Pretrial Services—A Family Legacy

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AFTER BEING SWORN in as a United States probation and pretrial services officer for the Western District of North Carolina in September 1991, I arrived at the Maritime Institute of Technology and Graduate Studies campus in Maryland for my two-week training. Kate Lynott of the Federal Judicial Center facilitated the Pretrial Services track. As the designated pretrial officer for Asheville, I settled into class to learn the pretrial ropes. During the first class session, Kate, a pretrial expert, recounted the history of federal pretrial services. When Kate reached the 1960s, she mentioned the name Senator Sam J. Ervin, Jr. of North Carolina and his role in national bail reform. While Sam J. Ervin, Jr. is most widely known for his chairmanship of the Select Committee on Presidential Campaign Activities, informally known as the Senate Watergate Committee, I knew him as my grandfather. Armed with Kate's information on the history of pretrial services, I began to research my grandfather's role in bail reform and was stunned to learn the level of his involvement in my chosen field. What his contributions taught me for my work ahead was the necessity to keep the presumption of innocence first and foremost in my investigations of defendants pending trial, and to never forget that each person before me is an individual warranting his or her own detailed investigation in order for the court to make appropriate release decisions.

Prior to occupying one of North Carolina's Senate seats, my grandfather practiced law in Morganton, a rural region in Western North Carolina. During the period of prohibition in the 1920s and early 1930s, he represented many people charged with the illegal manufacture of moonshine liquor in the North Carolina mountains. In *Just a Country Lawyer: A Biography of Senator Sam Ervin*, Paul R. Clancy (1974) writes,

> [Ervin] became interested in bail reform because of his many legal contacts with moonshiners. "Their only vice was makin' moonshine likker and they felt that they were doin' no harm, that they had a prescriptive right to do that. They were honorable, paid their debts, told the truth." A prison official told him they made very well behaved inmates. Many of these upstanding citizens, unable to pay bail while awaiting trial, languished in jails where, as a former client wrote to him, there were many bad and disreputable men and he didn't want to associate with them. (p. 108)

As my grandfather knew, these men had homes, families, and friends in the region and that they were not going to leave. What they did not have was money with which to post bail. Furthermore, always at the forefront of my grandfather's mind was the presumption of innocence for every person charged with a crime. In his book *Preserving the Constitution*, my grandfather wrote,

> As a country lawyer who represented many poor people charged with bailable offenses, I became aware of the painful truth that multitudes of poor people, who were afterwards acquitted, were unjustly imprisoned while awaiting trial solely on account of their poverty. This is simply no way in which society can adequately compensate such persons for this wrong. (Ervin, 1984, p. 296)

On June 11, 1954, Sam Ervin was sworn in as a United States senator, interestingly enough, by then-Vice President Richard Nixon, the future president of the United States who would be investigated by the Senate Watergate Committee and would ultimately resign on August 9, 1974. During his twenty-year tenure in the Senate, my grandfather addressed numerous issues related to the United States Constitution and the rights of its people. While I do not agree with some of the positions my grandfather took while in the Senate, I do agree with his efforts to make the process of bail release available to all persons, and not just to those with money.

In order to substantiate his beliefs and concerns regarding bail reform, in January of 1961 when my grandfather became the Chairman of the Senate Subcommittee on Constitutional Rights, he sought out opinions of judges, lawyers, and law professors concerning constitutional issues. In *Preserving the Constitution*, he wrote, "Many of them suggested that the most serious problem was the unhappy plight of poor people imprisoned while awaiting trial because of their inability to give monetary bail" (Ervin, 1984, p. 296). Based on the responses from these experts, and because of his personal concerns about the plight of the pretrial incarceration of the poor in rural North Carolina, the Subcommittee began work to address bail reform.

Concern about unnecessary incarceration of defendants awaiting trial was not limited to the Senate subcommittee. At the same time studies were underway in New York, Philadelphia, and Washington regarding bail practices. The Vera Institute was created to study bail reform, with its first effort the

Manhattan Bail Project. In *Senator Sam Ervin: Last of the Founding Fathers*, Karl E. Campbell (2007) writes,

> Appalled by the numbers of poor defendants who spent months in jail because they could not afford bail, the founders of the Manhattan Bail Project worked to convince judges that most defendants, regardless of their economic status, could be released on their own recognizance and trusted to return for their day in court. Of the 2,195 defendants released at the urging of the Vera Foundation, only fifteen failed to appear for trial—a default rate far better than those who had been released on monetary bail. The Manhattan Bail Project was so successful that cities across the country started their own bail reform programs and Attorney General Robert Kennedy agreed to sponsor the National Conference on Bail and Criminal Justice in 1964. On the eve of the National Bail Conference, Ervin introduced a series of bills designed to reform bail practices in the federal courts. (pp. 189-190)

It should be noted that until this point no action had been taken by Congress on the issue of bail since the Judiciary Act of 1789. Subcommittee hearings were held in 1964, but Congress took no action. Based on testimony from Attorney General Kennedy, staff from the Manhattan Bail Project and the District of Columbia Bail Project, and a host of other interested entities, the Subcommittee realized that patches to the current system would not suffice; instead, large-scale reform was necessary.

On March 4, 1965, my grandfather introduced S. 1357, an omnibus bail reform bill. Sixteen senators were listed as co-sponsors. Included in this bill was a proposal to reflect the term "release" instead of "bail" in the heading of Chapter 207 of Title 18, representing the full-scale changes sought. Hearings were again conducted and with amendments, the bill was unanimously passed by the full Senate on September 21, 1965. The final bill included factors that courts are still required to consider in pretrial release, such as the nature and circumstances of the offense charged, the weight of the evidence and the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, prior criminal record, and any history of failure to appear. Despite the fact that the House failed to take action on the bill before adjournment in 1965, bail reform remained an important issue.

In his address to Congress on March 9, 1966, President Lyndon Johnson urged Congress to take steps to fight crime and specifically requested passage of bail reform. In the ensuing House hearings, amendments were made to the Senate bill. My grandfather wrote in his article "The Legislative Role in Bail Reform," written for the *George Washington Law Review* in March 1968, that a Senate-proposed release condition requiring supervision by probation officers was deleted. He stated,

> . . . according to the House report, since probation officers are agents of the court whose functions normally come into play only after conviction, then use at the pretrial stage might be prejudicial to the defendant. Additional supervisory duties would further burden the already pressed probation system.

Perhaps this language assisted in the formation of later laws relating to pretrial services officers and the differentiation between pretrial and probation officers.

The House adopted their amended version of the bail reform bill on June 7, 1966; two days later, the Senate passed the amended version. It should be noted that the only major opposition encountered in both the Senate and House hearings was voiced by professional bondsmen.

In a formal ceremony at the White House on June 22, 1966, President Johnson signed the Bail Reform Act of 1966 into law, stating, "so this legislation, for the first time, requires that the decision to release a man prior to trial be based on facts—like community and family ties and past record, and not on his bank account" (qtd. in Ervin, 1984, p. 301). In the words of the Act, "a man, regardless of his financial status—shall not needlessly be detained—when detention serves neither the ends of justice nor the public interest." Conditions of release were also included in the Act for defendants whose personal recognizance might not reasonably assure their appearance for trial, and included third-party custodians and restrictions on travel, association, or residence. I was amazed by how many aspects of this Act transcend time and how our pretrial language differs little in 2015. As my grandfather noted in his *George Washington Law Review* article, work on bail reform took five years to complete. He stated, "…the history of the Bail Act demonstrates the kind of careful, objective, and deliberate study which should always precede changes in our highly complex system of criminal justice" (Ervin, 1967).

During the various hearings prior to the passage of the Bail Reform Act of 1966, and afterwards in considering bail reform for the District of Columbia, discussions occurred regarding "preventive detention." The issue was again raised by President Richard Nixon, who wanted Congress to amend the 1966 act to "empower federal judges to deny bail to persons charged with federal crimes prior to trial if they found their release would pose a risk to the community" (Ervin, 1984, p. 303). In a letter to Professor Joshua Lederberg at Stanford University on behalf of the Subcommittee on Constitutional Rights, my grandfather voiced his concerns about this proposed amendment:

> . . . the pretrial jailing of so-called "dangerous defendants" . . . raises grave constitutional questions when considered in the light of the 8th Amendment's guarantee of reasonable bail, the due process clause of the 5th Amendment, the 6th Amendment's guarantee of access to counsel and the opportunity to participate in the preparation of a defense, and the due process and equal protection clauses of the 14th Amendment. In my view jailing people because of possible future misconduct repudiates the most basic principles of a free society and smacks of a police state rather than a democracy under law.
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> Not only does the proposed pretrial detention unfairly deprive an individual of the opportunity to assist in his defense, but it may cost him his job, it is detrimental to his family life and it subjects him to the physical and psychological degradation of prison life. Moreover, I do not believe that judges are gifted with the prophetic powers necessary to determine accurately which individuals represent a danger to the community. The law would therefore result in the imprisonment without trial of many innocent persons and would be highly susceptible to abuse. (Ervin, 1969, p. 2)

In this letter my grandfather indicated that crimes committed by those released on bail actually decreased after passage of the 1966 act. For instances in which crimes were committed, the majority of those persons had been on release more than 60 days. His recommendation was to address the delays in which trials occurred and not to amend the act as passed in 1966. The letter concludes with the following summary: "In my judgment, it is infinitely better to strive for the constitutional

goal of speedy trial than to resort to the enticingly simple but desperate and unjust device of pretrial detention" (Ervin, 1969, p. 2).

Despite the Subcommittee on Constitutional Rights' concerns, the District of Columbia Court Reform Bill pass\ed Congress containing a preventive detention provision. My grandfather continued his advocacy for a speedy trial act and achieved its enactment during his last week in the Senate in 1974. The Federal Speedy Trial Act of 1974 also included the creation of 10 "demonstration" pretrial services agencies to prevent criminal conduct by defendants released on bond and to address nonappearance of those released. This act led to the Federal Pretrial Services Act of 1982, which extended pretrial services agencies to all federal judicial districts.

My grandfather's involvement in bail reform sparked a passion in me for pretrial work. Realizing the effort he put toward fairness for individuals facing trial, I took his words and efforts into my own day-to-day work and vowed to share what he and I both viewed as important in the pretrial arena. As part of this endeavor I was privileged to serve on the national Pretrial Services Working Group with an amazing group of pretrial experts to help update and teach our national policy guides, to present pretrial information at National Association of Pretrial Services Agencies conferences, to assist in the introduction of the federal Pretrial Risk Assessment Tool, and to help prepare a document designed to move pretrial supervision into the future. I encourage each person in the federal system to use his or her expertise on both a local and national level to further the pretrial objectives. As a result of my own involvement, I have been rewarded with knowledge and friendships lasting throughout my career and into retirement.

One aspect of pretrial work that warrants further effort is the need to increase the rate of release of defendants on bond. In recent years, release rates have declined, although instances of failure to appear have remained steady. While on bail release, defendants can continue with their employment, maintain contact with family members, and work closely with counsel to prepare the best possible defense. Recent research reflects that defendants who are released on bond preceding plea or verdict are more likely to be successful on post-conviction supervision. Furthermore, defendants who are released on bond frequently receive shorter sentences. By following the mandates of the Bail Reform Act of 1966 and subsequent laws regarding pretrial release, not only are we maintaining the dictates of the presumption of innocence, but we are also saving governmental monies when finances are tight. And there is no indication that this comes at the expense of public safety. We should never lose sight of the fact that pretrial services is the front door to the federal criminal justice system for defendants. Pretrial obligations are statutory and every defendant requires a personal investigation and assessment. It is often hard to take an adversarial position in recommending release, but it is incumbent upon each practitioner to put forth the best information available to the court for release consideration. By using the individual investigation, the Pretrial Risk Assessment tool and the officer's judgment, more recommendations for release can and should occur. And the skill of the United States probation and pretrial services officers in supervision will continue to assist in ensuring a defendant's appearance for trial.

During my research, I personally learned a great deal about my grandfather's beliefs about the criminal justice system, a system in which I worked for 34 years. One of his quotes speaks strongly to me. He wrote, "As a lawyer, legislator and judge, I entertained the abiding conviction that the administration of criminal justice is the most sacred obligation of government" (Ervin, 1984, p. 296). Throughout my career I, like so many others, worked hard to uphold the laws and to balance the rights of individuals against the safety of our communities. I have been extremely proud of this opportunity to honor my grandfather's work to "uphold this most sacred obligation of government."

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