University of Baltimore Law Review

Volume 52 | Issue 1 Article 4

10-1-2022

The Bail Reform Act of 1984: A Cause of and Solution to the Federal Pretrial Detention Crisis

Daryl J. Olszewski

THE BAIL REFORM ACT OF 1984: A CAUSE OF AND SOLUTION TO THE FEDERAL PRETRIAL DETENTION CRISIS

Daryl J. Olszewski*

I. INTRODUCTION

The Bail Reform Act of 1984[1] was a radical and controversial change to federal criminal law. Courts became required to consider a defendant's prospective dangerousness when setting conditions of release,[2] and for the first time, courts could detain a person merely charged with a crime because the court feared that person would commit a crime while awaiting trial.[3]

The prospect of courts detaining a person presumed innocent of any crime, based solely on fears of what he might do in the future, drew harsh criticism from scholars,[4] judges,[5] and members of Congress.[6] Nonetheless, the view that prevailed in Congress was that preventative detention was appropriate and constitutional, provided it was preceded by adequate procedural protections,[7] reserved for rare, extreme cases,[8] and short in duration.[9]

---

* Career Law Clerk, United States District Court. J.D., Marquette University Law School. Special thanks to the coworkers who offered insights and encouragement and to Laurel, Truman, and Leo, whose patience and support made this Article possible.

1. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.
2. United States v. Himler, 797 F.2d 156, 159 (3d Cir. 1986) (citing 18 U.S.C. § 3142(g)(4) (Supp. II 1985)).
3. United States v. Melendez-Carrion, 790 F.2d 984, 988, 999 (2d Cir. 1986) ("[P]retrial preventive detention has never been part of the general American approach to criminal justice.").
4. *See, e.g.*, Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 371 (1970); Steven Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 FORDHAM L. REV. 40, 40–41 (1980).
5. *See, e.g.*, Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 929–30 (1985); United States v. Salerno, 794 F.2d 64, 66 (2d Cir. 1986); United States v. Salerno, 481 U.S. 739, 755–67 (1987) (Marshall, J., dissenting, joined by Brennan, J.); *Salerno*, 481 U.S. at 767–68 (Stevens, J., dissenting).
6. *See, e.g.*, Sam J. Ervin Jr., *Foreword: Preventive Detention — A Step Backward for Criminal Justice*, 6 HARV. C.R.-C.L. L. REV. 291, 291–93 (1971) [hereinafter Ervin, *Foreword*]; Sam J. Ervin, Jr., *Preventive Detention, a Species of Lydford Law*, 52 GEO. WASH. L. REV. 113, 113–115 (1983) [hereinafter Ervin, *Lydford Law*].
7. S. REP. NO. 98-225, at 22 (1983).
8. *Id.* at 6–7 ("[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial."); *id.* at 12 ("It is anticipated that [release on personal recognizance or an unsecured appearance bond] will continue to be appropriate for the majority of Federal defendants.").
9. *See id.* at 22, n.73.

In the roughly forty years since Congress enacted the Bail Reform Act, preventative pretrial detention has become an accepted part of federal criminal procedure, and the harshest criticisms of the Act—that pretrial detention based on perceived dangerousness violated both due process and a right to bail under the Eighth Amendment—have been rejected by the Supreme Court.[10] However, contrary to Congress's intent and expectations, pretrial detention is neither rare nor brief. Pretrial detention rates have steadily increased so that now nearly two-thirds of all federal criminal defendants are detained for the entire pretrial period.[11] Pretrial detention lasts, on average, nearly a year,[12] and it is not uncommon for defendants to be incarcerated for years before their cases are resolved.[13]

Current pretrial detention rates strongly suggest that courts are widely misapplying the Act.[14] At a minimum, courts appear to be applying the law in a manner inconsistent with what Congress intended and expected when it enacted the Bail Reform Act.[15]

What follows is not an argument for upsetting precedent or even amending federal law. Nor is the goal here to merely discuss the mechanics of the Act or describe the extent of the federal pretrial detention crisis. Rather, the aim is to detail what Congress intended when it passed the Bail Reform Act of 1984, how current practice is inconsistent with those intentions, and how applying the Act consistent with Congress's intent stands to mitigate the current crisis.

To provide a foundation for this discussion, Part II briefly recounts the history of bail in the federal system over the roughly 200 years that preceded Congress first authorizing preventative pretrial detention.[16] This is followed in Part III with a discussion of the circumstances that led to the passage of the Bail Reform Act of 1984 and Congress's intentions and expectations of how courts would

10. *Salerno*, 481 U.S. at 755.

11. *Pretrial Services Release and Detention for the 12-Month Period Ending September 30, 2021 (Table H-14)*, U.S. CTS., https://www.uscourts.gov/file/39862/download [https://perma.cc/3QQS-CHC4] (last visited Nov. 8, 2022) (stating that 64.6% of all federal defendants are detained and never released before trial).

12. U.S. CTS., PRETRIAL SERVICES DETENTION SUMMARY: DAYS, AVERAGE AND MEDIAN FOR THE 12-MONTH PERIOD ENDING MARCH 31, 2022 (TABLE H-9A) (2022) (on file with author).

13. James G. Carr, *Why Pretrial Release Really Matters*, 29 FED. SENT'G REP. 217, 217–18 (2017).

14. *See infra* Part V.

15. *See infra* Part V.

16. *See infra* Part II.

apply the Act.[17] Part IV offers a comprehensive analysis of the provisions of the Bail Reform Act and how courts have interpreted and applied the Act.[18] Part V outlines release and detention statistics since the adoption of the Bail Reform Act to highlight that, overall, not only has there been a consistent and steady trend toward increased detention, but defendants are being detained for far longer than Congress intended.[19]

Part VI discusses possible explanations for the explosion of federal detention and contends that there is not a compelling explanation for the current national detention rate that is consistent with both the strictures of the Bail Reform Act and Congress's intent in passing it.[20] Pretrial detention constitutes an extreme restraint on liberty, and it is properly utilized only in extraordinary circumstances.[21] By ensuring prompt resolution of criminal cases, courts are able to both protect the rights of detained defendants and minimize the risk posed by the pretrial release of potentially dangerous defendants.[22]

II. A VERY BRIEF HISTORY OF BAIL IN THE FEDERAL COURTS

"The concept of bail as it is applied in the United States is rooted in the belief that a person who has not yet been convicted of a crime should ordinarily not spend any extended period of time in jail."[23] Federal law regarding bail is as old as the federal government. At around the same time that James Madison introduced what would become the Eighth Amendment and its prohibition on "excessive bail,"[24] Congress passed the Judiciary Act of 1789, which served as the foundation for federal bail law for the next 175 years and established a right to bail in all but capital cases.[25]

17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part V.
20. *See infra* Part VI.
21. *See* United States v. Salerno, 481 U.S. 739, 767–68 (1987) (Stevens, J., dissenting).
22. S. REP. NO. 98-225, at 21–22 (1983).
23. H.R. REP. NO. 98-1121, at 16 (1984).
24. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 84–86 (1977); *see also* Roman L. Hruska, *Preventive Detention: The Constitution and the Congress*, 3 CREIGHTON L. REV. 36, 42 (1969).
25. Judiciary Act, § 33, 1 Stat. 73, 91 (1789) ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be 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 offence, and of the evidence, and the usages of law."); *see also, e.g.*, 18 U.S.C. §§ 3141–3146 (1964). Some scholars point

The traditional practice was for a judicial officer to set a surety bond based on the nature of the charged offense and the defendant's criminal record.[26] As a result, those without the resources to post bond were detained pending trial.[27] Those with financial means were generally forced to buy their freedom by paying a non-refundable premium to a bondsman.[28]

It was not until the Bail Reform Act of 1966[29] that there was a material change to this roughly 175-year-old practice of bail.[30] "A product of the 'New Frontier' and the 'Great Society,' [the Bail Reform Act of 1966] reflected a broad consensus that society had the ability and the duty to alleviate the disadvantages caused by poverty, racism, and powerlessness."[31]

The 1966 Act sought "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."[32] In introducing the bill that would

to the longstanding rule authorizing the denial of bail in capital cases as evidence that preventative detention had always been permissible in some circumstances. *See* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1230 (1969). However, the denial of bail in capital cases likely had more to do with the fact that persons facing execution were particularly unlikely to show up for trial rather than any conclusion that persons accused of capital offenses were uncommonly dangerous. *See* Tribe, *supra* note 4, at 377–78. ("It is doubtful that very many people, even in the eighteenth century, thought that persons charged with larceny of goods valued at over $50 or forging United States currency were too dangerous to release into the community before trial. Yet under the Federal Crimes Act of 1790, both of those offenses were punishable by death and hence non-bailable. Furthermore, the same treatment was applicable in a number of states to such offenses as horse theft and sodomy.").

26. Arthur L. Burnett, *Reforms in the Law of Bail: A Magistrate's Viewpoint*, 10 AM. CRIM. L. REV. 197, 197 (1971).
27. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.
28. 112 CONG. REC. 12491 (1966) (statement of Rep. William McCulloch) ("Under this 'right to bail' however a bail bonding system has grown up which is the subject of our present concern. Instead of a defendant posting security which is returned to him when he himself returns for trial, in most instances an accused must buy a bond, paying to the bondsman a percentage of the amount set by the judge. Thus, in a very real sense, the accused must buy his freedom—if he can—even nothwithstanding [sic] the fact he is presumed innocent until found guilty.").
29. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214.
30. Patricia M. Wald & Daniel J. Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940, 940 (1966).
31. Duke, *supra* note 4, at 40.
32. § 2, 80 Stat. at 214.

become the 1966 Act, Senator Sam Ervin said, "The Federal bail system, as it operates today, is repugnant to the spirit of the Constitution and in direct conflict with the basic tenets that a person is presumed innocent until proven guilty by a court of law, and that justice should be equal and accessible to all."[33]

Under the 1966 Act, "there were only three grounds on which courts denied bail pending trial: capital offenses, risk of flight, and risk of obstruction of justice."[34] Although Congress considered allowing for preventative detention of dangerous defendants, it ultimately concluded that "additional study" of the issue was necessary.[35]

Release on the defendant's own recognizance or on an unsecured bond became the default in all but capital cases.[36] If the judicial officer found that either was insufficient to assure the defendant's appearance, the officer could then impose any reasonably necessary condition, including the posting of cash bail.[37]

The 1966 Act stated:

> In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[38]

If the judicial officer set conditions that the defendant was unable to meet after twenty-four hours, the defendant was entitled to have the judicial officer review the conditions.[39] The judicial officer would then either amend the conditions to enable the defendant's release or

33. 111 CONG. REC. 4098 (1965).
34. Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 690 (1985).
35. S. REP. NO. 98-225, at 7 (1983) (citing S. REP. NO. 89-750, at 5 (1965)); *see also* 111 CONG. REC. 24523 (1965).
36. § 3(a), 80 Stat. at 214.
37. *Id.*
38. *Id.*
39. *Id.* at 215.

set forth in writing why the conditions were required and explain why the defendant must be detained.[40]

Efforts to authorize preventative detention began soon after the enactment of the 1966 Act[41] and gained momentum with the support of President Nixon and his Attorney General.[42] Despite strong opposition by some,[43] in 1970, Congress, as a preliminary step to a nationwide law, enacted a bail statute for the District of Columbia that permitted pretrial detention based on a finding that the defendant was dangerous.[44] When the District of Columbia Court of Appeals in 1981 rejected a constitutional challenge to the preventative detention provision of the District of Columbia bail statute,[45] and the Supreme Court declined to review that decision,[46] a new push for a federal preventative detention statute began.

Further helping pave the road to the 1984 Act, after a pilot program in ten districts,[47] Congress passed the Pretrial Services Act of 1982 and established Pretrial Services offices across the country.[48] This enabled better informed release and detention decisions through more effective investigations into defendants' backgrounds.[49] Courts could also order closer supervision and support of defendants on pretrial release.[50]

Finally, the Supreme Court in June of 1984 found that the preventative detention of juveniles was constitutional.[51]

III. THE ENACTMENT OF THE BAIL REFORM ACT OF 1984

The Supreme Court's tacit approval of the District of Columbia's preventative detention statute[52] and explicit approval of preventative

40. *Id.*
41. *See* Hruska, *supra* note 24, at 58–59; Ervin, *Lydford Law*, *supra* note 6, at 115–16.
42. *See* Mitchell, *supra* note 25, at 1223.
43. Ervin, *Foreword*, *supra* note 6*,* at 292 (referring to the D.C. law as "an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem").
44. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 210(a), 84 Stat. 473, 644.
45. United States v. Edwards, 430 A.2d 1321, 1324 (D.C. 1981).
46. *See* Edwards v. United States, 455 U.S. 1022 (1982).
47. *See* Speedy Trial Act of 1974, Pub. L. No. 93-619, § 201, 88 Stat. 2076, 2086.
48. Pretrial Services Act of 1982, Pub. L. No. 97-267, 96 Stat. 1136.
49. *See* Lay & De La Hunt, *supra* note 5, at 935–36.
50. *See id*.
51. Schall v. Martin, 467 U.S. 253, 281 (1984).
52. *See* Edwards v. United States, 455 U.S. 1022 (1982).

detention of juveniles[53] were sufficient to satisfy the doubts of a majority of Congress and spurred renewed efforts to amend the federal bail law. The primary impetus for the Bail Reform Act of 1984 was the perception of a "growing problem" of persons on pretrial release committing crimes while they awaited trial.[54] The extent of the problem, however, was disputed.[55] Congress pointed to studies showing that between thirteen and seventeen percent of defendants were re-arrested while on pretrial release, with the rate rising to twenty-five percent for defendants released on surety bond.[56] United States Pretrial Services and Probation offices, however, reported that in the year preceding the enactment of the Bail Reform Act of 1984 only two percent of federal defendants were re-arrested while on release.[57]

Also significant in the Act's passage was a belief that judges making bail decisions were already considering a defendant's perceived dangerousness and imposing prohibitively high bail for those the judge deemed too dangerous to release.[58] Proponents of the bill that became the 1984 Act argued that not only did a lack of statutory authorization for courts to consider a defendant's dangerousness create a "desperate dilemma" for judges,[59] but sub rosa detention decisions fostered arbitrariness and denied defendants the opportunity to directly challenge the judge's conclusions.[60]

Congress intended and expected that only "a small but identifiable group of particularly dangerous defendants"[61] would be detained

53. *Schall*, 467 U.S. at 281.

54. S. REP. NO. 98-225, at 6 (1983).

55. Lay & De La Hunt, *supra* note 5, at 944.

56. S. REP. NO. 98-225, at 6.

57. Daniel B. Ryan, *The Federal Detention Crisis: Causes and Effects*, FED. PROB., Mar. 1993, at 54, 54; *see also* S. REP. NO. 98-147, at 10 (1983) (noting that less than nine percent of federal defendants were rearrested while on pretrial release).

58. *See, e.g.*, Edward M. Kennedy, *A New Approach to Bail Release: The Proposed Federal Criminal Code and Bail Reform*, 48 FORDHAM L. REV. 423, 428–29 (1980).

59. S. REP. NO. 98-225, at 10 (quoting Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong. 1st Sess. 177 (testimony of Jeffrey Harris, Deputy Associate Attorney General)).

60. Kennedy, *supra* note 58, at 428–29, 432; Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 7 (1989).

61. S. REP NO. 98-225, at 6; *see also* United States v. Leon, 766 F.2d 77, 81 (2d Cir. 1985) (noting that detention is warranted in "rare cases"); United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) (Kennedy, J.) ("Only in rare circumstances should release be denied.").

pending trial. Most defendants, Congress anticipated, would continue to be released on their own recognizance or on an unsecured bond.[62]

In part, to ensure that detention was rare, Congress authorized detention only after a detention hearing, permitted a detention hearing under only specific circumstances,[63] imposed a high burden on the government, and afforded defendants expansive means for challenging the government's assertions.[64]

Congress specified factors that courts must consider when deciding whether detention was appropriate.[65] A subtle but material change from the prior law was that the 1984 Act required courts to consider the defendant's "criminal history," whereas courts previously were instructed to consider only the defendant's "record of convictions."[66] The Committee was of the view that, although "prior arrest[s] should not be accorded the weight of a prior conviction it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lengthy record of prior arrests, particularly if there were convictions for similar crimes."[67]

Congress also created a rebuttable presumption that certain defendants should be detained.[68] A presumption of detention applied if, within the last five years, the defendant had committed certain serious offenses while on pretrial release.[69] A presumption also applied if there was probable cause that the defendant committed a drug offense punishable by at least ten years in prison or the defendant used a firearm in an offense.[70] Over the subsequent decades, Congress expanded the applicability of the presumption of detention.[71]

62. S. REP. NO. 98-225, at 12.
63. 18 U.S.C. § 3142(f)(1)–(2); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986).
64. 18 U.S.C. § 3142(f) ("At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.").
65. 18 U.S.C. § 3142(g) (Supp. II 1985); *see also infra* Section IV.C.5.
66. *Compare* 18 U.S.C. § 3146(b) (1982), *with* 18 U.S.C. § 3142(g) (Supp. II 1985).
67. S. REP. NO. 98-225, at 23 n.66; *see also* United States v. Acevedo-Ramos, 755 F.2d 203, 209 (1st Cir. 1985) (holding that the district court properly considered the defendant's prior arrests).
68. 18 U.S.C. § 3142(e) (Supp. II 1985).
69. *Id.*
70. *Id.*
71. *See id.* § 3142(e)(2)–(3); *see also infra* Section IV.C.3.

Congress expected that any pretrial detention would be brief. Early proposals for pretrial detention based on the defendant's dangerousness limited detention to as little as thirty days.[72] The notion of routinely resolving federal prosecutions in such a timeframe might seem incredible to practitioners today, but that limitation was consistent with practices at the time of the proposal. In 1960, defendants who were held in custody because they could not post required bail had their cases resolved within, on average, twenty-five days.[73] Courts and prosecutors expedited the cases of persons detained so that in many districts jailed defendants received trials within two weeks of arrest.[74]

The District of Columbia statute, on which the 1984 Act was modeled, included a sixty-day limit.[75] After the Department of Justice expressed strong opposition to a sixty-day limit,[76] the Senate Judiciary Committee ultimately concluded that it was unnecessary to include a time limit in the Bail Reform Act.[77] The Speedy Trial Act, which Congress enacted in 1974,[78] already included a ninety-day limit.[79] Some senators, however, did not appear to understand how flexible the Speedy Trial Act's ninety-day limit was in practice.[80]

> Speaking in opposition to an amendment that would have reduced the 90-day limit of section 3164(b) to 60 days, Senator Thurmond told the Senate that "the 90 days is the worst case limit," Senator Laxalt called the 90-day limit the "upper bound," and Senator Grassley relied on the 90-day limit to assure his colleagues that "no defendant will be

72. Hruska, *supra* note 24, at 67.

73. ATT'Y GEN.'S COMM. ON POVERTY & THE ADMIN. OF FED. CRIM. JUST., REPORT OF THE U.S. ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 67 (1963).

74. *Id.* at 68.

75. S. REP. NO. 98-225, at 22, n.73 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3205.

76. Letter from Robert A. McConnell, Assistant Att'y Gen., Off. Legis. Affs., to Strom Thurmond, Chairman, Comm. on the Judiciary (Apr. 19, 1983), *reprinted in* S. REP. NO. 98-147, at 89–90 app. (1983).

77. S. REP. NO. 98-225, at 22, n.73.

78. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified as 18 U.S.C. § 3161).

79. 18 U.S.C. § 3164(b).

80. United States v. Melendez-Carrion, 790 F.2d 984, 996 (2d Cir. 1986); ("It may well be that the Senate did not fully appreciate just how long pretrial detention might last under the exclusions of the Speedy Trial Act . . . .").

> detained indefinitely while the processes of justice grind to a halt."[81]

Thus, in authorizing preventative detention under the 1984 Act, Congress expected that preventative detention would be both rare and brief. As discussed in Part V, current practice is far from what Congress intended or expected.[82]

IV. THE BAIL REFORM ACT IN PRACTICE

When a defendant first appears in federal court, the Bail Reform Act provides four possible outcomes: (1) temporary detention; (2) release on his personal recognizance or an unsecured bond; (3) release on conditions; or (4) detention.[83]

A. Temporary Detention

Temporary detention is proper only if the defendant is subject to pretrial or post-conviction supervision under local, state, or federal law,[84] or if the defendant may be subject to custody by immigration authorities because the defendant is not a citizen or a lawful permanent resident of the United States.[85] While temporary detention may be appropriate when the defendant is subject to post-conviction supervision for "any offense,"[86] temporary detention on the basis of pretrial supervision is appropriate only if the defendant was on supervision for a felony offense.[87] The judge must take care to ensure that the defendant was on supervision at the time the defendant allegedly committed the present federal offense and remains on supervision at the time of the defendant's initial appearance.[88] It is insufficient that the defendant is merely on supervision at the time of the initial appearance.[89]

Before temporarily detaining a defendant, the court must also find that the defendant "may flee or pose a danger to any other person or

81. *Id*. (quoting 130 CONG. REC. S941, 943, 945 (daily ed. Feb. 3, 1984)) (citations omitted).
82. *See infra* Part V.
83. 18 U.S.C. § 3142(a).
84. *Id.* § 3142(d)(1)(A).
85. *Id.* § 3142(d)(1)(B).
86. *Id.* § 3142(d)(1)(A)(ii)–(iii).
87. *Id.* § 3142(d)(1)(A)(i).
88. *Id.* § 3142(d)(1)(A).
89. *Id.*

the community."[90] Congress's choice of "may" suggests a standard markedly different than the "reasonably assure" standard otherwise applicable to assessment of risks of flight and danger to the community under the Bail Reform Act.[91] Because it can be argued that most anyone charged with a crime is capable of flight or endangering the community,[92] this would seem to reflect a very low standard that the government can easily satisfy.

As the name implies, temporary detention is for a limited period.[93] Although the statute authorizes a court to order a defendant detained for up to ten days, excluding weekends and holidays, as with all matters under the Bail Reform Act, decisions must be based on the specific circumstances.[94]

If the other authority does not take custody of the defendant during the period of temporary detention, the defendant must appear in federal court again, at which point the court must consider the question of release or detention.[95]

B. Release

If the government does not move for a detention hearing (and the court does not sua sponte find a serious risk that the defendant will flee or interfere with the judicial process[96]), the court must release the defendant.[97]

Congress intended that release on the defendant's own recognizance or pursuant to an unsecured appearance bond to be the default in federal court.[98] Initially, Congress required courts to impose only a single condition on all released defendants—that the defendant "not commit a Federal, State, or local crime during the period of his release."[99] Congress later added cooperation with the collection of a DNA sample, if required under the DNA Analysis Backlog Elimination Act of 2000, as a standard condition for all released defendants.[100]

90. *Id.* § 3142(d)(2).
91. *See id.* § 3142(b)–(e).
92. *See infra* Section IV.C.1.
93. 18 U.S.C. § 3142(d).
94. *Id.*
95. *See* United States v. Becerra-Cobo, 790 F.2d 427, 429, 431 (5th Cir. 1986).
96. 18 U.S.C. § 3142(f)(2).
97. *See id.* § 3142(b)–(c).
98. *Id.* § 3142(b); United States v. Stone, 608 F.3d 939, 945 (6th Cir. 2010) ("The default position of the law, therefore, is that a defendant should be released pending trial.").
99. 18 U.S.C. § 3142(b) (Supp. II 1985).
100. 18 U.S.C. § 3142(b).

Beyond those two conditions, Congress did not intend any condition to be "standard."[101] The only exception arises with respect to defendants accused of certain offenses involving children.[102] When Congress passed the Adam Walsh Child Protection and Safety Act of 2006,[103] it required courts to order such defendants to comply with electronic monitoring, curfew, restrictions on associations, residence, and travel, avoid contact with a victim or witness, report regularly to a law enforcement or pretrial services agency, and not possess a firearm, destructive device, or dangerous weapon.[104] The court,

101. It must be emphasized that all conditions are not appropriate to every defendant and that the Committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition set out in subsection (c)(1). The Committee intends that the judicial officer weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him and to the offense charged, and with specific reference to the factors set forth in subsection (g).

S. REP. NO. 98-225, at 13–14 (1983). *But see* United States v. Tortora, 922 F.2d 880, 882 (1st Cir. 1990) (referring to conditions that the defendant "not violate the law, appear at scheduled proceedings, eschew possession of weapons and substance abuse, restrict his travel, etc." as "boilerplate"); *see also* Sara J. Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)*, FED. PROB., Sept. 2018, at 46, 48 (noting that "it appears that officers are often recommending a 'standard' set of conditions, usually based on their experience in court and their knowledge of what they believe the judge will most likely impose").

102. *See infra* notes 103–04.

103. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

104. 18 U.S.C. § 3142(c)(1) ("In any case that involves 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, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii)."); *see also* United States v. Stephens, 594 F.3d 1033, 1039–40 (8th Cir. 2010) (rejecting facial challenge to the mandatory curfew and electronic monitoring provisions); United States v. Peeples, 630 F.3d 1136, 1138–39 (9th Cir. 2010) (rejecting defendant's arguments that the mandatory release provisions violated the Excessive Bail Clause of the Eighth Amendment, the Due Process Clause of the Fifth Amendment, including the presumption of innocence, and the separation of powers doctrine); Bryan Dearinger, *The Mandatory Pretrial Release Provisions of the Adam Walsh Act Amendments: How "Mandatory" Is It, and Is It Constitutional?*, 85 ST. JOHN'S L. REV. 1343, 1345 (2011).

however, retains significant discretion regarding the nature and extent of those mandatory conditions.[105]

If "the judicial officer determines that [release on personal recognizance or an unsecured appearance bond] will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," only then may the court impose additional conditions on the defendant's release.[106] The conditions that the court imposes must be the least restrictive that "will reasonably assure the appearance of the person as required and the safety of any other person and the community . . . ."[107] Although Congress specified certain conditions that courts may impose,[108] the court is ultimately free to impose any "condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[109]

Courts are explicitly permitted to require the defendant to post cash or other assets as a condition of release.[110] Monetary conditions are most effective at mitigating the risk of non-appearance.[111] However, courts may make forfeiture of cash or property a sanction for a violation of any condition of release.[112] In determining the amount of a monetary condition, the court must assess the defendant's net worth both to ensure that the amount is sufficient to deter non-compliance and not excessive so as to result in the defendant's detention.[113]

This does not mean that when the court finds a financial condition to be necessary that the court must set it at an amount the defendant can readily meet. A defendant might have "to go to great lengths" to raise bail that is set high enough to serve the deterrent purpose of

105. *Peeples*, 630 F.3d at 1139 (citing *Stephens*, 594 F.3d at 1039).
106. 18 U.S.C. § 3142(b).
107. *Id.* § 3142(c)(1).
108. *Id.* § 3142(c)(1)(B)(i)–(xiii).
109. *Id.* § 3142(c)(1)(B)(xiv).
110. *Id.* § 3142(c)(1)(B)(xi) (authorizing the court to require the defendant to "execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require").
111. United States v. Tortora, 922 F.2d 880, 886 n.8 (1st Cir. 1990) ("Real estate as security seems a much more effective condition of release in a 'flight risk' case than in a 'dangerousness' case.").
112. United States v. Santiago, 826 F.2d 499, 500, 506–07 (7th Cir. 1987) (affirming forfeiture of third-party's real estate following defendant's arrest for drug dealing while on bond); United States v. Patriarca, 948 F.2d 789, 793 n.3 (1st Cir. 1991) (citing United States v. Vaccaro, 719 F. Supp. 1510, 1513 (D. Nev. 1989)).
113. *Patriarca*, 948 F.2d at 794–95 (citing 18 U.S.C. § 3142(c)(1)(B)(xi)).

bail.[114] If a defendant cannot satisfy a monetary condition, and thus remains detained, the court should reassess the condition. If the court concludes that the monetary condition (and thus detention) is necessary, then the court must comply with 18 U.S.C. § 3142(i) and enter a written detention order.[115]

Congress also explicitly authorized courts to inquire into the source of any funds used as bond.[116] Although many courts had already made such inquiries during what was commonly referred to as a *Nebbia* hearing,[117] some courts refused to do so given the lack of explicit legal authority supporting the inquiry.[118] In explicitly authorizing the court to inquire as to the source of bond, Congress sought to avoid situations, particularly with respect to highly lucrative drug trafficking, where the posting and subsequent forfeiture of an even significant bond was "simply a cost of doing business."[119]

Congress also specified that a court may require a defendant to "remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court . . . ."[120] The third-party custodian must be able to

114. United States v. Szott, 768 F.2d 159, 160 (7th Cir. 1985).

115. United States v. McConnell, 842 F.2d 105, 108–10 (5th Cir. 1988); United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); *see also* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

116. 18 U.S.C. § 3142(g)(4).

117. *See* United States v. Nebbia, 357 F.2d 303 (2nd Cir. 1966).

118. S. REP. NO. 98-225, at 24 (1983).

119. *Id.*

120. 18 U.S.C. § 3142(c)(1)(B)(i). Historically, this third-party custodian provision was a means to order the defendant into the custody of organizations such as halfway houses. And the 1966 Act explicitly to referred placing the defendant "in the custody of a designated person or organization agreeing to supervise him" as a condition the court may impose. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3, 80 Stat. 214, 214. Although no longer explicitly authorized, the court may still appoint organizations as third-party custodians under its broad authority to impose any reasonable condition on the defendant's release. *Id. See also* 18 U.S.C. § 3154(4) ("Pretrial services functions shall include the following: . . . Operate or contract for the operation of appropriate facilities for the custody or care of persons released under this chapter including residential halfway houses, addict and alcoholic treatment centers, and counseling services, and contract with any appropriate public or private agency or person, or expend funds, to monitor and provide treatment as well as nontreatment services to any such persons released in the community, including equipment and emergency housing, corrective and preventative guidance and training, and other services reasonably deemed necessary to protect the public and ensure that such persons appear in court as required."). *Cf.* United States v. Sack, 379 F.3d 1177,

"reasonably . . . assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community."[121] Although this provision could be read as requiring that the proposed custodian be able to vouch for the defendant personally, the more reasonable reading of this provision is that a proposed custodian need demonstrate only an ability to provide supervision of the defendant sufficient to assure the defendant's appearance and the safety of the community.[122]

While some may question the practical value of a third-party custodian, for some defendants, the scrutiny of a close friend or relative may prove more effective in both motivating compliance and alerting the court of non-compliance than supervision by a Pretrial Services officer.[123] A third-party custodian may be particularly effective when the custodian has a vested interest in the defendant's compliance, for example, when the custodian posted cash or property to secure the defendant's release.[124] On the other hand, a person who has an interest in the defendant remaining out of custody, such as a spouse who relies on the defendant's income, generally would make a poor third-party custodian.[125]

Notably, the Bail Reform Act of 1984 did not refer to electronic monitoring (although the Adam Walsh Act made it a standard condition for defendants charged with certain offenses against children).[126] While common today, electronic monitoring was novel even years after the passage of the Act.[127] Courts are permitted to impose electronic monitoring as a condition pursuant to the catch-all provision of 18 U.S.C. § 3142(c)(1)(B)(xiv).

Similarly, the Act does not explicitly refer to imposing home detention or home confinement as a condition, but it likewise is authorized under the statutory catch-all provision.[128] While the catch-

1179 (10th Cir. 2004) (affirming conviction for escape following defendant's failure to return to halfway house where he was ordered to reside as a condition of his pretrial release).

121. 18 U.S.C. § 3142(c)(1)(B)(i).
122. *See id.*
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.* § 3142(c)(1)(B).
127. S*ee* United States v. O'Brien, 895 F.2d 810, 815 (1st Cir. 1990) (discussing testimony regarding the effectiveness of what today is referred to as radio frequency monitoring and noting "[t]he bracelet itself has been used in fourteen districts to date, with about 200 defendants").
128. United States v. Tortora, 922 F.2d 880, 895 (1st Cir. 1990) (Breyer, C.J., concurring) ("I part company with the majority, however, if it means to imply that, given proper

all provision is not limitless, it provides courts with wide authority to impose a variety of conditions[129] provided the condition is "reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[130]

C. Detention

1. Motion for a Detention Hearing

When the government moves for a detention hearing it must specify the basis for its motion.[131] There are three broad bases for the court holding a detention hearing: (1) there is a serious risk the defendant will flee;[132] (2) there is a serious risk that the defendant "will obstruct or attempt to obstruct justice, or (3) threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror";[133] or what is often referred to as the defendant's "dangerousness" or "danger to the community."[134]

Although "dangerousness" may be common shorthand for the circumstances set forth in 18 U.S.C. § 3142(f)(1), it is important to remember that an allegation that the defendant is dangerous is not actually a basis to hold a detention hearing.[135] Therefore, when the government seeks detention because the defendant poses a "danger to the community," it must identify which specific provision of 18 U.S.C. § 3142(f)(1) it is relying on.[136] If the government moves for a

record evidence and findings, the district court lacks the legal power to create and to impose a kind of 'pre-trial house arrest' upon a defendant such as this one.").

129. *Id.* at 887–88.

130. 18 U.S.C. § 3142(c)(1)(B)(xiv).

131. United States v. Melendez-Carrion, 790 F.2d 984, 993 (2d Cir. 1986). Federal Rule of Criminal Procedure 47(b) requires that "[a] motion . . . shall state the grounds upon which it is made . . ." FED. R. CRIM. P. 47(b). And lest the government be tempted to assert every ground for fear of waiving an argument, the Court of Appeals for the Second Circuit noted that "[e]very lawyer has an obligation to file pleadings only in a good-faith belief that valid grounds exist for the relief sought, an obligation that should weigh heavily with those exercising the power of public prosecution." *Melendez-Carrion*, 790 F.2d at 993 (citing United States v. Berger, 295 U.S. 78, 88 (1935)).

132. 18 U.S.C. § 3142(f)(2)(A).

133. *Id.* § 3142(f)(2)(B).

134. *Id.* § 3142(f)(1).

135. *See* United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992) ("a person's threat to the safety of any other person or the community, in the absence of one of the six specified circumstances, could not justify detention under the Act").

136. *See id.* at 110.

detention hearing based solely on the defendant's alleged dangerousness and none of the circumstances set forth under 18 U.S.C. § 3142(f)(1) apply, the court must deny the motion for a detention hearing and release the defendant on bond.[137]

A detention hearing based on the defendant's dangerousness is appropriate only if the case involves a crime of violence; sex trafficking of children; a terrorism offense that is listed in 18 U.S.C. § 2332b(g)(5)(B) and punishable by at least ten years in prison;[138] any offense punishable by life imprisonment or death;[139] a drug offense punishable by at least ten years in prison;[140] any felony if the defendant has at least two convictions for offenses that fit within those described in the preceding list;[141] any felony that involves a minor victim; any felony that involves the possession or use of a firearm, destructive device, or dangerous weapon; or any felony failure to register under the Sex Offender Registration and Notification Act.[142]

> "[C]rime of violence" is defined as:
> (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

137. *See id.*; United States v. Ploof, 851 F.2d 7, 10 (1st Cir. 1988) ("[T]he court based its detention order on dangerousness to the community, an insufficient basis by itself, defendant argues, when a detention hearing is sought under § 3142(f)(2)(B)."); *see also* United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (holding that, after the government moved for a detention hearing based on the risk that the defendant would fail to appear, the court could not detain the defendant because he posed a danger of committing another offense involving false identification). According to an informal poll conducted by way of a confidential judicial listserv in 1998, "several" magistrate judges were of the view that a detention hearing is permissible "whenever they believe a danger to the community may exist, and there are no appropriate conditions of release available." Krista Ward & Todd R. Wright, *Pretrial Detention Based Solely on Community Danger: A Practical Dilemma*, 1 FED. CTS. L. REV. 625, 628 (2006). That position, however, is not supported by the text or legislative history of the Act.

138. 18 U.S.C. § 3142(f)(1)(A).

139. *Id.* § 3142(f)(1)(B).

140. *Id.* § 3142(f)(1)(C).

141. *Id.* § 3142(f)(1)(D).

142. *Id.* § 3142(f)(1)(E). Although the provision states that it applies only to felony violations of the registration requirement of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250, all violations of 18 U.S.C. § 2250 are currently felonies. *See id.* § 2250.

person or property of another may be used in the course of committing the offense; or

(C) any felony under chapter 77, 109A, 110, or 117.[143]

The "residual clause" of this definition is similar to those that the Supreme Court found unconstitutionally vague in *Johnson v. United States*,[144] *Sessions v. Dimaya*,[145] and *United States v. Davis*.[146] However, because the Bail Reform Act neither defines a criminal offense nor fixes the permissible sentence for a criminal offense, it is not susceptible to a vagueness challenge.[147]

Circuits have split on the meaning of the phrase "in a case that involves" in 18 U.S.C. § 3142(f)(1)'s introduction to the list of offenses that follows.[148] A reasonable argument could be made that this phrase means that a court may hold a detention hearing even when the charged offense does not fit under any of the subsections of 18 U.S.C. § 3142(f)(1), provided the conduct specified in the statute is somehow involved in the case. For example, a defendant may be charged with money laundering.[149] If the money the defendant is charged with laundering was allegedly the proceeds of drug trafficking, arguably, a drug offense punishable by a term of at least ten years in prison is "involve[d]" in the case.[150] A co-defendant may even be charged on the same indictment with such a drug offense, and thus in a broad sense the "case" undoubtedly "involves" a drug offense punishable by at least ten years in prison.[151]

The Court of Appeals for the Fifth Circuit endorsed such a broad view and held that uncharged allegations that the defendant sexually assaulted children could support the detention of a defendant charged with receiving child pornography.[152]

143. *Id.* § 3156(a)(4).
144. *See* Johnson v. United States, 576 U.S. 591, 593, 597, 606 (2015).
145. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018).
146. *See* United States v. Davis, 139 S. Ct. 2319, 2323–24 (2019).
147. *See* United States v. Watkins, 940 F.3d 152, 159–61 (2d Cir. 2019) (discussing Beckles v. United States, 137 S. Ct. 886 (2017)).
148. 18 U.S.C. § 3142(f)(1); *compare* United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992) (endorsing a broad view of the phrase "in a case that involves"), *with Watkins*, 940 F.3d at 164–65 (endorsing a narrow view of the phrase "in a case that involves").
149. *See* 18 U.S.C. § 1956.
150. *See Byrd*, 969 F.2d at 110.
151. *Id.*
152. *Id.* This case arose before Congress amended the statute to permit detention of any person charged with a felony that involves a minor victim. *See* Adam Walsh Child

The Court of Appeals for the Second Circuit, however, rejected a broad understanding of the phrase "a case that involves," holding that a court can consider only the defendant's charged conduct when assessing whether a detention hearing is permitted under 18 U.S.C. § 3142(f)(1).[153] It noted that the committee report regarding what would become the Bail Reform Act of 1984 referred to charged conduct when discussing when the court may hold a detention hearing.[154] The court, however, found that "involves" had a different meaning when it was used in 18 U.S.C. § 3142(f)(1)(E), which authorizes a detention hearing "in a case that involves . . . any felony that is not otherwise a crime of violence that *involves* a minor victim or that *involves* the possession or use of a firearm . . . ."[155] The Court of Appeals held that, in that context it was appropriate to look beyond the specific charged offense and consider the alleged conduct.[156]

2. The Timing of the Detention Hearing

Release or detention must be addressed at the defendant's first appearance before a judicial officer,[157] and if a detention hearing is to be held, it "shall be held immediately upon the person's first appearance before the judicial officer . . . ."[158]

The unambiguous requirement that a detention hearing "shall be held immediately upon the person's first appearance before the judicial officer" would seem to require the government (or the court on its own motion) to seek detention at the defendant's first appearance.[159] A majority of the en banc Court of Appeals for the Eighth Circuit, however, held that the provision means merely "that

Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216, 120 Stat. 587, 617 (2006).

153. *See Watkins*, 940 F.3d at 164.

154. *Id.* at 164–65 (quoting S. REP. NO. 98-225, at 21 (1983)) ("The committee has determined that whenever a person is *charged* with one of these offenses and the attorney for the Government elects to seek pretrial detention, a hearing should be held so that the judicial officer will focus on the issue of whether, in light of the seriousness of the *offense charged*, and the other factors to be considered under subsection (g), any form of conditional release will be adequate to address the potential danger the defendant may pose to others if released pending trial.") (emphasis added by the court).

155. 18 U.S.C. § 3141(f)(1)(E) (emphasis added).

156. *See Watkins*, 940 F.3d at 165–67.

157. 18 U.S.C. § 3142(a).

158. *Id.* § 3142(f).

159. United States v. O'Shaughnessy, 764 F.2d 1035, 1038 (5th Cir. 1985) (citing United States v. Payden, 759 F.2d 202, 205 (2d Cir. 1985)).

once a motion for pretrial detention is made, a hearing must occur promptly thereafter."[160] Similarly, the Court of Appeals for the Seventh Circuit, citing pragmatic considerations, held that "first appearance" means the defendant's first appearance in the charging district.[161] Therefore, although the government may seek detention at an initial appearance in a district other than where the offense was allegedly committed,[162] if it does not, it does not waive the opportunity to later seek detention at the defendant's first appearance in the charging district.[163] When the government initially seeks temporary detention, the court need not hold a detention hearing at the defendant's initial appearance; the court may defer the detention hearing to see if the other authority takes custody of the defendant.[164]

The statute provides for an automatic continuance upon a party's demand.[165] The government is automatically entitled to a delay of up to three days and the defendant may delay up to five days (both excluding weekends and holidays).[166] Any further delay requires a showing of good cause.[167] During any such continuance, the defendant is detained.[168] Although the court in a multi-defendant case may wish to hold a single detention hearing for all defendants, the court cannot delay the hearing beyond three days unless all defendants agree to the delay (or the court finds good cause applicable to all defendants).[169] The court may not sua sponte grant

160. United States v. Maull, 773 F.2d 1479, 1483 (8th Cir. 1985).
161. United States v. Dominguez, 783 F.2d 702, 705 (7th Cir. 1986); *see also* United States v. Melendez-Carrion, 790 F.2d 984, 990 (2d Cir. 1986) (following *Dominguez*).
162. FED. R. CRIM. P. 5(c)(3).
163. *See Dominguez*, 783 F.2d at 704.
164. United States v. Becerra-Cobo, 790 F.2d 427, 428–29, 431 (5th Cir. 1986).
165. *See Dominguez,* 783 F.2d at 704 ("[T]he legislative history does suggest that the automatic continuances are available to facilitate preparation for a detention hearing . . . ."); *see also* United States v. Williams, No. 92-8408, 1993 WL 310286, at *1 n.4 (5th Cir. May 6, 1993) (per curiam) ("Once the Government files a motion for continuance in a pre-trial detention hearing, the plain language of the statute governing such hearings, 18 U.S.C. § 3142(f)(2), appears to require an automatic delay of three days without the need for the Government to show any cause.").
166. *See* 18 U.S.C. § 3142(f).
167. *See id.*
168. *See id.*
169. *See* United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990); *see also* United States v. Hurtado, 779 F.2d 1467, 1476 (11th Cir. 1985) ("We find nothing in the language or the legislative history to suggest that the mere convenience of the court or of the attorneys, on either side, constitutes good cause to expand upon the three or five day period provided.").

an extension or find good cause.[170] Ultimately, however, a failure to comply with the time limits under 18 U.S.C. § 3142(f) does not bar the court from holding a detention hearing and does not mean that the defendant must be released.[171] Thus, although the court must comply with the timeliness requirement, a defendant does not have a remedy for non-compliance.[172]

The defendant can also waive his right to a detention hearing and consent to detention.[173] This waiver, however, is not absolute.[174] Procedurally, it "can be viewed as a request for an indefinite continuance for good cause."[175] Should the defendant later seek release, he can invoke his right to a detention hearing.[176]

In districts where government requests for continuances are not routine and there is an opportunity for a detention hearing at the defendant's first appearance, defense counsel should be cautious in proceeding with the hearing immediately.[177] Counsel must balance a client's interest in prompt release against the need to present the best possible argument in opposition to the government's request for detention.[178] Because the Bail Reform Act limits the circumstances under which a detention hearing may be reopened, defense counsel who proceeds with a hearing armed with incomplete information may not have the opportunity to later present additional information.[179] A detention hearing may be reopened at any time, but only

> if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the

170. *See Hurtado*, 779 F.2d at 1476.
171. *See* United States v. Montalvo-Murillo, 495 U.S. 711, 716–17 (1990).
172. *See id.* at 716.
173. *See* United States v. Coonan, 826 F.2d 1180, 1184 (2d Cir. 1987); *see also* United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc).
174. *See Clark*, 865 F.2d at 1437.
175. *Id.*
176. *See id.*
177. *See id.*
178. *See* United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989).
179. *See id.* (holding that testimony of family members that the defendant "appeared whenever required to do so during prior prosecutions" is not new evidence); *see also* United States v. Dillon, 938 F.2d 1412, 1415 (1st Cir. 1991) (affirming decision to not reopen detention hearing so defendant could present 18 affidavits of friends and family attesting to the defendant's good character).

> appearance of such person as required and the safety of any other person and the community.[180]

Not only must the new information be material, but it also must not have been "known to the movant at the time of the hearing."[181] The movant, of course, is the defendant, not defense counsel. Therefore, defense counsel's ignorance of a relevant fact at the time of the detention hearing is not a basis to reopen the hearing if that fact was known to the defendant.[182]

3. The Presumption of Detention

Presumptions, in their myriad forms, pose difficult problems in the law.[183] Courts must decide both the nature of the presumption and the effect of rebutting it.[184]

The Act encompasses two broad presumptions, one based on the defendant's criminal history[185] and a second based on the current charge.[186] The criminal history presumption is rarely implicated,[187] and thus only the latter presumption is discussed here.

The presumption of detention under 18 U.S.C. § 3142(e)(3) is triggered "if the judicial officer finds that there is probable cause to believe that the person committed" one of the denominated offenses, most commonly a drug offense punishable by at least ten years in prison[188] or an offense involving a firearm under 18 U.S.C. § 924(c).[189] A presumption of detention also applies to certain

180. 18 U.S.C. § 3142(f).
181. *Id.*
182. *See id.*
183. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 342 PRESUMPTIONS, IN GENERAL 724–26 (Robert P. Mosteller ed., 8th ed. 2020) ("One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'").
184. *See Presumption*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless and until the truth of such inference is disproved.").
185. 18 U.S.C. § 3142(e)(2).
186. *Id.* § 3142(e)(3).
187. *See* JEFRI WOOD, THE BAIL REFORM ACT OF 1984, at 35 (Fed. Jud. Ctr., 4th ed. 2022), https://www.fjc.gov/sites/default/files/materials/57/The%20Bail%20Reform%20Act%20of%201984-Fourth%20Edition.pdf [https://perma.cc/QQ7L-2L87] ("As of this writing, no published appellate case law specifically addresses the previous-violator presumption.")
188. *See id.* § 3142(e)(3)(A).
189. *See id.* § 3142(e)(3)(B).

offenses involving minor victims[190] and terrorism offenses.[191] Although not all courts have agreed,[192] the majority view, that an indictment or complaint charging a designated offense, standing alone, is sufficient to trigger the presumption,[193] is likely the correct view.

A requirement that judges assess probable cause could result in an irreconcilable conflict.[194] If the court at a detention hearing were to independently assess probable cause and find an indictment unsupported, it would not result in dismissal of the indictment; the grand jury's probable cause finding is virtually unassailable.[195] Thus, a defendant may be forced to stand trial on charges that a court has found unsupported by probable cause.[196] Although the court's finding will mean that a presumption of detention does not apply, it does not necessarily mean that the defendant will be released.[197]

However, if an indictment or complaint is conclusive as to the existence of probable cause, it is curious that Congress would include a provision that would apply only in the rare instance of a detention hearing following an information.[198] Congress may have intended

190. *Id.* § 3142(e)(3)(E).

191. *Id.* § 3142(e)(3)(B)–(D).

192. *See* United States v. Allen, 605 F. Supp. 864, 869 (W.D. Pa. 1985) (holding that a "judicial officer must have a factual basis independent of the fact that an indictment has been returned upon which to make a finding of probable cause sufficient to trigger the second rebuttable presumption under § 3142(e)"); *see also* United States v. Hurtado, 779 F.2d 1467, 1483–85 (11th Cir. 1985) (Clark, J., concurring in part and dissenting in part).

193. United States v. Contreras, 776 F.2d 51, 53–54 (2d Cir. 1985) (holding that an indictment conclusively establishes the existence of probable cause and the court need to make an additional finding); *Hurtado*, 779 F.2d at 1479; United States v. Yamini, 91 F. Supp. 2d 1125, 1130 (S.D. Ohio 2000) ("Since the grand jury had found probable cause to indict Defendant, the Court held that there was no need for the Government to establish probable cause.").

194. *See* Gerstein v. Pugh, 420 U.S. 103, 116–17 & nn.18–19 (1975) (discussing the implications of a prosecutor's filing of an information and a grand jury's return of an indictment in relation to a finding of probable cause for pretrial detention).

195. *See id.*

196. *See id.* at 117 n.19 (noting the "willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate").

197. *See id.* at 123–25 (holding that pretrial detention must comply with the Fourth Amendment but that states are allowed wide latitude in how they implement pretrial procedure as long as it does not violate the Constitution).

198. There is some evidence that the "probable cause" requirement may be an artifact from an early edit of the bill that became the 1984 Act. *See generally* S. REP. NO. 98-225, at 17–18 (1983). Congress initially considered triggering the presumption not upon a finding of probable cause but instead only if a judicial officer found there was a "substantial probability" that the defendant committed a specified offense. *Hurtado*,

courts to consider both charged and uncharged conduct when assessing the application of the presumption.[199] However, the Court of Appeals for the Second Circuit, rejected that view.[200] It held that whether the presumption applies depends on the charges in the complaint or the indictment.[201] To hold otherwise may deprive a defendant the adequate opportunity to prepare because the defendant may first learn of allegations triggering the presumption only at the detention hearing.[202]

When the presumption of detention applies, it imposes on the defendant a burden of production; the government retains the ultimate burden of persuasion.[203] Thus, defendants need not prove that they pose no danger to the community or risk of flight.[204] Nor do defendants need to demonstrate that they are not guilty of the offense charged or that the offense charged did not pose a danger to the

779 F.2d at 1484 (Clark, J., concurring in part and dissenting in part). The District of Columbia act on which the Bail Reform Act of 1984 was based required a substantial probability finding. United States v. Edwards, 430 A.2d 1321, 1334 (D.C. Cir. 1981). One judge found the higher standard essential to due process. *Id.* at 1351–52 (Ferren, J., concurring in part and dissenting in part). A higher substantial probability standard would ensure that the presumption applied only in the strongest cases and would avoid the potential for conflict between the court's finding and the grand jury's indictment should the court not find probable cause. A failure to sustain the higher substantial probability burden is not necessarily inconsistent with a grand jury's finding of probable cause. However, the change from substantial probability to probable cause was not a late amendment to the bill but rather an early and conscious choice by the Committee, thus undermining any suggestion that the inclusion of the probable cause standard was made without full appreciation of its implications. *See* S. REP. NO. 98-225, at 18.

199. *See* S. REP. NO. 98-225, at 4–6 (discussing the consideration of pretrial detention based on the possibility of subsequent crimes during the pretrial period).

200. United States v. Chimurenga, 760 F.2d 400, 404–05 (2d Cir. 1985).

201. *Id.* at 405 ("The plain language of the statute and the legislative history shows that the presumption was intended to arise only after a defendant has been *charged* with the particular offense by a valid complaint or indictment.") (emphasis added).

202. *Id.*

203. United States v. Jessup, 757 F.2d 378, 380 (1st Cir. 1985); United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986); United States v. Fortna, 769 F.2d 243, 251 (5th Cir. 1985); United States v. Portes, 786 F.2d 758, 764 (7th Cir. 1985); United States v. Hir, 517 F.3d 1081, 1086 (9th Cal. 2008) (citing United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991)); United States v. Stone, 608 F.3d 939, 945 (6th Cir. 2010). This is in contrast to the presumption of detention that exists following conviction under which the defendant has the burdens of production and persuasion. *See* 18 U.S.C. § 3143; *see also Jessup*, 757 F.2d at 382.

204. *See Jessup*, 757 F.2d at 382; United States v. Dominguez, 783 F.2d 702, 706–07 (7th Cir. 1986).

community.[205] Rather, defendants have the burden "to come forward with evidence" indicating that they are neither dangerous nor a flight risk.[206]

"The burden of production is not a heavy one to meet,"[207] and most any defendant can come up with *some* evidence that he is neither dangerous nor a risk of non-appearance. "Any evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3)."[208] Defendants may rebut the presumption of flight simply by showing that they have longstanding ties to the community.[209] Or defendants may rebut the presumption by showing that they do not fit the prototypical defendant Congress had in mind when enacting the presumption.[210] However, defendants

205. *See Dominguez*, 783 F.2d at 706–07.

206. *See* S. REP. NO. 98-225, at 36 (1983) (discussing the presumption under 18 U.S.C. § 3148); *see also Dominguez*, 783 F.2d at 707 ("They are 'rebutted' when the defendant meets a 'burden of production' by coming forward with some evidence that he will not flee or endanger the community if released."); United States v. Carbone, 793 F.2d 559, 560 (3d Cir. 1986) ("The defendant must produce some credible evidence forming a basis for his contention that he will appear and will not pose a threat to the community.") (citing *Jessup*, 757 F.2d at 378); United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991) ("A defendant must produce only 'some evidence' to rebut this presumption.") (citing *Jessup*, 757 F.2d at 384).

207. *Dominguez*, 783 F.2d at 707.

208. *Id.*

209. United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992) (citing United States v. Jackson, 845 F.2d 1262, 1266 (5th Cir. 1988)).

210. *Jessup*, 757 F.2d at 387 ("The less those features resemble the congressional paradigm, the less weight the magistrate will likely give to Congress's concern for flight."); *Dominguez*, 783 F.2d at 707; United States v. Fortna, 769 F.2d 243, 251–52 (5th Cir. 1985). For example, with respect to persons subject to the presumption of detention by virtue of having been charged with a drug offense punishable by at least ten years in prison, the Committee explained the basis for the presumption as follows:

> It is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Persons charged with major drug felonies are often in the business of importing or distributing dangerous drugs, and thus, because of the nature of the criminal activity with which they are charged, they pose a significant risk of pretrial recidivism. Furthermore, the Committee received testimony that flight to avoid prosecution is particularly high among persons charged with major drug offenses. Because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States from

do not rebut the presumption merely by demonstrating that they are unlikely to receive a sentence of a length at which the presumption is triggered (e.g., that the defendant is unlikely to be sentenced to at least ten years in prison for a drug offense).[211]

Because it is easy for a defendant to rebut the presumption, it should be uncommon for a court to detain a defendant for failing to rebut the presumption.[212] Generally, only when a defendant offers nothing to support release will it be fair to say that the presumption has not been rebutted.[213]

But unlike many other presumptions that shift only the burden of production, rebutting the presumption of detention does not "burst the bubble" of the presumption.[214] Given how easy it is for a defendant to rebut the presumption, that would render the presumption effectively meaningless.[215] Consequently, courts have adopted a "middle ground" approach with respect to the presumption whereby the effect of the presumption does not wholly vanish upon the defendant presenting some evidence to rebut it.[216] Thus, to say

> whence most dangerous drugs are imported into the country, these persons have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

S. REP NO. 98-225, at 20 (1983).

211. United States v. Moss, 887 F.2d 333, 336–37 (1st Cir. 1989) (Breyer, J.). However, the sentence that the defendant is likely to receive if convicted is a relevant factor for the court to consider in deciding whether to release a defendant and which, if any, conditions to impose on the defendant's release. *Id.* at 337.

212. *Cf. Jessup*, 757 F.2d at 382–83 (noting that by saying that the defendant had not rebutted the presumption raised the possibility that the court improperly shifted the burden of persuasion to the defendant).

213. *See* United States v. Daniels, 772 F.2d 382, 383 (7th Cir. 1985) (noting that the defendant "who introduced no evidence at the hearing" did not rebut the statutory presumption of detention); *Rueben*, 974 F.2d at 587 ("[The defendants] have introduced no evidence to support their position that their appearance at trial can be reasonably assured. Accordingly, they have not rebutted the presumption that they are flight risks and that no condition or combination of conditions will reasonably assure their appearance at trial.").

214. *Jessup*, 757 F.2d at 382–83.

215. *Id.*

216. *Id.* at 383–84; United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986); United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989); United States v. Stone, 608 F.3d 939, 945–46 (6th Cir. 2010).

that the presumption is "rebutted" "is somewhat misleading because the rebutted presumption is not erased. Instead, it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)."[217]

The Court of Appeals for the First Circuit acknowledged that this left courts with little practical guidance on how to consider the rebutted presumption.[218] But it noted that it was not unusual for Congress to fail to offer such guidance; after all, it did not indicate how courts should consider any of the factors under § 3142(g).[219]

One consideration relevant to the weight to afford a rebutted presumption is how well the defendant fits within the prototypical defendant Congress had in mind when enacting the presumption.[220] Ultimately, however, judges should be cautious about putting too much weight on the presumption given that research shows the statutory presumptions are poor predictors of a defendant's actual risk of non-appearance or dangerousness.[221] Thus, the applicability of the presumption should not function as "an almost de facto detention order," as some have argued it has become.[222]

4. The Standards Applicable at a Detention Hearing

a. Risk of Non-Appearance

Courts agree that the ordinary preponderance of the evidence standard applies when a court assesses whether to detain a defendant based on a risk of non-appearance.[223] But courts have sometimes

217. *Dominguez*, 783 F.2d at 707 (citing *Jessup*, 757 F.2d at 384); *see also* United States v. Diaz, 777 F.2d 1236, 1237–38 (7th Cir. 1985); *Martir*, 782 F.2d at 1144 ("A judicial officer conducting a detention hearing should, even after a defendant has come forward with rebuttal evidence, continue to give the presumption of flight some weight by keeping mind that Congress has found that these offenders pose special risks of flight, and that a 'strong probability arises' that no form of conditional release will be adequate to secure their appearance." (quoting S. REP. NO. 98-225, at 19 (1983)); United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir. 1991) ("When a defendant produces such evidence, however, the presumption does not disappear. The burden of persuasion remains on the government and the rebutted presumption retains evidentiary weight.") (citing *Jessup*, 757 F.2d at 384).

218. *Jessup*, 757 F.2d at 384.

219. *Id.*

220. *See id.* at 387.

221. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB., Sept. 2017, at 52, 60.

222. *Id.* at 61.

223. *See, e.g.*, United States v. Chimurenga, 760 F.2d 400, 405–06 (2d Cir. 1985); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Araneda, 899 F.2d 368, 370 (5th Cir. 1990); United States v. Dillon, 938 F.2d 1412, 1416 (1st Cir.

articulated this standard in a manner that could be read as being subtly but materially inaccurate.[224] For example, the Court of Appeals for the Second Circuit said, "To order detention, the court must find by a preponderance of the evidence that the defendant presents a risk of flight, and, if it finds such a risk, that no conditions could reasonably assure the defendant's presence at trial."[225] Similarly, the Court of Appeals for the Ninth Circuit stated, "On a motion for pretrial detention, the Government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk . . . ."[226]

The government's burden is not merely to prove that it is more likely than not that there is a "risk" that the defendant will flee.[227] There is always a risk that every defendant may flee, and thus a burden to prove a "risk" is no burden at all.[228] Rather, the government's burden is to prove the quantum of that risk.[229] In other

1991); United States v. Quartermaine, 913 F.2d 910, 917 (11th Cir. 1990); United States v. Cisneros, 328 F.3d 610, 616–17 (10th Cir. 2003); United States v. Vasquez-Benitez, 919 F.3d 546, 549, 551 (D.C. Cir. 2019); United States v. Diaz-Hernandez, 943 F.3d 1196, 1198 (9th Cir. 2019).

224. *See* United States v. Jackson, 823 F.2d 4, 5 (2d Cir. 1987) (citing United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986), cert. dismissed, 479 U.S. 978 (1986)); United States v. Aitken, 898 F.2d 104, 107 (9th Cir. 1990).

225. *Jackson*, 823 F.2d at 5.

226. *Aitken*, 898 F.2d at 107; *see also Portes*, 786 F.2d at 765 ("The statute does not establish the quantum of proof by which the government must establish this risk of flight. We adopt the position taken by the other circuits that congressional silence means acquiescence in the traditional preponderance of the evidence standard.").

227. *Cf.* 18 U.S.C. § 3142(f)(2)(A). Before the court can hold a detention hearing on the basis of risk of non-appearance the court must find a "serious risk" that the defendant will fail to appear as required. *Id.* Surely a higher burden than mere "risk" is required for actual detention if a "serious risk" is required simply to hold a detention hearing. Courts, however, have sometimes incorrectly (or at least imprecisely) articulated the "serious risk" standard as the applicable detention standard rather than the standard for holding a detention hearing. *See, e.g.*, *Berrios-Berrios*, 791 F.2d at 249 ("[T]he government had shown by a preponderance of the evidence that, if [the defendant] is released on bail, there is a serious risk that she will flee."); United States v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988) ("It is sufficient for the court to find by a preponderance of evidence that the defendant poses a serious risk of flight."); United States v. Vortis, 785 F.2d 327, 327–28 (D.C. Cir. 1986) ("On August 1, 1985, after a hearing under 18 U.S.C. § 3142(f)(2)(A), Magistrate Patrick J. Attridge found by a preponderance of the evidence that there was a serious risk that appellant would flee, and ordered him detained pretrial pursuant to 18 U.S.C. § 3142(e).").

228. *See* sources cited *supra* note 227.

229. *See* United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985) ("That is to say, to order detention on this ground the judicial officer should determine, from the information before him, that it is more likely than not that no condition or

words, the government must prove that it is more likely than not that a defendant will flee if released.[230]

b. Dangerousness

Congress articulated two types of dangerousness for which defendants may be detained pre-trial: danger to "the safety of any other person" and danger to "the community."[231] Congress explained:

> The reference to safety of any other person is intended to cover the situation in which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community.[232]

"[T]o order a defendant preventatively detained, a court must identify an articulable threat posed by the defendant to an individual or the community."[233] Thus, if a court orders a defendant detained because the person is a danger to the community, the court's finding should not simply recount the statute but state specifically how the defendant will endanger the community if released.[234] That danger is not limited to physical violence.[235]

combination of conditions will reasonably assure the accused's appearance."); United States v. King, 849 F.2d 485, 489 (11th Cir. 1988) ("[W]e hold that the government established by a preponderance of the evidence that no condition or set of conditions will reasonably assure [the defendant's] presence at trial."); United States v. Trosper, 809 F.2d 1107, 1109 (5th Cir. 1987) ("Here the government contends that [the defendant's] appearance at trial cannot be reasonably assured by any combination of conditions of bail. To prevail on its motion for detention pending trial, the government was required to establish this contention by a preponderance of the evidence."); United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996) ("That preponderance must, of course, go to the ultimate issue: that no combination of conditions-either those set out in the Bail Reform Act itself or any others that the magistrate or judge might find useful-can 'reasonably' assure that the defendant will appear for trial.").

230. *See* cases cited *supra* note 229.

231. 18 U.S.C. § 3142(b), (c)(1), (c)(1)(B), (c)(1)(B)(i), (c)(1)(B)(xiv), (e)(1), (e)(2), (f), (g).

232. S. REP. NO. 98-147, at 39 (1983).

233. United States v. Munchel, 991 F.3d 1273, 1283 (D.C. Cir. 2021).

234. *Id.* at 1282–83.

235. *Id.* at 1283 (citing United States v. King, 849 F.2d 485, 487 n.2 (11th Cir. 1988); United States v. Williams, 753 F.2d 329, 335 (4th Cir. 1985) (quoting S. REP. NO. 98-225, at 12 (1983)) ("The legislative history of the Act, however, is clear that the concern about safety was intended to 'be given a broader construction than merely

Courts,[236] including the Supreme Court,[237] and other authorities[238] have consistently said that the Bail Reform Act requires clear and convincing evidence of dangerousness to sustain detention based upon a perceived danger to the community. "The 'clear and convincing evidence' with respect to a defendant's danger to the community required by § 3142(f)(2)(B) means something more than 'preponderance of the evidence,' and something less than 'beyond a reasonable doubt.'"[239]

Relevant in assessing whether the government has met its burden is not merely the quantum of the evidence but the extent to which the government has reliably proven those underlying facts.[240] Thus,

danger of harm involving physical violence.'"); United States v. Hare, 873 F.2d 796, 798 (5th Cir. 1989) (citing United States v. Hawkins, 617 F.2d 59 (5th Cir.)) ("The risk of continued narcotics trafficking on bail constitutes a risk to the community.").

236. *See, e.g.*, United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985) (Kennedy, J.) ("Under the 1984 Act, a finding that a person presents a danger to the community must be supported by clear and convincing evidence.").

237. United States v. Salerno, 481 U.S. 739, 741 (1987) ("The Bail Reform Act of 1984 (Act) allows a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"). *See also id.* at 742 ("If the judicial officer finds that no conditions of pretrial release can reasonably assure the safety of other persons and the community, he must state his findings of fact in writing, § 3142(i), and support his conclusion with 'clear and convincing evidence,' § 3142(f)."); *id.* at 750 ("In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. 18 U.S.C. § 3142(f)."); *id.* at 751 ("When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat. Under these circumstances, we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *id.* at 752 ("The Government must prove its case by clear and convincing evidence. § 3142(f).").

238. *See, e.g.*, WOOD, *supra* note 187 ("The statute specifies that a finding that no conditions will reasonably assure the safety of any other person or the community must be supported by clear and convincing evidence.").

239. United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985) (citing Addington v. Texas, 441 U.S. 418, 431 (1979)).

240. Whereas the portion of the Bail Reform Act that applies following conviction explicitly imposes a burden of clear and convincing evidence on the defendant, 18 U.S.C § 3143(a)(1), (2)(B), (b)(1)(A), the pretrial detention portion of the Bail Reform Act, *id.* § 3142, does not. Rather, the portion of the Act that courts routinely cite to support the clear and convincing evidence standard states only that "[t]he *facts*

although the Federal Rules of Evidence do not apply,[241] and government proffer is routinely how facts are presented at a detention hearing,[242] district courts should nonetheless be mindful of whether the proffered facts regarding dangerousness are reliably established.[243] After all, although the Act authorizes *defendants* "to

the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence." *Id.* § 3142(f)(2) (emphasis added). Given the text and context of the provision, one reasonable understanding is that, rather than explicitly establishing a burden of proof in the traditional sense, Congress intended to require the government to support its position with reliable evidence, notwithstanding the inapplicability of the Rules of Evidence. This understanding is supported by the Committee Report which explained the "clear and convincing evidence" provision as follows:

> This provision emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear and convincing evidence such as records of arrest and convictions should be presented. . . . Similarly, if the dangerous nature of the current offense is to be a basis for detention then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.

S. REP. NO. 98-147, at 49 (1983). *But see* S. REP. NO. 98-225, at 7 (1983).

241. 18 U.S.C. § 3142(f)(2)(B) ("The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."). In the view of the Court of Appeals for the Fifth Circuit, this provision means not only that the Rules of Evidence do not apply but that the court may consider matters that might not constitute "evidence" under traditional standards. United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985).

242. United States v. Hammond, 44 F. Supp. 2d 743, 745 (D. Md. 1999) (citing United States v. Acevedo-Ramos, 755 F.2d 203, 208 (1st Cir. 1985)); United States v. Martir, 782 F.2d 1141, 1145 (2d Cir. 1986); United States v. Delker, 757 F.2d 1390, 1397 (3d Cir. 1985); *Fortna*, 769 F.2d at 250–51; United States v. Portes, 786 F.2d 758, 767 (7th Cir. 1985); United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986); United States v. Gaviria, 828 F.2d 667, 669 (11th Cir.1987)); United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000); *see also Acevedo-Ramos*, 755 F.2d at 206 (Breyer, J.,) ("[T]he need for speed necessarily makes arraignments, 'probable cause' determinations, and bail hearings typically informal affairs, not substitutes for trial or even for discovery. Often the opposing parties simply describe to the judicial officer the nature of their evidence; they do not actually produce it.").

243. However, "[a] pretrial detention hearing is not intended to serve as a vehicle for discovery from the government. Nothing in the statute or the legislative history indicates otherwise." United States v. Suppa, 799 F.2d 115, 120 (3d Cir. 1986). Case

present information by proffer or otherwise,"[244] it does not explicitly authorize the *government* to proceed by proffer.

While permitting the government to proceed by proffer is within the court's discretion,[245] in appropriate cases, courts may insist upon live testimony to support the government's motion for detention.[246] Therefore, although Congress did not intend detention hearings to be mini-trials,[247] "the court should always exercise [its] discretion with the recognition that a pretrial detention hearing may restrict for a significant time the liberty of a presumably innocent person."[248]

The Circuits have split as to whether the court may insist that a defendant proceed by proffer.[249] The Court of Appeals for the Third Circuit held that the court may bar a defendant from calling

law suggests that government reliance on live witness testimony was much more common in the early days of the Bail Reform Act of 1984, but prosecutors are often reluctant to call witnesses at detention hearings, in part, because doing so triggers disclosure obligations under FED. R. CRIM. P. 26.2. *See* FED. R. CRIM. P. 46(j). Likewise, prosecutors, should be cautious about relying on wiretap evidence at detention hearings. *See* 18 U.S.C. § 2518(9); Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 828 (2012).

244. 18 U.S.C. § 3142(f). Permitting the defendant to proceed by proffer also avoids potential self-incrimination problems. *See* United States v. Parker, 848 F.2d 61, 62–63 (5th Cir. 1988).

245. *Cf.* United States v. Salerno, 481 U.S. 739, 743 (1987) (noting, without comment, that the government presented its case by proffer); *see also Martir*, 782 F.2d at 1145 ("In light of the Act's mandate for informality and the need for speed at a point where neither the defense nor the prosecution is likely to have marshalled all its proof, the government as well as the defendant should usually be able to proceed by some type of proffer where risk of flight is at issue.").

246. *See Hammond*, 44 F. Supp. 2d at 745 (concluding that live testimony rather than government proffer was necessary at detention hearing).

247. *Delker*, 757 F.2d at 1396 (citing S. REP. NO. 98-225, at 22 (1983)); *Martir*, 782 F.2d at 1145.

248. *Delker,* 757 F.2d at 1398; *see also* United States v. Acevedo-Ramos, 755 F.2d 203, 207 (1st Cir. 1985) (Breyer, J.,) (noting that judges have discretion to "insist[] upon the production of the underlying evidence or evidentiary sources where their accuracy is in question"); *Martir*, 782 F.2d at 1145 ("[W]hile the Act hence gives courts considerable discretion regarding methods of presenting information about the risk of flight, the exercise of that discretion should reflect an awareness of the high stakes involved.").

249. *Compare Delker*, 757 F.2d at 1395–96 (holding that courts may bar defendants from calling witnesses), *with* United States v. Torres, 929 F.2d 291, 292 (7th Cir. 1991) (holding that courts cannot force defendants to proceed via proffer).

witnesses.[250] The Court of Appeals for the Seventh Circuit, however, held that a court cannot force a defendant to proceed by proffer.[251]

5. The Statutory Factors

Many of the factors a court must consider under 18 U.S.C. § 3142(g) when "determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community"—"character"; "mental condition"; "the nature and circumstances of the offense charged"; "the weight of the evidence against the person"; "family ties, employment, financial resources, length of residence in the community"[252]; and "record concerning appearance at court proceedings"—were retained from the prior law.[253]

With respect to "the nature and circumstances of the offense charged," "the former refers to the generic offense while the latter encompasses the manner in which the defendant committed it."[254]

Circuit courts are split over the meaning of the weight of the evidence factor. The Court of Appeals for the Seventh Circuit observed that, if the evidence against a defendant is weak, it is more likely that the defendant will appear for trial because an acquittal is preferrable to life as a fugitive.[255] The Court of the Appeals for the Ninth Circuit (by then-Judge Kennedy) said that the weight of the

250. *Delker*, 757 F.2d at 1395–96.

251. *Torres*, 929 F.2d at 292.

252. 18 U.S.C. § 3142(g). Occasionally, a defendant's only connection to a district is the alleged crime. The defendant may not have a place to reside in the district, and, if allowed to return home, the defendant may be unable to afford returning to the district as required. Judges may feel compelled in such circumstances to order that the defendant be detained, despite the defendant not otherwise being a risk of flight or a danger. To avoid costly and needless detention, courts should consider employing the funding available under 18 U.S.C. § 4285. *See* United States v. Gonzales, 684 F. Supp. 838 (D. Vt. 1988); United States v. Sandoval, 812 F. Supp. 1156, 1157 (D. Kan. 1993); *cf.* United States v. Forest, 597 F. Supp. 2d 163, 165 (D. Me. 2009) (holding that the statute does not authorize payment for defendant's intra-district travel). This funding may also be useful to avoid expensive in-custody transportation when a defendant first appears in district other than that where the offense was allegedly committed, or the defendant lacks the resources to travel to the charging district. *See* FED. R. CRIM. P. 5(c)(2)–(3).

253. *Compare* 18 U.S.C. § 3146(b)(1)–(5) (1982) *with* 18 U.S.C. § 3142(e) (Supp. II 1985).

254. United States v. Singleton, 182 F.3d 7, 11–12 (D.C. Cir. 1999) (quoting 18 U.S.C. § 3142(g)(1)).

255. United States v. Diaz, 777 F.2d 1236, 1238 (7th Cir. 1985).

evidence is "the least important of the various factors."[256] However, the Court of Appeals for the Sixth Circuit offered a very different view as to the meaning of the "weight of the evidence" factor.[257] It stated, "This factor goes to the weight of the evidence of dangerousness, not the weight of the evidence of the defendant's guilt."[258]

With the 1984 Act, Congress required courts to consider the danger that every defendant poses to the community or any person.[259] In emphasizing specific factors that the court must consider in assessing the nature and the circumstances of the charged offense, Congress largely tracked the circumstances when a detention hearing may be held based on the defendant's alleged danger to the community.[260] "[T]he degree of that danger remains critical under § 3142(g)."[261] A relatively low risk of a significant harm may weigh more than a high risk of a minor harm.

The factors set forth in 18 U.S.C. § 3142(g) are finite; the court may not consider other factors not specified.[262] Notably, the defendant's immigration status is not listed as a factor.[263] Thus, the fact that a defendant is not lawfully present in the United States and may be deported by immigration officials before trial if not detained

256. United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) (Kennedy, J.); *see also* Tribe, *supra* note 4, at 382 ("Even if a defendant is certain to be convicted, this certainty does not imply ipso facto that he is likely to constitute a danger to the community if released.").

257. *See, e.g.*, United States v. Stone, 608 F.3d 939, 948 (6th Cir. 2010).

258. *Id.*

259. 18 U.S.C. § 3142(g)(4).

260. *Compare id.* § 3142(f)(1) (describing the procedures for a detention hearing upon a motion by the State), *with id.* § 3142(g)(1) (requiring the court to consider the "the nature and circumstances of the offense charged").

261. United States v. Leon, 766 F.2d 77, 81 (2d Cir. 1985).

262. Fassler v. United States, 858 F.2d 1016, 1018 n.4 (5th Cir. 1988) ("Section 3142(g) identifies those factors to be considered in the pretrial detention hearing. The financial resources of the defendant are relevant only insofar as they reflect the likelihood that the defendant will appear before the court when required."); United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015) ("The factors that a court should consider in determining whether a particular defendant should be released under pretrial supervision or confined pending trial are set forth in 18 U.S.C. § 3142(g), and immigration status is not a listed factor."); United States v. Colon Osorio, 188 F. Supp. 2d 153, 155 (D.P.R. 2002) ("[U]nder the Bail Reform Act selective prosecution is not a factor which the Court may consider at a detention hearing.").

263. *Santos-Flores*, 794 F.3d at 1090; United States v. Diaz-Hernandez, 943 F.3d 1196, 1199 (9th Cir. 2019) ("A defendant's immigration detainer is not a factor in this analysis, whether as evidence for or against a finding that the defendant poses a risk of nonappearance.").

is not a reason to order a defendant detained.[264] "[T]he risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition."[265] "A district court, addressing whether pre-trial detention is appropriate under the Bail Reform Act, may not speculate as to what may or may not happen in the future to the defendant under a different statutory and regulatory regime."[266] This is not to say that a court cannot take into account a defendant's alienage;[267] it undoubtedly implicates the defendant's community ties. However, alienage is not dispositive.[268]

Additionally, the court may not consider whether the probable length of detention is likely to violate the defendant's due process rights.[269] The length of detention is governed primarily by the provisions of the Speedy Trial Act.[270]

D. Length of Detention

Congress expected that the ninety-day time limit under the Speedy Trial Act would ensure that pretrial detention would be brief.[271] However, some senators did not appear to recognize how pliable that deadline is in practice.[272] Even the Supreme Court, in upholding the constitutionality of preventative detention under the Bail Reform Act,

264. *Santos-Flores*, 794 F.3d at 1091–92. However, even if ordered released under the Bail Reform Act, a defendant may be detained by immigration authorities. *See* United States v. Veloz-Alonso, 910 F.3d 266, 268 (6th Cir. 2018); United States v. Soriano Nunez, 928 F.3d 240, 246–47 (3d Cir. 2019); United States v. Lett, 944 F.3d 467, 470 (2d Cir. 2019); United States v. Vasquez-Benitez, 919 F.3d 546, 552–53 (D.C. Cir. 2019).

265. *Santos-Flores*, 794 F.3d at 1091 (citing United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1176–78 (D. Or. 2012)).

266. *Diaz-Hernandez*, 943 F.3d at 1199.

267. *Santos-Flores*, 794 F.3d at 1090.

268. *Id.*

269. United States v. Colombo, 777 F.2d 96, 100 (2d Cir. 1985) ("At this stage of the proceedings, this determination, both as a statutory and constitutional matter, is premature. Reviewing the Act and its legislative history to determine whether there is any statutory foundation for Judge Weinstein's consideration of anticipated length of detention, it appears that Congress was not unconcerned with this issue, but relied on the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1983), to limit the period of pretrial incarceration.").

270. United States v. Accetturo, 783 F.2d 382, 387–88 (3d Cir. 1986).

271. S. REP. NO. 98-225, at 22 n.73 (1983). The absence of a strict time limit on pretrial detention was one reason the Court of Appeals for the Second Circuit found the Bail Reform Act unconstitutional. United States v. Melendez-Carrion, 790 F.2d 984, 999 (2d Cir. 1986).

272. *Melendez-Carrion*, 790 F.2d at 996 (quoting 130 CONG. REC. S941, 943, 945 (daily ed. Feb. 3, 1984)).

referred to the Speedy Trial Act's deadlines as "stringent"[273]—a characterization that, with the Speedy Trial Act's liberal provisions for excludable time, might surprise many practitioners.[274]

The ninety-day clock, like all deadlines under the Speedy Trial Act, is subject to excludable time.[275] Courts may exclude time under the Speedy Trial Act whenever doing so serves the "ends of justice."[276] In practice, time is readily excluded such that some have characterized the Speedy Trial Act's "ends of justice" exclusion as "a 'broad source of justification for delay.'"[277] The Court of Appeals for the Second Circuit noted that, given the ease with which time is excluded under the Speedy Trial Act, "[i]t may well be that the Senate did not fully appreciate just how long pretrial detention might last under the exclusions of the Speedy Trial Act."[278] "In federal court, the minimum period from start to finish is rarely less than six months."[279]

Aside from the Speedy Trial Act, the Due Process Clause offers some protection against protracted pretrial detention under the Bail

273. United States v. Salerno, 481 U.S. 739, 747 (1987).

274. *See* Allen Daniel Applbaum, *As Time Goes By: Pretrial Incarceration under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055, 1067–68 (1987) ("The possibilities for judicial abuse under this ends of justice/complex multidefendant-trial exclusion are frightening. Although the exclusion stipulates that all relevant factors be considered, the balancing-of-interests clause is misleading because it permits broad judicial discretion in determining whether a specific delay should be excluded from the Speedy Trial Act computation. In effect, the provision swallows the Speedy Trial Act's ninety-day rule, and because of its broad scope, the Act could become a sword in the hands of the courts. In fact, courts have interpreted the ends of justice provision as a broad source of justification for delay, and because no absolute outer limit is specified delays can last for more than a year." (footnotes, quotation marks, brackets, and ellipses omitted)); *see also* United States v. Torres, 995 F.3d 695, 707 (9th Cir. 2021) ("To be sure, the Speedy Trial Act is not foolproof protection against prolonged pretrial detention.").

275. 18 U.S.C. § 3164(b) ("The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.").

276. *Id.* § 3161(h)(7)(A).

277. Applbaum, *supra* note 274, at 1068 (quoting NANCY L. AMES ET AL., THE PROCESSING OF FEDERAL CRIMINAL CASES UNDER THE SPEEDY TRIAL ACT OF 1974 (AS AMENDED 1979) 41 (1980) (study prepared by ABT Associates Inc., submitted to U.S. Department of Justice)).

278. United States v. Melendez-Carrion, 790 F.2d 984, 996 (2d Cir. 1986).

279. Carr, *supra* note 13, at 217 ("Even in many such straightforward cases—and others like them, such as felons in possession of a firearm—often nine months or more goes by from initial appearance to final disposition. With the fairly commonplace multi-count, multi-defendant conspiracies involving drug, white collar, and, more recently, terrorism charges, eighteen months or more pass from charge to sentencing.").

Reform Act.[280] Due process, however, can be assessed only in hindsight; a district court may not consider the likely length of pretrial detention in denying the government's motion to detain a defendant.[281] Nor is a delay in a trial a new factor meriting reopening a detention hearing under 18 U.S.C. § 3142(f).[282]

There is no fixed deadline at which pretrial detention violates due process.[283] Each case must be assessed individually.[284] Courts and

280. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 769 n.4 (1987) ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal."); United States v. Colombo, 777 F.2d 96, 101 (2d Cir. 1985); United States v. Accetturo, 783 F.2d 382, 387–88; United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986) ("Although pretrial detention is permissible when it serves a regulatory rather than a punitive purpose, we believe that valid pretrial detention assumes a punitive character when it is prolonged significantly."); United States v. Portes, 786 F.2d 758, 768 (7th Cir. 1985) ("We recognize that, at some point, the length of delay may raise due process objections and we urge that district courts expedite the trials of those detained pending trial.").

281. *Colombo*, 777 F.2d at 100 ("At this stage of the proceedings, this determination, both as a statutory and constitutional matter, is premature."); *see also* United States v. Tortora, 922 F.2d 880, 889 (1st Cir. 1990) ("Congress was surely aware of this potential when it enacted 18 U.S.C. § 3142. Nevertheless, Congress conspicuously omitted any instruction to consider the potential length of detention as part of the pretrial release calculus."); *Portes*, 786 F.2d at 768 ("We recognize that, at some point, the length of delay may raise due process objections and we urge that district courts expedite the trials of those detained pending trial. However, as the Second Circuit noted in its review and reversal of the *Colombo* decision, at this stage of the proceedings, a determination that the length of detention is impermissible 'both as a statutory and constitutional matter, is premature.'"); United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989) ("Nor can the length of his current or potential future detention be considered under this section since it is not material to the issue of risk of flight or dangerousness."); United States v. Quartermaine, 913 F.2d 910, 917 (11th Cir. 1990) ("The Act itself, however, does not provide that pretrial delay should be considered as a factor."). Ironically, one reason the Court of Appeals for the Second Circuit gave for concluding that the likely length of detention was not a proper factor in deciding whether to release a defendant was because the timing of a trial "remains a speculative matter." *Colombo*, 777 F.2d at 101. Of course, every aspect of a release or detention decision is a speculative exercise. And it may be fair to presume that a court would be far more capable of speculating as to (and in fact controlling) when a case will go to trial than predicting a defendant's propensity for committing new crimes or fleeing. *See* Applbaum, *supra* note 274, at 1089.

282. United States v. Orena, 986 F.2d 628, 630 (2d Cir. 1993).

283. *Accetturo*, 783 F.2d at 388 ("Because due process is a flexible concept, arbitrary lines should not be drawn regarding precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial.").

284. *Id.*; United States v. Gonzales Claudio, 806 F.2d 334, 340 (2d Cir. 1986); *Hare*, 873 F.2d at 801; *Tortora*, 922 F.2d at 888; United States v. Torres, 995 F.3d 695, 708 (9th Cir. 2021).

judges have found detention lasting four,[285] six,[286] or eight[287] months to violate due process.[288] Other courts have rejected claims relating to detention lasting much longer.[289] According to the Court of Appeals

285. *Theron*, 782 F.2d at 1516 ("We have no hesitancy in saying that in such circumstances four months additional incarceration before trial is too long.").

286. United States v. Lofranco, 620 F. Supp. 1324, 1326 (N.D.N.Y. 1985); United States v. Hall, 651 F. Supp. 13, 16 (N.D.N.Y. 1985).

287. United States v. Melendez-Carrion, 790 F.2d 984, 1008 (2d Cir. 1986) (Feinberg, C.J., concurring) ("I am convinced that the general requirements of due process compel us to draw that line at some point well short of the eight months involved here.").

288. *See also* United States v. Zannino, 798 F.2d 544, 548 (1st Cir. 1986) (per curiam) (stating, "[W]e shall assume that in many, perhaps most, cases, sixteen months would be found to exceed the due process limitations on the duration of pretrial confinement," but finding that due process was not violated given the unique circumstances of the case); *Gonzales Claudio*, 806 F.2d at 341, 343 (finding continued detention would violate due process when defendants had been already detained for fourteen months, trial was not expected to begin for three more months, and trial was expected to last eight months).

289. *See, e.g.*, United States v. Quartermaine, 913 F.2d 910, 918 (11th Cir. 1990) ("[T]he prospect of eight to ten months of pretrial detention, without more, does not mandate the release of a defendant for whom pretrial detention is otherwise appropriate."); United States v. Millan, 4 F.3d 1038, 1043–44 (2d Cir. 1993) (twenty-four months and an expectation of five to six months more before trial is complete); United States v. Vondette, 5 F. App'x 73, 75 (2d Cir. 2001) (forty months); United States v. Landron-Class, 705 F. Supp. 2d 154, 159–160 (D.P.R. 2010) (thirty-one months); United States v. El-Hage, 213 F.3d 74, 76–77 (2d Cir. 2000) (stating in a case involving an alleged conspirator of Usama Bin Laden, "The 30-33 months of pretrial detention . . . is extraordinary, and justified only by the unprecedented scope of violence . . . inflicted on innocent victims, by the extraordinarily complex and difficult preparation needed to present this case, and, more particularly, because the lengthy delay in bringing defendant to trial may not be laid at the government's doorstep"); United States v. Briggs, 697 F.3d 98, 104 (2d Cir. 2012) (holding that, although it is "disturbed" by the defendant's detention, pretrial detention of more than twenty-four months did not violate due process); *Torres*, 995 F.3d at 709 ("On balance, we conclude that Torres's twenty-one-month detention [that was largely attributable to the coronavirus pandemic] does not yet violate due process, but we caution that the length of Torres's detention is approaching the limits of what due process can tolerate."); *cf.* United States v. Ailemen, 165 F.R.D. 571, 582 (N.D. Cal. 1996) (noting that "many courts refuse even to entertain due process challenges, concluding that the issue is not ripe" when "the length of detention already served, or of nonspeculative expected detention, is relatively short, between about six months and a year"). In a thorough analysis of case law on the issue, Magistrate Judge Wayne D. Brazil found that if there were any line to be gleaned from case law (as of 1996), it was at roughly two years. *Id.* at 587. It was at that point that courts generally found continued pretrial detention to violate due process unless the delay was wholly attributable to the defendant. *Id.* at 587–88, 591 ("No case has upheld pretrial

for the Second Circuit, "the ninety-day period specified in section 3164(b), representing the considered view of the Congress as to the normal limit on pretrial detention, provides at least a point of reference in our consideration of the constitutional limit on such detention."[290]

Although the length of detention is "a central focus of [the] inquiry,"[291] "the length of a detention period will rarely by itself offend due process."[292] Factors relevant in assessing whether protracted detention violates due process include "(i) the length of detention; (ii) the extent of the prosecution's responsibility for the delay of the trial; and (iii) the strength of the evidence upon which the detention was based."[293] "As a general rule, the stronger the justification for keeping a defendant in detention, the longer he or she can be detained without violating the due process clause."[294] "[T]he constitutional limits on a detention period based on dangerousness to the community may be looser than the limits on a detention period based solely on risk of flight."[295] The Court of Appeals for the Seventh Circuit has held that the defendant must make a threshold showing that either the court or the prosecution unnecessarily delayed in bringing the case to trial.[296] In other words, a due process

detention expected to last more than thirty-two months against a due process challenge.").

290. *Gonzales Claudio*, 806 F.2d at 340–41.

291. *Briggs*, 697 F.3d at 101 (quoting *Gonzales Claudio*, 806 F.2d at 340).

292. United States v. Orena, 986 F.2d 628, 631 (2d Cir. 1993).

293. *Id.* at 630; *see also Torres*, 995 F.3d at 708 ("[I]n evaluating whether a due process violation has occurred, we weigh the following factors: (1) the length of the defendant's pretrial detention; (2) the prosecution's contribution to the delay; and (3) the evidence supporting detention under the Bail Reform Act."); United States v. Hare, 873 F.2d 796, 807 (5th Cir. 1989) ("In determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision, such as the seriousness of the charges, the strength of the government's proof that the defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits, but also additional factors such as the length of the detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay.").

294. United States v. Beverly, No. 87 CR 521, 1988 WL 36988, at *2 (N.D. Ill. Apr. 18, 1988); *see also Torres*, 995 F.3d at 708 ("Other courts . . . have also considered the strength of the evidence justifying detention under the Bail Reform Act, which we find appropriate." (citing *Briggs*, 697 F.3d at 101; United States v. Zannino, 798 F.2d 544, 547–48 (1st Cir. 1986) (per curiam); United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986))).

295. *Orena*, 986 F.2d at 631.

296. *See* United States v. Infelise, 934 F.2d 103, 104–05 (7th Cir. 1991).

violation can never result when the delay is wholly attributable to the defendant.[297]

An additional relevant factor in the due process analysis is the length of pretrial detention compared to the sentence the defendant may receive if convicted; detention approaching the likely length of a sentence is more likely to violate due process.[298] Ultimately, "[a] due process violation occurs when detention becomes punitive rather than regulatory, meaning there is no regulatory purpose that can rationally be assigned to the detention or the detention appears excessive in relation to its regulatory purpose."[299] Because that line is amorphous and a defendant is entitled to relief only after a violation has occurred, a defendant alleging that pretrial detention has violated due process may be forced to file repetitive motions asking the court, like a child on a road trip, "Are we there yet?"[300]

E. Violation of a Condition of Release

> The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which such person's arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of release that such person not commit a Federal, State, or local crime during the period of release, shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated.[301]

297. *See id.*

298. United States v. Ailemen, 165 F.R.D. 571, 581 (N.D. Cal. 1996) (citing United States v. Shareef, 907 F. Supp. 1481, 1484 (D. Kan. 1995)); United States v. Lofranco, 620 F. Supp. 1324, 1325 (N.D.N.Y. 1985) ("[H]olding a defendant without bail for longer than he would serve if tried and convicted must also violate due process.").

299. *Torres*, 995 F.3d at 708 (citing United States v. Salerno, 481 U.S. 739, 747 (1987)).

300. *See* Floralynn Einesman, *How Long Is Too Long? When Pretrial Detention Violates Due Process*, 60 TENN. L. REV. 1, 34 (1992) ("The current tests place the onus on the defendant to continuously raise the issue of the denial of due process rights. This burden remains on the defendant until the court either recognizes that the defendant's rights to due process have been violated and releases him from custody or resolves the case.").

301. 18 U.S.C. § 3148(b).

A few courts have held that, because the statute does not refer to any other means for initiating revocation proceedings, a motion by the government is required before the court can hold a bond revocation hearing.[302] However, "the weight of authority rejects that position and finds that revocation can be initiated by the court when Pretrial Services informs the court of an alleged violation."[303]

The same procedural protections apply to a bond revocation hearing as apply to a detention hearing.[304] And the government may likewise proceed by proffer.[305]

If the court finds clear and convincing evidence that a defendant violated any condition of release, the court must detain the defendant following a hearing,[306] provided the court finds "there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community" or "the person is unlikely to abide by any condition or combination of conditions of release."[307] The same is true if the court finds that there is probable cause[308] that the

302. United States v. Herrera, 29 F. Supp. 2d 756, 761 (N.D. Tex. 1998); United States v. Bronson, No. 05-CR-714, 2007 WL 2455138, at *9–10 (E.D.N.Y. Aug. 23, 2007).

303. United States v. Boone, No. 7:21-cr-00022, 2021 WL 3234618, at *1 (W.D. Va. July 29, 2021) (citing United States v. Pargellis, No. 3:19-cr-00272-3, 2020 WL 5581361, at *1 (M.D. Tenn. Sept. 17, 2020)); *see also* United States v. Roland, No. 1:05MJ111, 2005 WL 2318866, at *7–8 (E.D. Va. Aug. 31, 2005) ("Congress did not mean that 'only the government may move to initiate' a proceeding to sanction a defendant with a revocation of release and an order of detention. Rather, a holistic reading of Section 3148 provides that the government, like the judicial officer, has the discretion to initiate a release revocation proceeding."). Should a defendant argue that a revocation proceeding is improper because it was initiated by a Pretrial Services petition rather than a government motion, the government may quickly moot the argument by filing a written motion. *See* United States v. Koumbairia, No. 07-0061, 2007 WL 1307909, at *2, *5 (D.D.C. May 3, 2007).

304. United States v. Davis, 845 F.2d 412, 414 (2d Cir. 1988).

305. United States v. LaFontaine, 210 F.3d 125, 131 (2d Cir. 2000).

306. *Id.* at 130; 18 U.S.C. § 3148(a)–(b).

307. 18 U.S.C. § 3148(b)(2); *see also* United States v. Wilks, 15 F.4th 842, 848 (7th Cir. 2021).

308. Courts and practitioners must be mindful that the probable cause standard does not require evidence of a nature that may lead to a conviction. Therefore, although courts will commonly impose a condition that a defendant refrain from "use of a narcotic drug or other controlled substance," 18 U.S.C. § 3142(c)(1)(B)(ix), a violation reflected by a positive drug test is not merely a violation of a condition of release under 18 U.S.C. § 3148(b)(1)(B), but also probable cause that the defendant committed the crime of possession of a controlled substance. The distinction is material because if possession is a felony under state law, a presumption of detention applies under 18 U.S.C. § 3148(b). United States v. Alfonso, 284 F. Supp. 2d 193,

defendant committed a new crime while on release.[309] Thus, even if the defendant was not previously eligible for detention as a danger to the community under 18 U.S.C. § 3142(f), *any* violation of the conditions of release opens the door to detention on the basis of dangerousness.[310]

If there is probable cause that the defendant committed a felony while on pretrial release, "a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community."[311] As under 18 U.S.C. § 3142(e)(2) and (3), the presumption does not disappear once the defendant presents some evidence to rebut it, but it remains as one of the factors for the court to consider.[312]

The standard applicable in a revocation hearing is subtly, but significantly, different from that which applies initially under 18 U.S.C. § 3142.[313] Whereas the court initially assesses whether conditions will "reasonably assure" the defendant's appearance and the safety of the community,[314] at a revocation hearing the qualifier of "reasonably" no longer applies. Release is appropriate only if the court is "assure[d]" that the defendant "will not flee or pose a danger to the safety of any other person or the community."[315]

F. Review of Release and Detention Decisions

In part to facilitate review by a district judge or the court of appeals, a detention order must contain "written findings of fact and a

202–03 (D. Mass. 2003) (citing United States v. Rivera, 104 F. Supp. 2d 159, 160 (D. Mass. 2000)).

309. 18 U.S.C. § 3148(b)(1)–(2); *see also Wilks*, 15 F.4th at 848. ("A finding that the defendant violated a release condition does not alone permit revocation; the judge must make findings under both § 3148(b)(1) and (b)(2) before he may revoke release.").

310. *See* 18 U.S.C. § 3148(b).

311. 18 U.S.C. § 3148(b).

312. United States v. Cook, 880 F.2d 1158, 1162 (10th Cir. 1989); United States v. LaFontaine, 210 F.3d 125, 130 (2d Cir. 2000); *see also* 18 U.S.C. § 3142(e)(2)–(3).

313. *Compare* 18 U.S.C. § 3142(b) (outlining the standard a judicial officer will use in deciding whether to affirm a defendant's pretrial release), *with id.* § 3148(b) (describing the standard a judicial officer must use in deciding whether a prior decision of release should be revoked).

314. *Id.* § 3142(b), (c)(1), (e)(1)–(2), (f), (g).

315. *Id.* § 3148(b)(2)(A).

written statement of the reasons for the detention."[316] Similarly, a release order must "include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct."[317]

Either the government or the defendant may move to have a district judge review a magistrate judge's release order.[318] Only a defendant may seek review of a magistrate judge's detention decision.[319] A district judge may also sua sponte review a magistrate judge's decision.[320] When the defendant first appears in a district other than the district where the offense was allegedly committed,[321] any review must be by a district judge in the charging district.[322]

Because the Bail Reform Act provides a distinct procedure for a district judge to review a magistrate judge's release or detention order, the general procedure set forth under 28 U.S.C. § 636(b) for review of a magistrate judge's decision does not apply.[323] Consequently, the time limits set forth in Fed. R. Crim. P. 59(b) for seeking review of a magistrate judge's decision do not apply to motions under 18 U.S.C. § 3145(a) or (b).[324]

316. *Id.* § 3142(i)(1); *see also* FED. R. APP. P. 9(a)(1). The routine means of complying with this requirement is by completing a fill-in-the-blank form. *See* ADMIN. OFF. U.S. CTS., AO Form 472: *Order of Detention Pending Trial*, U.S. CTS., https://www.uscourts.gov/sites/default/files/ao472.pdf [https://perma.cc/7ZTX-W9HE] (last visited Nov. 8, 2022). This requirement may also be satisfied by a transcript of the detention hearing "if it evinces a clear and legally sufficient basis for the court's determination." United States v. Peralta, 849 F.2d 625, 626 (D.C. Cir. 1988).

317. 18 U.S.C. § 3142(h)(1); FED. R. APP. P. 9(a)(1); *see also AO Form 199A*: *Order Setting Conditions of Release*, U.S. CTS., https://www.uscourts.gov/sites/default/files/ao199a.pdf [https://perma.cc/FQY5-5LFE] (June 2019) [hereinafter *AO Form 199A*].

318. 18 U.S.C. § 3145(a).

319. *Id.* § 3145(b).

320. United States v. Gebro, 948 F.2d 1118, 1120 (9th Cir. 1991); *see also* United States v. Travis, No. 97-6102, 1997 WL 678524, at *1 (6th Cir. Oct. 28, 1997) (unpublished).

321. *See* FED. R. CRIM. P. 5(c)(2)–(3).

322. United States v. Evans, 62 F.3d 1233, 1235 (9th Cir. 1995); United States v. Torres, 86 F.3d 1029, 1031 (11th Cir. 1996); United States v. Vega, 438 F.3d 801, 803 (7th Cir. 2006); United States v. Godines-Lupian, 816 F. Supp. 2d 126, 128 (D.P.R. 2011). If a defendant's initial appearance is in a district other than where the offense allegedly occurred and that appearence is before a district judge rather than a magistrate judge, that district judge's release or detention decision is likewise subject to review by a district judge in the charging district. *See* United States v. Cannon, 711 F. Supp. 2d 602, 608 (E.D. Va. 2010).

323. United States v. Doby, 928 F.3d 1199, 1204 (10th Cir. 2019).

324. *Id. But see* United States v. Tooze, 236 F.R.D. 442, 444–46 (D. Ariz. 2006) (holding that the time limits under FED. R. CRIM. P. 59 applied to a motion under 18 U.S.C.

A district judge reviews the magistrate judge's decision de novo.[325] Thus, a district judge "may reject the magistrate judge's fact finding and start the hearing anew or may accept the findings of fact made by the magistrate [judge][326] and hear additional facts and argument."[327] The district judge may hold a detention hearing even if the magistrate judge did not.[328] The district judge "must state in writing, or orally on

§ 3145(a)–(b), but that a district judge retained discretion to consider an untimely motion).

325. *See, e.g.*, United States v. Koenig, 912 F.2d 1190, 1191 (9th Cir. 1990) (citing United States v. King, 849 F.2d 485, 491 (11th Cir. 1988); United States v. Hurtado, 779 F.2d 1467, 1480 (11th Cir. 1985); United States v. Maull, 773 F.2d 1479, 1481 (8th Cir 1985); United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985); United States v. Leon, 766 F.2d 77, 80 (2d Cir. 1985); United States v. Delker, 757 F.2d 1390, 1394–95 (3d Cir. 1985); United States v. Thibodeaux, 663 F.2d 520, 522 (5th Cir. 1981)); United States v. Clark, 865 F.2d 1433, 1436 (4th Cir. 1989) (en banc); United States v. Hunt, 240 F. Supp. 3d 128, 132–133 (D.D.C. 2017) (citing United States v. Stewart, 19 F. App'x 46, 47 (4th Cir. 2001) ; United States v. Gonzales, No. 98-2089, 1998 WL 321218, at *1 (10th Cir. June 5, 1998) ; United States v. Hazime, 762 F.2d 34, 36 (6th Cir. 1985); United States v. Portes, 786 F.2d 758, 760 (7th Cir. 1985)); United States v. Taylor, 289 F. Supp. 3d 55, 66 (D.D.C. 2018); United States v. Mallory, 268 F. Supp. 3d 854, 861 (E.D. Va. 2017); United States v. Oliveira, 238 F. Supp. 3d 165, 167 (D. Mass. 2017); United States v. Baker, 349 F. Supp. 3d 1113, 1128 (D.N.M. 2018); *see also* United States v. Munchel, 991 F.3d 1273, 1280 (D.C. Cir. 2021) (noting that the court has not squarely decided the issue). *Cf.* United States v. English, 629 F.3d 311, 320 (2d Cir. 2011) (holding that a district judge of a court with original jurisdiction of the offense cannot review the decision of another district judge of the same court under 18 U.S.C. § 3148; however, a peer may reopen a detention hearing under 18 U.S.C. § 3142(f)). Although the standard of review is de novo, practitioners must be mindful that, consciously or otherwise, district judges are likely to afford some measure of deference to the decisions of magistrate judges if for no other reason than an effort to discourage such motions for review. A district judge who regularly upsets the release or detention decisions of the court's magistrate judges invites making bond hearings a routine part of the judge's workload.

326. Following the Judicial Improvements Act of 1990, the judicial officer's title is properly "magistrate judge," not "magistrate." *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117 (1990) ("After the enactment of this Act, each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge . . . .").

327. *Oliveira*, 238 F. Supp. 3d at 167 (citing United States v. Marquez, 113 F. Supp. 2d 125, 127 (D. Mass. 2000)).

328. *Maull*, 773 F.2d at 1481, 1485 (holding that following a defendant's appeal of the conditions imposed by a magistrate, the district judge could hold a detention hearing and order the defendant detained "[t]o hold that the judge responding to this duty only may lighten the conditions already imposed, but not bolster them, would emasculate the essential scope of the statute.").

the record, the reasons for an order regarding the release or detention of a defendant . . . ."[329]

Although a district judge may rely on new information, if a motion for review under 18 U.S.C. § 3145(a) or (b) relies on a new and material fact, it is often more efficient for the court to construe the motion as one to reopen the detention hearing under 18 U.S.C. § 3142(f).[330] Likewise, an attorney who believes that reconsideration is appropriate in light of new information should first seek to reopen the detention hearing under 18 U.S.C. § 3142(f) before resorting to a motion under 18 U.S.C. § 3145(a) or (b).[331]

Under 18 U.S.C. § 3142(f) a detention hearing

> may be reopened . . . at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.[332]

Maintaining the distinction between 18 U.S.C. § 3142(f) before resorting to a motion under 18 U.S.C. § 3145(a) or (b) fosters judicial efficiency by perhaps negating the need for the district judge's review.[333]

If a magistrate judge denies a motion to reopen a detention hearing because the movant failed to present new and material information, the movant may then seek review by a district judge.[334] If the district judge had not reviewed the prior release or detention order, it is

329. FED. R. APP. P. 9(a)(1). *See also King*, 849 F.2d at 490 ("Adoption of the [magistrate judge's detention] order obviates the need for the district court to prepare its own written findings of fact and statement of reasons supporting pretrial detention."). The district judge need enter a new order "only where: 1) the district court considers evidence which was not considered by the magistrate; or 2) the district court adopts the magistrate's recommendation that pretrial detention is necessary but finds that certain of the magistrate's underlying conclusions or factual findings are incorrect or unsupported by the evidence." *Id.* at 491 (emphasis in original).

330. *See* United States v. Shaker, 665 F. Supp. 698, 700 n.2 (N.D. Ind. 1987) (discussing the court's ability to construe motions under § 3145(b) and 3142(f) similarly).

331. *Compare* 18 U.S.C. § 3142(f) (describing the appropriateness of a motion under this subsection when new evidence is the basis for the claim), *with id.* § 3145(a)–(b) (describing motions for revocation of detention orders generally, with no mention of new evidence in a claim raised).

332. *Id.* § 3142(f).

333. *See supra* notes 330–32 and accompanying text.

334. 18 U.S.C. § 3145.

inconsequential to the district judge's review whether the additional information is new and material.[335] Because there is no deadline for objecting to a magistrate judge's release or detention decision, the district judge's review would be a de novo review of the initial detention decision but with consideration of the additional information that the magistrate judge found insufficient to merit reopening the hearing.[336]

Following a decision by the district judge in the charging district, a party may seek review by the court of appeals.[337] The courts of appeals have split as to the standard of review that applies to such an appeal.[338] On the one side is the Court of Appeals for the Third Circuit, which has concluded that its review is plenary.[339] On the opposite side are the three courts of appeals—those of the Second,[340] Fourth,[341] and D.C. Circuits[342]—that will upset a release or detention

335. *See* United States v. Goba, 240 F. Supp. 2d 242, 245 (W.D. N.Y. 2003) (discussing how the district judge will use the record developed by magistrate judge but will ultimately "reach its own independent findings of fact and conclusions of law").

336. *Id.*

337. 18 U.S.C. § 3145(c); *see also* United States v. Baltazar-Sebastian, 990 F.3d 939, 943–44 (5th Cir. 2021).

338. *See* discussion *infra* notes 339–51 and accompanying text.

339. United States v. Soriano Nunez, 928 F.3d 240, 244 (3d Cir. 2019). *But see* United States v. Delker, 757 F.2d 1390, 1400 (3d Cir. 2019) ("Rule 9's requirements mandate that appellate courts give the reasons articulated by trial judges respectful consideration, but if, after careful assessment of the trial judge's reasoning, together with such papers, affidavits, and portions of the record as the parties present, the court of appeals independently reaches a conclusion different from that of the trial judge the court of appeals has the power to amend or reverse a detention or release decision."); United States v. Traitz, 807 F.2d 322, 325 (3d Cir. 1986) ("On appeal from the district court's decision to detain a defendant before trial and to release a defendant, the court of appeals has an obligation to make an independent determination on the application of the government for detention, although the reasons given by the trial judge are entitled to respectful consideration.").

340. United States v. Mattis, 963 F.3d 285, 291 (2d Cir. 2020)("As a rule, we apply deferential review to a district court's [bail determination] and will not reverse except for clear error." (quoting United States v. Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007))).

341. United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989) (en banc) (explaining that the review of district court's final detention order is done "under a clearly erroneous standard" (quoting United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985))).

342. United States v. Hale-Cusanelli, 3 F.4th 449, 454–55 (D.C. Cir. 2021) ("We review release and detention orders pursuant to the Bail Reform Act . . . for clear error. The clear error standard applies not only to the factual predicates underlying the district court's decision, but also to its overall assessment, based on those predicate facts, as to the risk of flight or danger presented by defendant's release." (internal citations and quotation marks omitted)).

decision only for clear error. Similarly, the Court of Appeals for the Fifth Circuit applies an abuse of discretion standard.[343]

Most courts of appeals, however, apply a middle standard of review but articulate it in different ways.[344] For example, the Court of Appeals for the First Circuit held:

> We conclude that Congress intended the appellate courts to independently review all detention decisions, giving deference to the determination of the district court. If upon careful review of all the facts and the trial judge's reasons the appeals court concludes that a different result should have been reached, the detention decision may be amended or reversed. If the appellate court does not reach such a conclusion—even if it sees the decisional scales as evenly balanced—then the trial judge's determination should stand.[345]

The Court of Appeals for the Seventh Circuit adopted a similar standard.[346]

The Courts of Appeals for the Sixth,[347] Eighth,[348] Ninth,[349] Tenth,[350] and Eleventh[351] Circuits have been more explicit and have

343. United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992) ("Absent an error of law, we must uphold a district court order 'if it is supported by the proceedings below,' a deferential standard of review that we equate to the abuse-of-discretion standard." (quoting United States v. Hare, 873 F.2d 796, 798 (5th Cir. 1989))).

344. *See* United States v. O'Brien, 895 F.2d 810, 814 (1st Cir. 1990); *see also* United States v. Tortora, 922 F.2d 880, 883 (1st Cir. 1990) ("Hence, independent review represents an intermediate level of scrutiny, more rigorous than the abuse-of-discretion or clear-error standards, but stopping short of plenary or *de novo* review." (citing United States v. Bayko, 774 F.2d 516, 519 (1st Cir. 1985))); United States v. Stewart, 19 F. App'x 46, 48 (4th Cir. 2001) ("The standard of review for pretrial detention orders under 18 U.S.C. § 3145(c) is one of independent review, with 'deference to the determination of the district court.'" (quoting *O'Brien*, 895 F.2d at 814))).

345. *O'Brien*, 895 F.2d at 814.

346. United States v. Wilks, 15 F.4th 842, 847 (7th Cir. 2021) ("For appeals of an initial decision to detain or release a defendant, we have adopted a standard that calls for an 'independent review' of the decision below, though with deference to the judge's findings of historical fact and his greater familiarity with the defendant and the case." (quoting United States v. Portes, 786 F.2d 758, 763 (7th Cir. 1985))).

347. United States v. Stone, 608 F.3d 939, 945 (6th Cir. 2010) ("We review the district court's factual findings for clear error, but we consider mixed questions of law and fact—including the ultimate question whether detention is warranted—de novo." (citing United States v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985))).

made clear that the only deference owed to the district court is with respect to its factual findings; the ultimate release or detention decision is subject to the court of appeals' independent review.

V. RELEASE AND DETENTION IN FEDERAL COURTS

The Administrative Office of the United States Courts (AO) maintains robust data regarding all aspects of the work of the court and its Pretrial Services offices, much of which is published in quarterly Caseload Tables.[352] Certain tables are readily accessible to the public through the AO's website.[353] However, significantly more information is available to judiciary personnel on an internal court website and to the public upon a request to the AO.[354] Judges also have access to a "Pretrial Dashboard" where they can review more detailed data and see how their own cases and decisions compare across districts, circuits, and the nation.[355]

Except when otherwise indicated, the data discussed here are derived from the AO's "H-Tables," which relate to the work of Pretrial Services, broken down by judicial district.[356]

348. United States v. Cantu, 935 F.2d 950, 951 (8th Cir. 1991) (per curiam) ("We apply the clearly erroneous standard to factual findings of the district court but independently review the ultimate conclusion that detention is required . . . .").

349. United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) (applying clearly erroneous standard to factual findings but de novo review to questions of law and mixed questions of law and fact).

350. United States v. Cisneros, 328 F.3d 610, 613 (10th Cir. 2003) ("We apply de novo review to mixed questions of law and fact concerning the detention or release decision, but we accept the district court's findings of historical fact which support that decision unless they are clearly erroneous." (citing United States v. Strickland, 932 F.2d 1353, 1355 (10th Cir. 1991) (per curiam))).

351. United States v. Gaviria, 828 F.2d 667, 668 (11th Cir. 1987) ("[T]his circuit has adopted the plenary standard of review in considering appeals under the Bail Reform Act. Nevertheless, the purely factual findings of the district court remain subject to the clearly erroneous standard." (citing United States v. Hurtado, 779 F.2d 1467, 1470–73 (11th Cir 1985))).

352. *Caseload Statistics Data Tables*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/T9BZ-7RAN] (last visited Nov. 8, 2022).

353. *Id.*

354. The non-public data cited herein was used with the permission of the AO. Non-public data is indicated by the use of "on file with author" in the accompanying citation.

355. *Cf. Court Operations and Pandemic Response–Annual Report 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/court-operations-and-pandemic-response-annual-report-2021 [https://perma.cc/XD79-FYRZ] (last visited Nov. 8, 2022).

356. Although the AO compiles the H-Tables quarterly, it publicly releases most H-Tables only annually and only then for the period ending September 30. To assist in

comparison and to enable discussion based on calendar years, the data discussed in this section are all derived from H-Tables covering the twelve-month period ending December 31. Those specific H-Tables are generally not public but are on file with the author for the years 2012 through 2021. Relevant here are the following tables:

U.S. CTS., FEDERAL PRETRIAL SERVICES: RECOMMENDATIONS MADE FOR INITIAL PRETRIAL RELEASE (TABLE H-3), U.S. CTS. [hereinafter TABLE H-3] (including the percent of cases where Pretrial Services and the prosecutor made a recommendation regarding release, and the percent where that recommendation was for release or detention) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: RECOMMENDATIONS EXCLUDING IMMIGRATION CASES (TABLE H-3A) (including the percent of cases where Pretrial Services and the prosecutor made a recommendation regarding release, and the percent where that recommendation was for release or detention) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: RECOMMENDATIONS EXCLUDING ILLEGAL ALIEN CASES (TABLE H-3B) (2013-2021) (including the percent of cases where Pretrial Services and the prosecutor made a recommendation regarding release and percent where that recommendation for release or detention) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: DEFENDANTS RELEASED ON BOND (TABLE H-6), [hereinafter TABLE H-6] (including the number of defendants released on bond and whether that bond was unsecured, secured, or corporate surety) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: DEFENDANTS WITH CONDITIONS OF RELEASE (TABLE H-8), [hereinafter TABLE H-8] (including the number of defendants released and subject to conditions including supervision by Pretrial Services, third-party custody, substance abuse testing and treatment, home confinement, and mental health treatment) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: DETENTION SUMMARY (TABLE H-9A) [hereinafter TABLE H-9A] (including number of defendants detained, total days detained, average number of days detained, and median number of days detained) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: CASES CLOSED, BY TYPE OF DISPOSITION (TABLE H-13), (including number of cases closed by, for example, dismissal, acquittal, and execution of sentence) (publicly available quarterlyon file with author).

U.S. CTS., FEDERAL PRETRIAL SERVICES: RELEASE AND DETENTION CASES (TABLE H-14), [hereinafter TABLE H-14] (including total cases, total defendants detained and never released, and released) (on file with the author for the period ending December 31).

Contrary to Congress's intentions and expectations, pretrial detention has become the norm. From a detention rate of less than thirty percent in 1985,[357] in 2021, roughly sixty-five percent of all federal defendants were detained for the entire pretrial period.[358] Prosecutors sought detention in seventy-one percent of all cases, and Pretrial Services recommended it in about sixty-two percent of cases.[359]

However, a significant portion of persons charged with criminal offenses in federal court are not lawfully present in the United States and are disproportionately detained due to fears they may flee.[360] Excluding such defendants, fifty-two percent of defendants in 2021 were detained for the entire pretrial period.[361] Over the preceding decade, the annual federal detention rate averaged 50.62%, excepting cases where the defendant was not lawfully present in the United States.[362]

U.S. CTS., FEDERAL PRETRIAL SERVICES: RELEASE AND DETENTION EXCLUDING ILLEGAL ALIEN CASES (TABLE H-14B) (2012-2021) [hereinafter TABLE H-14B] (including total cases, total defendants detained and never released, and released) (on file with the author for the period ending December 31).

U.S. CTS., FEDERAL PRETRIAL SERVICES: VIOLATIONS SUMMARY REPORT (TABLE H-15) (2012-2021) [hereinafter TABLE H-15] (including total cases "in release status," overall violation rate, felony rearrests, misdemeanor rearrests, failures to appear, and technical violations) (on file with the author for the period ending December 31).

357. U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SPECIAL REP., PRETRIAL RELEASE AND DET.: THE BAIL REFORM ACT OF 1984, at 2 tbl.2 (1988), https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf [https://perma.cc/A7Q6-2MW7] (illustrating the 30% figure includes both persons ordered detained (18.8% of all defendants) and persons for whom bail was set but remained in custody because they could not post it (10.1% of all defendants)).

358. U.S. CTS., FEDERAL PRETRIAL SERVICES: RELEASE AND DETENTION CASES (TABLE H-14) (2021) (on file with the author for the period ending December 31).

359. U.S. CTS., FEDERAL PRETRIAL SERVICES: RECOMMENDATIONS MADE FOR INITIAL PRETRIAL RELEASE (TABLE H-3) (2021) (on file with the author for the period ending December 31).

360. *Pretrial Services – Judicial Business 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2021 [https://perma.cc/4N5K-A83Z] (last visited Nov. 8, 2022).

361. U.S. CTS., FEDERAL PRETRIAL SERVICES: RELEASE AND DETENTION EXCLUDING ILLEGAL ALIEN CASES (TABLE H-14B) (2021) (on file with the author for the period ending December 31).

362. *See infra* Table 1 (illustrating nationwide detention rate excluding defendants not lawfully in the United States); *see also* TABLE H-14B, *supra* note 356.

Detention rates of defendants lawfully in the United States vary significantly among circuits.[363] The Fifth Circuit had the highest detention rate over the last decade with an average of 56.88% of defendants being detained each year.[364] This was followed by the First Circuit at 56.60% and the Eighth Circuit at 56%.[365] The lowest detention rates were in the Third (43.28%), Second (44.16%) and Eleventh (46.71%) Circuits.[366]

The length of detention is routinely far beyond the three months that some considered a "worst case limit"[367] at the time Congress passed the 1984 Act. In 2021, detained defendants spent an average of 355 days in custody pending the resolution of their cases.[368] That figure was likely skewed by delays resulting from the coronavirus pandemic, but in the decade before the pandemic—2010 through 2019—a detained defendant still spent an average of 249 days in pretrial custody.[369] The length of detention has been on an overall upward trend, with the average rising from 243 days over 2010 through 2014, to 255 days over 2015 through 2019.[370]

Over the last five years, pretrial detention consistently lasted the longest in the Second Circuit, followed by the First and Third, and was the shortest, on average, in the Fifth and Tenth Circuits.[371]

It is rare for defendants on pretrial supervision to be rearrested for new crimes.[372] In 2021, of the roughly 62,000 defendants on pretrial supervision, only 640 (1.036%) were rearrested for a new felony offense—the sorts of serious crimes that Congress had in mind when authorizing preventative detention.[373] A roughly equal number of defendants were rearrested for misdemeanors, and so, overall, about

363. *See infra* Table 1 (illustrating detention rates across United States circuits); *see also* TABLE H-14, *supra* note 356.

364. *See infra* Table 1 (illustrating detention rates across United States circuits); *see also* TABLE H-14, *supra* note 356.

365. *See infra* Table 1 (illustrating detention rates across United States circuits); *see also* TABLE H-14, *supra* note 356.

366. *See infra* Table 1 (illustrating detention rates across United States circuits); *see also* TABLE H-14, *supra* note 356.

367. United States v. Melendez-Carrion, 790 F.2d 984, 996 (2d Cir. 1986) (quoting 130 CONG. REC. 1,817 (1984)).

368. *See* U.S. CTS., FEDERAL PRETRIAL SERVICES: DETENTION SUMMARY (TABLE H-9A) (2021) (on file with the author for the period ending December 31).

369. *See id.*

370. *See id.*

371. *See id.*

372. *See infra* Table 1 (illustrating nationwide rearrest rate); *see also* TABLE H-15, *supra* note 356.

373. U.S. CTS., FEDERAL PRETRIAL SERVICES: VIOLATIONS SUMMARY REPORT (TABLE H-15) (2021) (on file with the author for the period ending December 31).

two percent of defendants on pretrial release were rearrested for new crimes.[374]

Over the past decade (2012 through 2021), on average, each year 1.72% of defendants on pretrial release were rearrested for new crimes.[375] Only 0.79% of defendants on pretrial release were arrested each year for felonies.[376]

Non-appearance is similarly rare.[377] In each year of the past decade, on average, 1.05% of defendants failed to appear as required.[378]

There does not appear to be a strong relationship between detention rates and rearrest rates.[379] For example, comparing average detention rates over the last decade in cases where the defendant was either a citizen or lawfully within the United States, to average rearrest rates over the same period, the First Circuit had a comparatively high detention rate (56.60%) and a low rearrest rate (1%).[380] Conversely, the Second Circuit had a comparatively low detention rate (44.16%) but a high rearrest rate (2.49%).[381] The Eighth Circuit, however, had the third-highest detention rate (56%) but the highest rearrest rate (3.18%).[382]

374. *See id*.
375. *See infra* Table 1 (illustrating nationwide rearrest rate); *see also* TABLE H-15, *supra* note 356.
376. *See infra* Table 1 (illustrating nationwide rearrest rate); *see also* TABLE H-15, *supra* note 356.
377. *See infra* Table 1 (illustrating nationwide failure to appear rate); *see also* TABLE H-15, *supra* note 356.
378. *See infra* Table 1 (illustrating nationwide failure to appear rate); *see also* TABLE H-15, *supra* note 356.
379. *See infra* Table 1 (illustrating detention and rearrest rates across United States circuits); *see also* TABLE H-15, *supra* note 356.
380. *See infra* Table 1 (illustrating detention and rearrest rates across United States circuits); *see also* TABLE H-14B, *supra* note 356.
381. *See infra* Table 1 (illustrating detention and rearrest rates across United States circuits); *see also* TABLE H-14B, *supra* note 356.
382. *See infra* Table 1 (illustrating detention and rearrest rates across United States circuits); *see also* TABLE H-14B, *supra* note 356.

Circuit	**Detention Rate** (excluding defendants not lawfully in the United States)	**Felony Rearrest Rate**	**Felony and Misdemeanor Rearrest Rate**	**Failure to Appear Rate**
Nationwide	50.62%	0.79%	1.72%	1.05%
First	56.60%	0.52%	1.00%	0.46%
Second	44.16%	1.12%	2.49%	0.83%
Third	43.28%	1.06%	1.94%	0.74%
Fourth	49.04%	0.80%	2.20%	1.13%
Fifth	56.88%	0.67%	1.34%	0.82%
Sixth	49.90%	0.81%	1.84%	0.81%
Seventh	50.47%	1.03%	2.15%	0.76%
Eighth	56.00%	1.27%	3.18%	1.31%
Ninth	48.14%	0.44%	0.92%	1.54%
Tenth	50.96%	0.44%	1.02%	1.62%
Eleventh	46.71%	0.94%	1.77%	0.68%

Table 1 - Average annual rates for the period 2012 through 2021[383]

Even presuming that detention rates may have an inverse relationship with rearrest rates, the data underscore the difficulty in predicting dangerousness, especially in marginal cases. For example, in 2021, the Fifth Circuit's 57.6% detention rate yielded an overall rearrest rate of 1.32%.[384] The Second Circuit, on the other hand, had a detention rate of 43.7% and a rearrest rate of 2.87%.[385] Supposing that the Second Circuit could decrease its rearrest rate to 1.32% if its

383. Data for calculations derived from Tables cited *supra* note 356.

384. *See* TABLE H-15, *supra* note 356. Of 8,298 defendants (excluding defendants not lawfully in the United States), 4,778 were detained in 2021. *See* TABLE H-14B, *supra* note 356. In the same period, 8,665 defendants were on pretrial release. *See* TABLE H-15, *supra* note 356. Of those, sixty-six were rearrested for felonies; forty-eight were rearrested for misdemeanors. *See id*. The pretrial release figure does not differentiate based on whether the defendant is lawfully within the United States. *See* TABLE H-14B, *supra* note 356.

385. *See* TABLE H-15, *supra* note 356. Of 2,666 defendants (excluding defendants not lawfully in the United States), courts in the Second Circuit detained 1,166 in 2021. *See* TABLE H-14B, *supra* note 356. In the same period, 5,643 defendants were on pretrial release. *See* TABLE H-15, *supra* note 356. Of those, seventy-seven were rearrested for felonies; eighty-five were rearrested for misdemeanors. *See* TABLE H-15, *supra* note 356.

courts detained more marginal defendants to increase the circuit's overall detention rate to match the Fifth Circuit's 57.6%, courts would have to detain 369 more defendants. However, only approximately eighty-eight of those defendants[386] would have been statistically likely to be rearrested for a new crime. In other words, preventing eighty-eight additional crimes in the Second Circuit would require the incarceration of 281 defendants who, statistically, would not have been rearrested for a new crime.

Not only is erring on detention inconsistent with Congress's intent, but this would be a significant investment in crime prevention, both in terms of the defendant's liberty and monetarily.[387] In terms of preventing crime, preventative detention is an investment that pays diminishing returns.

The average daily cost of federal pretrial detention is $101.30 per person,[388] and so detaining those 281 extra defendants for the 355 days that it takes, on average, for a federal case to reach resolution would cost over $10 million.

For those defendants who are released pending trial, the Bail Reform Act has been successful in minimizing courts' reliance on cash bond.[389] Roughly ninety-two percent of defendants released on bond in 2021 were released on unsecured bond.[390] Less than six percent of released defendants are required to post a secured bond and fewer than three percent are required to pay a bondsman to be released.[391] However, when defendants are released, nearly all are subject to conditions.[392] Approximately eighty-seven percent of

386. This calculation is derived by applying the Fifth Circuit's 1.32% rearrest rate to the 5,643 persons on pretrial release in the Second Circuit in 2021 to yield seventy-four (the number of persons on pretrial release who would have been rearrested for felonies and misdemeanors in 2021 if the Circuit had a 1.32% rearrest rate). Subtracting that figure from the Second Circuit's actual rearrest figure (162) yields eighty-eight. This calculation is imprecise because an increased detention rate would reduce the number of persons on pretrial release. Because the 5,643 figure includes persons released over multiple years and persons who are not lawfully in the United States but were nonetheless released, the figure cannot be reliably adjusted based on available data.

387. *Cf.* U.S. MARSHALS SERV., FACT SHEET: PRISONER OPERATIONS 2022 (Feb. 17, 2022), https://www.usmarshals.gov/sites/default/files/media/document/2022-Prisoner-Operations.pdf [https://perma.cc/9LBJ-TSN7].

388. *Id.*

389. *Cf.* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

390. *See* TABLE H-6, *supra* note 356.

391. *Id.*

392. *See* TABLE H-8, *supra* note 356.

released defendants are subject to supervision by Pretrial Services.[393] And over fifty-four percent of released defendants are subject to drug testing.[394]

VI. APPLYING THE BAIL REFORM ACT

Preventative pretrial detention is a routine part of federal criminal practice.[395] The Supreme Court has held that the Eighth Amendment does not guarantee a right to bail and that preventative pretrial detention does not violate due process because it is "regulatory" rather than "penal."[396] Not only is such detention routine but, contrary to Congress's intentions and expectations, it has become the norm in the federal system.[397]

There are many possible reasons for the explosion in pretrial detention in federal courts, and the actual explanation is likely multi-faceted.[398] Perhaps the most intuitive explanation is that federal prosecutorial priorities have shifted toward more dangerous defendants whose backgrounds and alleged offenses tend to support detention.[399] Research, however, has found that hypothesis to be, at best, a partial explanation.[400] It also fails to account for significant

393. *Id.*
394. *Id.*
395. *See supra* note 11.
396. United States v. Salerno, 481 U.S. 739, 752, 754–55 (1987).
397. *See supra* note 11.
398. *See* COMM'N ON CIV. RTS., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 1, 31 (Jan. 2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf [https://perma.cc/GT52-Z9N5] [hereinafter U.S. COMM'N ON CIV. RTS. REPORT].
399. *See* James Byrne & Jacob Stowell, *The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants*, FED. PROB., Sept. 2007, at 31, 33, 35–36. (noting that in the period of 1993 to 2001 there was a major reduction in white-collar prosecutions and significant increases in immigration and sex offenses and a moderate increase in drug prosecutions and concluding "it appears that the changing profile of the federal offender is at least partially responsible for the steady increase in the pretrial detention population"); Carr, *supra* note 13, at 218 ("A bedrock reason, regardless of who and what else may be responsible for high detention rates, is that federal defendants, especially felons in possession and participants in drug conspiracies, often have records of multiple, often violent, felonies.").
400. *See, e.g.*, Byrne & Stowell, *supra* note 399, at 35–37; Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, FED. PROB., Sept. 2018, at 3, 6, 10.

variations in detention rates among demographically similar districts.[401]

There is also the fact that, from the perspective of a judge or prosecutor, detention is always the safe bet.[402] A judge's decision to detain a defendant will never be proven "wrong"[403] in the same way that a decision to release a defendant may be if the person flees or commits a new crime. If the defendant commits a serious offense while on release, the judge may be the subject to widespread

401. There is no apparent reason to suspect that qualitative differences in defendants between, for example, the Eastern District of Wisconsin (Milwaukee and surrounding areas) and the Southern District of Indiana (Indianapolis and surrounding areas) can account for their respective detentions rates of under forty-one percent and nearly sixty-nine percent. *Pretrial Services Release and Detention, Excluding Immigration Cases for the 12-Month Period Ending September 30, 2021 (Table H-14A)*, U.S. CTS., https://www.uscourts.gov/file/39876/download [https://perma.cc/4LF7-B4HK] (last visited Nov. 8, 2022).

402. Tribe, *supra* note 4, at 375.

403. > Even as an experiment, the Administration's proposal has the distinct air of an episode from Alice's Wonderland, for it is an experiment that can only confirm and never rebut the experimenter's hypothesis. Once the government has instituted a system of imprisonment openly calculated to prevent crimes committed by persons awaiting trial, the system will appear to be malfunctioning only when it releases persons who prove to be worse risks than anticipated. The pretrial misconduct of these persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely have been released, its errors will be invisible. Since no detained defendant will commit a public offense, each decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results. The inevitable consequence is a continuing pressure to broaden the system in order to reach ever more potential detainees.

    Id.; *see also* David Jett, *The Loss of Innocence: Preventive Detention under the Bail Reform Act of 1984*, 22 AM. CRIM. L. REV. 805, 814 (1985) ("[I]t will be very difficult to prove whether those persons detained under the Act's bail provisions would have committed crimes if released. Thus, the Act's efficacy in protecting society will be beyond empirical proof"). Even the Committee reviewing the bill that became the Bail Reform Act of 1984 acknowledged the paradox of predicting dangerousness. *See also* S. REP. NO. 98-225, at 9 (1983) ("The question whether future criminality can be predicted, an assumption implicit in permitting pretrial detention based on perceived defendant dangerousness, is one which neither experience under the District of Columbia detention statute nor empirical analysis can conclusively answer. If a defendant is detained, he is logically precluded from engaging in criminal activity, and thus the correctness of the detention decision cannot be factually determined.").

opprobrium for having released the defendant.[404] And a judge who is perceived as too soft on defendants may spur public or political criticism that could impair that judge's opportunities for obtaining a higher position.[405]

Prosecutors face similar pressure to avoid being "wrong" with respect to detention.[406] But, unlike a judge, who recognizes that neutral adherence to the law and unpopular decisions are the burdens of being a judge,[407] a prosecutor is an advocate. Although some prosecutors may be rightly concerned that seeking detention too often risks losing "credibility with the court,"[408] others may regard a practice of erring on the side of seeking detention as consistent with the obligations of an advocate.[409]

404. Duke, *supra* note 4, at 49 ("Thus, the judge is open to criticism for every crime committed by one whom he has released."); Ronald Kessler, *I Set a Defendant Free and Got Blamed When He Raped Someone*, MARSHALL PROJECT (Aug. 31, 2017), https://www.themarshallproject.org/2017/08/31/i-set-a-defendant-free-and-got-blamed-when-he-raped-someone [https://perma.cc/AC8K-7DL6]. *Cf., e.g.*, Glenn Thrush & Shaila Dewan, *Waukesha Suspect's Previous Release Agitates Efforts to Overhaul Bail*, N.Y. TIMES (Nov. 25, 2021), https://www.nytimes.com/2021/11/25/us/waukesha-wisconsin-brooks-bail.html [https://perma.cc/K3AP-ECH3].

> Judges often state they do not want to end up in the paper because of a bad decision. The very structure of pretrial incarceration encourages judges to be more punitive, independent of legislation encouraging a more lenient approach, because of the fear of releasing someone pretrial who then commits a horrible crime. Because judges will be held accountable for such tragedies, they err on the side of detention to avoid any political blowback. In the alternative, when a judge incarcerates someone pretrial who would not have committed a crime on release, no one will ever know.

Mitali Nagrecha, et al., *Court Culture and Criminal Law Reform*, 69 DUKE L.J. ONLINE 84, 102 (2020).

405. *Cf.* Tierney Sneed, *Ambitious Trial Judges Could Be Wary After GOP Attacks on Judge Jackson's Sentencing Record*, CNN (Apr. 11, 2022, 7:21 AM), https://www.cnn.com/2022/04/11/politics/jackson-sentencing-supreme-court-nominations/index.html [https://perma.cc/W7DT-SD88].

406. *See* Thrush & Dewan, *supra* note 404.

407. *Cf.* 28 U.S.C. § 453 ("Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God.'").

408. Scott, *supra* note 60, at 25.

409. *Id.*

Whether, and to what extent, a fear of being "wrong" may affect any individual judge or prosecutor or detention matters broadly is impossible to quantify; any such influence is unlikely to be articulated and may well be subconscious.[410] But it is hardly radical to suggest that some judges may drift from the strictures of the federal bail statutes to detain persons. After all, it was a belief that judges were widely using impermissibly high cash bail as a means for detaining dangerous defendants that was a significant impetus for the Bail Reform Act of 1984.[411]

But judges, prosecutors, or Pretrial Services officers who are concerned about being "wrong" in their detention decisions or recommendations must remember that a defendant's flight or commission of a new crime while on pretrial release does not show that it was "wrong" to release a defendant.[412] The standard articulated throughout the Bail Reform Act—"*reasonably* assure"[413]—incorporates a margin of error favoring the defendant and release.[414] It does not limit release to circumstances where the defendant's appearance and the safety of the community can be guaranteed.[415]

Further limiting when detention is appropriate is the government's ultimate burden of persuasion.[416] As to the risk of non-appearance, the government must prove by a preponderance of the evidence that no combination of conditions will reasonably assure the defendant's appearance as required.[417] In predicting the likelihood of a future occurrence, that burden translates into a bet that, if the defendant were released, it is more likely than not that the defendant will flee.[418] In other words, a court must release a defendant even if there

410. *Cf.* Cohen & Austin, *supra* note 400, at 7 (noting that detention rates for persons accused of sex offenses increase concurrently with media coverage of sex offenders committing violent crimes).

411. *See, e.g.*, Duke, *supra* note 4, at 55.

412. *See* Cohen & Austin, *supra* note 400, at 12.

413. 18 U.S.C. § 3142(b), (c)(1), (c)(1)(B), (e)(1)–(3), (f), (g), (g)(4) (emphasis added); *see also id.* § 3142(c)(1)(B)(i) ("able reasonably to assure"); (c)(1)(B)(xi)–(xii), (xiv) ("reasonably necessary").

414. *See* United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985) (citing United States v. Orta, 760 F.2d 887, 890–92 (8th Cir. 1985)).

415. *Orta*, 760 F.2d at 891–92. *But see supra* Section IV.E (discussing revocation of release under 18 U.S.C. § 3148 and noting that following a violation of a condition of release the standard is "will assure" rather than the "reasonably assure" standard applicable under 18 U.S.C. § 3142).

416. *See supra* Section IV.C.4.

417. *See* sources cited *supra* note 223.

418. *Id.*

is as much as a fifty percent chance that the person will not appear as required.

Judges and practitioners must also be cognizant of the distinction between non-appearance and flight.[419] Although both are problematic and either may merit detention, it is flight—where a defendant evades prosecution for an extended period—that is of most concern.[420] Aside from defendants with extensive foreign contacts, few defendants have the means to truly attempt to flee.[421] Many defendants who miss a court appearance or violate conditions of release are apprehended in short order.

The clear and convincing evidence standard that applies to claims that the defendant would be dangerous if released is even higher.[422] Even if a judge finds that it is more likely than not—i.e., greater than a fifty-percent chance—that a defendant will endanger the community, the judge may nonetheless be required to release the defendant.[423] A defendant must be released unless the judge is *convinced* that the defendant will endanger the community if released.[424] "Doubts regarding the propriety of release should be resolved in favor of the defendant."[425]

It is not as if defendants are released without scrutiny. Aside from the legal and social institutions that have long existed to protect the public from dangerous persons generally,[426] persons on pretrial release may be subject to a wide array of conditions[427] including supervision by Pretrial Services. The federal detention rate has continued to increase despite the advent of actuarial risk assessment tools,[428] periodic concerted efforts to decrease detention rates in

419. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 682–83 (2018).

420. See *id.* at 724–37.

421. *See* Carr, *supra* note 13, at 218.

422. 18 U.S.C. § 3143(a)(1); *see also supra* Section IV.C.4.b.

423. *See supra* Section IV.C.4.b.

424. United States v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985) (Kennedy, J.).

425. *Id.* at 1405.

426. United States v. Melendez-Carrion, 790 F.2d 984, 1002 (2d Cir. 1986). ("Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future.").

427. 18 U.S.C. § 3142(c).

428. *See Pretrial Risk Assessment*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/supervision/pretrial-risk-assessment [https://perma.cc/VX45-MFHT] (last visited Nov. 8, 2022). While actuarial risk assessment tools may be valuable in informing recommendations of Pretrial Services

certain districts,[429] and significant improvements in the ability to monitor defendants on pretrial release.[430] Drug testing is inexpensive and accurate.[431] Electronic monitoring, which did not exist in 1984, has evolved from radio frequency monitoring that detected only if the bracelet was within range of the unit[432] to GPS units that can provide constant real-time precise tracking and instant notification of bracelet tampering.[433] While many think of electronic monitoring primarily as a means of mitigating the risk that a defendant may flee, research shows that defendants on location monitoring are significantly less likely to be rearrested while on pretrial release.[434]

Among defendants who are released, even low risk defendants are commonly subject to strict conditions.[435] Thus, rather than providing an alternative to detention as many expected, one result from the development of Pretrial Services is to bring more persons within "the net of social control" by subjecting nearly all defendants to pretrial supervision.[436] While a defendant will certainly prefer supervision to detention, it is easy for decisionmakers to overlook that even minor and routine conditions may constitute significant restraints on liberty.[437] Simply meeting with a Pretrial Services officer or reporting for random drug testing can interfere with work, education, or family obligations.[438] And "more release conditions translate into

officers, a judge may consider only the factors specified in 18 U.S.C. § 3142(g), United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015), so a court's explicit consideration of any actuarial risk assessment is unlikely to be consistent with the Bail Reform Act. Thus, few districts provide Pretrial Risk Assessment (PTRA) scores to judges. Cohen & Austin, *supra* note 400, at 9.

429. *See* Valdez Hoffer, *supra* note 101, at 46–49.

430. *Id.* at 48.

431. *See* D. ALAN HENRY & JOHN CLARK, BUREAU OF JUSTICE ASSISTANCE, PRETRIAL DRUG TESTING: AN OVERVIEW OF ISSUES AND PRACTICES tbl.1 (1999), https://www.ojp.gov/pdffiles1/176341.pdf [https://perma.cc/QZ6W-CPZ5].

432. S*ee* United States v. O'Brien, 895 F.2d 810, 815 (1st Cir. 1990) (discussing testimony regarding the effectiveness of what today is referred to as radio frequency monitoring and noting that "[t]he bracelet itself has been used in fourteen districts to date, with about 200 defendants").

433. *See* Kevin T. Wolff et al., *The Impact of Location Monitoring Among U.S. Pretrial Defendants in the District of New Jersey*, FED. PROB., Dec. 2017, at 8, 8–9.

434. *Id.* at 13.

435. *See* Byrne & Stowell, *supra* note 399, at 32.

436. *Id.* at 31.

437. *See generally id.* at 31–38 (contending that defendants who are low level offenders, and would not have otherwise been detained, are detained because of policy decisions and recommending a reconsideration of current policies and systems).

438. *See generally id.* at 32 (outlining the additional requirements of pretrial supervision).

more technical violations during the pretrial release process,"[439] which can then lead to detention[440] or adverse outcomes at sentencing.

All of this is not to suggest that detention is never appropriate—only that it is overused. Congress has clearly found that pretrial detention is appropriate for some defendants, and courts are bound to order detention when required under the Bail Reform Act.[441] Nonetheless, "physical confinement of an individual is the ultimate deprivation of liberty."[442] Pretrial detention implicates other significant rights including: a defendant's ability to prepare his defense,[443] consult with counsel,[444] retain counsel of his choice, raise his children, and interact with and support his family.[445] There is also the risk that pretrial detention may coerce a defendant to plead

439. *Id.*

440. *See* 18 U.S.C. § 3148(b).

441. *See* United States v. Melendez-Carrion, 790 F.2d 984, 988, 990 (2nd Cir. 1986).

442. *Id.* at 998; *see also* United States v. Edwards, 430 A.2d 1321, 1354 (Ferren, J., concurring in part and dissenting in part) ("All parties and all judges of this court agree: pretrial detention affects a clear and vital liberty interest. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (alteration in original))).

443. *See* Kennedy, *supra* note 58, at 425 ("[T]he defendant who remains in jail often loses his job and is unable to provide for his family. More importantly, complete pretrial incarceration hinders the defendant in preparing his defense."); Kalhous & Meringolo, *supra* note 243, at 846–48 (discussing how detention diminishes defendants' morale, prevents them from locating witnesses, prevents consultation with counsel on evenings during trial, and requires counsel to inefficiently spend significant time traveling, passing through security, and related administrative matters). The Bail Reform Act authorizes the temporary release of a person if the court concludes that such release is "necessary for preparation of the person's defense or for another compelling reason." 18 U.S.C. § 3142(i). Defendants have historically sought release under the latter clause of the provision for matters such as funerals of close family members. *See, e.g.*, United States v. Sanders, 466 F. Supp. 3d 779, 790–91 (E.D. Mich. 2020); United States v. Kenney, No. CR-07-66-B-W, 2009 WL 5217031, at *1 (D. Me. Dec. 30, 2009). It was also the basis for many release requests during the COVID-19 pandemic. *See, e.g.*, United States v. Clark, 448 F. Supp. 3d 1152, 1154 (D. Kan. 2020); United States v. Gage, 462 F. Supp. 3d 822, 825 (N.D. Ohio 2020).

444. The Bail Reform Act does require that any detained defendant "be afforded reasonable opportunity for private consultation with counsel," but detention will inevitably complicate the attorney-client relationship for many reasons, including the time it takes for counsel to travel to an institution, limits on the length of meetings, and administrative requirements of the institution. *See* 18 U.S.C. § 3142(i)(3).

445. Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1146 (1965).

guilty[446] or cooperate with the government.[447] Should the defendant be convicted, there is some evidence that defendants who had been detained pretrial receive harsher sentences than similar defendants who were released.[448]

A possible explanation for released defendants obtaining more favorable sentences is that they have had the benefit of being able to prove to the sentencing judge that they can act lawfully and comply with conditions.[449] For example, in *United States v. Hamzeh*, the defendant was charged with acquiring a machine gun and a silencer with the intent of carrying out a mass shooting to "defend Islam."[450] Unsurprisingly, the court ordered the defendant detained pending trial.[451] After roughly thirty months of detention, repeated unsuccessful motions for release,[452] and significant delays attributable to the government,[453] the court recognized that more than

446. *See* Kalhous & Meringolo, *supra* note 243, at 848.

447. Every United States Magistrate Judge has likely encountered cases where the government argues that a defendant must be detained pending trial because he is an incorrigible and severe threat to public safety, but a few days later the government joins in a motion for his release because the defendant is cooperating with law enforcement. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 766–67 (1987) (Marshall, J., dissenting with whom Brennan, J., joined). In fact, that is exactly what happened to Salerno's co-defendant, Vincent Cafaro. *See id.*

448. J. C. Oleson, et al., *Pretrial Detention Choices and Federal Sentencing*, FED. PROB., June 2014, at 12, 12–13, 17 (noting an apparent causal relationship between detention and unfavorable sentencing disposition and a similar but "not as pernicious" relationship between revocation of pretrial release and adverse sentencing disposition); Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention,* 22 AM. L. & ECON. REV. 24, 57 (2020); Joseph A. DaGrossa & Jonathan P. Muller, *Pretrial Detention and the Sentencing Variance: An Analysis of Fixed Effects Across U.S. District Courts*, FED. PROB., Dec. 2021, at 27, 31–32.

449. *See* Carr, *supra* note 13, at 218.

450. United States v. Hamzeh, No. 16-CR-21, 2019 WL 1331639, at *1 (E.D. Wis. Mar. 25, 2019).

451. Bruce Vielmetti, *Man Accused of Mass Shooting Plot in Milwaukee Wins a Sliver of Freedom*, MILWAUKEE J. SENTINEL (June 27, 2018, 7:00 AM), https://www.jsonline.com/story/news/crime/2018/06/27/man-fbi-accuses-mass-shooting-plot-wins-sliverfreedom/730980002/ [https://perma.cc/4XNQ-7N2B].

452. *See, e.g.*, *id.*; *see also* Bruce Vielmetti, *Accused Mass-Shooting Plotter Still Waiting on Bond Request 3 Months After Hearing*, MILWAUKEE J. SENTINEL (Oct. 20, 2017, 7:00 AM), https://www.jsonline.com/story/news/crime/2017/10/20/accused-mass-shooting-plotter-still-waiting-bond-request-3-months-after-hearing/784096001/ [https://perma.cc/2K7Z-DSJN].

453. *See, e.g.*, John Diedrich, *Suspect Held as FBI Transcribes Tapes in Masonic Center Plot*, MILWAUKEE J. SENTINEL (June 29, 2016, 6:00 AM), https://www.jsonline.com/story/news/crime/2016/06/29/suspect-held-as-fbi-transcribes-tapes-in-masonic-center-plot/86543810/ [https://perma.cc/E63F-82AJ]; John Diedrich, *Translations Delay*

ninety days had elapsed under the Speedy Trial Act,[454] and it was compelled to release the defendant.[455] Initially released to home incarceration, the defendant's compliance led to a progressive reduction in conditions.[456] When the defendant eventually pled guilty,[457] he had nearly four years—a delay partially attributable to the government's interlocutory appeal[458] and the coronavirus pandemic—of spotless compliance with his conditions of pretrial release.[459] The court sentenced the defendant to time served and explicitly noted his track record of compliance on pretrial supervision when foregoing any further supervised release.[460]

Even brief periods of detention—the three days that the government is automatically entitled to or the ten days under 18 U.S.C. § 3142(d)—can have significant consequences for a defendant in terms of loss of employment and housing or for the public in terms of the defendant's risk of recidivism.[461]

With the significant burdens that detention imposes on a defendant, it would seem reasonable that detention should likewise result in burdens upon both the government and the court. "[W]hen the government moves for pretrial detention it has an obligation to

Masonic Center Case, MILWAUKEE J. SENTINEL (Aug. 28, 2016, 1:00 PM), https://www.jsonline.com/story/news/crime/2016/08/28/case-against-man-masonic-plot-delayed-translations/89423946/ [https://perma.cc/B7HL-BLSN]; Bruce Vielmetti, *2 Years After the FBI Said It Thwarted a Mass Killing in Milwaukee, the Case Hasn't Gone to Trial. Here's Why*, MILWAUKEE J. SENTINEL (Feb. 12, 2018, 5:00 AM), https://www.jsonline.com/story/news/crime/2018/02/12/2-years-after-fbi-said-thwarted-mass-killing-milwaukee-case-hasnt-gone-trial-heres-why/320894002/ [https://perma.cc/Y6ZY-59MH].

454. 18 U.S.C. § 3164(b).

455. Rick Barrett, *Man Accused of Mass Shooting Plot in Milwaukee Wins Release from Jail*, MILWAUKEE J. SENTINEL (July 28, 2018, 2:54 PM), https://www.jsonline.com/story/news/crime/2018/07/28/milwaukee-mass-shooting-plot-defendant-wins-release/855641002/ [https://perma.cc/T27L-5BNT].

456. Bruce Vielmetti, *Man Named in Murder Plot that Targeted Milwaukee Masonic Center Gets Time Served*, MILWAUKEE J. SENTINEL (May 26, 2022, 6:01 AM), https://www.jsonline.com/story/news/2022/05/26/man-plot-killdozens-milwaukee-masonic-center-avoids-prison/9893143002 [https://perma.cc/Q4YD-XL3A].

457. Bruce Vielmetti, *Milwaukee Terror Plot Case from 2016 Ends Quietly with Plea Deal*, MILWAUKEE J. SENTINEL (Dec. 14, 2021, 12:56 PM), https://www.jsonline.com/story/news/crime/2021/12/14/case-over-milwaukee-masonic-temple-shooting-plot-ends-plea-deal/6501644001/ [https://perma.cc/2C2U-SQWT].

458. United States v. Hamzeh, 986 F.3d 1048, 1050 (7th Cir. 2021); Vielmetti, *supra* note 456.

459. *See* Vielmetti, *supra* note 456.

460. *See* Vielmetti, *supra* note 457.

461. 18 § U.S.C. 3142(f); *id.* § 3142(d); Austin, *supra* note 221, at 53.

arrange for the trial as quickly as possible, using extraordinary means if necessary."[462] The court has no less of an obligation.[463]

The Speedy Trial Act requires that a trial of a detained defendant begin within ninety days of when the defendant's detention begins.[464] Although the exclusions under the Speedy Trial Act, and especially the broad "ends of justice" exclusion under 18 U.S.C. § 3161(h)(7)(A), can dramatically extend this deadline, the ninety-day deadline is not a dead letter.[465] Unlike the seventy-day deadline, which requires the dismissal of an indictment only upon the defendant's motion,[466] the ninety-day deadline requires the court to release a defendant even without the defendant's motion.[467] In other words, even if the defendant does not recognize that ninety-days of unexcluded time have elapsed, the court must act and release the defendant.

Courts can ensure the relevance of the Speedy Trial Act by conscientiously applying its provisions.[468] Every exclusion under 18 U.S.C. § 3161(h)(7)(A) must be supported by specific reasons for the court's "finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public *and* the defendant in a speedy trial."[469]

In considering the defendant's interest in a speedy trial, the court must consider "a detained defendant's status."[470] While it may be in

462. United States v. Jackson, 823 F.2d 4, 8 (2d Cir. 1987) (quotation marks omitted).

463. 130 CONG. REC. S13,088 (daily ed. Oct. 4, 1984) (statement of Sen. Patrick Leahy) ("Judges should embrace the bail standards in this bill, but should use their considerable powers to see to it that those who are denied bail because of danger to the society are promptly tried.").

464. 18 U.S.C. § 3164(b).

465. *See, e.g.*, United States v. Hamzeh, No. 16-CR-21 (E.D. Wis. July 27, 2018) (Minute and Order Entry granting release from custody) (recognizing that after over two years of pretrial detention more than ninety days of un-excluded time had accumulated and releasing the defendant on the court's own motion).

466. *See* 18 U.S.C. § 3162(a)(2).

467. *See id.* § 3164(c).

468. *See supra* notes 271–79 and accompanying text.

469. 18 U.S.C. § 3161(h)(7)(A) (emphasis added); *see also* Zedner v. United States, 547 U.S. 489, 506–07 (2006).

470. United States v. Torres, 995 F.3d 695, 600, 704 (9th Cir. 2021) ("[T]he plain text of § 3161(h)(7) requires consideration of the best interest of the defendant in a speedy trial, an ends-of-justice analysis will necessarily include consideration of whether the defendant is detained. . . . Because the statute requires consideration of the defendant's best interest in a speedy trial, we can envision no circumstance in which a district court could properly fail to consider a defendant's detained status when addressing a motion to continue the trial. We do not suggest the defendant's detained status would

the defendant's interest to remain in custody if the alternative is to proceed to trial unprepared or without time to challenge the admissibility of certain evidence, delays attributable to the government are not necessarily in the defendant's best interest.[471] For example, delays resulting from the government's failure to promptly produce complete discovery should not be mechanically excluded under the Speedy Trial Act.[472]

The public interest favors prompt resolution whether the defendant is detained or released.[473] Protracted detention of presumptively innocent persons undermines public confidence in the fairness of the criminal justice system. If the defendant is out of custody, pretrial delays significantly increase the danger that a defendant poses to the public.[474] Thus, beyond conditions and supervision, ensuring a prompt trial is a powerful tool that a court has for protecting the public from potentially dangerous defendants.[475] Regardless of whether a defendant is detained or released, with any delay memories fade, witnesses disappear, and evidence is lost, thereby undermining the ultimate truth-seeking role of a trial.[476] Thus, a judge's conscientious and strict application of the Speedy Trial Act, along with active and creative case management,[477] protects both the public and defendants.

Even if delays are appropriate under the Speedy Trial Act, protracted pretrial detention may violate due process.[478] Given the significant increase in how long it now routinely takes to resolve cases in federal courts, it may be that due process violations are not

be dispositive of a motion to continue, but the statute requires a defendant's pretrial detention be considered.").

471. *See, e.g.*, United States v. Hamzeh, No. 16-CR-21 (E.D. Wis. July 27, 2018) (Minute and Order Entry granting release from custody).

472. *See, e.g.*, sources cited *supra* note 453.

473. *See* Hruska, *supra* note 24, at 39.

474. Ervin, *Foreword*, *supra* note 6, at 294 ("[M]ost bail recidivism does not occur in the immediate post-arrest period.").

475. Ervin, *Lydford Law*, *supra* note 6, at 126 ("In lieu of preventive detention, prosecutors and courts should give expedited priority to the trial of persons charged with serious or violent crimes.").

476. *Cf.* Doggett v. United States, 505 U.S. 647, 655 (1992).

477. Strategies may include, for example, individualized scheduling in multi-defendant cases (rather than applying the one schedule to every defendant, regardless of the extent of the discovery relevant to him or the specific charges he faces) and considering a defendant's release or detention status in resolving a motion for severance.

478. *See supra* notes 280–88 and accompanying text.

reserved for the exceptionally protracted case; it is possible that due process violations have become routine.[479]

VII. CONCLUSION

The release or detention decision is, in the view of Judge James G. Carr, a "hinge moment" in criminal proceedings; only a judge's sentencing decision matters more to a defendant.[480] Whether a defendant is released or detained pending trial will affect every aspect of the proceedings that follow, as well as significantly upset the lives of the defendant and persons close to the defendant.[481]

Release or detention decisions are undoubtedly difficult. No judge wants to recognize that he could have prevented a person from being the victim of a serious crime if only he had detained a defendant.[482] But a judge is also all that stands between a defendant and the "ultimate deprivation of liberty" that physical confinement constitutes.[483] Although judges have long been tasked with trying to predict a defendant's future behavior while on pretrial release, first in his likelihood of flight and more recently in his likelihood of committing a new crime, there is little to suggest that judges are actually any good at it.[484]

While pretrial detention is not deemed "punishment" for purposes of the Due Process Clause, that legal hair-splitting matters little to a detained defendant.[485] An order of detention is, from a defendant's perspective, the equivalent of an indeterminate sentence to months or

479. *See supra* notes 12–13 and accompanying text.

480. Carr, *supra* note 13, at 217–19.

481. *See supra* notes 443–48 and accompanying text.

482. *See supra* note 404.

483. United States v. Melendez-Carrion, 790 F.2d 984, 998 (2d Cir. 1986); *see also* United States v. Edwards, 430 A.2d 1321, 1354 (D.C. 1981) (Ferren, J., concurring in part and dissenting in part) ("All parties and all judges of this court agree: pretrial detention affects a clear and vital liberty interest. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" (quoting Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part) (alteration in original))).

484. *See* H.R. REP. NO. 98–1121, at 11 (1984) (noting that "the chances of false predictions of dangerousness are substantial" because "predicting who will commit dangerous pretrial crime is at present nearly impossible" and noting one study that found that for each correct prediction, there may be seven incorrect predictions).

485. *See* Edwards, 430 A.2d at 1354–55 (Ferren, J., concurring in part and dissenting in part); Arthur R. Angel et al., *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 336 (1971).

years in jail.[486] It is a sentence imposed following an often perfunctory hearing where the only evidence presented may have been hearsay[487] or the only facts a prosecutor's proffer.[488] It is also a sentence that may be imposed on an entirely innocent person.[489] This is not merely a matter of being innocent of the charged offense but there is nothing about the procedural protections of the Bail Reform Act that bars the preventative detention of a person who has lived an entirely scrupulous and upstanding life.[490] There is not, for example, a requirement that a defendant have ever been convicted of any crime (much less a serious crime) before the person may be deemed dangerous and detained.[491]

The Bail Reform Act provides a structure for decision-making, but ultimately every release or detention decision is a highly individualized exercise of a judge's discretion. Significant in how a

486. *See* Edwards, 430 A.2d at 1354–55 (Ferren, J., concurring in part and dissenting in part).

487. *See supra* note 241.

488. *See supra* notes 242–43.

489. *See supra* note 248 and accompanying text.

490. As Laurence Tribe stated:

> To every man, the suggested system of preventive detention makes this threat: Even if you have never before been charged or convicted of any offense, you may be jailed for sixty days as a criminal menace to public safety simply because a judge finds a "substantial probability" that you have committed any of nine "dangerous crimes" and finds that "no . . . conditions of release will reasonably assure the safety of any other person or the community" . . . .
>
> . . . .
>
> . . . The proposed statute would undercut each man's control over his own fate and substitute the oppressive control of discretionary authority, for every man would have cause to fear that he might be labeled a likely criminal and imprisoned for at least two months for reasons ultimately beyond his control. Although one who is willing to obey society's commands can so order his life as to be virtually certain that he will never be found guilty beyond a reasonable doubt of any specific criminal act, a man cannot possibly achieve the same measure of assurance that no judge will ever find a "substantial probability" that he has committed an offense, and no man can so pattern his conduct as to feel secure that he will never be thought to pose a danger to "any other person or the community."

Tribe, *supra* note 4, at 392, 394.

491. *Id.* at 392–93.

judge exercises that discretion is the "culture" of a district.[492] New judges, attorneys, and Pretrial Services officers adapt to the preexisting norms of a district and are unlikely to attempt to significantly upset settled practices and expectations.[493] Given that release and detention decisions are infrequently included in legal research databases, much less published in reporters (and those that are tend to be factually unusual in some respect),[494] it is hardly surprising that judges and practitioners may rely on an anecdotal sense of what is "normal" to frame the exercise of their discretion. The result can be a feedback loop that persists over generations of decisionmakers where, for example, a Pretrial Services officer's recommendations are based on expectations of what a judge will do, but the judge's decisions are heavily influenced by the officer's recommendation.[495]

Although there is no shortage of proposed amendments to the Bail Reform Act,[496] breaking that loop and changing a culture of detention does not require new laws. Rather, it can start with each participant in the release or detention process better understanding that erring on the side of releasing the defendant,[497] even though the person *may*

492. Timothy P. Cadigan, et al., *The Eastern District of Michigan: How Does It Consistently Achieve High Release Rates*, FED. PROB., Sept. 2012, at 15, 15. *See generally* Nagrecha, et al., *supra* note 404, at 97–107 (discussing how court cultures can influence criminal justice reform in both positive and negative fashions as well as the institutional and sociocultural factors that affect those cultures).

493. *See* Carr, *supra* note 13, at 219.

494. Although every release order must "include a written statement that sets forth all the conditions to which the release is subject," 18 U.S.C. § 3142(h)(1), and every detention order must "include written findings of fact and a written statement of the reasons for the detention," *id.* § 3142(i)(1), these decisions are commonly set forth in standardized fill-in-the-blank forms. *See AO Form 199A*, *supra* note 317; *AO Form 199B: Additional Conditions of Release*, U.S. CTS., https://www.uscourts.gov/sites/default/files/ao199b.pdf [https://perma.cc/5ED8-83P2] (Dec. 2020).

495. For example, in an assessment of the federal Detention Reduction Outreach Program (DROP), the author concluded that "officers struggle with making recommendations that are consistent with the statutory obligation of 'least restrictive conditions' and the federal risk principle." Valdez Hoffer, *supra* note 101, at 48. Rather, officers often made recommendations based on their experience with the court and what they expected the court to do. *Id.*

496. *See, e.g.*, Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1315–23 (2021) (suggesting expansion of appellate review, including the possibility of mandatory review of detention orders, narrowing the application of the presumption of detention, prohibiting consideration of a defendant's potential dangerousness, or requiring that courts the financial and collateral costs of detention).

497. *See supra* note 493 and accompanying text.

flee or *may* pose a danger to community, is neither extreme nor radical. Rather, it is what the Bail Reform Act requires and Congress intended.