, "Do you have enough faith in your son that you would post your house, understanding these conditions?" and make sure that they are not just looking at a piece of paper, that they tell me that they have faith in Johnny to reappear and to comply with these conditions.

On the rare occasions in which I have used the appearance and compliance bond, I have done all that, and then sometimes I still do not have faith in the parents and the defendant that he is going to show up, and I detain the person because——

Mr. FORBES. Well, let me go to the ones where you did have the faith in it. Let me put on Ms. Braswell's hat now. I want you to answer this, though, Judge, if you can. What can the bondsmen do in a situation like that? Mr. Keller raises a good point.

I know this is rare, but I have had situations where people have told me—I know one recently where a man was at a soccer game for his son, you know, a good guy. He is watching the soccer game. The soccer game gets delayed. He is torn between does he walk out on his son, does he stay for the last 15 minutes. He stays for the last, I mean, literally, and then he gets caught in traffic going back, and he is late, you know, and his bond was not forfeited, but he is in a situation where, you know, those kinds of things do happen.

What does a bondsman do? I mean, we get on them all the time, worried about whether they are using too much authority, well, you know, how they are going after people and those kinds of things. What do they do to police them from drug use and those kinds of things? So how can I look at Ms. Braswell and say, "This is how you can monitor it." What do we ask them to do?

Judge MILLER. It is up to them to decide whether they want to run the risk. On the appearance and compliance bonds that I have dealt with, I have only dealt with family members, and I have personally advised them of the risk.

Mr. FORBES. I just think that gets to a point where the bondsman really does not have many good——

Ms. Braswell, what can you do in that situation? How do you monitor, you know, Defendant A if they are out and you are worried about whether they are going to be on drug use or whatever? How do you monitor that? I mean, I understand appearance. You can go grab them, you can get them in court, and you can find them. But that is tough enough. How do you monitor those other compliance conditions?

Ms. BRASWELL. You cannot. You cannot. There is no efficient way. The only way that I could tell you—and it is not possible—is you would have to attach yourself to that person 24 hours a day, 7 days a week. That is the only way that I or anyone else could guarantee anyone's behavior or performance.

And not being wise here or smart-alecky, the truth, in fact, were if I could do that or if you could do that, we would not need to build new jails. We would not need to have judges. We would not need to have new courthouses because, if we could figure out how to do that, we would all have the solution to that problem, and——

Mr. FORBES. Judge, my time is out, and the Chairman needs to move on to another questioner. But one of the things that just really concerned me—I understand your position and Ms. Braswell's, but it just seems to me that if you have that one defendant, and it is his mother or it is his father's property, maybe there is something intrinsically maybe that says, "I do not want them to be at jeopardy."

I do not see what he has for the corporate surety most of the time. He is sitting there to them, and he is saying, you know, "I do not know them." You know, "I have just paid my premium." So we do not have that connection——

Judge MILLER. Well——

Mr. FORBES [continuing]. And then I really do not know what realistically they have to enforce it.

I am sorry. Go ahead, Judge.

Judge MILLER. From reading Ms. Braswell's statement, she talks about the collateralization of these bonds. Usually, if there is a corporate bond involved here, they have obtained as much collateral as they can from grandmother or father or mother and have deeded the house whenever they can get it—at least that is my experience with the bondsmen I know—so that if the bond is forfeited by the court, the bondsman pays the $50,000 bond and then goes and takes the house.

That would be their decision to do after they paid the $50,000 under 46(f)(2), I believe it is. It is up to a U.S. district judge to determine whether to remit any or all of the $50,000.

Mr. FORBES. Thank you. My time has expired.

Mr. WEXLER. Mr. Chairman, could Mr. Keller and I have an opportunity to respond, with your permission?

Mr. SCOTT. Sure.

Mr. FORBES. I did not mean to cut you off. I was just out of time.

Mr. SCOTT. The gentleman from Florida, Mr. Wexler?

Mr. WEXLER. Just in response, respectfully, to the judge's testimony, I am somewhat astonished as to the logic that is being employed by the judicial branch.

In essence, it seems to me that the judge's testimony entirely supports Congressman Keller's testimony, which is we have a two-

tier system, those who can afford and those who cannot, and the issue in H.R. 2286 is not who should be detained and who should not. If a judge decides the person should be detained because they are a risk to the community, then they should be detained, and this bill does not affect anything. The only people this bill affects are those that a judge has determined should be released, and then the question is whether they have the means in which to employ a secured bond.

The judge's testimony suggests that the judicial branch does not support the bill because it is rarely used in the Federal courts, although it is regularly employed in State courts. Or it is not regularly employed in Federal courts because they are not available in Federal courts because of the conditions that make it financially unreasonable for a bond company to provide the bond.

So the effect is, as the judge very ably testified, he is in the position of asking Mom or Grandmom to come up. Well, what about the situation where Grandmom says, "Well, I am not so sure." Well, then that is it! The judge has decided he is no risk. Grandmom says, "I am not sure." So, even though the judge has decided he is no risk, he is back in.

But if this bill were passed, the defendant would have another option, which is to go to a surety company, and if the surety company determines to offer the bond at whatever price is issued and it was available at a reasonable rate, then that defendant, who the judge has determined is not a risk to society, would not be detained.

Mr. KELLER. I just have two points to respond to the judge.

I appreciate Judge Miller being here, but, first, the gist of his argument seems to be it is not that big a deal because there are very few bonds forfeited. That is because there were very few bonds issued because you had people sitting in jail because they do not have a Mercedes or BMW or $100,000 in their bank account as collateral.

The case that I mentioned, the hypothetical case about what if you had a $100,000 bond and you crossed the jurisdictional line and then you forfeit, that was a real case. That is the Vaccaro case from 1995, and the court in the 9th Circuit there said, "Well, if you do not like this situation where you can forfeit $100,000 bond just by traveling outside the jurisdiction, then Congress should fix it." That is what we are doing.

The second thing I would point out is I really respect the judge and his organization, but let me be crystal clear: He is not speaking for all judges in the United States here by any means. For example, you have an original co-sponsor of this bill as Judge Ted Poe.

Now, Judge Poe is from Texas. He is a tough judge. He is like the Clint Eastwood of judges. If I went before Judge Poe and saw that that is the guy I had drawn, I might just plead guilty then just to avoid being in front of him. But as tough and as great a reputation as he has, he thinks this is a good bill. He thinks this is fair. He thinks he still has the appropriate remedies to put people in jail who violate his conditions.

And so, with that in mind, I still would urge folks to support this bill.

Mr. SCOTT. I think the judge's testimony was speaking for the Judicial Conference, not for all judges, but for the conference. Is that right, Judge?

Judge MILLER. That is correct, except when I was giving my personal viewpoint, which I was requested to give.

Mr. SCOTT. Okay. Thank you.

The gentleman from Massachusetts?

Mr. DELAHUNT. Yes, I understand, Ms. Braswell, you clearly do not have the resources to do the monitoring. And I appreciate that beyond appearance, given various presumptions that have been enacted by Congress and other concerns that the court may have based on Federal probation recommendations, the issue is if there are conditions that need to be monitored in the event—decided by a judge magistrate or a Federal magistrate—how do you do it?

I guess my question is, why not go to a system where appearance is the sole avenue in terms of the issuance of a bond? But if there are additional concerns that the court has regarding a particular defendant, why not utilize the Federal probation service to do random monitoring to ensure compliance with those conditions?

Judge Miller?

Judge MILLER. Well, we do. We do use Federal pretrial in some districts that——

Mr. DELAHUNT. Okay, but my point is if we maximize their use in terms of the conditions that you as a Federal magistrate have in terms of compliance, why not go back to the original system of appearance being the essence of the issuance of a bond?

Judge MILLER. Well, as I stated in my opening statement, I believe Congress changed the philosophy back in 1984——

Mr. DELAHUNT. Well, we can change it again given the——

Judge MILLER. You can.

Mr. DELAHUNT [continuing]. Realities of what we are hearing here today.

Judge MILLER. The Bail Reform Act of 1984 had us look at both dangerousness and risk of flight, and——

Mr. DELAHUNT. I understand.

Judge MILLER [continuing]. That is what we look through as we go through——

Mr. DELAHUNT. I guess what I am saying to you is that it is an existing resource for the Federal probation service, okay?

Judge MILLER. It is. It is.

Mr. DELAHUNT. They have a case load much less than most State probation services have. Is it, in your opinion, a significant additional burden to require the Federal probation service to insist upon compliance with conditions that a magistrate might feel are necessary?

Judge MILLER. That is one of the lesser steps that is used in this process, that we have the pretrial services supervise the defendant, and they do that. They require them to come in.

Mr. DELAHUNT. I understand, but I am trying to solve the problem that has been articulated here by saying use them and take the concerns that you hear expressed here and utilize them as well as a surety bond so as to ensure appearance.

Judge MILLER. When the court sets a bond, ordinarily, we set, say, a $10,000 bond, and the defendant can post that bond them-

selves. This bill would say that if a defendant violates conditions of appearance or conditions of release, if he has a compliance bond, that we could not forfeit the $10,000 even if it is the defendant's money and he took a gun and was chasing down a witness. It is a broad bill. It is broader than the focus of——

Mr. DELAHUNT. I yield back. I think I have made my point, and I suggest that we take a look at utilization of the Federal probation service.

Ms. Braswell, do you have a response?

Ms. BRASWELL. Yes, sir. Thank you.

There are two types of bond forms that we are traditionally given that exist: the AO98, which is strictly an appearance bond form, and the AO98A, which is appearance and conditions.

I can tell you that from talking with my colleagues and with the personal experiences that I have had, we are never given a choice. The choice belongs to the judge. They tell us which form we are going to use and prepare it for us to use. We are not given a choice there, and that was the one thing I wanted to say to you.

I understand what you were trying to get at with your question to the judge, and what I stated in my statement is still a fact. We could guarantee appearance, and that is it. We are not taking the judicial discretion from the judge. We are not going to interfere with his discretion. We are not going to interfere with the process.

The judge can put whatever conditions on the bond that he so wishes, whether it be the defendant home at 10 or that he does not cross the State line or whatever, get arrested again, and then he has the discretion of ordering that bond revoked or whatever he would like to do—make greater conditions, order Federal pretrial services to pick this defendant up, to monitor his behavior. He still has that discretion. This changes none of that.

Mr. SCOTT. The gentleman from California?

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I am amazed when I come to hearings, and I get to learn things. In 1984, the Bail Reform Act was part of the Comprehensive Crime Control Act which passed the House of Representatives on a motion to recommit on a continuing resolution. I happened to be the author of that motion to recommit. I spent several years preparing for that.

I did, in fact, lead the charge to change bail in the United States on the Federal system so that, in fact, you could take into consideration dangerousness in the community, so that you could have pretrial detention under certain circumstances, but I am amazed to learn that I intended to change the bail surety system in the United States.

Of course, having had experience with the 9th Circuit, it does not surprise me that they would tell me things that I did not know, since they often find things in the Constitution that are difficult, if not impossible, to find, in the first instance.

I understand here where we are talking about the seldom use of surety bonds in the Federal system. That is the point! The Federal system has basically written out surety bonds. The Federal courts have basically said, "We do not want them," and the 9th Circuit allowed you to do that.

I think we have a decision here as to whether or not we think that the Federal system is so different than the State system, most of which State systems have adopted pretrial detention along the lines that we have on the Federal system for violent criminals, but have not gotten rid of surety bonds and have not done it in the way that it has been done in the Federal system.

So I, for one, having a little bit of experience on this, believe that, number one, I am very proud of the Bail Reform Act because I believe that the people who are a danger to the community ought to be held, if that determination is made prior to trial under those circumstances that we established in the law.

But, at the same time, I believe that the bail system, having looked at it for 20 or 30 years, works pretty well. It actually is a pretty good system that allows us to have third parties go out and round up these characters if they do not show up for trial, which, otherwise, would be required by our system.

Or, Your Honor, with all due respect, if what you are telling us is that the threat is by the Federal courts that if we pass this, you are not going to let people out that you think ought to be out, frankly, we are going to take that risk. I do not want people who are a danger to the community out there, but that is the judgment that you folks make, and if you think that someone is a danger to the community prior to trial, then that is the decision you ought to make.

But please do not suggest that it is now going to be our fault that you are not going to be letting people out that you think ought to be out because we have changed this. All we are changing is whether or not the bail bonds person is going to be responsible for daily monitoring these individuals to make sure that they do comply with your other conditions as opposed to the traditional notion we have had in this country for, I think, going back almost to the beginning of the republic that bail bondsmen are a third-party mechanism by which we guarantee people show up when they are supposed to show up.

Now, if we want to change that, it seems to me Congress should change that, but I do not think the 9th Circuit should be telling us what they think we ought to do or they think we did when I cannot recall a single person discussing it in all the time that we spent coming up with the Bail Reform Act suggesting we wanted to get rid of surety bonds in this circumstance.

So, Your Honor, if you and the Judicial Conference have specific areas of overreach in this bill, as you just suggested in your last reply, we would love to see that so if amendments are necessary to ensure that we are not overreaching, we would be happy to do it.

I just want to make sure that we adjust the problem that exists now, which is the Federal system has basically determined you do not want surety bonds. That was never the intention of Congress as far as I can understand. But, then again, I was just the chief author of the legislation.

I thank you for the time.

Mr. SCOTT. Thank you.

Let me ask a couple other questions.

Oh, I am sorry. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Thank you, Mr. Chairman. I had a Transportation hearing, and I just got here. So I will have no questions at this time.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Let me ask a couple other questions.

Now, Judge Miller, as I understand the bill, this does not prohibit you from, as a condition of release, imposing behavioral standards?

Judge MILLER. No, it does not.

Mr. SCOTT. What it does is if there is a violation, it limits your sanctions in that you cannot forfeit the bond? You can impose other sanctions, revoke the bond or detain the person from then on. You could fine the person and try to get the fine from somewhere other than the bond.

Judge MILLER. Fine them for contempt? Is that what you are suggesting?

Mr. SCOTT. Yes, I guess. It is essentially what you are doing when you revoke the bond. Are there other things that you could do other than revoke the bond pretrial?

Judge MILLER. Change the conditions and perhaps add conditions to the bond. Various districts have different kinds of conditions.

Mr. SCOTT. But, I mean, we ascertained that when you get down to the list and release without conditions on a bond, if you fail that, then you get down to release with conditions. You can still get down to that and release them with the conditions. The sanction, however, could not be, if this bill passes forfeiting the bond.

Judge MILLER. Could not forfeit the bond whether it was posted by a corporate surety, by a parent or by the defendant who violated the conditions.

Mr. SCOTT. If the defendant posted bond himself and you have ascertained that, then you could get that with a fine. Is that right?

Judge MILLER. You would have to go through contempt procedures. That is the only way I can think of doing it, and that is——

Mr. SCOTT. Then how do you get money out of the bond without any similar kind of proceeding?

Judge MILLER. If it is a forfeited bond, the bond has been posted with the court. The defendant posted the $10,000, and we already have the money in hand. We just turn it over to the Treasury.

Mr. SCOTT. Well, if you are going to turn over the money that is essentially in escrow to the Treasury, how do you do that without any of the same proceedings you would need to get money out of his pocket? You are hitting him for, say, $10,000. How do you do that without the same kind of proceedings that you would fine him $10,000?

Judge MILLER. Well, there would be two separate proceedings. The procedure to forfeit the bond is a separate procedure that we go through pursuant to Rule 46. That would be a show cause hearing.

If a corporate surety was involved, they would be notified. They could come in and defend the reasons for remission. A district judge would determine that.

For contempt, it would be a totally separate proceeding with notice to the defendant that he is in contempt of court for these various reasons, for failing to follow the order of the court setting conditions of release.

So it is separate issues.

Mr. SCOTT. So, essentially, by posting the bond, you have given up your rights to be tried on the question of whether you are going to lose $10,000.

Judge MILLER. If you posted a $10,000 bond, that money comes back to you. If you appear——

Mr. SCOTT. That is right. And if you want to keep it and not give it back to the defendant, he does not have the same kind of right as he would if it were a straight-up bond.

Judge MILLER. Different types of rights. I think a bond would be a civil procedure so you would have a preponderance of the evidence standard as to whether he violated the condition. If it was a fine, a criminal fine, you, of course, have to prove it beyond a reasonable doubt. But that would be a distinction that leaps to my mind right now.

Mr. SCOTT. Do you have other questions?

The gentleman from Virginia?

Mr. FORBES. Thank you, Mr. Chairman.

And, Judge, this is for you and for Ms. Braswell.

Ms. Braswell, I am not conversant on the exact case law now as to the rights of the bondsman as to the individual that they have bonded out, but I know under a lot of the State law, it is pretty strong. You can do pretty much what you want in grabbing that individual whenever you want to grab that individual if you think that they have violated something or may be getting ready to abscond. I could be wrong on that.

Judge, is there any differentiation between the rights and the processes that you would go through if you have somebody under a pretrial release process and you perceive that they have not been in compliance versus what the bondsman might be able to do in that same situation if they perceive they were not in compliance? And maybe I have not articulated that well. Is that——

Judge MILLER. The bondsman, under Federal statute, can return the defendant to court.

Mr. FORBES. Anytime they want to?

Judge MILLER. I think they have to have a reason, just as pretrial services tells——

Mr. FORBES. I do not think they do. I mean, I think Ms. Braswell will tell you if you just feel that they are going to be leaving the State or whatever, I think—and some people out there are shaking their heads, so I do not know.

Ms. Braswell, you tell me. What are your rights?

Ms. BRASWELL. Thank you, sir.

Taylor v. Taintor, which was the United States Supreme Court decision 100-some-odd years ago, gives the bail agent the right to apprehend and surrender the defendant at any time.

In some State laws, you are still allowed to apprehend the defendant based on that decision, but there are some State rules and regulations in certain States that if you put this individual back prior to his failing to appear that you might have to return some

of his money. But *Taylor v. Taintor* gives us clear and distinct rights to apprehend the defendant at any time.

Mr. FORBES. I did not realize the case, but I thought that was the law.

But, Judge, if we let them out on a pretrial supervised basis, how do you then determine that they may be in non-compliance? Do they go through all the due process rights and have hearings on that?

Judge MILLER. The pretrial services officer will write a violation report to me. He will affirm it under oath. I will issue a warrant for their arrest. The marshals will arrest them. Then we will have a hearing to determine whether they should be revoked. Eighteen USC 31 49 is the surrender of an offender by a surety, and Ms. Braswell is correct. She can bring them in for any reason.

Then, subsequently, we would have a hearing just as if the marshals had arrested him on my warrant to determine whether it should be revoked and to use this language, and they absolve the surety of responsibility to pay all or part of the bond in accordance with Rule 46.

Mr. WEXLER. Mr. Chairman? Could we just have the one quick opportunity to respond again?

Mr. SCOTT. Yes, sir.

Mr. WEXLER. With all due respect to the judge again, I have sat here trying to figure out the example that the judge gave in terms of the gentleman who in theory would be provided release based on the surety bond, who then waved around the gun, and then the judge gave the example of this bill would allow—I think in effect what the judge was saying is one of the reasons why the bill ought to become law is because this bill would allow somehow that defendant to be the beneficiary of his errant behavior and would not have his money forfeited.

I am trying to understand the logic behind the example because the judge defends the current situation, which, admittedly, he testified is rarely, if ever used. In 1 percent of the cases is a surety bond issued.

So, under the current system, if a judge determined that that defendant should be released—and that is the only time this would be relevant because if a judge determined he should not be released, he would not be out to be waving his gun in the first place—under the current system, 99 out of 100 times, the defendant that the judge let out would wave his gun and there would be no money lost anyway!

So how is it that if we pass this bill, we would somehow be rewarding this behavior that today is not rewarded? I cannot figure it out.

Mr. SCOTT. I would like to thank the witnesses for their testimony.

The Members may have additional written questions for the witnesses which will be forwarded to you, and, if so, I would ask you to answer them as promptly as you can so they can be made part of the record.

We have several documents for the record, two written statements for the record: One has been provided by Mr. Gallagher of

the Surety & Fidelity Association; the second has been provided by Mr. Roche, past president of the Professional Bond Agents.

[The information referred to follows:]

PREPARED STATEMENT OF EDWARD G. GALLAGHER,
THE SURETY & FIDELITY ASSOCIATION OF AMERICA

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

Testimony of Edward G. Gallagher

Before the U.S. House of Representatives

Subcommittee on Crime, Terrorism, and Homeland Security
Committee on the Judiciary

HR 2286 -- Bail Bond Fairness Act of 2007

June 7, 2007

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Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary of the United States House of Representatives

HR 2286 – Bail Bond Fairness Act of 2007
Testimony of Edward G. Gallagher
June 7, 2007

Mr. Chairman, thank you for inviting us here today to testify on a matter that is critical to the surety industry and the efficient functioning of the federal courts in criminal matters.

The Surety & Fidelity Association of America (SFAA) is a trade association of approximately 500 insurance companies that are licensed to write surety and fidelity bonds. SFAA members are sureties on a significant percentage of the bail bonds written at both the state and federal levels.

Surety bail bonds help the criminal judicial system to function by allowing release of defendants who otherwise would have to be held in pretrial detention and by assuring that third parties have an interest in recovering any defendant who fails to appear as required by the court. The bail agent and surety company, together with any friends or relatives of the defendant who agree to indemnify the surety should the defendant fail to appear, have a financial interest in his or her appearance in court.

If the bail agent and surety believe that the defendant is likely to flee, they can arrest the defendant and surrender him or her to the U.S. Marshal. 18 U.S.C. §3149 specifically provides for the surrender of an offender by the surety.

If the defendant fails to appear, the bail agent and surety can locate and arrest the defendant and return him or her to custody. In return for recovering the defendant, the bail agent and surety can seek remission of the bond forfeiture pursuant to Federal Rule of Criminal Procedure 46(e)(2). This gives the bail agent and surety, and anyone who has helped secure the release of the defendant by indemnifying the surety, a strong financial incentive to locate and recover an absconding defendant.

This basic system predates the United States and is part of the Constitution via the Eighth Amendment forbidding excessive bail. It has worked well at both the state and federal level for over 200 years.

Recently, however, a serious obstacle to the use of commercial bail bonds has arisen at the federal level. In addition to appearance, federal courts can impose other conditions on release of the defendant. These other conditions typically include not committing a new offense, not leaving a specified jurisdiction without permission, not using controlled substances, and participating in drug or alcohol counseling. These are all worthy goals, and the defendant should have every incentive, including continued pretrial release, to abide by them. The problem that has arisen, however, is the extension of bail bond forfeitures in the federal system to violation of these behavioral conditions of release.

The bail agent and surety can monitor the defendant, try to make sure he or she appears, and seek to recover anyone who fails to appear. Non-appearance can be remedied by diligent recovery efforts, and Rule 46 gives the bail agent and surety an incentive to undertake such

recovery efforts. Violation of behavioral conditions of release, however, cannot be controlled by the bail agent or surety, and a violation cannot be remedied after it has occurred.

The addition of such behavioral conditions to the risk undertaken by the bail bond surety, therefore, is a significant increase in the risk to the surety without any counterbalancing benefit to the Government or the public. The surety cannot prevent the defendant from using drugs or failing to participate in drug or alcohol programs or leaving the specified jurisdiction, and if the defendant breaches such a condition the surety can do nothing to remedy the violation. This makes it less likely that the surety will be able to justify the risk of providing a bail bond for a federal defendant and correspondingly more difficult for the defendant to obtain a bail bond. The result is inevitably either more federal defendants in pretrial detention, or more federal defendants released without the safeguards of a commercial bail bond, or both.

The court is deprived of one of the alternatives historically available to assure the appearance of the defendant. If the defendant is released without a commercial bail bond, he or she is substantially less likely to appear, and, of course, not subject to recovery by the bail industry.

SFAA and its members, therefore, support HR 2286 and urge the Subcommittee and Committee to approve it. By making appearance the only condition on which the surety bail bond can be forfeited, the bill would make bail bonds more available to federal defendants without decreasing the ability of courts to condition the release of defendants on compliance with behavioral standards. The bill, if enacted, will improve the appearance rate for federal defendants without adversely impacting defendants' compliance with other conditions that the bail agent and surety cannot control.

PREPARED STATEMENT OF ARMANDO ROCHE, MCBA,
PAST PRESIDENT, PROFESSIONAL BAIL AGENTS OF THE UNITED STATES

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Prepared Statement
of
Armando Roche, MCBA, Past President
Professional Bail Agents of the United States

on

H.R. 2286,
The Bail Bond Fairness Act

Before the Committee on
Crime, Terrorism and Homeland Security

Room 2141,
The Rayburn House Office Building

June 7, 2007

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PREPARED STATEMENT OF ARMANDO ROCHE

Good morning Chairman Scott and members of this distinguished committee. I would like to thank you for allowing me to submit testimony in support of H.R. 2286, the Bail Bond Fairness Act.

My name is Armando Roche. I am a past president of the Professional Bail Agents of the United States and a member of its Board of Directors for the past 26 years. I also serve as a member of the Surety and Fidelity Association of America's Bail Insurance Company committee.

I am the CEO and owner of Roche Surety and Casualty Co., Inc. a Florida domiciled Insurance Company approved to write bail bonds across the county. We are also approved by the Federal Registry to underwrite bail bonds in the Federal Courts.

A bail bond agency in Tampa, FL, which I have owned and operated since 1975, has written thousands of bail bonds in the state court system guaranteeing the appearance of defendants in court. However, that same agency has only written one bond in the Federal Courts of the middle district of Florida.

Due to the Vaccaro decision our company, Roche Surety and Casualty Co., does not encourage it's agents to write Federal bonds. The reason is a basic business decision, the Vaccaro decision makes the agent and the Insurance Company liable for violation of conditions imposed by a judge. Conditions, I would add, that no one, including the judge setting those conditions, can predict will not be violated by a defendant. For example, if the judge imposes a condition on you not to drink alcohol and sets a bond on you for fifty thousand dollars and you leave here and go home and have a drink, the court could forfeit the bail and order the company to pay the fifty thousand. Who, in their right mind, would want to take on that responsibility?

Even with this high risk of liability, my company wrote a total of 27 Federal bonds in 2006 and since the beginning of this year, has written a total of 23 Federal bonds. Because of the risk, when one of our agents does write a bond, we encourage them to secure the bond to the fullest extent possible.

Traditionally and prior to the Vaccaro decision, bail bonds were written on the guarantee of the defendant's appearance in court and not for violation of conditions. The net effect of the Vaccaro decision was to reduce the amount of bonds written by Insurance Companies in the Federal Courts. H.R. 2286 will restore fairness on the forfeiting of a bail bond for its intended purpose of guarantying a defendant's appearance in court and not the impossible prediction of human behavior.

I ask for your support of H.R. 2286, The Bail Bond Fairness Act.

Thank you.

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Mr. SCOTT. There are other things coming before the Committee. The hearing is now adjourned.

[Whereupon, at 11:09 a.m., the Subcommittee was adjourned.]

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