

# Putting the "Mandatory" Back in the Mandatory Detention Act

Mani S. Walia

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

## Recommended Citation

Walia, Mani S. (2011) "Putting the "Mandatory" Back in the Mandatory Detention Act," *St. John's Law Review*: Vol. 85 : No. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol85/iss1/4>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

# PUTTING THE “MANDATORY” BACK IN THE MANDATORY DETENTION ACT

MANI S. WALIA<sup>†</sup>

## INTRODUCTION

Suppose a criminal defendant is found guilty of violating a serious federal law, like hostage taking, possessing child pornography, or first-degree murder, and is sentenced to multiple years’ imprisonment.<sup>1</sup> Will he be detained during the period after conviction but before sentencing? The Bail Reform Act establishes the procedure by which district courts determine whether a convicted person is eligible for bail pending sentencing or appeal.<sup>2</sup> It provides that a person who is found guilty of certain serious offenses—crimes of violence, offenses with the maximum sentence of life in prison or death, or serious drug offenses—“and is awaiting imposition or execution of sentence be *detained*,” unless a sole exception applies.<sup>3</sup>

This Article’s position is straightforward: Unless the convicted person satisfies that exception, he should be detained pending sentencing under the Bail Reform Act’s mandatory detention provision, codified at 18 U.S.C. § 3143(a)(2).<sup>4</sup> An

---

<sup>†</sup> Mani Walia is an associate at Baker Botts, L.L.P. He previously served as a law clerk to the Honorable Jane R. Roth of the United States Court of Appeals for the Third Circuit and to the Honorable Hayden Head of the United States District Court for the Southern District of Texas. He would like to thank his wife, Sabina, for her invaluable and cheerful support, insight, and editing on this—and all—writing projects.

<sup>1</sup> See 18 U.S.C. § 1203 (2006) (proscribing hostage taking); 18 U.S.C. § 2252 (proscribing child pornography) (2006 & Supp. II); 18 U.S.C. § 1111 (proscribing murder) (2006).

<sup>2</sup> See *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991).

<sup>3</sup> See 18 U.S.C. § 3143(a)(2) (emphasis added); *DiSomma*, 951 F.2d at 496.

<sup>4</sup> See 18 U.S.C. § 3143(a)(2). This provision, entitled “Release or detention pending sentencing or appeal,” provides as follows:

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

uncontroverted reading of § 3143(a)(2) supports this conclusion. Moreover, the provision's legislative history evinces congressional desire to "require the detention, in most cases, of a convicted criminal pending sentence[ing] or appeal[,] . . . allowing release only under *very narrow circumstances*."<sup>5</sup>

But all eight United States Courts of Appeals that have analyzed this issue nevertheless take the position that the convicted person can escape detention during the period after conviction but before sentencing even though the mandatory detention provision applies—and its sole exception is not satisfied—if the district court finds "exceptional reasons."<sup>6</sup> The "exceptional reasons" clause, however, is found in a section of a different federal statute, 18 U.S.C. § 3145(c), which is titled "*Appeal from a release or detention order*."<sup>7</sup> And

---

(A)

- (i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or
- (ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

*Id.*

<sup>5</sup> 136 CONG. REC. 3465 (1990) (statement of Rep. Glickman).

<sup>6</sup> See *United States v. Christman*, 596 F.3d 870, 871 (6th Cir. 2010) (order reversing authorization of detention pending sentencing) ("[W]e hold that the district court erred in not considering whether Christman established exceptional reasons to support his release pending sentencing."); *United States v. Goforth*, 546 F.3d 712, 716 (4th Cir. 2008) (concluding that district courts may grant bail to convicted persons pending sentencing "under § 3145(c) when 'exceptional reasons' exist"); *United States v. Garcia*, 340 F.3d 1013, 1014 n.1 (9th Cir. 2003) ("Although the 'exceptional reasons' provision appears in a subsection that otherwise concerns actions taken by appellate courts, we agree with the other circuits to have addressed the issue that the district court has authority to determine whether there are exceptional reasons."); *United States v. Mostrom*, 11 F.3d 93, 95 (8th Cir. 1993) (per curiam); *United States v. Jones*, 979 F.2d 804, 806 (10th Cir. 1992) (per curiam); *United States v. Herrera-Soto*, 961 F.2d 645, 647 (7th Cir. 1992) (per curiam); *DiSomma*, 951 F.2d at 496; *United States v. Carr*, 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam) ("[W]e conclude that the 'exceptional reasons' language of § 3145 may be applied by the judicial officer initially ordering such mandatory detention, despite its inclusion in a section generally covering appeals."). From 2002 until March 2010, when it issued *Christman*, the Sixth Circuit had agreed with its sister circuits through an unpublished opinion. See *United States v. Cook*, 42 F. App'x 803, 804 (6th Cir. 2002) (unpublished) (stating that district courts are "not precluded from making a determination of exceptional circumstances in support of release"). Incidentally, four of the eight published decisions were issued by the courts themselves as per curiam decisions.

<sup>7</sup> 18 U.S.C. § 3145(c) (emphasis added).

18 U.S.C. § 1345(c)'s very first sentence explicitly limits its ambit to “[a]n appeal from a release or detention order . . . governed by the provisions of section 1291 of title 28 and section 3731 of [title 18].”<sup>8</sup> Both 28 U.S.C. § 1291 and 18 U.S.C. § 3731 deal solely with appellate courts’ reviews of final orders from district courts.<sup>9</sup>

This Article contends that 18 U.S.C. § 3145(c) is confined under its plain language to use only by appellate courts in reviewing district courts’ bail orders. In addition, the section’s legislative history unequivocally displays congressional desire to limit the application to appellate courts only: Its sponsor noted that the “exceptional circumstances” clause applies “*in the appeals setting*.”<sup>10</sup> Indeed, some of the eight appellate courts concede that their approach allows district courts to use a clause contained with a statutory section pertaining to appeals.<sup>11</sup> But they decided to sidestep that inconsistency, the section’s legislative history and, most importantly, the section’s plain language all in an effort to promote their view of fair results over fidelity to text or congressional intent.<sup>12</sup>

The eight courts of appeals do correctly identify the first statutory inquiry that a district court must undertake when a convicted person files a motion seeking bail pending sentencing under 18 U.S.C. § 3143(a)(2).<sup>13</sup> Specifically, the first question is to evaluate whether the convicted person would be subject to 18 U.S.C. § 3143(a)(2)’s mandatory-detention

---

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> See 28 U.S.C. § 1291; 18 U.S.C. § 3731; see also *United States v. Chen*, 257 F. Supp. 2d 656, 661 (S.D.N.Y. 2003) (stating that both 28 U.S.C. § 1291 and 18 U.S.C. § 3731 “relate solely to review of a final order of a district court by a court of appeals”).

<sup>10</sup> 135 CONG. REC. S15,202 (daily ed. Nov. 7, 1989) (statement of Sen. Simon) (emphasis added).

<sup>11</sup> See, e.g., *Garcia*, 340 F.3d at 1014 n.1 (acknowledging that its interpretation allows district courts to use a provision contained in a section that covers appeals); *Carr*, 947 F.2d at 1240 (same); cf. *United States v. Cantrell*, 888 F. Supp. 1055, 1056 (D. Nev. 1995) (stating that 18 U.S.C. § 3145(c) “on its face” appears “to allow only appellate courts to make the determination whether ‘exceptional reasons’ make detention inappropriate”).

<sup>12</sup> See *United States v. Salome*, 870 F. Supp. 648, 652 (W.D. Pa. 1994) (stating that the courts of appeals’ decisions “ignore certain fundamental principles of statutory interpretation”).

<sup>13</sup> See, e.g., *United States v. Jones*, 979 F.2d 804, 805 (10th Cir. 1992) (per curiam) (noting that the district court properly analyzed § 3143(a)(2)’s exceptions before denying bail to the criminal).

provision,<sup>14</sup> which requires that convicted persons who plead or are found guilty of certain crimes be presumed to be mandatorily detained while awaiting sentencing.<sup>15</sup> The convicted person would be able to argue a single, two-part exception because § 3143(a)(2) allows district courts to decline to mandatorily detain the criminal if (1) the court finds that there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government has recommended that no sentence of imprisonment be imposed on the person; and (2) the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.<sup>16</sup> If the convicted person cannot establish that exception, he is required, under § 3143(a)'s clear mandate, to be detained until the district court can sentence him.

Yet after the eight courts of appeals correctly identify the statutory inquiry in § 3143(a)(2), they incorrectly inject a second statutory inquiry to circumvent § 3143(a)(2)'s mandate: They allow district courts to evaluate whether "exceptional reasons" exist under 18 U.S.C. § 3145(c). Thus, district courts in those eight circuits may allow convicted persons to avoid detention after conviction but before sentencing or appeal if "exceptional reasons" are established. This is so despite the language of § 3143(a)(2) that compels detention.<sup>17</sup> Not surprisingly, many convicted persons are filing motions seeking release until sentencing under § 3145(c)—§ 3143(a)(2) notwithstanding.<sup>18</sup> And many district courts are granting them.<sup>19</sup>

---

<sup>14</sup> See *Chen*, 257 F. Supp. 2d at 657 ("There is no dispute that [§] 3143 of Title 18 governs the question of release in the first instance.").

<sup>15</sup> See 18 U.S.C. § 3143(a)(2).

<sup>16</sup> See *id.*

<sup>17</sup> *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991) (stating that a district court could use 18 U.S.C. § 3145(c) even though "the language of section 3142(b)(2) compels detention"). Section 3143(b)(2) governs the procedure by which district courts decide whether to grant bail to a criminal pending his appeal. The difference between (a)(2) and (b)(2) is that the former governs the discretion that judicial officers have in granting release pending sentencing while the latter governs that discretion pending appeal. Section 3145(c) applies to appellate review of orders under either. See *United States v. Garcia*, 340 F.3d 1013, 1015 n.2 (9th Cir. 2003) ("Section 3145(c) . . . applies to defendants seeking release pending sentencing as well as to those seeking release pending appeal. The legal principles . . . are equally applicable in both circumstances.").

<sup>18</sup> See, e.g., *United States v. Cochran*, 640 F. Supp. 2d 934, 935 (N.D. Ohio 2009) (stating that defendant moved for release pending sentencing under 18 U.S.C. § 3145(c) even though § 3143(a)(2) applied); *United States v. Smith*, 593 F.

This Article's disagreement with the courts is over a serious issue. Granting bail to a person convicted of one of these three serious crimes could lead to him harming an individual in the community.<sup>20</sup> And equally important, the appellate courts'

---

Supp. 2d 948, 950 (E.D. Ky. 2009) ("Despite [§ 3143(a)(2)'s] mandate, Smith moved for continued release pending sentencing."); *United States v. Briggs*, 577 F. Supp. 2d 435, 436 (D.D.C. 2008) (stating that, although § 3143(a)(2) "require[d]" detention "pending sentencing," defendant moved for release pending sentencing under 18 U.S.C. § 3145(c)); *United States v. Miller*, 568 F. Supp. 2d 764, 766 (E.D. Ky. 2008) ("Miller was remanded to custody pursuant to the provisions of 18 U.S.C. . . . § 3143(a)(2). He has now filed a motion seeking to be released from custody for 'exceptional reasons' under 18 U.S.C. § 3145(c)."); *United States v. Mellies*, 496 F. Supp. 2d 930, 931 (M.D. Tenn. 2007) (stating that Mellies moved for release pending sentencing under 18 U.S.C. § 3145(c), arguing among other things, that his recent dental implants constituted "exceptional reasons"); *United States v. Harrison*, 430 F. Supp. 2d 1378, 1379 (M.D. Ga. 2006) (stating that Harrison filed a motion urging release from custody pending sentencing based on § 3145(c) even though § 3143(a)(2) applied); *Chen*, 257 F. Supp. 2d at 657 (stating that defendant asked that his bail be continued pending sentencing); *United States v. Green*, 250 F. Supp. 2d 1145, 1148–49 (E.D. Mo. 2003) ("Under § 3145(c), this Court may release Defendant pending sentencing only upon a clear showing that an 'exceptional reason' makes Defendant's further detention inappropriate." (footnote omitted)); *United States v. Kaquatosh*, 252 F. Supp. 2d 775, 776–77 (E.D. Wis. 2003) (stating that defendant moved for release pending sentencing under 18 U.S.C. § 3145(c) even though § 3143(a)(2) applied); *United States v. Cantrell*, 888 F. Supp. 1055, 1056 (D. Nev. 1995) ("Although Cantrell apparently concedes [that § 3143(a)(2) applies], he argues he should remain on release pursuant to 18 U.S.C. § 3145(c) . . ."); *United States v. Salome*, 870 F. Supp. 648, 650 (W.D. Pa. 1994) (stating that defendant moved for release under § 3145(c), even though "the express terms of § 3143(a)" applied); *United States v. Bloomer*, 791 F. Supp. 100, 102 (D. Vt. 1992) ("Notwithstanding the criteria . . . set forth in § 3143(a)(2)(A)–(B), defendant argues that 18 U.S.C. § 3145(c) compels his release.").

<sup>19</sup> *See, e.g.*, *United States v. Price*, 618 F. Supp. 2d 473, 483 (W.D.N.C. 2008) ("The Court further finds that 'exceptional reasons' exist in the instant case."); *United States v. Mitchell*, 358 F. Supp. 2d 707, 708–09 (E.D. Wis. 2007) (granting bail to a convicted person awaiting sentencing under 18 U.S.C. § 3145(c) because exceptional reasons existed); *United States v. Kaquatosh*, 252 F. Supp. 2d 775, 779–80 (E.D. Wis. 2003) (same); *United States v. Charger*, 918 F. Supp. 301, 303–04 (D.S.D. 1996) (finding "exceptional reasons" because defendant's family, rather than prison, would be the best environment to aid in his rehabilitation before sentencing); *Cantrell*, 888 F. Supp. at 1057–58 (finding "exceptional reasons" because defendant had been participating in a substance-abuse program and would benefit more from outpatient treatment than from detention). For the full discussion on district courts granting bail under § 3145(c), *see infra* Part V.C.

<sup>20</sup> *Cf. Teenage "Monster" Raped Girl, Nine[,] While on Bail for Sexually Assaulting 10-year-old*, DAILY MAIL ONLINE (Jan. 26, 2010), <http://www.dailymail.co.uk/news/article-1245986/Teenage-monster-raped-girl-bail-sexually-assaulting-10-year-old.html> (discussing a defendant's criminal acts committed while on bail pending trial in England); Richard Edwards, *One Fifth of Murder Suspects "Committed Crime While on Bail"*, TELEGRAPH ONLINE (Mar. 23, 2008), <http://www.telegraph.co.uk/news/uknews/1582527/One-fifth-of-murder->

interpretation of § 3145(c) arms district courts with broad discretion to release a person convicted of a serious crime pending sentencing, even though Congress confined use of that statute to courts of appeals only. Simply put, the eight appellate courts' grants of broad discretion to district courts are not tethered to any statutory authority. The courts themselves have legislated over Congress, which enacted text to curtail district courts' discretion and expanded the discretion that district courts to release convicted persons pending sentencing. Federal courts may not act as legislative bodies by amending laws or applying laws selectively.<sup>21</sup> Instead, they must comport with separation-of-powers principles and apply unambiguous statutory language even if they disagree with it.<sup>22</sup> District courts should not be applying a statute that Congress wrote exclusively for courts of appeals.

Therefore, when presented with the opportunity, the remaining courts of appeals—the First, Third, Eleventh, and D.C. Circuits—should confine the application of § 3145(c) to federal appellate courts only. Moreover, the eight courts of appeals should overrule their jurisprudence to adhere to the section's proper interpretation. Furthermore, the Supreme Court, if it elects to decide this matter authoritatively, should confine § 3145(c)'s ambit to federal appellate courts.

Part I explains the current statutory framework. Part II, details Congress's motivation to enact the two Bail Reform Acts, details the Acts' histories, and explains their provisions. Next, Part III delineates the statutory-interpretation principles that courts must follow to determine what § 3143(a)(2) and § 3145(c) provide. Part IV argues why courts should reserve § 3145(c)

---

suspects-committed-crime-while-on-bail.html ("Almost one in five murder suspects in Britain last year were alleged to have committed the offence while on bail . . .").

<sup>21</sup> See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citations omitted)).

<sup>22</sup> See *Chen*, 257 F. Supp. 2d at 664 n.30. The court noted that it found exceptional reasons under 18 U.S.C. § 3145(c) if it "were deciding on release versus detention *without the benefit of statutory guidance* . . . . But [it] cannot decide this issue as if there is no controlling law. There is, and [it is] bound by the rule of law." *Id.* (emphasis added).

exclusively for courts of appeals. And finally, Part V presents the analysis of the appellate courts and district courts that have weighed in on the issue and addresses counterarguments.

### I. STATUTORY FRAMEWORK

Federal Rule of Criminal Procedure 46 conditions a convicted person's eligibility for release pending sentencing or appeal on 18 U.S.C. § 3143.<sup>23</sup> Section 3143, in turn, delineates the process by which a convicted person may obtain release pending sentencing or appeal.

Section 3143 segregates between two categories of crimes to determine eligibility for release pending sentencing or appeal: those listed in § 3142(f)(1)(A), (B), and (C)—which are crimes of violence, offenses with the maximum sentence of life in prison or death, or drug offenses<sup>24</sup>—and those crimes not listed in those subsections.<sup>25</sup> Throughout, § 3143, though, for persons convicted of *either* category of crime, the district court “presumes that detention is valid, and the defendant bears the burden of overcoming that presumption and proving that release is appropriate.”<sup>26</sup>

Section 3143(a)(1) applies to the group of criminals who are *not* convicted of crimes listed in § 3142(f)(1). For these criminals, if the sentence is imprisonment, the judicial officer must detain the criminal pending sentencing unless she finds by clear and convincing evidence that the criminal “is not likely to flee or pose a danger to the safety of another person or the community if released.”<sup>27</sup>

Section 3143(a)(2) applies to criminals convicted of crimes of violence, offenses with the maximum sentence of life in prison or death, or drug offenses.<sup>28</sup> For these criminals, the judicial officer

---

<sup>23</sup> FED. R. CRIM. P. 46(c).

<sup>24</sup> 18 U.S.C. § 3142(f)(1)(A)–(C) (2006); see *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991).

<sup>25</sup> See *DiSomma*, 951 F.2d at 496 (“[Section 3143] distinguishes between two categories of crimes to determine eligibility for release.”); see also Jonathan S. Rosen, *An Examination of the “Exceptional Reasons” Jurisprudence of the Mandatory Detention Act: Title 18 U.S.C. §§ 3143, 3145(c)*, 19 VT. L. REV. 19, 23 (1994) (describing § 3143 as applying to two categories of crimes).

<sup>26</sup> *United States v. Hooks*, 330 F. Supp. 2d 1311, 1312 (M.D. Ala. 2004).

<sup>27</sup> 18 U.S.C. § 3143(a)(1).

<sup>28</sup> *Id.* § 3143(a)(2) (incorporating by reference 18 U.S.C. § 3142(f)(1)(A)–(C), which identifies the relevant crimes). “Crime of violence” means an offense for which a required element of proof is the use, attempted use, or threatened use of physical



must “detain” the individual pending sentencing unless she finds that: (1) a substantial likelihood that a motion for acquittal or new trial will be granted, or an attorney for the government has recommended that no sentence of imprisonment be imposed on the person; and (2) by clear and convincing evidence, the person is not likely to flee or pose a danger to any other person or the community.<sup>29</sup>

Thus, both § 3143(a)(1) and (a)(2) follow the same general rule, namely, the convicted person must be detained unless the statutory exception applies. The difference lies in additional burdens placed on the person convicted under a § 3143(a)(2) crime to invoke the exception. The exception for § 3142(f)(1)(A), (B), or (C) convicted persons is tougher for the convicted person to achieve because of its additional requirements.<sup>30</sup>

By contrast, § 3143(b), which deals with bail pending appeals, provides an exception only for the non-section 3142(f)(1)(A), (B), or (C) convicted persons.

Section 3143(b) distinguishes between the same two classes of convicted persons in the appeals setting. For the non-section 3142(f)(1)(A), (B), or (C) convicted persons seeking release pending an appeal filed by them, § 3143(b)(1) provides as follows:

[T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

---

force against the person or property of another or a felony that involves a substantial risk that physical force may be used in the course of committing the offense. See 18 U.S.C. § 3156(a)(4); *DiSomma*, 951 F.2d at 496.

<sup>29</sup> 18 U.S.C. § 3143(a)(2).

<sup>30</sup> See *United States v. Wright*, No. 2:07-CR-46 TS, 2009 WL 87604, at \*1 (D. Utah Jan. 12, 2009) (stating that a person convicted of a crime specified in 18 U.S.C. § 3142(f) faces “heightened burdens” to earn bail pending sentencing compared to a person convicted of a crime not specified in that section); see also *United States v. Bloomer*, 967 F.2d 761, 762 (2d Cir. 1992) (“18 U.S.C. § 3143(a)(2) provides that persons ‘found guilty’ of offenses described in subparagraphs (A), (B), or (C) of 18 U.S.C. § 3142(f)(1) and ‘awaiting imposition or execution of sentence’ shall be detained unless two conditions are met.”).

- (i) reversal,
- (ii) an order for a new trial,
- (iii) a sentence that does not include a term of imprisonment,
- (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.<sup>31</sup>

This section works like § 3143(a)(1) and (a)(2)—the general rule is detention and an exception exists.

Section 3143(b)(2), which applies to § 3142(f)(1)(A), (B), or (C) convicted persons seeking release pending their appeal, departs in operation from the other three subsections described. It provides no exceptions. Section 3143(b)(2) states bluntly that

[t]he judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, *be detained*.<sup>32</sup>

Thus, a § 3142(f)(1)(A), (B), or (C) convicted person may not seek release pending his appeal—he will be detained categorically.

Section 3145(c) enters the framework, according to the eight appellate courts, at this point. It provides as follows:

(c) Appeal from a release or detention order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are *exceptional reasons* why such person's detention would not be appropriate.<sup>33</sup>

The eight appellate courts allow district courts to use this section in assessing whether to grant bail to a convicted person pending sentencing.

But everything about § 3145(c) pertains to an *appeal* of the underlying bail order, which makes the proposition that district courts may apply it during their initial analysis of whether to

---

<sup>31</sup> 18 U.S.C. § 3143(b)(1).

<sup>32</sup> *Id.* § 3143(b)(2) (emphasis added).

<sup>33</sup> *Id.* § 3145(c) (emphasis added).

grant bail untenable.<sup>34</sup> First, the section itself confines its application to an “[a]ppeal from a” bail order. Second, the statute’s first two sentences confine its application to appeals. And third, the section’s legislative history reveals that both leading legislators who introduced the last sentence of § 3145(c)—the disputed sentence that contains the exceptional reasons provision—intended to confine that last sentence to apply only in the appeals setting: “In the *appeals* setting, the convicted criminal could only be released if the attorney for the government files a motion indicating there are *exceptional circumstances* which warrant release and the defendant is not likely to flee or pose a danger to the community.”<sup>35</sup> Ultimately, § 3145(c)’s ratified language completely reflected this congressional desire. Accordingly, and as demonstrated herein, § 3145(c) should apply only during appellate review of a district court’s order denying bail.

Similarly, § 3145’s two other subsections pertain to the review of the underlying order—not the determination in which a district court reaches its conclusion in the underlying order. First, subsection (a) deals with the district court’s ability to review an order of release issued by a magistrate judge, “or by a person other than a judge of court having original jurisdiction of the offense and other than a Federal appellate court.”<sup>36</sup> Presumably, the clause means that if a magistrate judge or a sister district court issues an order of release, a movant can seek review of that order with the district court in which the case was filed.<sup>37</sup> The “motion” seeking review of the release order—which either the government or the individual seeking an amendment to the release order can file—“shall be determined promptly.”<sup>38</sup> Likewise, subsection (b) deals with a district court’s ability to review a detention order issued by a tribunal other than the

---

<sup>34</sup> See *United States v. Bloomer*, 791 F. Supp. 100, 102 (D. Vt. 1992) (“[W]e think that § 3145(c) by its very provisions applies exclusively to reviewing courts and not to the court which initially ordered release or detention . . .”).

<sup>35</sup> 136 CONG. REC. 3466 (1990) (statement of Rep. Glickman); (statement of Rep. Glickman) (emphasis added); *accord* 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon).

<sup>36</sup> 18 U.S.C. § 3145(a).

<sup>37</sup> See *United States v. Cisneros*, 328 F.3d 610, 615 (10th Cir. 2003) (stating that, under this statute, the district judge to whom the case is originally assigned is the court having original jurisdiction over the offense).

<sup>38</sup> 18 U.S.C. § 3145(a).

district court in which the case was filed.<sup>39</sup> The statutory framework on its face, even without resort to the legislative history, countenances the notion that § 3145 applies to reviews of the bail order—not the determination of the bail order in the first instance.<sup>40</sup>

If interpreted correctly, § 3145(c) enters the statutory framework only when a convicted person files an appeal. At that point, during the appellate inquiry in § 3145(c), the appellate court can vacate the district court's order denying bail pending sentencing made under § 3143(a)(2) if two requirements are met. First, the convicted person must satisfy the relaxed standard of

---

<sup>39</sup> See *id.* § 3145(b).

<sup>40</sup> A bill in Congress would add subsection (d) to 18 U.S.C. § 3145. In September 2009, Senators Jon Kyl and John Cornyn sponsored the “USA PATRIOT Reauthorization and Additional Weapons Against Terrorism Act of 2009.” 155 CONG. REC. S9,934 (daily ed. Sept. 29, 2009) (statement of Sen. Kyl). A bill before the 111th Congress would have added subsection (d) to 18 U.S.C. § 3145. In September 2009, Senators Jon Kyl and John Cornyn sponsored the “USA PATRIOT Reauthorization and Additional Weapons Against Terrorism Act of 2009.” 155 CONG. REC. S9,934 (daily ed. Sept. 29, 2009) (statement of Sen. Kyl). But the bill did not make it out of Committee to which it was assigned, and it thus died. See *id.* The purpose of the bill is “to reauthorize the expiring intelligence tools of the USA PATRIOT Improvement and Reauthorization Act of 2005 and defend against terrorism through improved classified procedures and criminal law reforms, and for other purposes.” *Id.* at S9,933. Title III of this proposed bill, entitled “Additional Government Weapons Against Terrorism Act of 2009,” would amend 18 U.S.C. § 3145 by adding subsection (d). *Id.* at S9,934. It would provide as follows:

SEC. 305. PREVENTING UNWARRANTED RELEASE OF CONVICTED TERRORISTS AND SEX OFFENDERS PENDING SENTENCING OR APPEAL.

(a) In General.—Section 3145 of title 18, United States Code, is amended by adding at the end the following:

(d) Application.—No person shall be eligible for release under subsection (c) based on exceptional reasons if the person is being detained pending sentencing or appeal in a case involving—

- (1) an offense under section 2332b of this title;
- (2) an offense listed in section 2332b(g)(5)(B) of this title for which a maximum term of imprisonment of 10 years or more is prescribed; or
- (3) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

*Id.* at S9,936. The section thus eviscerates courts' discretion in using the “exceptional reasons” provision in cases involving convicted terrorists and sex offenders. These two members of Congress are attempting, once again, to curtail courts' discretion, comporting with the arc of legislative history, by preventing federal appellate courts from using the amorphous “exceptional reasons” exception in cases involving persons convicted of utmost serious crimes.

§ 3143(a)(1)—namely, that he is not likely to flee and will not pose a danger to the safety of any other person or the community.<sup>41</sup> And second, the appellate court must find “exceptional reasons.”<sup>42</sup> The same holds true for a convicted person challenging a district court’s decision to deny him bail pending his appeal: During the appellate inquiry, the court can vacate the district court’s order made under § 3143(b)(2) if the convicted person satisfies the relaxed standard in § 3143(b)(1) and the appellate court finds “exceptional reasons.”<sup>43</sup> As evidenced by its plain language, § 3145(c) does not allow district courts to use the “exceptional reasons” language when determining if a convicted person may receive bail pending sentencing or appeal.<sup>44</sup>

Referring to the § 3145’s legislative history and the earlier Acts of 1966 and 1984 that governed bail makes this notion—its applicability only to courts of appeals—clear.

## II. THE BAIL REFORM ACTS AND THEIR IMPETUSES

Congress has crafted legislation three times—in 1966, 1984, and 1990—concerning the federal courts and bail. Notably, each enactment added different tests to different classes of criminals. For instance, under the Judiciary Act of 1789, which governed bail orders until 1966, Congress provided rules governing only bail decisions for defendants in the interim between indictment

---

<sup>41</sup> See *United States v. Sabhnani*, 529 F. Supp. 2d 377, 383 (E.D.N.Y. 2007) (noting that § 3143(a)(1) provides “a less stringent test than the one that applies to individuals who have been convicted of violent crimes” under § 3143(a)(2)).

<sup>42</sup> See 18 U.S.C. § 3145(c). The definition of “exceptional reasons” has eluded a uniform definition. See generally *Rosen*, *supra* note 25, at 25–34 (documenting the varying judicial definitions). This is so because “[s]ection 3145(c) does not define the term ‘exceptional reasons.’” *United States v. Briggs*, 577 F. Supp. 2d 435, 437 (D.D.C. 2008). As such, courts have been attempting to define it. “[C]ourts have generally read the phrase to mean circumstances that are ‘clearly out of the ordinary, uncommon, or rare.’” *Id.* (quoting *United States v. Koon*, 6 F.3d 561, 563 (9th Cir. 1993) (Rymer, J., concurring)); see *United States v. Larue*, 478 F.3d 924, 925–26 (8th Cir. 2007) (stating that courts generally have defined the term as “circumstances that are ‘clearly out of the ordinary, uncommon, or rare’”).

<sup>43</sup> See 18 U.S.C. § 3145(c).

<sup>44</sup> See *United States v. Chen*, 257 F. Supp. 2d 656, 660 (S.D.N.Y. 2003) (“Section 3145(c) therefore governs *appellate* review of either: (i) a district court’s initial release or detention order made pursuant to section 3143, or (ii) a district court’s order, made pursuant to section 3145(a) or (b), reviewing another court’s release or detention order.” (emphasis added)).

and trial.<sup>45</sup> By 1984, Congress had provided rules governing defendants, convicted persons presentencing—during the period between conviction and sentencing—and convicted persons post-sentencing—during the period between sentencing and appeal.<sup>46</sup>

Importantly, each enactment individually evidenced congressional desire to limit the federal courts' ability to grant bail. And the cumulative arc of federal legislation governing bail reveals that Congress has slowly been enervating courts' discretion to grant bail since 1966. The conclusion, then, from the eight courts of appeals to inject wide discretion to district courts is untenable.

#### A. *Colonial America Until 1966*

In colonial America, bail law was patterned after English law.<sup>47</sup> The law governing bail simply prohibited excessive bail.<sup>48</sup> The English excessive bail clause was intended to remedy judicial abuses in denying bail to specific prisoners.<sup>49</sup> After years of this practice, English lawmakers were fed up, accusing the King of attempting “to subvert . . . the laws and liberties of the kingdom . . . [in that] excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the Subjects.”<sup>50</sup> The English Bill of Rights thus corrected this situation by declaring that “excessive bail ought not to be required.”<sup>51</sup>

---

<sup>45</sup> See *infra* notes 59–61 and accompanying text.

<sup>46</sup> See *infra* Part II.C.

<sup>47</sup> See generally Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 983 (1965) (noting that the Virginia, Maryland, Delaware, North Carolina, Georgia, and Massachusetts colonies incorporated bail provisions stemming from English law).

<sup>48</sup> See *id.*

<sup>49</sup> See *United States v. Edwards*, 430 A.2d 1321, 1327–28 (D.C. 1981) (en banc) (stating that the English Bill of Rights sought to close a loophole in the English bail system by restricting the discretion of local justices in setting bail for offenses otherwise deemed bailable). See generally William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 66 (1977) (concluding that Parliament enacted this provision in the English Bill of Rights to proscribe the injustice of selectively imposing excessive bail); Hermine H. Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1189–90 (1972) (same).

<sup>50</sup> Bill of Rights, 1689, 1 W. & M., 2d Sess., ch. 2, § 10, 3 Stat. at Large 440, 441 (Eng.).

<sup>51</sup> *Id.*

When the colonies became independent in 1776, they enacted specific bail laws that mirrored the English rule.<sup>52</sup> Virginia's rule, penned by George Mason,<sup>53</sup> declared shortly that "excessive bail ought not to be required."<sup>54</sup>

When James Madison prepared an initial draft of the Bill of Rights in 1789,<sup>55</sup> which passed Congress in 1789 and was ratified in 1791, he looked to the Virginia Constitution as the model.<sup>56</sup> Indeed, the Eighth Amendment in this Bill of Rights was taken virtually verbatim from Section 9 of the Virginia Constitution, which was taken, in turn, from the English Bill of Rights.<sup>57</sup> It provided that "Excessive bail shall not be required."<sup>58</sup> Representative Livermore uttered the sole comment about this clause during the congressional debates: "[The clause] seems to have no meaning in it, I do not think it necessary. What is meant by the term excessive Bail?"<sup>59</sup>

While, the Constitution prohibits judges from levying excessive bail.<sup>60</sup> It does not provide any rules about bailable offenses or the different standards of granting bail to defendants before trial or convicted persons after conviction but before

---

<sup>52</sup> See *Edwards*, 430 A.2d at 1328 ("When the colonies asserted their independence in 1776, they largely adopted the bail provisions from their colonial charters into their state constitutions.").

<sup>53</sup> See *Solem v. Helm*, 463 U.S. 277, 285 n.10 (1983) (stating that George Mason authored the Virginia Declaration of Rights).

<sup>54</sup> VA. CONST. art. 1, § 9, reprinted in 9 W. HENING'S STATUTES AT LARGE 111 (1821).

<sup>55</sup> See *United States v. Gecas*, 120 F.3d 1419, 1477 (11th Cir. 1997) (Birch, J., dissenting) (noting that James Madison prepared the initial draft of the Bill of Rights).

<sup>56</sup> See *United States v. Payne*, 492 F.2d 449, 459-60 (4th Cir. 1974) (noting that the Virginia Constitution's "importance as the source of the federal Bill of Rights may not be overemphasized" and that "[e]very specific guarantee in the Virginia proposal, save one, later found a place in the federal Bill of Rights").

<sup>57</sup> See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) ("[I]t is clear that the Eighth Amendment was 'based directly on Art. I, § 9, of the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.'" (quoting *Solem*, 463 U.S. at 285 n.10)).

<sup>58</sup> U.S. CONST. amend. VIII.

<sup>59</sup> 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1834).

<sup>60</sup> See U.S. CONST. amend. VIII; *United States v. Edwards*, 430 A.2d 1321, 1330 (D.C. 1981) (en banc) ("The historical origins of the excessive bail clause, as well as its narrow language, indicate that its primary purpose is to limit the judiciary."). Incidentally, the Supreme Court has interpreted this Amendment to prohibit the imposition of excessive bail without creating a right to bail in criminal cases. See *United States v. Salerno*, 481 U.S. 739, 754-55 (1987) (stating that the Eighth Amendment does not grant absolute right to bail).

sentencing. By contrast, the Judiciary Act of 1789, passed at the same time as the Bill of Rights, created substantive rules distinguishing bailable vis-à-vis nonbailable offenses for defendants facing criminal trials.<sup>61</sup> It provided that all defendants charged with noncapital crimes would receive bail and that, in capital cases, the decision to detain a defendant was to be left to the judge:

[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein regarding the nature and circumstances of the offense, and of the evidence and the usages of law.<sup>62</sup>

Defendants thus had an absolute right to bail in all noncapital cases,<sup>63</sup> and courts had total discretion in capital cases. That changed in 1966.

#### B. *Bail Reform Act of 1966*

In 1966, Congress enacted the first major substantive change in federal bail law since 1789—the Bail Reform Act of 1966.<sup>64</sup>

The purpose of this Act [was] to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.<sup>65</sup>

The Act treated defendants in noncapital cases differently than defendants in capital cases or criminals after conviction pending sentencing or appeal. For defendants in noncapital cases, the Act stated that “any person charged with an offense . . . shall . . . be ordered released pending trial on his

---

<sup>61</sup> It did not, though, provide guidance on bail decisions to convicted persons. See Judiciary Act of 1789, § 33, 1 Stat. 91–92.

<sup>62</sup> *Id.* at 91.

<sup>63</sup> See Foote, *supra* note 47, at 971 (“Section 33 of the Judiciary Act extend[ed] an absolute right to bail in all noncapital federal criminal cases.”).

<sup>64</sup> Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214 (codified as amended at 18 U.S.C. §§ 3146–51 (1966)), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1976. The statutory references in this section are to the 1966 Act unless otherwise indicated.

<sup>65</sup> *Id.* § 2.



personal recognizance” or on personal bond *unless* the judicial officer determines that these incentives will not adequately assure his appearance at trial.<sup>66</sup> The 1966 Act thus created a presumption for releasing a suspect on bail before trial, with fleeing from trial as the sole touchstone for the bail decision.<sup>67</sup> This departed from the Judiciary Act’s mandate that defendants in noncapital cases had an absolute right to bail.

For defendants in capital cases or criminals post-conviction, the judge was authorized to weigh the risk of fleeing from trial and threats to community safety when determining bail. The Act provided as follows:

a person (1) who is charged with an offense punishable by death, or (2) who has been convicted of an offense and is either awaiting sentence or has filed an appeal . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.<sup>68</sup>

For these two groups, though, the presumption remained that bail was appropriate. Thus, for a convicted person seeking bail awaiting sentencing and a convicted person seeking bail pending an appeal, both of whom the Act treated the same, the court would presume to grant bail unless the individual would likely flee or pose a danger.

After a short period of operating under the 1966 Act, Congress noticed problems with defendants in noncapital cases. When passing the 1966 Act, Congress conceded that it was not attempting to deal with evaluating defendants’ dangerousness during the bail inquiry.<sup>69</sup> The problems associated with the 1966

---

<sup>66</sup> *Id.* § 3 (codified as amended at 18 U.S.C. § 3146(a) (1966)).

<sup>67</sup> See *United States v. Cowper*, 349 F. Supp. 560, 562 (N.D. Ohio 1972) (“The Bail Reform Act in 1966 re-emphasized that the purpose of any restrictions on release was to assure the presence of the accused at trial.”); Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 *YALE L.J.* 320, 320 n.3 (1987) (stating that under the 1966 Act, “pretrial detention in noncapital cases could be ordered solely to avoid defendant’s failure to appear at trial”).

<sup>68</sup> Bail Reform Act of 1966, § 3, 80 Stat. at 215–16 (codified as amended at 18 U.S.C. § 3148 (1966)).

<sup>69</sup> See H.R. REP. NO. 89-1541, at 3 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2296, 1966 WL 4286 (acknowledging that the Act did not deal with “the problem of the preventative detention of the accused because of the possibility that his liberty might endanger the public” because that went “beyond the scope of the present

Act were considered by the Judicial Council committee to study the Operation of the Bail Reform Act in the District of Columbia in May 1969.<sup>70</sup> The release of potentially dangerous noncapital defendants troubled the Committee, and it thus recommended that, even in noncapital cases, judges considers a person's dangerousness before granting bail.<sup>71</sup> Congress went along with the ideas put forth in the Committee's proposals and changed the 1966 Bail Reform Act as it applied to defendants charged with crimes in the District of Columbia by allowing judges to consider dangerousness to the community as well as risk of flight when setting bail in noncapital cases.<sup>72</sup>

Perhaps encouraged by the 1970 amendment applicable to the District of Columbia, Congress, in 1984, changed the bail rules for the federal system.

### C. *Bail Reform Act of 1984*

Roughly twenty years later, "Congress enacted The Comprehensive Crime Control Act of 1984, . . . legislation designed to address a broad spectrum of issues related to criminal prosecutions."<sup>73</sup> One part, sponsored by Senator Strom

---

proposal"). See generally Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 686 (1985).

<sup>70</sup> H.R. REP. NO. 91-907, at 87-94 (1970); see *United States v. Edwards*, 430 A.2d 1321, 1341 (D.C. 1981) (en banc) (stating that to evaluate the 1966 Act, "Congress considered (1) the alarming increase in street crime in the District of Columbia since 1966; (2) statistical studies involving recidivism by persons while on pretrial release; (3) recommendations by the President's Commission on Crime in the District of Columbia (1966), and the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia (1969); and (4) pretrial release and detention practices in England and other countries").

<sup>71</sup> See Judicial Council Committee To Study the Operation of the Bail Reform Act in the District of Columbia (1969), reprinted in *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 703 (1970).

<sup>72</sup> D.C. CODE ANN. § 23-1322(a)(2) (LexisNexis 2011).

<sup>73</sup> See generally Barry Tarlow, *Bail Pending Release: The Bail Reform Act*, CHAMPION, Nov. 2005, at 68 (describing the 1984 Bail Reform Act's purpose).

Thurmond,<sup>74</sup> was the Bail Reform Act of 1984,<sup>75</sup> which repealed the 1966 Bail Reform Act. It “dramatically changed the bail system.”<sup>76</sup>

The 1984 Act’s overarching feature was its decision to reverse the presumption in favor of granting bail post-conviction and replace it with a presumption in favor of denying bail.<sup>77</sup> It also aimed to resolve the problem of the infliction of harm on innocent victims by defendants who have been released pending trial.<sup>78</sup>

The Act carefully distinguished how defendants vis-à-vis convicted persons should be treated. For defendants, “[u]pon th[eir] first appearance before a judicial officer” after being “charged with an offense, the judicial officer shall” do one of four things: (1) release the suspect without conditions; (2) release him with conditions; (3) temporarily detain him; or (4) detain him prior to trial.<sup>79</sup> The district court must conduct a detention hearing if the government requests the hearing, and the case

---

<sup>74</sup> *Bill Summary & Status—98th Congress (1983–1984)—S.215*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d098:SN00215:@@L&summ2=m&> (last visited Feb. 23, 2011).

<sup>75</sup> Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. § 3142 (2006 & Supp. II)).

<sup>76</sup> 135 CONG. REC. 27,711 (1989) (statement of Sen. Simon) (discussing the 1984 Act in his introduction of the 1990 Act); see *United States v. Salerno*, 481 U.S. 739, 742 (1987) (“Congress formulated the Bail Reform Act of 1984 as the solution to a bail crisis in the federal courts.” (citation omitted)).

<sup>77</sup> See *United States v. Miller*, 753 F.2d 19, 22–23 (3d Cir. 1985) (“The Bail Reform Act of 1984 was enacted because Congress wished to reverse the presumption in favor of bail that had been established under the prior statute, the Bail Reform Act of 1966.”); *id.* (“The basic distinction between the existing provision [from the 1966 Bail Act] and Section 3143 is one of presumption . . . [T]he [1966] statute incorporates a presumption in favor of bail even after conviction. It is the presumption [in favor of granting bail] that the Committee wishes to eliminate . . .” (quoting S. REP. NO. 225-98 at 26 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3189)); see also *United States v. Koon*, 6 F.3d 561, 567 n.1 (9th Cir. 1993) (Reinhardt, J., dissenting) (noting that Congress, through the 1984 Act, reversed the presumption to release that existed in the 1966 Act).

<sup>78</sup> See *Koon*, 6 F.3d at 567 (“We used to presume that defendants were entitled to bail pending appeal. The only reason Congress reversed this presumption in 1984 was its concern for the danger many defendants present upon release.”); Berg, *supra* note 69, at 739 (stating that the Act’s proponents worried about defendants inflicting harm on victims pending trial).

<sup>79</sup> See Bail Reform Act of 1984, § 203(a), 98 Stat at 176–77 (codified as amended at 18 U.S.C. § 3142(a)(1)–(4)). For a discussion about the controversial nature of temporarily detaining the suspect, see Berg, *supra* note 69, at 702–04.

involves one of the serious crimes listed in § 3142(f)(1)(A)–(D).<sup>80</sup> Those subsections include (A) “a crime of violence,” (B) “an offense for which the maximum sentence is life imprisonment or death,” (C) “an offense for which a maximum term of imprisonment of ten years is prescribed in the Controlled Substances Act,” and (D) any felony, when the suspect has “been convicted of two or more prior offenses [listed] in subsections (A) through (C).”<sup>81</sup> At that hearing, the district court “*shall order* the detention of the person prior to trial” if no condition of release will “reasonably assure” his appearance at trial “and the safety of any other person and the community.”<sup>82</sup> Thus, a defendant charged with one of the serious crimes listed in § 3142(f)(1)(A)–(D) would be detained if he is a flight risk or presents a safety concern to another person or the community.

The 1984 Act differed from the 1966 Act to the detriment of defendants and convicted persons. In the 1984 Act, Congress expanded the evaluation of dangerousness to three classes of defendants—those charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, or an offense for which a maximum term of imprisonment of ten years is prescribed in the Controlled Substances Act.<sup>83</sup> Under the 1966 Act, by contrast, only in cases in which a defendant was charged with a capital crime was the district court permitted to weigh dangerousness to community safety.<sup>84</sup> And in those cases, the district courts began the inquiry by presuming bail was

---

<sup>80</sup> Bail Reform Act of 1984, § 203(a), 98 Stat at 179 (codified as amended at 18 U.S.C. § 3142(f)).

<sup>81</sup> *Id.*

<sup>82</sup> § 203(a), 98 Stat at 178–79 (codified as amended at 18 U.S.C. § 3142(e)) (emphasis added). The government has the burden of proving by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community. *See* United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 403 (2d Cir. 1985). The standard is different when the issue is whether any conditions of release will reasonably assure the defendant’s attendance at trial. In that case, the government need only prove that there are no such conditions by a preponderance of the evidence. *See* United States v. Tedder, 903 F. Supp. 344, 345 (N.D.N.Y. 1995) (citing United States v. Martir, 782 F.2d 1141, 1146 (2d Cir. 1986)).

<sup>83</sup> *See* § 203(a), 98 Stat at 179 (codified as amended at 18 U.S.C. § 3142(f)); *see also* Rosen, *supra* note 25, at 21 n.17 (citing 18 U.S.C. § 3142(f)(1)(A)–(D) (2006 & Supp. I)).

<sup>84</sup> Bail Reform Act of 1966, Pub. L. No. 89-465, § 3, 80 Stat. 214, 214 (codified as amended at 18 U.S.C. § 3148 (1966), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

appropriate.<sup>85</sup> Under the 1984 Act, however, the three classes of previously mentioned defendants were presumed to be detained.<sup>86</sup>

For those convicted and awaiting sentencing, they were presumed to be detained unless they were not likely to flee or pose a danger to another person or the community.

The judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142 (b) or (c). If the judicial officer makes such a finding, [such judicial officer] shall order the release of the person in accordance with section 3142 (b) or (c).<sup>87</sup>

The 1984 Act demonstrated a coarsening of treatment to convicted persons. Convicted persons seeking bail while awaiting sentencing were no longer presumed to receive bail as they were under the 1966 Act unless the court had reason to believe they were "not likely to flee or pose a danger to the safety of any other person or the community."<sup>88</sup> Instead, under the 1984 Act, defendants were presumed to be detained unless they could establish that they would not flee or pose a danger.<sup>89</sup> The 1984 Act was thus "an improvement from the old law in protecting the community from dangerous individuals and ensuring that defendants are accorded with procedural safeguards."<sup>90</sup>

The 1984 Act also contained a separate rule for those convicted, sentenced, and seeking bail pending their appeal. The Act treated convicted persons seeking bail while awaiting

---

<sup>85</sup> *Id.* Interestingly, neither this Act nor the 1966 Act allowed courts to evaluate whether the person would pose a danger to himself if released.

<sup>86</sup> See Bail Reform Act of 1984, § 203(a), 98 Stat. at 178–79 (codified as amended at 18 U.S.C. § 3142(e)).

<sup>87</sup> § 203(a), 98 Stat at 181 (codified as amended at 18 U.S.C. § 3143 (2006)).

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*; *United States v. Miller*, 753 F.2d 19, 22–23 (3d Cir. 1985) (noting that the 1984 Act made detention the presumption). Moreover, the convicted person had the burden of proof to prove these requirements. See *United States v. Affleck*, 765 F.2d 944, 953 (10th Cir. 1985) (stating that in order to grant bail under the 1984 Act, "a court must find that the defendant has met his burden of proving by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or to the community if released").

<sup>90</sup> 135 CONG. REC. 27,711 (1989) (statement of Sen. Simon) (summarizing the 1984 Act in his introduction of the 1990 Act).

sentencing and convicted persons seeking bail pending appeals in different subsections with different rules, in contrast to the 1966 Act, which lumped the two together.<sup>91</sup> Specifically, the 1984 Act provided that

[t]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, *be detained*, unless the judicial officer finds—

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.<sup>92</sup>

#### D. *Mandatory Detention Act of 1990*

Because of the proliferation of violent and drug-related crimes in the 1980s, Congress concluded that the 1984 Act did not go far enough in detaining dangerous criminals who awaited sentencing or appeal.<sup>93</sup> Thus, in 1990, Congress diminished federal courts' discretion on detention once again.<sup>94</sup>

---

<sup>91</sup> *United States v. Bloomer*, 967 F.2d 761, 763 (2d Cir. 1992) (“The 1984 Act divided former section 3148 into two subsections, subsection 3143(a), concerning release ‘pending sentence,’ and subsection 3143(b), concerning release ‘pending appeal.’”).

<sup>92</sup> Bail Reform Act of 1984, § 203, 98 Stat. at 1981–82 (codified as amended at 18 U.S.C. § 3143(a), (b)(2)(B)(i)–(ii)) (emphasis added). The 1984 Act also used the term “judicial officer.” 18 U.S.C. § 3156(a)(1) (2006). The Act incorporated the definition of “judicial officer,” which means

[U]nless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia.

*Id.*

<sup>93</sup> *See Rosen*, *supra* note 25, at 22.

<sup>94</sup> *See United States v. Koon*, 6 F.3d 561, 567 (9th Cir. 1993) (Reinhardt, J., dissenting) (noting that Congress reversed the presumption to release in the 1984 Act and then, in the 1990 Act, “tightened the requirements in 1990 out of a concern that a clear and convincing showing was not enough to protect society from violent criminals and serious drug offenders”); *United States v. Green*, 250 F. Supp. 2d 1145, 1148 (E.D. Mo. 2003) (“The intent of the bill was clearly to limit judicial discretion in the case of convicted drug traffickers or violent criminals.”).

In passing the “Mandatory Detention for Offenders Convicted of Serious Crimes Act,”<sup>95</sup> Congress made earning bail pending sentencing or appeal even more elusive for three classes of convicted persons: convicts of crimes of violence, convicts of offenses with a maximum sentence of life in prison or death, and convicts of certain drug offenses with a maximum sentence of at least ten years in prison.<sup>96</sup> Under the 1984 Act, these three classes of individuals were already presumed to be detained pending trial, sentencing, and appeal.<sup>97</sup> But Congress wanted to make earning bail after conviction even tougher for these three classes.<sup>98</sup>

So these types of serious criminals were dealt with again in the three additions to the 1990 Act: (1) 18 U.S.C. § 3142(a)(2), the subsection about bail after conviction but before sentencing;<sup>99</sup> (2) 18 U.S.C. § 3143(b)(2), the subsection about bail post-sentencing but before appeal;<sup>100</sup> and (3) the one sentence to 18 U.S.C. § 3145(c), the subsection about an appeal or review of those orders—and the subsection at the center of the controversy.<sup>101</sup>

The legislative history reveals the drafters’ desire to make earning bail tougher. In contrast to the Second Circuit’s frustration that the legislative history of § 3145 is “sparse and uninformative,”<sup>102</sup> the legislative history, which consists of comments made by Senator Paul Simon and Representative Dan Glickman, is rich and reveals Congress’s motivation.<sup>103</sup> That is,

---

<sup>95</sup> Mandatory Detention for Offenders Convicted of Serious Crimes Act, Pub. L. No. 101-647, § 901, 104 Stat. 4826, 4926 (1990) (codified as amended at 18 U.S.C. §§ 3143, 3145).

<sup>96</sup> See 18 U.S.C. § 3143(b)(2) (incorporating by reference 18 U.S.C. § 3142(f)(1)(A)–(C) (2006 & Supp. II), which identifies the relevant crimes).

<sup>97</sup> See Bail Reform Act of 1984, § 203(a), 98 Stat. at 1976–82 (codified as amended at 18 U.S.C. §§ 3141–43).

<sup>98</sup> See 136 CONG. REC. 3465–66 (1990) (statement of Rep. Glickman); 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon).

<sup>99</sup> See 18 U.S.C. § 3142(a)(2).

<sup>100</sup> See *id.* § 3143(b)(2).

<sup>101</sup> *Id.* § 3145(c).

<sup>102</sup> *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991); see *United States v. Garcia*, 340 F.3d 1013, 1016–17 (9th Cir. 2003) (“This is a case in which a plain reading of the statute offers little if any help. Moreover, not only does a reading of the statute not provide much assistance with regard to the meaning of ‘exceptional reasons,’ the legislative history is also ‘sparse and uninformative.’” (quoting *DiSomma*, 951 F.2d at 497)).

<sup>103</sup> See 136 CONG. REC. 3465–66 (1990) (statement of Rep. Glickman); 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon).

the Act's legislative history evinces congressional desire to *prevent* courts from granting bail to persons convicted of serious crimes—which makes the eight appellate courts injection of wide discretion to district courts to grant bail to persons convicted of serious crimes untenable.

Indeed, Senator Paul Simon, the Act's sponsor, unambiguously noted that “[t]he primary purpose of this [A]ct is to *prevent* the release on bail of convicted drug traffickers or violent criminals who are awaiting *sentencing* or appeal.”<sup>104</sup> This is the purpose because “there is little need for judicial discretion to release those who have been found guilty.”<sup>105</sup> Senator Simon noted that, under the 1984 Bail Reform Act, “a judge ha[d] discretion to release a convicted defendant pending sentencing or appeal.”<sup>106</sup> But, according to him, “[t]he purpose of this legislation is to close this loophole by *narrowing* the judicial officer's discretion in cases where the defendant has been convicted of drug trafficking or violent crime.”<sup>107</sup>

Likewise, Representative Dan Glickman noted that the Mandatory Detention Act would “require the detention, in most cases, of a convicted criminal pending sentence or appeal.”<sup>108</sup> He acknowledged that “under [the 1984 Act], a judge ha[d] discretion to release a convicted criminal pending sentencing or appeal,” but that “[t]his bill would *tighten that loophole* considerably, allowing release only under *very narrow circumstances*.”<sup>109</sup>

Senator Simon's and Representative Glickman's forceful comments establish that narrowing—not expanding—judicial discretion was their motivation.<sup>110</sup>

Senator Simon also explained the narrow exception that would exist if the Act passed. He noted that, “[w]hile the intent . . . [was] to limit judicial discretion[,] . . . the Justice Department ha[d] recommended that in certain *limited*

---

<sup>104</sup> 135 CONG. REC. 27,711 (1989) (emphasis added) (statement of Sen. Simon).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> 136 CONG. REC. 3465 (1990) (statement of Rep. Glickman).

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> See 136 CONG. REC. 3465–66 (1990) (statement of Rep. Glickman); 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon).



circumstances the judicial officer should retain discretion.”<sup>111</sup> Senator Simon described the exception that would ultimately become codified in 18 U.S.C. § 3142(a)(2):

[I]n the presentencing setting, if the attorney for the government will recommend a sentence of no incarceration or if the judicial officer finds that there is a substantial likelihood the defendant's motion for [a] new trial or acquittal will be granted and the defendant is not likely to flee or pose a danger to the community, the judicial officer may release the defendant.<sup>112</sup>

Neither Senator Simon's nor Representative Glickman's comments contained any suggestion of any other exception—involving exceptional reasons or otherwise—for convicted persons presentencing.<sup>113</sup>

When enacted, § 3143(a)(2) mirrored the two legislators' comments by offering a single, narrow exception for convicted persons presentencing:

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

(A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.<sup>114</sup>

Senator Simon also commented about the proposal that would eventually become the last sentence in 18 U.S.C. § 3145(c). He noted that “*in the appeals setting*, if the attorney for the government files a motion indicating that there are *exceptional circumstances* which warrant release and the defendant is not likely to flee or pose a danger to the community, the judicial

---

<sup>111</sup> 135 CONG. REC. 27,711 (1989) (emphasis added) (statement of Sen. Simon).

<sup>112</sup> *Id.* at 27,711–12.

<sup>113</sup> *See* 136 CONG. REC. 3465–66 (1990) (statement of Rep. Glickman); 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon).

<sup>114</sup> 18 U.S.C. § 3143(a)(2) (2006).

officer may order release.”<sup>115</sup> Representative Glickman, too, noted that the “exceptional circumstances” touchstone applied “[i]n the *appeals setting*,” without any suggestion of application in the district court setting.<sup>116</sup>

Senator Simon added the “exceptional reasons” provision after the Justice Department recommended it.<sup>117</sup> Senator Simon, then Chairman of the Subcommittee on the Constitution, had written to Assistant Attorney General Edward Dennis to request comments on the version of the Mandatory Detention Act that did not allow for any exceptions.<sup>118</sup> It must be remembered that the proposal regarding bail pending a convicted person’s appeal contained *no* exception,<sup>119</sup> while the proposal on the subsection on bail pending sentencing did contain an exception.

The response, which came from Assistant Attorney General Carol Crawford, indicated that the Justice Department suggested that the bill would benefit from an exception for defendants who were not dangerous or a risk of flight and who raised a substantial issue on appeal.<sup>120</sup> The letter began by noting that

18 U.S.C. § 3143 currently provides that persons convicted, who are either awaiting sentence (if the applicable guideline calls for a sentence of imprisonment) or who have been sentenced to a term of imprisonment, be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the community *and* that *the*

---

<sup>115</sup> 135 CONG. REC. 27,712 (1989) (emphasis added) (statement of Sen. Simon).

<sup>116</sup> 136 CONG. REC. 3466 (1990) (emphasis added) (statement of Rep. Glickman).

<sup>117</sup> See *United States v. Koon*, 6 F.3d 561, 567 (9th Cir. 1993) (Reinhardt, J., dissenting) (“The [‘exceptional reasons’] exception was first proposed by the Department of Justice, in a letter to Senator Simon which expressed general support for the Mandatory Detention Act but also expressed concern about its ‘mandatory nature.’” (quoting *United States v. DiSomma*, 769 F. Supp. 575, 577 (S.D.N.Y.), *aff’d*, 951 F.2d 494 (2d Cir. 1991)).

<sup>118</sup> See *United States v. Garcia*, 340 F.3d 1013, 1018 n.4 (9th Cir. 2003).

<sup>119</sup> When § 3143(b)(2) was ultimately enacted, it reflected the proposal’s no-exception approach, which departed from § 3143(a)(2)’s inclusion of an exception. See 18 U.S.C. § 3143(b)(2) (2006); *Koon*, 6 F.3d at 567 (noting that “the harshness of section 3143(b)(2)[ ]” was its “blanket prohibition on release pending appeal in drug cases and cases involving crimes of violence”).

<sup>120</sup> See *Garcia*, 340 F.3d at 1018 n.4 (“The response, which came on July 26, 1989 from Crawford, made clear that the Justice Department believed that the bill went too far and that an exception was needed for defendants who were not dangerous or a risk of flight, and who raised a substantial issue on appeal . . .”).

*appeal raises a substantial question of law or fact likely to result in a reversal, an order for a new trial, or a sentence other than imprisonment.*<sup>121</sup>

Thus, the letter addressed only the Justice Department's worries about the categorical nature of the proposed 18 U.S.C. § 3143(b)(2)—the subsection *on appeals* by the convicted person. Making its applicability to § 3143(b)(2) clear, the letter asserted that, “[u]nder section 2 . . . this provision would be modified so as to *mandate detention* . . . if the offense was a crime of violence [or] a controlled substance offense . . . that carries a maximum penalty of life imprisonment or death.”<sup>122</sup> Though the Justice Department expressed “support [for] the thrust of section 2 to strengthen the law to make the possibility of an inappropriate release order even less likely,” it was, “however, somewhat concerned about the *mandatory nature of the proposed amendment.*”<sup>123</sup>

The letter addressed those concerns of the mandatory nature of the proposal that would become § 3143(b)(2) by describing two examples illustrating the need for an exception. First, it described “a situation in which the convicted defendant does not pose either a danger to the community if released or a risk of flight, and in *which the appeal* raises a substantial question of law.”<sup>124</sup> Specifically, “an elderly man convicted under 18 U.S.C. [§] 1111 of the mercy killing of his spouse, who has lived in the community all his life without prior incident, and who is challenging the applicability of the federal murder statute to mercy killings, *a question of first impression in the circuit.*”<sup>125</sup> Second, it described a situation in which “a convicted drug dealer who, because of wounds incurred during his capture, was temporarily incapacitated and thus not likely to commit further crimes or to flee, and *whose appeal* raised a novel and difficult search or seizure question on which the conviction will stand or fall.”<sup>126</sup> The letter concluded by noting that,

while we have no doubt of Congress's power to mandate the detention of persons convicted of violent crimes or drug offenses,

---

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (emphasis added).

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> *Id.* (emphasis added).

<sup>126</sup> *Id.* (emphasis added).

whose crimes call for a sentence of imprisonment, we believe that, as a matter of policy, some mechanism should exist so that, in the *extraordinary case*, the court could order release.<sup>127</sup>

The letter spawned the one-sentence addition to 18 U.S.C. § 3145(c), which is the sentence that the eight appellate courts interpret incorrectly. That sentence is in emphasis as follows:

(c) Appeal from a release or detention order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. *A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.*<sup>128</sup>

Under 18 U.S.C. § 3145(c)’s plain text, a defendant who falls within the purview of § 3143(a)(2) by committing crimes of violence, certain drug crimes, and crimes with life sentences, may win on an *appeal* of a detention order if he can satisfy two tests. First, he must meet § 3143(a)(1)’s requirements,<sup>129</sup> which are that he will not flee or pose a danger to any other person or the community.<sup>130</sup> Second, he must “clearly show[] that there are exceptional reasons why [his] detention would not be appropriate.”<sup>131</sup> So a convicted person must convince the appellate court that he is not a flight risk or danger to the community and must show that “exceptional reasons” supporting bail exist.

It is colorable to suggest that the intent driving Congress to draft § 3145(c) was to create an exception for *district courts* to use when deciding whether to grant bail pending the convicted person’s *appeal* and that Congress simply did not draft § 3145(c) properly. This is so because the Justice Department’s letter suggested an exception to assuage its concern “about the mandatory nature of the proposed amendment” and the other

---

<sup>127</sup> *Id.* (emphasis added).

<sup>128</sup> 18 U.S.C. § 3145(c) (2006).

<sup>129</sup> *See id.*

<sup>130</sup> *Id.* § 3143(a)(1).

<sup>131</sup> *Id.* § 3145(c).

bail provisions all included exceptions that district courts could use. Only the provision dealing with bail pending appeal contained no exception for district court usage.

But § 3145(c)'s text does not comport with that colorable congressional desire. The text does not permit district courts to use the "exceptional reasons" exception when evaluating whether to grant bail to a convicted person pending his appeal. Instead, the text applies only to federal appellate courts during their review of district court orders of both types of bail decisions—sentencing or appeals.

As to the issue of district courts and their decisionmaking regarding bail pending *sentencing*, nothing in the legislative history suggests that district courts should have the ability to use the "exceptional reasons" exception. Indeed, Congress already included an exception for district court usage in 18 U.S.C. § 3143(a)(2) itself. Moreover, Congress had the intention *not* to give district courts much discretion in their decisionmaking process.<sup>132</sup> So the notion that Congress would create a single exception, which presents an onerous, compound structure for the three classes of serious convicted persons to satisfy before gaining bail, in addition to a broad exception that requires less than the first exception is, almost illogical. That would mean that Congress was trying to limit district courts of their discretion in one provision of the Act, but then inject wide discretion in the next provision. If that were the case—that district courts could use the broad discretion embedded in § 3145(c)—Congress created a situation where the exception swallows the rule. Specifically, the hurdles preventing a person convicted of one of the crimes prescribed in § 3143(a)(2) from being released on bail pending sentencing would disappear because the convicted person could simply ignore § 3143(a)(2) and resort to § 3145(c), which contains little of § 3143(a)(2)'s impediments to bail. The proposition that Congress intended to offer district courts a second, broad exception is unlikely, especially in light of the numerous statements from Senator Simon and Representative Glickman about curtailing courts' discretion.

---

<sup>132</sup> See *supra* Part II.D.

## III. SECTION 3145(C)'S STATUTORY MEANING

A. *Statutory Interpretation Principles*

It is certainly understandable that courts are tempted to create expedients to come to, what they believe are, fairer results under the statute. Indeed, the hypothetical situations in the Justice Department's letter to Senator Simon are illustrative of situations in which the fairer result would be to release the criminal until sentencing.<sup>133</sup> But when courts are interpreting congressional acts, it is not their place to inject their view of fairness because of this bedrock principle: Statutory text governs.

The familiar first step in interpreting an Act of Congress is to "begin with the text of the . . . Act itself."<sup>134</sup> The "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms" in the statutory language, "that language must ordinarily be regarded as conclusive."<sup>135</sup> "[T]he authoritative statement is the statutory text"—"not the legislative history or any other extrinsic material."<sup>136</sup> The

---

<sup>133</sup> See *United States v. Garcia*, 340 F.3d 1013, 1018 n.4 (9th Cir. 2003). *see also* *United States v. Hooks*, 330 F. Supp. 2d 1311, 1312–14 (M.D. Ala. 2004) (finding "exceptional reasons" and thus granting bail to a woman "so as to allow her to make provisions for the care of her three minor children"); *United States v. Chen*, 257 F. Supp. 2d 656, 664 n.30 (S.D.N.Y. 2003) (describing a situation in which the court felt tempted to use the "exceptional reasons" exception because the "defendant [was] married and the father of a very young child").

<sup>134</sup> See *Negonsott v. Samuels*, 507 U.S. 99, 104–05 (1993); *see also* *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (stating that the statutory-interpretation "inquiry begins with the statutory text"); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[W]e begin as we do in any exercise of statutory construction with the text of the provision in question . . ."); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us."); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 237 (1990) ("Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute."); 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., *FEDERAL PRACTICE AND PROCEDURE* § 8382 (4th ed. 2008) ("[T]he Supreme Court has admonished courts for years to give effect to statutory language. . . . Questions of statutory interpretation should be resolved from the legislative language if possible.").

<sup>135</sup> *Negonsott*, 507 U.S. at 104 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (internal quotation marks omitted)).

<sup>136</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

“plainness” of the at-issue statutory language is determined by examining the language itself, the specific context in which the language is used, and the broader context of the statute.<sup>137</sup>

When interpreting statutory language during step one, courts should construe statutory language to avoid interpretations that would render any phrase superfluous.<sup>138</sup> Indeed, “[i]t is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”<sup>139</sup> Courts must therefore interpret the statute “‘as a symmetrical and coherent regulatory scheme,’<sup>140</sup> and ‘fit, if possible, all parts into an [sic] harmonious whole.’”<sup>141</sup> Relatedly, courts must interpret subsections of a statute in the context of the whole enactment.<sup>142</sup> Therefore, “[w]hen ‘interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will

---

<sup>137</sup> See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (stating that resorting to legislative history is unnecessary “if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent’” (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997))); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240–41 (1989); *United States v. Boucha*, 236 F.3d 768, 774 (6th Cir. 2001); *Marshak v. Treadwell*, 240 F.3d 184, 192 (3d Cir. 2001).

<sup>138</sup> See, e.g., *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

<sup>139</sup> *Id.* (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); see *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute.” (internal quotation marks omitted)); see also *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 237 (2008) (Kennedy, J., dissenting) (citing *Duncan v. Walker*, 533 U.S. 167, as establishing “our duty to give effect, if possible, to every clause and word of a statute” (internal quotation marks omitted)). But courts may not, in pursuit of giving effect to every word, “virtually destroy the meaning of the entire context” by giving “them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent.” *Van Dyke v. Cordova Copper Co.*, 234 U.S. 188, 191 (1914).

<sup>140</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

<sup>141</sup> *Id.* (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

<sup>142</sup> *United Savs. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . .”). See generally NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:2 (7th ed. 2008).

take in connection with it the whole statute.’”<sup>143</sup> If the statute’s language is unambiguous, that language governs,<sup>144</sup> and a court’s inquiry is thus complete.

If, however, the language is unclear, courts will progress to step two and attempt to discern Congress’s intent using canons of statutory interpretation.<sup>145</sup> The goal is to determine Congress’s intent as embodied in particular statutory language.<sup>146</sup> Not surprisingly, to determine congressional intent, courts usually resort to legislative history.<sup>147</sup>

---

<sup>143</sup> *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. 183, 194 (1957)).

<sup>144</sup> *See, e.g., BedRoc Ltd. v. United States*, 541 U.S. 176, 177 (“The inquiry begins with the statutory text, and ends there as the text is unambiguous.”); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (stating that resorting to legislative history is unnecessary “if the statutory language is unambiguous and the statutory scheme is coherent and consistent”); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989); *Berkeley Inv. Group, Ltd. v. Colkitt*, 259 F.3d 135, 142 n.7 (3d Cir. 2001); *Steele v. Blackman*, 236 F.3d 130, 133 (3d Cir. 2001).

<sup>145</sup> *See Chickasaw Nation v. United States*, 534 U.S. 84, 89–91, 94 (2001); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447–48 (1987); *United States v. Cooper*, 396 F.3d 308, 310 (3d Cir. 2005) (stating that step two requires courts to “attempt to discern Congress’ intent using the canons of statutory construction”).

<sup>146</sup> *Chickasaw Nation*, 534 U.S. at 94.

<sup>147</sup> *See Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 237 (1990) (stating that since a phrase was ambiguous the Court would “normally resort to legislative history”); *see also Bank of Am. Nat’l Trust & Savs. Ass’n v. 203 North LaSalle St. P’ship*, 526 U.S. 434, 462 (1999) (Thomas, J., concurring) (stating that if a statute’s language is ambiguous, the legislative history is examined next); *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 433 (1987) (O’Connor, J., dissenting) (stating that if the text is unclear, “[w]e then review[] the legislative history of the statute and other traditional aids of statutory interpretation to determine congressional intent to create enforceable rights”); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) (resorting to legislative history to determine congressional intent of ambiguous statutory text); *Middlesex Cnty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 13 (1981) (noting that after reviewing statutory text, “we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent”). At least one member of the Court, Justice Scalia, finds resorting to legislative history unproductive in determining congressional intent. *See Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (stating that legislative history is “unreliable . . . as a genuine indicator of congressional intent”). Justice Breyer, by contrast, has attempted to demonstrate legislative history’s propriety and usefulness. *See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).



B. *Section 3145(c) Unambiguously Confines Itself To Use by Courts of Appeals Only*

Section 3145(c) of title 18 of the United States Code uncontroversially applies only to appellate courts reviewing decisions from district courts on appeal because of its title, text, internal structure, statutory structure, and legislative history.

First, 18 U.S.C. § 3145(c)'s title indicates that it deals with appeals: "Appeal from a release or detention order."<sup>148</sup>

Second, § 3145(c)'s text deals with appellate courts. Indeed, its first sentence discusses appeals and appellate courts: "*An appeal* from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title."<sup>149</sup> Both 28 U.S.C. § 1291 and 18 U.S.C. § 3731 deal solely with the review of district court final orders by appellate courts.<sup>150</sup> The second sentence, also, unambiguously notes that

<sup>148</sup> 18 U.S.C. § 3145(c) (2006); *see also* United States v. Smith, 593 F. Supp. 2d 948, 955 (E.D. Ky. 2009) ("As a preliminary matter, Section 3145(c) is titled '*appeal* from a release or detention order . . . .' (alteration in original) (quoting 18 U.S.C. § 3145(c)). The Supreme Court has noted that "statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute.'" Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) (quoting Porter v. Nussle, 534 U.S. 516, 528 (2002)).

<sup>149</sup> 18 U.S.C. § 3145(c) (emphasis added); *see* United States v. Mellies, 496 F. Supp. 2d 930, 933 (M.D. Tenn. 2007) ("The initial sentence of § 3145(c) . . . logically might lead the reader to conclude that subsection (c) pertains to review of a release or detention order by the court of appeals.").

<sup>150</sup> *See* 28 U.S.C. § 1291 (2006); 18 U.S.C. § 3731; *see also* Mellies, 496 F. Supp. 2d at 933 (stating that both of these statutes deal with "appellate jurisdiction"); United States v. Nesser, 937 F. Supp. 507, 509 (W.D. Pa. 1996) (stating that both of these statutes relate solely to review of a final order of a district court by a court of appeals). Section 1291, which is titled "Final Decisions of District Courts," provides as follows:

*The courts of appeals* (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (emphasis added). Section 3731, which governs "Appeal[s] by the United States," provides in relevant part as follows:

*An appeal by the United States shall lie to a court of appeals* from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a

“[t]he appeal shall be determined promptly.”<sup>151</sup> The term “district court” does not appear anywhere in § 3145(c). Thus, as one court aptly put it, “[i]n light of this language [in § 3145(c)], it is illogical to postulate that a district court should apply § 3145(c) when initially ruling on a release or detention motion.”<sup>152</sup>

Third, 18 U.S.C. § 3145(c)’s internal structure unambiguously confines the statute to appellate courts. The title and first two sentences, which lucidly apply to appellate courts—because of the references to “[a]ppel from,” “[a]n appeal,” 28 U.S.C. § 1291, 18 U.S.C. § 3731, and “[t]he appeal”—would be vitiated if district courts could use the “exceptional reasons” clause. An interpretation that district courts could use that clause would ignore the *five* references to appeals or appellate courts within the section.<sup>153</sup> To read § 3145(c) to apply to district courts would render both the statutory title and subsection (c)’s first two sentences meaningless, in violation of the “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”<sup>154</sup> In addition, allowing district courts to use the “exceptional reasons” clause in spite of § 3145(c)’s internal structure—with its myriad references to appeals or appellate courts that courts cannot ignore—would lead to the absurd result of district courts hearing appeals of their own orders.<sup>155</sup>

Fourth, the entire statutory structure of 18 U.S.C. § 3145 unambiguously confines the statute to appellate courts. Courts must read statutes, if possible, “as a symmetrical and coherent

---

motion for revocation of, or modification of the conditions of, a decision or order granting release.

18 U.S.C. § 3731 (emphasis added).

<sup>151</sup> 18 U.S.C. § 3145(c).

<sup>152</sup> *United States v. Salome*, 870 F. Supp. 648, 652 (W.D. Pa. 1994).

<sup>153</sup> *See Nesser*, 937 F. Supp. at 509 (stating that “it is not logical to construe the first sentence as giving the district courts power to hear appeals (from themselves, no less)”).

<sup>154</sup> *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

<sup>155</sup> *See United States v. Chen*, 257 F. Supp. 2d 656, 660 (S.D.N.Y. 2003) (“By definition, a court cannot hear an appeal from its own order.”); *see also United States v. Smith*, 593 F. Supp. 2d 948, 956 (E.D. Ky. 2009) (stating that allowing district courts to use § 3145(c) would involve “a contrived reading” of the statute given “that district judges would hear appeals from themselves”).

regulatory scheme.”<sup>156</sup> Section 3145’s subsections (a) and (b) deal with a district court’s *review* of bail or a detention order decided by a magistrate judge or a sister district court.<sup>157</sup> Thus, subsection (a) and (b), titled “Review of a release order” and “Review of a detention order,” respectively, reveal that the statute is about reviewing the underlying district court’s order, not about the decisionmaking process by which a district court arrives at its decision. Congress permitted a district court to review a magistrate judge’s order in subsections (a) and (b) and permitted a court of appeals to review a district court’s decision in subsection (c).<sup>158</sup> Thus, allowing district courts to use § 3145(c) when ruling on a motion seeking bail pending sentencing would be inconsistent with subsections (a) and (b).<sup>159</sup>

Fifth, the legislative history supports the interpretation that 18 U.S.C. § 3145(c) applies only to courts of appeals. Most strikingly, Senator Simon and Representative Glickman stated their beliefs that the “exceptional circumstances” touchstone was intended to apply “[i]n the *appeals setting*,” without any suggestion of application in the district court setting.<sup>160</sup>

Moreover, in addition to codifying the intent to restrict the “exceptional reasons” provision to “the appeals setting” by unambiguously saying so in § 3145(c), Congress codified that intent in two other ways. First, it did so by placing the “exceptional reasons” provision in 18 U.S.C. § 3145 and not in 18 U.S.C. § 3143, as it did for the other two amendments in the

---

<sup>156</sup> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)) (internal quotation marks omitted).

<sup>157</sup> *See* 18 U.S.C. § 3145(a)–(b) (2006).

<sup>158</sup> *Smith*, 593 F. Supp. 2d at 957 (“Read in its natural progression, it makes sense that that after the statute provides review by a district court of a magistrate judge’s order in parts (a) and (b), part (c) would provide the parties the right to seek ‘[a]ppeal from a release or detention order’ given by a district court.” (alteration in original)).

<sup>159</sup> The Supreme Court has referred to 18 U.S.C. § 3145 as the “review provisions . . . provid[ing] for immediate *appellate* review of [a] detention decision.” *United States v. Salerno*, 481 U.S. 739, 752 (1987). Though *Salerno* referred to § 3145 before the 1990 Amendment, which added § 3145(c), its statement still holds true: Section 3145, as a whole, deals with reviews of the underlying district court decision on bail.

<sup>160</sup> *See* 136 CONG. REC. 3466 (1990) (statement of Rep. Glickman); 135 CONG. REC. 27,712 (1989) (statement of Sen. Simon).

1990 Mandatory Detention Act.<sup>161</sup> That is, of the three amendments contained in the 1990 Act, Congress placed two in 18 U.S.C. § 3143 and one in 18 U.S.C. § 3145(c). So if Congress had intended to allow district courts to use the “exceptional reasons” provision, then surely it would have added that provision to 18 U.S.C. § 3143—not to 18 U.S.C. § 3145(c).<sup>162</sup>

Second, Congress codified its intent to restrict § 3145(c) to appellate courts by promulgating Federal Rule of Criminal Procedure 46 and Federal Rule of Appellate Procedure 9(c). Criminal Procedure Rule 46 states that “[t]he provisions of 18 U.S.C. § 3143 govern release pending sentencing or appeal.”<sup>163</sup> It contains no suggestion that district courts can use 18 U.S.C. § 3145(c). Appellate Procedure Rule 9(c), by contrast, states that “[t]he [appellate] court must make its decision regarding release in accordance with the applicable provisions of 18 U.S.C. §§ 3142, 3143, and 3145(c).”<sup>164</sup> By promulgating Criminal Procedure Rule 46 and Appellate Procedure Rule 9(c), Congress demonstrated that district courts are not permitted to use 18 U.S.C. § 3145(c).<sup>165</sup>

---

<sup>161</sup> See *United States v. Chen*, 257 F. Supp. 2d 656, 661 (S.D.N.Y. 2003) (“Why would Congress, primarily concerned with amending section 3143, place the ‘exceptional reasons’ provision in an entirely different section? The only plausible answer is the one supported by the text itself: Congress intended section 3145(c) for the appellate courts alone.”); *United States v. Salome*, 870 F. Supp. 648, 652 (W.D. Pa. 1994) (“The fact that Congress inserted the ‘exceptional reasons’ language in § 3145(c) indicated that [it] intended this discretion to be limited to the judges of the courts of appeals.”).

<sup>162</sup> Cf. *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 544 U.S. 33, 47 (2008) (“We find it informative that Congress placed § 1146(a) in a subchapter entitled, ‘POSTCONFIRMATION MATTERS’ . . . . The placement of § 1146(a) within a subchapter expressly limited to postconfirmation matters undermines Piccadilly’s view that § 1146(a) covers preconfirmation transfers.”). Two courts have noted that the placement of the “exceptional reasons” provision undercuts the argument that the provision is available to district courts. See *United States v. Smith*, 593 F. Supp. 2d 948, 957 (E.D. Ky. 2009) (“If the Congress had intended to invest district courts with the discretion to determine whether exceptional reasons existed, [ ] it would have said so in § 3143.” (alteration in original) (quoting *In re Sealed Case*, 242 F. Supp. 2d 489, 492 (E.D. Mich. 2003)) (internal quotation marks omitted)); *Chen*, 257 F. Supp. 2d at 661 (“The placement of the ‘exceptional reasons’ provision is especially telling in light of the fact that it was adopted at the same time as the mandatory detention amendments to section 3143.”).

<sup>163</sup> FED. R. CRIM. P. 46(c).

<sup>164</sup> FED. R. APP. P. 9(c) (emphasis added).

<sup>165</sup> See *Jackson v. Stinnett*, 102 F.3d 132, 132 (5th Cir. 1996) (stating that, if Congress does not change a procedural rule proposed by the Supreme Court within a prescribed seven-month window, it approves the rule).

The cumulative arc of legislative history also supports our conclusion. Specifically, on each occasion in which Congress acted to change the bail laws—1966, 1984, and 1990—Congress expressed a desire to narrow the federal courts' ability to grant bail. For example, Congress enacted the Bail Reform Act of 1984 to limit judges' discretion in granting bail before sentencing or appeal. And it enacted the Mandatory Bail Act "to *prevent* the release on bail of convicted drug traffickers or violent criminals who are awaiting *sentencing* or appeal."<sup>166</sup> Therefore, a holistic view of federal legislation governing bail illustrates that Congress intended to erase courts' discretion in granting bail.

Finally, it would be illogical for district courts to use 18 U.S.C. § 3145(c) because § 3145(c) deals with appellate review. Legislative history supports the notion that Congress intended to *narrow* district courts' discretion in granting bail pending sentencing to persons convicted of the crimes listed in § 3143(f).<sup>167</sup> It would be anomalous for Congress to codify that desire by creating a stringent exception to the general rule that district courts should detain those convicted persons pending sentencing but then create a broad exception that obviates the thrust of § 3143(a)(2). Congress's work in creating § 3143(a)(2) would be for naught: Section 3143(a)(2)'s rule to detain unless a stringent exception is satisfied would be swallowed by § 3145(c)'s broad exception.<sup>168</sup> Put another way, Congress would have

---

<sup>166</sup> 135 CONG. REC. 27,711 (1989) (statement of Sen. Simon) (emphasis added).

<sup>167</sup> See *supra* notes 104–109 and accompanying text.

<sup>168</sup> See *United States v. Green*, 250 F. Supp. 2d 1145, 1147 n.1 (E.D. Mo. 2003) (stating that to qualify for bail under § 3145(c), the convicted person is not required to meet the requirements of § 3142(a)(2)). If this odd situation were the interpretation, convicted persons would never file motions under 18 U.S.C. § 3143(a)(2), with its stringent exception, and instead, would always file motions under 18 U.S.C. § 3145(c), with its easier exception.

*narrowed* judicial discretion for district courts in one section, § 3142(a)(2), only to have *broadened* judicial discretion for district courts in another section, § 3145(c).<sup>169</sup>

In sum, both 18 U.S.C. § 3145(c)'s text and legislative history categorically restrict its usage to appellate courts only.

#### IV. JUDICIAL LANDSCAPE

##### A. *Federal Courts of Appeals*

The eight federal appellate courts that have analyzed this issue have all incorrectly concluded that district courts may apply the “exceptional reasons” provision.<sup>170</sup>

The Fifth Circuit, in 1991, was the first federal court of appeals to analyze the issue in *United States v. Carr*.<sup>171</sup> Both Defendants in that case were convicted of a conspiracy to possess with intent to distribute cocaine, an offense with a maximum sentence of forty years.<sup>172</sup> During the time before trial, both women were on release because the court determined that they were neither flight risks nor dangerous to the community.<sup>173</sup> After conviction, both women filed motions seeking bail pending sentencing under 18 U.S.C. § 3143(a)(2).<sup>174</sup> The district court correctly denied their motions<sup>175</sup> because once a court decides that the exception contained in § 3142(a)(2) is inapplicable, the inquiry is over.

---

<sup>169</sup> See *United States v. Sabhnani*, 529 F. Supp. 2d 377, 381–82 (E.D.N.Y. 2007) (“The test under § 3145(c) is necessarily a *flexible* one, and district courts have *wide latitude* to determine whether a particular set of circumstances qualifies as ‘exceptional.’” (emphasis added) (quoting *United States v. Lea*, 360 F.3d 401, 403 (2d Cir. 2004))); see also *United States v. Rentas*, No. 09–CR–555(HB), 2009 WL 3444943, at \*1 (S.D.N.Y. Oct. 26, 2009) (stating that § 3145(c) presents a “‘somewhat *amorphous* standard [that] invites a case-by-case evaluation’ of the circumstances and arguments” (emphasis added) (quoting *United States v. Lippold*, 175 F. Supp. 2d 537, 540 (S.D.N.Y. 2001))); *United States v. Reboux*, No 5:06–CR–451, 2007 WL 4409801, at \*2 (N.D.N.Y. Dec. 14, 2007) (“This [exceptional reasons] language is quite broad.”).

<sup>170</sup> *United States v. Chen*, 257 F. Supp. 2d 656, 659 (S.D.N.Y. 2003) (stating that “every court of appeals” that has “considered the question ha[s] concluded that section 3145(c) allows district courts to release a defendant”).

<sup>171</sup> See 947 F.2d 1239, 1240 (5th Cir. 1991) (per curiam).

<sup>172</sup> *Id.*

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

<sup>175</sup> See *id.*

The Fifth Circuit ignored that mandate, injecting discretion to the district court to use 18 U.S.C. § 3145(c). It noted that “[s]ection 3145(c) is confusing because it is entitled ‘appeal from a release or detention order.’”<sup>176</sup> But the court nevertheless determined that district courts can use the provision because the last sentence of § 3145(c), with its reference to “the judicial officer,” indicated so. According to the court, “[t]his sentence was added to § 3145(c) with the mandatory detention provisions of § 3143(a)(2) and (b)(2) and was apparently designed to provide an avenue for exceptional discretionary relief from those provisions.”<sup>177</sup> The court noted that § 3143(a)(2) and (b)(2) “use the term ‘judicial officer’ when referring to the individuals initially ordering such mandatory detention.”<sup>178</sup> It concluded by finding support from two district court decisions that interpreted § 3145 like it did, and it stated that “[w]e see no reason why Congress would have limited this means of relief to reviewing courts.”<sup>179</sup>

Of course, when the text is clear, it is unnecessary to speculate about Congress’s motivations. The Fifth Circuit sidestepped a textual analysis; it did not explain how it found 18 U.S.C. § 3145(c)’s title, text, internal structure, or statutory structure ambiguous. Instead, it found that the statute *unambiguously* applies to district courts because of its use of “the judicial officer.”<sup>180</sup> That term, however, does not make the statute apply to district courts; it, in fact, supports the notion that the statute applies unambiguously to courts of appeals only.

“Judicial officer” is defined as follows:

[U]nless otherwise indicated, *any person or court* authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to detain or release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court of the District of Columbia.<sup>181</sup>

---

<sup>176</sup> *Id.* (citing 18 U.S.C. § 3145(c) (2006)).

<sup>177</sup> *See id.* (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 902, 104 Stat. 4826, 4827).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* (emphasis added).

<sup>180</sup> *Id.*

<sup>181</sup> 18 U.S.C. § 3156(a)(1) (emphasis added). Section 3041 includes all “judge[s] of the United States.” 18 U.S.C. § 3041.

“Judicial officer” can thus mean either a single person or a court depending on the context in which it is used.<sup>182</sup>

In 18 U.S.C. § 3145(c), Congress confined the statute for use by “*the* judicial officer.”<sup>183</sup> The article “the” is important; it limits the ambit of “judicial officer” to the particular “judicial officer” to whom the statute refers—appellate courts. Imagine if Congress wrote “court” instead of “judicial officer” in § 3145(c). The phrase “the court” would limit “court” to a particular court instead of the entire universe of courts. The universe of possible “judicial officer[s]” is limited depending upon the grammatical article before it and the context of the statute in which it applies. Section 3145(c) applies to an “appeal from a release or a detention order,” and the term “the judicial officer” thus refers to the particular appellate court hearing the appeal.<sup>184</sup>

Senator Simon illustrated this language usage point clearly when discussing the provision that would become 18 U.S.C. § 3145(c): “[I]n *the appeals setting*, if the attorney for the government files a motion indicating that there are *exceptional circumstances* which warrant release and the defendant is not likely to flee or pose a danger to the community, *the judicial officer* may order release.”<sup>185</sup> He used the term

---

<sup>182</sup> See *United States v. Smith*, 593 F. Supp. 2d 948, 956 (E.D. Ky. 2009) (“Therefore, the definition [of ‘judicial officer’] provides that the term . . . can mean either a single judge (‘any person’) or a full ‘court’ depending on the context in which it is used.”).

<sup>183</sup> 18 U.S.C. § 3145(c) (emphasis added).

<sup>184</sup> See *Smith*, 593 F. Supp. 2d at 956 (stating that the term “judicial officer” is not “ambiguous, but rather, that its meaning is limited in this context to appellate courts.”); *United States v. Chen*, 257 F. Supp. 2d 656, 663 (S.D.N.Y. 2003) (stating that use of “judicial officer” in § 3145(c) is “narrower” than all of its possibilities because “[i]n the context of a provision dealing with appellate review, ‘judicial officer’ must be read to mean only appellate judges”). In operation, a convicted person would appeal from a district court’s order denying bail presentencing decided under 18 U.S.C. § 3143(a)(2). The convicted person would argue on appeal that the appellate court should order his release under 18 U.S.C. § 3145(c). At this point, Federal Rule of Appellate Procedure 9(a)(3) is triggered. It provides that “[t]he court of appeals *or one of its judges* may order the defendant’s release pending the disposition of the appeal.” FED. R. APP. P. 9(a)(3) (emphasis added). Thus, “the judicial officer” authorized to use § 3145(c) is either the appellate court or a single judge of that appellate court who can authorize release until the appellate court renders its ultimate decision. See *Smith*, 593 F. Supp. 2d at 956–57 (stating that the conclusion that “the term ‘the judicial officer’ logically applies to appellate judges . . . is bolstered” by Federal Rule of Appellate Procedure 9(a)(3) because it also demonstrates “that the singular use of the term ‘judicial officer’ within section 3145(c) logically applies to appellate judges”).

<sup>185</sup> 135 CONG. REC. 27,712 (1989) (statement of Sen. Simon) (emphasis added).



“judicial officer” to refer to the decision maker or tribunal in which the issue exists. His statement makes clear that use of the term “judicial officer” was not always intended to include the entire universe of its definition. Instead, the term is limited by the word “the,” which means the term refers to one type of “judicial officer”; that one type of judicial officer is the court in “the appeals setting”—appellate courts.

The term “judicial officer” comprises various members of the judiciary, including, *inter alia*, magistrate judges, district court judges, and federal appellate judges.<sup>186</sup> But Senator Simon’s statement makes clear that “judicial officer” was not intended to include the entire array of its possible definition.

Similarly, Senator Simon used “the judicial officer” to mean a different particular type of judicial officer when describing 18 U.S.C. § 3143(a)(2). He noted that § 3143(a)(2)’s exception was intended for another type of “judicial officer”—a district court: “[I]n the presentencing setting, if an attorney for the government will recommend a sentence of no incarceration or if the judicial officer finds that there is a substantial likelihood the defendant’s motion for [a] new trial or acquittal will be granted . . . the judicial officer may release the defendant.”<sup>187</sup> The use of “the judicial officer” in that context limits the term’s possibilities to district courts because only district courts deal with defendants’ motions in the presentencing setting.<sup>188</sup> Concededly, it was awkward for Congress to include courts

---

<sup>186</sup> See 18 U.S.C. § 3156(a)(1).

<sup>187</sup> 135 CONG. REC. 27,711–12 (1989) (statement of Sen. Simon) (emphasis added).

<sup>188</sup> One scholar, however, has argued that Congress intended the term “judicial officer” in 18 U.S.C. § 3145(c) to apply to district courts in addition to appellate courts. See Rosen, *supra* note 25, at 27. Specifically, Mr. Rosen notes that “during the drafting of section 3145(c), the section’s original text stated that the exceptional reasons issue could be addressed ‘by a court of appeals or a judge thereof.’” See *id.* at 27 n.41 (quoting 136 CONG. REC. 11,026 (1990)). According to Mr. Rosen, the “change[] made to the provision during its drafting further support[s] the principle that a district court may address bail motions raising exceptional reasons.” Rosen, *supra* note 25, at 27. But that drafting change surmount the statements by Senator Simon and Representative Glickman that confined § 3145(c) to “the appeals setting.” Moreover, given all of Congress’s statements about narrowing courts’ discretion, it is more likely that Congress used the term “judicial officer” solely for statutory consistency. That is, because it was able to limit the term “judicial officer” with “the,” Congress was able to use the same term throughout the statutory structure with its particular ambit narrowing for particular provisions. For instance, “the judicial officer” was limited to mean district courts in the context of § 3143(a)(2), while it was limited to mean appellate courts in the context of § 3145(c).

within the ambit of “judicial officer,” but that is undeniably what they did in 18 U.S.C. § 3156(a).<sup>189</sup> And even though Congress’s decision to include an entity—a court—into the definition of “judicial officer” was awkward, that decision did not create an ambiguity in 18 U.S.C. § 3145(c), especially in light of the plethora of references to appellate courts and appeals within § 3145(c). Perhaps Congress simply decided that statutory consistency outweighed awkwardness and thus decided to use the same term—“judicial officer”—throughout the statutory scheme, restricting it with “the” when needed.

In spite of *Carr*’s shortcomings in failing to properly interpret § 3145(c),<sup>190</sup> some courts of appeals have simply decided this important issue by citing to *Carr*.<sup>191</sup> For instance, the Second Circuit, in reviewing a district court’s use of § 3145(c), noted the district court’s analysis of § 3143(b)(1)’s requirements and assumed that, after § 3143(b)(1)’s application, “[o]nly then does the trial court consider the presence of exceptional circumstances making detention inappropriate.”<sup>192</sup> It cited *Carr* for support and then proceeded to analyze whether the district court was correct on the merits.<sup>193</sup>

Likewise, the Eighth Circuit decided this important issue by approving the district court’s holding on the issue, which simply quoted *Carr*. The Eighth Circuit did not analyze 18 U.S.C. § 3145(c)’s title, text, internal structure, statutory structure, or legislative history. It simply noted approvingly that “the Fifth Circuit held that § 3145(c) relief is *not* limited to

---

<sup>189</sup> 18 U.S.C. § 3156(a)(1).

<sup>190</sup> See *United States v. Chen*, 257 F. Supp. 2d 656, 663 (S.D.N.Y. 2003) (criticizing *Carr*’s reasoning); see also *United States v. Harrison*, 430 F. Supp. 2d 1378, 1383 (M.D. Ga. 2006) (“The *Chen* court then proceeded to deconstruct the three reasons proffered in *Carr* . . .”).

<sup>191</sup> See *Chen*, 257 F. Supp. 2d at 662 (S.D.N.Y. 2003) (“The [appellate] courts that have held that section 3145(c) is available to district courts almost uniformly cite, without discussion, the Fifth Circuit’s decision in *Carr*.”).

<sup>192</sup> *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991).

<sup>193</sup> *DiSomma* is not without its in-Circuit critics. The District Court for the District of Vermont has noted that it viewed “§ 3145(c) by its very provisions [as applying] exclusively to reviewing courts and not to the court which initially ordered release or detention.” *United States v. Bloomer*, 791 F. Supp. 100, 102 (D. Vt. 1992).

reviewing courts; district courts may release a defendant who has been convicted. This court . . . agrees with the reasoning of the Fifth Circuit Court of Appeals.”<sup>194</sup>

The Tenth Circuit also neglected to engage in full analysis of 18 U.S.C. § 3145(c)'s title, text, internal structure, or statutory structure.<sup>195</sup> It posited that “[t]his court has never addressed directly the question of whether the ‘exceptional reasons’ provision of § 3145(c) applies to requests for release made to the district court.”<sup>196</sup> The court then noted that it had affirmed a case without an opinion in which the district court considered whether exceptional reasons existed.<sup>197</sup> Finally, it concluded that it joined “[a]ll the other circuits that have addressed the issue have ruled that the ‘exceptional reasons’ provision does apply to district courts.”<sup>198</sup>

The Ninth Circuit also neglected to engage in a full analysis.<sup>199</sup> In a footnote, the court addressed the issue by simply stating the inquiry, citing its sister circuits, and agreeing with them: “Although the ‘exceptional reasons’ provision appears in a subsection that otherwise concerns actions taken by appellate courts, we agree with the other circuits to have addressed the issue that the district court has authority to determine whether there are exceptional reasons.”<sup>200</sup>

The Sixth Circuit, like the Second, Eighth, Ninth, and Tenth, analyzed the issue but briefly, without reviewing 18 U.S.C. § 3145(c)'s title, text, internal structure, or statutory structure.<sup>201</sup> The court noted that, although it had “never explicitly held in a published opinion that the district court has authority to release a defendant being detained pursuant to § 3142(a)(2) upon a showing of ‘exceptional reasons’ under § 3145(c), [it had] reached that conclusion in an unpublished

---

<sup>194</sup> *United States v. Mostrom*, 11 F.3d 93, 95 (8th Cir. 1993) (per curiam) (quoting trial court's order dated Nov. 18, 1993).

<sup>195</sup> *See Chen*, 257 F. Supp. 2d at 662 n.22 (describing the Tenth Circuit's reasoning as “curt”).

<sup>196</sup> *United States v. Jones*, 979 F.2d 804, 806 (10th Cir. 1992) (per curiam).

<sup>197</sup> *See id.*

<sup>198</sup> *Id.*

<sup>199</sup> *See Chen*, 257 F. Supp. 2d at 662 n.22 (describing the appellate courts' cursory analysis).

<sup>200</sup> *United States v. Garcia*, 340 F.3d 1013, 1014 n.1 (9th Cir. 2003).

<sup>201</sup> *See United States v. Christman*, 596 F.3d 870, 870–71 (6th Cir. 2010) (order reversing authorization of detention pending sentencing).

opinion.”<sup>202</sup> And given that unpublished case’s “holding, the unanimous agreement of other circuits that have considered the issue, and the government’s concession of error,” it held that “the district court erred in not considering whether [the defendant] established exceptional reasons to support his release pending sentencing.”<sup>203</sup> The Sixth Circuit’s reliance on its earlier, unpublished decision is misplaced since that panel also did not analyze § 3145(c)’s title, text, internal structure, or statutory structure.<sup>204</sup>

The Seventh Circuit and the Fourth Circuit are the only courts of appeals to join the Fifth Circuit in engaging in detailed, albeit incorrect, analysis of the issue.

In *United States v. Herrera-Soto*,<sup>205</sup> Herrera-Soto appealed to the Seventh Circuit from a district court’s order imposing mandatory detention pending his appeal after analyzing, but rejecting, the “exceptional reasons” provision.<sup>206</sup> The Seventh Circuit discussed why district courts, in its view, could use the provision. It acknowledged that, “[a]lthough the provision . . . appears in a section titled ‘Appeal from a Release or Detention Order,’ this provision should be read in conjunction with the portion of the statute outlining the general procedures for release pending appeal.”<sup>207</sup> This is so, according to the court, because “[t]he ‘exceptional reason’ provision § 3145(c) was added to the Bail Reform Act along with the amendment providing for mandatory detention in certain circumstances.”<sup>208</sup> According to the court:

It was therefore included as an avenue of relief from the mandatory detention provisions, which in turn constitute a portion of the general provisions for release pending appeal. The statute does not indicate that Congress *intended* that a person having “exceptional reasons” sufficient to override mandatory detention should be limited to a period of release

---

<sup>202</sup> *Id.* (citing *United States v. Cook*, 42 F. App’x 803, 804 (6th Cir. 2002) (unpublished)).

<sup>203</sup> *Id.* (citing *United States v. Goforth*, 546 F.3d 712, 715 (4th Cir. 2008); *Garcia*, 340 F.3d at 1014 n.1) (citation omitted).

<sup>204</sup> *See Cook*, 42 F. App’x at 804 (resolving this important issue by simply stating that district courts are “not precluded from making a determination of exceptional circumstances in support of release”).

<sup>205</sup> 961 F.2d 645 (7th Cir. 1992) (per curiam).

<sup>206</sup> *Id.* at 646.

<sup>207</sup> *Id.* at 647.

<sup>208</sup> *Id.*

only while an appeal of the detention order is pending. Read in context, such a limitation, would obviously narrow the relief *intended* by Congress.<sup>209</sup>

The court's reasoning contains two mistakes. First, it ignored § 3145(c)'s text. When the text is clear, resorting to legislative history is of course unnecessary.<sup>210</sup> The text reveals that the statute applies in the appeals setting. Second, in viewing the legislative history, the court did not appreciate that Congress intended to curtail, not expand, its discretion. Its statement that "[t]he statute does not indicate that Congress intended that a person having 'exceptional reasons' sufficient to override mandatory detention should be limited to a period of release only while an appeal of the detention order is pending"<sup>211</sup> ignores the legislative history that the provision was confined to a discussion of the "appeals setting."<sup>212</sup> Moreover, the court's statement that "such a limitation [of appellate courts only using § 3145(c)], would obviously narrow the relief *intended* by Congress" is vitiated by the legislative history that actually supports narrowing courts' discretion and ability to grant bail.<sup>213</sup> Of course, the Seventh Circuit should not have resorted to assaying the legislative history in the first place.

Like the Seventh Circuit, the Fourth Circuit analyzed the issue. In *United States v. Goforth*,<sup>214</sup> "Goforth moved the district judge for review of the detention order under 18 U.S.C. § 3145, arguing that 'exceptional reasons' made detention inappropriate."<sup>215</sup> The district judge denied the motion, holding that he "is not a 'judicial officer' within the meaning of § 3145(c) and therefore ha[d] no authority under the subsection to determine whether 'exceptional reasons' exist."<sup>216</sup>

The Fourth Circuit, finding that the statute unambiguously applied to district courts, reversed the district court.<sup>217</sup> It stated that the "definition [of 'judicial officer'] unquestionably encompasses district judges," and it thus held "that district

---

<sup>209</sup> *Id.* (emphasis added) (citation omitted).

<sup>210</sup> *See supra* Part III.A.

<sup>211</sup> *Herrera-Soto*, 961 F.2d at 647.

<sup>212</sup> *See supra* notes 115–116 and accompanying text.

<sup>213</sup> *Herrera-Soto*, 961 F.2d at 647 (emphasis added).

<sup>214</sup> 546 F.3d 712 (4th Cir. 2008).

<sup>215</sup> *Id.* at 713.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 715.

judges unambiguously qualify as ‘judicial officers’ under § 3145(c).”<sup>218</sup> The court erred, however, in failing to note that the term “judicial officer” had been limited by “the.”<sup>219</sup> Furthermore, although noting that “the general context of that section and its title may suggest that it addresses appellate judges,” the court failed to analyze § 3145’s title, text, internal structure, or statutory structure.<sup>220</sup>

The court then stated that it “would reach the same result even if [it] assumed *arguendo* that the text of § 3145(c) is ambiguous” because the “legislative history leads us to the conclusion that the term ‘judicial officer’ here includes district judges.”<sup>221</sup> The court reasoned that, because Congress changed the proposed language in 18 U.S.C. § 3145(c) from “‘by a court of appeals or a judge thereof’” to “‘the judicial officer[,]’ . . . Congress intended to include district judges among those who could grant ‘exceptional reasons’ relief.”<sup>222</sup> The court erred because it viewed but one piece of legislative history, which is not conclusive,<sup>223</sup> and failed to examine the explicit statements made by Senator Simon and Representative Glickman indicating their intent that § 3145(c) be confined to “the appeals setting.”<sup>224</sup>

It ordinarily would be powerful indicia of correctness when all eight federal appellate courts are in accord on an issue. But, as detailed above, the group’s projection of a sturdy consensus is a facade because several of them did not analyze the issue thoroughly and the other courts engaged in only some analysis.<sup>225</sup>

---

<sup>218</sup> *Id.*

<sup>219</sup> See *supra* notes 171–178 and accompanying text.

<sup>220</sup> *Goforth*, 546 F.3d at 715.

<sup>221</sup> *Id.* (emphasis added).

<sup>222</sup> *Id.* (citing *Rosen*, *supra* note 25, at 27 n.41).

<sup>223</sup> See *supra* notes 182–184 and accompanying text (arguing that Congress, by limiting the term “judicial officer” with “the,” was able to use the same term throughout the statutory structure with its particular scope narrowing in particular contexts).

<sup>224</sup> See *supra* notes 115–116 and accompanying text.

<sup>225</sup> See *United States v. Cochran*, 640 F. Supp. 2d 934, 936 (N.D. Ohio 2009) (“[T]his seemingly powerful list of authorities holds considerably less persuasive value than an initial glance at the string cite would ordinarily indicate.”); *United States v. Chen*, 257 F. Supp. 2d 656, 659–60 (S.D.N.Y. 2003) (stating that all six courts of appeals that had analyzed the issue before the *Chen* Court “ha[d] uniformly given the question cursory treatment, foregoing rigorous statutory analysis in favor of reliance on *stare decisis*”).

None of the eight circuits meaningfully analyzed 18 U.S.C. § 3145(c)'s title, text, internal structure, statutory structure, or legislative history.

*B. A Possible yet Unstated Concern*

Perhaps some appellate courts are trying to provide discretion to district courts under 18 U.S.C. § 3145(c) because they are wary of the categorical nature of 18 U.S.C. § 3143(b)(2), the statute dealing with bail pending appeal. That is, § 3143(b)(2), which governs bail for the same three classes of persons convicted of serious crimes as § 3143(a)(2), denies bail pending their appeal *without exception*. Thus, a criminal may argue for the exception to obtain bail before sentencing but may not argue for any exception to obtain bail pending his appeal because none exists.<sup>226</sup>

Perhaps puzzled about why Congress would not create an exception for district court usage for those same convicted persons seeking bail pending their appeals, the courts resort to interpreting 18 U.S.C. § 3145(c) to allow district courts to have one exception to § 3143(b)(2).<sup>227</sup> But courts, regardless of any perceived unfairness in convicted persons not having the opportunity to argue any exceptions to 18 U.S.C. § 3143(b)(2), should not read 18 U.S.C. § 3145(c) to provide one because its statutory coverage is textually limited to appellate courts.

*C. Tangible Consequences of the Appellate Courts' Interpretation*

The Article's disagreement with the eight appellate courts is not an academic quibble; it is over an issue that is having practical, tangible, and negative consequences. District courts

---

<sup>226</sup> Any potential argument that it is unconstitutional to categorically deny a convicted person bail pending his appeal will likely fail because the Eighth Amendment does not grant an absolute right to bail. *See United States v. Salerno*, 481 U.S. 739, 754–55 (1987).

<sup>227</sup> *See United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003) (stating that serious criminals are not eligible for release pending their appeals unless 18 U.S.C. § 3145(c) applies); *United States v. Koon*, 6 F.3d 561, 567 (9th Cir. 1993) (Reinhardt, J., dissenting) (“Congress added the ‘exceptional reasons’ provision in 18 U.S.C. § 3145(c) to mitigate the harshness of section 3143(b)(2)'s blanket prohibition on release pending appeal in drug cases and cases involving crimes of violence.”); *United States v. DiSomma*, 951 F.2d 494, 496 (2d Cir. 1991) (stating that “[w]hile the language of section 3143(b)(2) compels detention, an exception permits release of mandatory detainees who meet the requirements for release under” § 3145(c)).

are using 18 U.S.C. § 3145(c) as a second exception to 18 U.S.C. § 3143(a)(2) to release convicted persons on bail.<sup>228</sup> The Article asserts that Congress provided only one exception to 18 U.S.C. § 3143(a)(2)—the exception that is actually contained in § 3143(a)(2). The eight courts of appeals have judicially created a second exception, in violation of statutory text, for district courts that district courts are routinely applying.

This judicially created exception, § 3145(c), is swallowing Congress's rule that a district court must detain a § 3142(f)(1) convicted person unless he satisfies the stringent exception in § 3143(a)(2). In effect, district courts that grant bail to a person convicted of a crime specified in 18 U.S.C. § 3142(f)(1)(A), (B), or (C) based on 18 U.S.C. § 3145(c) are using § 3145(c)'s broad exception, which should be confined to appellate court usage only, to sidestep § 3143(a)(2)'s stringent exception.

For example, in *United States v. Charger*, a case where 18 U.S.C. § 3143(a)(2) applied and its exception was not met, the district court nevertheless granted bail under § 3145(c) because the convicted person's "family needs this time together to heal, to pray, to address the [Defendant's] alcohol problems, and to make it likely that defendant will not again act as he did in this case."<sup>229</sup> The *Charger* court found those factors, in addition to the defendant's participation in an alcoholism program, rising to "exceptional reasons" warranting release.<sup>230</sup> The court should have ended the inquiry when it found that the Defendant could not satisfy § 3143(a)(2)'s exception.

---

<sup>228</sup> See, e.g., *United States v. Teague*, No. 1:09cr42, 2009 WL 3261701, at \*2 (W.D.N.C. Oct. 8, 2009) (stating that a convicted person may be released on bail if he satisfies the exception contained in § 3142(a)(2) or the "exception . . . found in 18 U.S.C. § 3145(c)"); *United States v. Sabhnani*, 529 F. Supp. 2d 377, 381 (E.D.N.Y. 2007) (stating that "a defendant convicted of a crime of violence and awaiting sentencing who cannot satisfy the criteria set forth in § 3143(a)(2) *may nevertheless* be released" under the exception contained in § 3145(c) (emphasis added)); *United States v. Kaquatosh*, 252 F. Supp. 2d 775, 776 (E.D. Wis. 2003) (stating that, even if § 3143(a)(2)'s exception is not satisfied, the convicted person could nevertheless seek release under the exception contained in § 3145(c)).

<sup>229</sup> *United States v. Charger*, 918 F. Supp. 301, 304 (D.S.D. 1996).

<sup>230</sup> See *id.*; see also *United States v. Cantrell*, 888 F. Supp. 1055, 1057 (D. Nev. 1995) (finding "exceptional reasons" because the convicted person had been participating in a substance abuse program and would benefit more from outpatient treatment than from detention).



Its likely that sometimes district court judges might at times find it difficult on the human level to levy punishment to a sympathetic convicted person. But when Congress has spoken to the contrary, as it has here, it is simply not within the courts' power to substitute their own preferences. Instead, district courts must abide by 18 U.S.C. § 3143(a)(2), with its general rule to detain and its stringent exception to release only if: (1) it finds that there is a substantial likelihood that a motion for acquittal or new trial will be granted, or the government has recommended that no sentence of imprisonment be imposed on the person; and (2) it finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.<sup>231</sup>

The *Charger* court is not alone. Other district courts have allowed the exception to swallow Congress's rule that they must detain the § 3142(f)(1) convicted person unless he satisfies the difficult-to-satisfy exception in § 3143(a)(2). For instance, a district court found "exceptional reasons" and thus granted release to a convicted person pending sentencing because he "had done exceptionally well while on pre-trial release," which included obtaining employment, desiring to obtain "a psychological evaluation," and having "stable employment [, which] . . . had enabled him to regularly send money home to his family."<sup>232</sup>

In addition, another district court found "exceptional reasons" where a convicted person "fully cooperated with the government" and performed "well on pretrial release" by, inter alia, renouncing criminal activities, securing full-time employment, bringing "himself up to date on his child support payments," and scoring negative results on "all of his urine tests."<sup>233</sup> Other district courts have, too, found exceptional reasons to release a person convicted of a crime listed under § 3142(f) pending sentencing.<sup>234</sup>

---

<sup>231</sup> See 18 U.S.C. § 3143(a)(2) (2006).

<sup>232</sup> *Kaquotosh*, 252 F. Supp. at 779–80.

<sup>233</sup> *United States v. Mitchell*, 358 F. Supp. 2d 707, 708–09 (E.D. Wis. 2007).

<sup>234</sup> See *United States v. Rentas*, No. 09 CR 555(HB), 2009 WL 3444943, at \*1–2 (S.D.N.Y. Oct. 26, 2009) (finding "exceptional reasons" warranting release pending sentencing because convicted person was "gainfully employed," complied with her release terms, cooperated with the government, and had young children who suffered from hyperactivity and insomnia); *United States v. Price*, 618 F. Supp. 2d 473, 475, 483 (W.D.N.C. 2008) (finding "exceptional reasons" warranting release

#### D. Federal District Courts

In contrast to the eight courts of appeals and the district courts that apply § 3145(c) without questioning whether they should, two groups of district courts interpret the disputed section differently.

##### 1. Finding the Language Ambiguous

Two federal district courts have taken the position that 18 U.S.C. § 3145(c)'s language is ambiguous, and they thus resort to the legislative history, which according to them supports the view that district courts can use § 3145(c).<sup>235</sup> Both courts conclude that, “[b]ecause the term ‘judicial officer’ is reasonably susceptible to more than one meaning, . . . [s]ection 3145 of the Bail Reform Act is, in fact, ambiguous.”<sup>236</sup> Specifically, these courts’ determinations that “judicial officer” is ambiguous is incorrect, as discussed above.

---

pending sentencing because convicted person believed that detention would threaten her health and her unborn baby's health); *United States v. Sabhnani*, 529 F. Supp. 2d 377, 383 (E.D.N.Y. 2007) (finding “exceptional reasons” warranting release pending sentencing because convicted person “is solely responsible for operating his business” and needed time to arrange care for his four children and wind down his family’s financial affairs); *United States v. Hooks*, 330 F. Supp. 2d 1311, 1312 (M.D. Ala. 2004) (finding “exceptional reasons” warranting release pending sentencing because the convicted person needed to take care of her three minor children); *see also* *United States v. Reboux*, No 5:06–CR–451 (FJS), 2007 WL 4409801, at \*3 (N.D.N.Y. Dec. 14, 2007) (finding “exceptional reasons” warranting release pending sentencing because the convicted person had cooperated with the government and displayed “exemplary behavior prior to and during the criminal proceedings”).

<sup>235</sup> *See* *United States v. Miller*, 568 F. Supp. 2d 764, 775–76 (E.D. Ky. 2008) (holding that it had jurisdiction under 18 U.S.C. § 3145(c) to consider defendant’s request for release pending sentencing based upon the “exceptional reasons” provision because the text was ambiguous and the legislative history supported application by district courts); *United States v. Price*, 618 F. Supp. 2d 473, 479–83 (W.D.N.C. 2008) (same). *Price* was decided ten months before the Fourth Circuit held that 18 U.S.C. § 3145(c) unambiguously applies to district courts. *See* *United States v. Goforth*, 546 F.3d 712, 715 (4th Cir. 2008). *Price*’s holding was unaffected by *Goforth*—both allow district courts to use § 3145(c)—but its reasoning that § 3145(c) is ambiguous is no longer viable law in the Fourth Circuit.

<sup>236</sup> *Price*, 618 F. Supp. 2d at 480; *see Miller*, 568 F. Supp. 2d at 771 (noting that “the term ‘judicial officer’ is ‘reasonably susceptible to more than one meaning’ inasmuch as it is used throughout the bail statutes to refer to judges at all levels of the federal judicial system, depending on the posture of the case” (quoting *Price*, 618 F. Supp. at 480)).

The term “judicial officer” does not create an ambiguity in the statute warranting a resort to legislative history. As described above, the universe of possible “judicial officers” is limited by the grammatical article before it and the context of the statute in which it applies.<sup>237</sup>

After finding that 18 U.S.C. § 3145(c) is ambiguous, these two district courts interpreted the legislative history inaccurately. They noted that “[t]he timing of the [1990] amendments to the statutes (*i.e.*, contemporaneous) tends to show that by adding the ‘exceptional reasons’ language to § 3145(c), Congress intended to create an exception to the newly codified mandatory detention provision within § 3143(a)(2).”<sup>238</sup> This analysis disregards the exception contained in § 3143(a)(2) and Congress’s well-documented desire to limit courts’ discretion. Moreover, the district court in *United States v. Price* incorrectly interpreted the Justice Department’s letter—which it described as “the only useful historical document on the issue”—as “not limit[ing] the district court’s ability to entertain such an analysis.”<sup>239</sup> This statement is incorrect because the Justice Department addressed the concern that the proposal that ultimately became 18 U.S.C. § 3142(b)(2) had no exceptions.<sup>240</sup>

## 2. Getting It Right

A group of district courts has gotten it right, in contrast to the eight courts of appeals and the two district courts discussed above. They hold that 18 U.S.C. § 3145(c) unambiguously pertains to only courts of appeals—not district courts.<sup>241</sup> These

---

<sup>237</sup> See *supra* notes 175–182 and accompanying text.

<sup>238</sup> *Price*, 618 F. Supp. 2d at 480–81; see *Miller*, 568 F. Supp. 2d at 773 (quoting *Price*, 618 F. Supp. 2d at 480–81).

<sup>239</sup> *Price*, 618 F. Supp. 2d at 481.

<sup>240</sup> See *supra* notes 121–126 and accompanying text.

<sup>241</sup> See *United States v. Cochran*, 640 F. Supp. 2d 934, 937 (N.D. Ohio 2009) (holding that the plain language of 18 U.S.C. § 3145(c) established that it applies only to appeals); *United States v. Smith*, 593 F. Supp. 2d 948, 957 (E.D. Ky. 2009) (“In the end, the most natural reading of the text, structure, and context of section 3145(c) leads to the conclusion that Congress grants authority to find ‘exceptional reasons’ only to appellate courts.”); *United States v. Harrison*, 430 F. Supp. 2d 1378, 1385–86 (M.D. Ga. 2006) (stating that 18 U.S.C. § 3145(c) applies only to courts of appeals); *United States v. Chen*, 257 F. Supp. 2d 656, 660 (S.D.N.Y. 2003) (“The structure, language, and placement of section 3145(c) all favor the view that a district court is not invested with the power to reach ‘exceptional reasons.’ ”); *United States v. Nesser*, 937 F. Supp. 507, 509 (W.D. Pa. 1996) (holding that “Congress reserved” § 3145(c) to courts of appeals only); *United States v. Salome*, 870 F. Supp.

courts apply proper statutory interpretation principles and start by noting 18 U.S.C. § 3145(c)'s title indicates that it deals with appeals.<sup>242</sup> Moreover, according to them, the language contained in § 3145(c) unambiguously applies to appellate courts.<sup>243</sup> And finally, they note “that the overall structure of § 3145” supports the notion that it does not apply to district courts.<sup>244</sup>

### 3. Inconsistent Application of Federal Law

District courts in the Eleventh Circuit, a circuit with no binding authority on whether district courts may apply 18 U.S.C. § 3145(c), have taken divergent views, thus causing an inconsistent application of federal law. Three district courts within the Eleventh Circuit have concluded that they may resort to the “exceptional reasons” provision in deciding whether a criminal may receive bail.<sup>245</sup> But another district court within the Eleventh Circuit disagrees, holding that 18 U.S.C. § 3145(c) applies only to courts of appeals.<sup>246</sup>

And from 2002 until March 2010, when the Sixth Circuit issued a binding decisions, district courts within the Sixth Circuit were also applying 18 U.S.C. § 3145(c) inconsistently.<sup>247</sup>

---

648, 652 (W.D. Pa. 1994) (stating that the court of appeals’ decisions “ignore certain fundamental principles of statutory interpretation” and that it had “no authority pursuant to § 3145(c) to determine whether there are ‘exceptional reasons’ that make defendant’s detention inappropriate”).

<sup>242</sup> See, e.g., *Smith*, 593 F. Supp. 2d at 955 (“As a preliminary matter, Section 3145(c) is titled ‘[a]ppeal from a release or detention order . . .’” (alteration in original)); *Chen*, 257 F. Supp. 2d at 660 (“The title of the subsection (‘appeal from a release or detention order’) and the use of the word ‘appeal’ in place of ‘review’ weigh heavily in favor of reading § 3145(c) to apply only to appellate courts.”).

<sup>243</sup> See, e.g., *Cochran*, 640 F. Supp. 2d 937–38 (assaying the text of 3145(c)); *Chen*, 257 F. Supp. 2d at 662 (“[T]he language of the sentence in included in § 3145(c) is direct.”); *Salome*, 870 F. Supp. at 652 (stating that the first sentence of § 3145(c) plainly reveals that it applies to appellate courts).

<sup>244</sup> See, e.g., *Chen*, 257 F. Supp. 2d at 665 (noting that the “structure of section 3145 compels the conclusion that a district court may not consider ‘exceptional reasons’ as a basis for release”); *Salome*, 870 F. Supp. at 652 (“[T]he overall structure of § 3145 belies the argument that § 3145(c) should be applied by a district court.”).

<sup>245</sup> See *United States v. Hooks*, 330 F. Supp. 2d 1311, 1312 (M.D. Ala. 2004) (considering a criminal’s motion for bail under 18 U.S.C. § 3145(c)); *United States v. Bryant*, 873 F. Supp. 660, 662–63 (N.D. Ga. 1994) (same); *United States v. Pope*, 794 F. Supp. 372, 373 (S.D. Fla. 1992) (same).

<sup>246</sup> *Harrison*, 430 F. Supp. 2d at 1385–86 (stating that 18 U.S.C. § 3145(c) applies only to courts of appeals).

<sup>247</sup> Until March 2010, when the Sixth Circuit issued a published order, district courts within the Sixth Circuit were free to disregard the Sixth Circuit’s

Some district courts had concluded that they may use 18 U.S.C. § 3145(c).<sup>248</sup> Other district courts, by contrast, had concluded that they could not.<sup>249</sup>

#### CONCLUSION

Section 3145(c)'s unambiguous text confines its application to courts of appeals only. District courts may not resort to it, and its concomitant injection of broad discretion, because Congress reserved its usage to courts of appeals. Moreover, though resort to legislative history is unnecessary, that legislative history evinces congressional desire to limit § 3145(c) to the "appeals setting."<sup>250</sup> In addition, the entire arc of legislative history for the Bail Reform Act of 1966, Bail Reform Act of 1984, and the Mandatory Detention Act of 1990 was to limit, not augment, courts' discretion.<sup>251</sup>

The Article notes, however, that Congress could amend 18 U.S.C. § 3145(c) to allow for district court usage. Sensible reasons exist for Congress to amend § 3145(c) to allow district courts the discretion of granting bail if truly "exceptional reasons" exist. For instance, suppose a convicted person in a

---

pronouncement that they are "not precluded from making a determination of exceptional circumstances in support of release," *United States v. Cook*, 42 F. App'x 803, 804 (6th Cir. 2002), because unpublished cases are not binding precedent in the Sixth Circuit. *See, e.g., Bell v. Johnson*, 308 F.3d 594, 611 (6th Cir. 2002). In March 2010, as mentioned above, the Sixth Circuit "h[e]ld that the district court erred in not considering whether Christman established exceptional reasons to support his release pending sentencing." *United States v. Christman*, 596 F.3d 870, 871 (6th Cir. 2010) (order reversing authorization of detention pending sentencing).

<sup>248</sup> *See United States v. Miller*, 568 F. Supp. 2d 764, 769 (E.D. Ky. 2008) (holding that it had jurisdiction under 18 U.S.C. § 3145(c) to consider defendant's request for release pending sentencing based upon the "exceptional reasons" provision because the text was ambiguous and the legislative history supported application by district courts); *United States v. Salazar*, 3:06CR-112-H, 2007 WL 542390, at \*1-2 (W.D. Ky. Feb. 16, 2007) (applying § 3145(c)); *United States v. Burnett*, 76 F. Supp. 2d 846, 848-50 (E.D. Tenn. 1999) (same); *United States v. Rodriguez*, 50 F. Supp. 2d 717, 721 (N.D. Ohio 1999) (same).

<sup>249</sup> *See United States v. Cochran*, 640 F. Supp. 2d 934, 937 (N.D. Ohio 2009) (holding that the plain language of 18 U.S.C. § 3145 established that it applies only to appeals); *United States v. Smith*, 593 F. Supp. 2d 948, 957 (E.D. Ky. 2009) ("In the end, the most natural reading of the text, structure, and context of section 3145(c) leads to the conclusion that Congress grants authority to find 'exceptional reasons' only to appellate courts."); *In re Sealed Case*, 242 F. Supp. 2d 489, 491-92 (E.D. Mich. 2003) (same).

<sup>250</sup> *See supra* notes 115-116 and accompanying text.

<sup>251</sup> *See supra* Part II.B-D and accompanying text.

terrorism case pledges to cooperate proactively with the government pending sentencing. Presumably, Congress would want district courts to have the flexibility of granting bail, letting the government accumulate as much information from the convicted criminal as possible.<sup>252</sup> This Article thereby urges Congress to consider amending 18 U.S.C. § 3145(c) to allow district courts to grant bail in very specific circumstances that Congress deems appropriate.

But that day has not arrived. The extant version of § 3145(c) applies only to courts of appeals. This Article concludes by reciting one district court's apt conclusion on this situation: "[A] judge's wish . . . that an act of Congress provide more flexibility, is simply not a sufficient ground to abandon reliance on the words of the statute itself."<sup>253</sup> Federal courts cannot violate bedrock separation-of-powers principles by disregarding clear congressional mandates and replacing them with their own preferences of what the mandates should mean.<sup>254</sup>

---

<sup>252</sup> At least two members of Congress have expressed their desire to prevent appellate courts from using the "exceptional reasons" provision in terrorism cases. As mentioned above, a bill in Congress would add subsection (d) to 18 U.S.C. § 3145. In September 2009, Senators Jon Kyl and John Cornyn sponsored the "USA PATRIOT Reauthorization and Additional Weapons Against Terrorism Act of 2009." S. 1726, 111th Cong. (2009). Title III of this proposed bill, entitled "Additional Government Weapons Against Terrorism Act of 2009," would amend 18 U.S.C. § 3145 by adding subsection (d). *Id.* § 301. Subsection (d) would remove the appellate courts' ability to use the "exceptional reasons" provision in cases involving convicted terrorists and sex offenders. *See supra* note 40.

<sup>253</sup> *United States v. Smith*, 593 F. Supp. 2d 948, 957–58 (E.D. Ky. 2009).

<sup>254</sup> *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (stating that federal courts' power is limited, constrained by the Constitution and federal statutes).