The Federal Systems' "No Conditions Suffice" Limiting Process For Detention is Not Enough

Lately I've been seeing new pretrial detention provisions that have detention eligibility nets of varying narrowness, but that all seem to have settled on a further limiting process that consists of a statement requiring judges to find that that "no condition or combination of conditions" suffice to provide reasonable assurance of court appearance of public safety in order to detain within the net. This limiting process, even when paired with a clear and convincing evidence burden, is a necessary component of a detention provision, but it is simply not enough.

Don't get me wrong, forcing a court to look at alternatives (which it would likely have to do to determine that a certain set of conditions is insufficient) is very important, but the "no conditions" finding cannot be used alone to determine detention within the eligibility net. Please bear with me as I explain.

For a number of reasons when America was founded, we settled on the model of "no bail" provisions having a detention eligibility nets and further limiting processes to provide a way out of detention even for those within the nets. The first nets/processes were paired with the right to bail and said things like, "except capital defendants (the net) when the proof is evident and the presumption is great" (the further limiting process). In America we have always set out the charges that might lead to detention (likely to provide fair notice under the Due Process Clause), and we have never allowed automatic detention based on charge. We can quibble about whether a process to find proof evident is practically the same as detaining based simply on the charge, but that's another post. Just realize why we have what I call "further limiting processes," which is to allow a way out of detention by further delineating the findings a judge must make to detain within the net. America wanted this due to fundamental notions of liberty and freedom.

If you look at all the states today, you'll see a variety of nets and limiting processes, but they exist everywhere. Some are good, but most are bad and some have been successfully challenged on constitutional grounds. Don't confuse the limiting process – which is technically the finding that judges must make for intentional detention within the net – with the other procedural due process stuff that has to happen in a detention hearing. They're intertwined, but I find it easier to think of the three things (nets, further limiting processes, and procedural requirements) separately. Up until about the 1960s, states mostly had the

"categorical" nets and processes, saying all persons are bailable except certain categories of crimes, such as capital offenses or treason, when the proof is evident and the presumption is great. Those nets and processes worked well in America until about the 1800s, when we started having second thoughts about who should be released and detained pretrial. For now, just realize that back then bailable defendants (mostly noncapital defendants) were expected to be released, but beginning in the 1800s many weren't for lack of personal sureties and, later, the inability to self-pay or to pay a bondsman. At the same time in the states, judges were gradually seeing people who were not in the various nets, but whom they wanted to detain on purpose without playing the game of setting high dollar amounts. This caused the courts to struggle with how to do pretrial detention for many decades.

Fast forward to the 1960s. When America passed the Bail Reform Act of 1966, it was a release act. It simply didn't speak directly to intentional detention for noncapital defendants and so it was designed to get noncapital defendants out of jail. It provided presumptions of release on recognizance, and listed a variety of release conditions if OR didn't work, but it did not say what to do if a judge felt that no conditions would suffice to bring people back to court (at the time, public safety was not a valid consideration at bail). Because of this we saw a great deal of confusion in the federal case law when judges would decide in any given case that none of the conditions listed in the 1966 Act were sufficient, but when there was no explicit provision dealing actually dealing with detention. These cases – what I call the detention cases -- were hit and miss, and I wrote about them at length in my *Model Bail Laws* paper. It was those cases, though, that provided a historical basis for only detaining American defendants if they demonstrated extreme risk to do a very bad thing, like commit a serious or violent crime or to intentionally flee. For now, just realize that in this period, judges were sometimes trying to detain on purpose by saying "no conditions sufficed" and other judges were doing the same thing simply by using money without making a record. The whole thing was a mess.

When Congress passed the DC Act of 1970 (the first to allow preventive detention based on danger) and the Bail Reform Act of 1984, it intended to fix the detention issues by: (1) getting rid of money's ability to detain; and (2) providing a process for intentional detention that included a limited detention eligibility net and a further limiting process. The process chosen an ultimately enacted into the BRA of 1984 was to let judges detain within the net if there were "no conditions or

combination of conditions" that would reasonably assure public safety or court appearance." I'm convinced that Congress used this "no conditions" process because: (a) it was aware of the detention cases, in which judges made use of the phrase "no conditions" in trying to apply the 1966 Act to detention; (b) in a statute like the BRA of 1984, which listed all the various available conditions, it seemed logical to express unmanageable risk by alluding to the inability to use that list; and (c) the federal system already had pretrial services in every district by 1982, and so Congress likely felt it had the resources to provide supervision for the release conditions mentioned in the 1984 Act.

In sum, the "no conditions or combination of conditions" limiting process was the best Congress could do at the time to deal with the history, the current risk research (which was scant), and the state of affairs it had in the way of resources. It might have made sense back then, but it does not make sense any longer.

First, the "no conditions" standard is subjective. One judge may decide no condition suffice, while another may not. Second, it is resource based. If a jurisdiction does not have pretrial services and the ability to supervise on an array of nonfinancial conditions, it makes no sense to tell it that it can detain based on a finding that no condition suffices. If a jurisdiction does not have any options except jail and flat out release, it will likely frequently find that no conditions suffice to manage the risk.

Third, it does not make the best use of the risk research, the history, and the law. In a sense, the "no conditions" process is a statement of risk. It is basically saying that because there are no conditions that suffice to manage the risk, then this person must be objectively risky. A much better limiting process would be based on current notions of defendant risk, which is what I did in my current model.

Fourth, it doesn't work to rein in detention. In the federal system, even with all its resources to supervise conditions, the "no conditions" limiting process (along with an ever-widening net, etc.) has led to detention rates of as high as 80%.

Realize that the "no conditions" limiting process is not the only one out there, but it seems to be the default when people don't know what else to do. Other states have adopted other limiting processes, which are better, and my model has one that I think surpasses all the others. The "no conditions" process is simply the one people tend to turn to first, and its use in the federal system apparently makes it seem somehow palatable. Also, it is a necessary part of a better process, so it's not

something you want to throw out – you simply have to add to it because it is insufficient, by itself, in achieving our goals.

Accordingly, some of us (including a few on this list serve) came up with a better limiting process for American jurisdictions to pair with a limited charge-based detention eligibility net. It has the following elements:

1. A clear and convincing burden of proof.
2. A statement of risk (instructing a judge that he or she may only detain those within the detention eligibility net upon clear and convincing evidence of facts and circumstances showing "substantial" or "extreme" risk (the latter of which I favor simply due to its use historically in the detention cases) of something very bad (see number 3).
3. It is incredibly important that the statement of high or extreme risk must also articulate an answer to the "risk of what" question. It is not enough to say you will detain someone for high risk to public safety broadly. Historically in America, we detain for extreme risk to commit a serious or violent crime or to intentionally flee to avoid prosecution, not extreme risk to commit any crime whatsoever or to simply miss court. Please, if you get nothing else from this post, get this: you have to answer the "risk of what" question, especially for a primary net based solely on prediction, or you will undoubtedly over-detain.
4. This risk statement is then paired with the "no conditions" language to force courts also to show unmanageability and that it worked through alternatives.
5. In my opinion, it must also include a requirement of finding facts and circumstances beyond anything that can be gleaned from a risk tool in order to detain. We simply cannot have a jurisdiction say, "We detain all high risk people, and we use a tool to determine high risk."
6. This primary net and process must be also paired with a secondary net and process to deal with pretrial failure. All this is explained in my papers, and, yes, the secondary net makes it slightly easier to detain after pretrial failure.
7. And, as mentioned before, this limiting process must also be paired with all of the procedural due process elements like those reviewed favorably by the U.S. Supreme Court in *Salerno.*
8. Finally, a detention provision such as this must be coupled with a provision eliminating money as a detention mechanism or, as we have seen, judges will simply use money to avoid the lawful process.

The good news about this new American limiting process is that it can overcome flaws with any particular net. Indeed, as we worked through the limiting process for my paper, we didn't all agree on my net, but we felt that the process – which focuses on answering the "risk of what" question, keeps actuarial, aggregate risk at a minimum, and goes far beyond the "no conditions" language, is capable of reining in detention of even an extremely wide net.

All of the questions I have been receiving lately have been answered through an examination of this net/limiting process framework.

For example, Texas has just introduced an unlimited net (which is bad) paired with the "no conditions" process. Obviously, this cannot stand, as even the federal system's documented failed use of the "no conditions process" is coupled with an eligibility net, which the current proposal lacks. Texas is looking at some serious pretrial detention and possibly having the whole thing overturned on court unless it either: (1) tightens the net; (2) tightens the limiting process; or (3) preferably, both.

As another example, the task force in California decided not to recommend changing the constitution, which was done, I think, because that task force believed that the "no bail" provision already had a narrow net and a sufficiently decent limiting process with many of the elements listed above.

I know it's tempting to use the "no conditions" limiting process, simply because one sees it everywhere. But do realize its extreme shortcomings, and the fact that we have a much better solution to the question of, "Whom should we detain?"

In sum, while the "no conditions or combination of conditions" limiting process may have made sense at one point in American history, it is simply insufficient – by itself – to be used now.

Keep up the great work!

Tim