

# COVER MEMO

**To:** Alternatives to Bail Drafting Committee  
**From:** Josh Bowers and Sandy Mayson  
**CC:** Lucy Grelle  
**Date:** November 9, 2018  
**Re:** Initial Meeting, Washington, D.C. (9/16-9/17)

---

In the materials that follow, we raise a set of questions, which we hope will effectively guide our initial discussions of the draft act. As reporters, we wrestled with the level of generality at which to pitch the questions. First, we could frame issues abstractly, exploring conceptually what constitutes best practices from the standpoint of, say, fairness or efficiency (or some other criminal justice policy or principle). Second, we could frame issues positively, in terms of what states and jurisdictions already do or have done. Here, we would start with the federal constitutional baseline and build up from there, evaluating different pretrial release statutes, good and bad. Third, we could work from a rough statutory framework of our own design, examining (within this model) what might work, what might not, what to keep, what to refine, and what to discard.

All of these approaches have advantages and drawbacks. The first approach runs the risk of being less than productive. We imagine that we could spend an entire weekend discussing high theory without finding much of a toehold for a draft act. The second approach runs the risk of leaving us path-dependent upon (highly imperfect) current approaches and statutory models. As reporters, we are confident that there is much to be learned (good and bad) from what American jurisdictions currently do, but we are also quite certain that no state has successfully done our work for us. Simply put, there is a lot of room for us to improve upon even the best of what's out there. The third approach runs the risk of putting the cart before the horse. As reporters, we do not want

to tell you what a draft act definitively ought to look like, especially before all of us have even had the chance to meet. Still, we feel that the skeleton of a draft act might serve to focus our analyses and to keep us on task.

Thus, we offer you a set of materials that comprise something of a mix of all three approaches. Attached, you will find a “Case Compendium” and an “Issues Memo.” We recommend that you start with the Case Compendium and then move on to the Issues Memo. The Case Compendium consists of explanations of and excerpts from a set of recent cases. It describes emerging trends in state and federal statutory and constitutional law. It should give you a sense of the baseline legal requirements, some of the better and worse practices, and, conceptually, the policies and principles that a quality draft act ought to serve. To these ends, we also have included (as Appendices F-G) two documents: (1) a helpful and short paper authored by the Pretrial Justice Institute (entitled, “*Key Features of Holistic Pretrial Justice Statutes and Court Rules*”), which succinctly describes the objectives of bail reform and references current approaches that advance these objectives (at least somewhat successfully); and (2) abridged opinions of four of the most significant cases on pretrial release and detention.

Before we introduce the Issues Memo, we also want to make you aware that we have included (as Appendices A-E) a series of charts from the National Conference of State Legislatures (with handwritten notes in the margin, revealing our quick calculations of what fraction of states require or permit which release conditions or pretrial practices). We hope these charts will provide a bird’s-eye view of the statutory lay of the land. (Likewise, the Issues Memo itself includes some citations that reference how many states do what and when, thereby giving you an even better sense of whether a referenced practice is conventional or innovative.) Finally, please know that we have included (as Appendix H) an “Invitation to Comment” from the Judicial Council of

California, which details the state's recent efforts to statutorily overhaul its pretrial release and detention rules and practices.

As to the organization of the Issues Memo itself, please note that it follows the skeleton of a draft act. In crafting the Issues Memo in this fashion, we do not intend to be presumptuous or to present any approach as a *fait accompli*. We are confident that our ultimate draft act can and will be framed otherwise. It is just that the scope of our mission is broad—stretching across procedural stages, with judicial decisions at early stages influencing the substantive and procedural state of play at subsequent stages. It's a puzzle, and we have our work cut out for us. To facilitate that work effectively, we concluded that the best way to organize the pieces of the puzzle (and the discussions that flow therefrom) is to take you through each procedural stage as we envision it. But please know that we are in no way wedded to the current formulation. Our hope is that this framework might ensure that we all leave fewer stones unturned as we make our way through this initial meeting.

Concretely, the Issues Memo consists of a set of sections, proceeding largely chronologically, from one procedural stage of the pretrial period to the next. Within each of these sections, you will find “**discussion notes**” that raise issue(s) for discussion. In some places, we also include proposed draft language which we can keep, rework, or discard entirely.

We look forward to our meeting in Washington, D.C. See you soon.