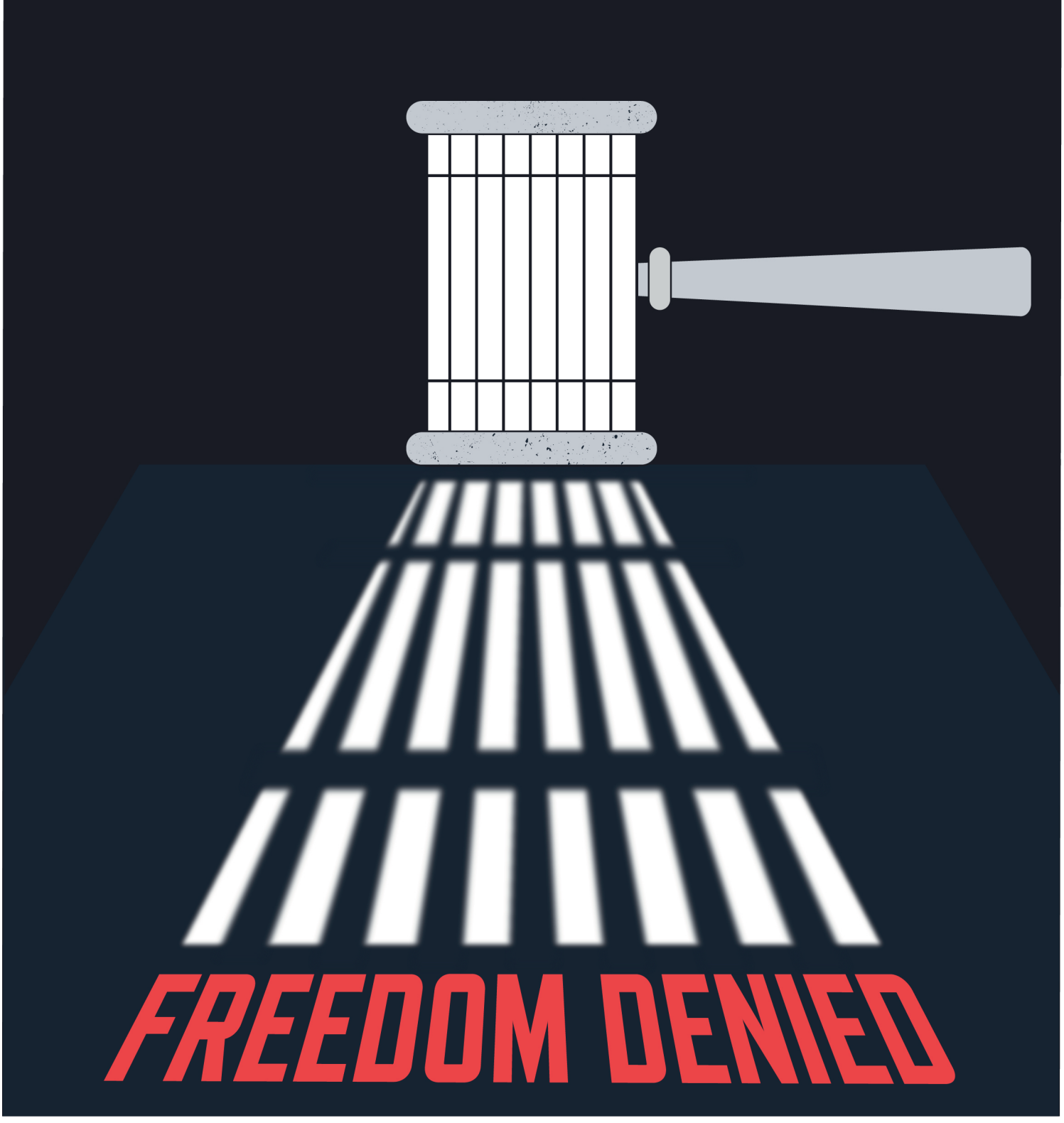

How the Culture of Detention Created a Federal Jailing Crisis

Alison Siegler, Lead Author | October 2022

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Federal Criminal Justice Clinic

EXECUTIVE SUMMARY

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The FCJC is the nation's first legal clinic devoted to representing indigent clients charged with federal felonies, pursuing impact litigation in federal court, and engaging in systemic reform of the federal criminal system to combat racial and socioeconomic inequities.

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EXECUTIVE SUMMARY

Over thirty years ago, the Supreme Court held that people charged with federal crimes should only rarely be locked in jail while awaiting trial: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[1] Given that everyone charged with a crime is presumed innocent under the law, federal judges should endeavor to uphold the Court's commitment to pretrial liberty.

This Report reveals a fractured and freewheeling federal pretrial detention system that has strayed far from the norm of pretrial liberty.[2] This Report is the first broad national investigation of federal pretrial detention, an often overlooked, yet highly consequential, stage of the federal criminal process. Our Clinic undertook an in-depth study of federal bond practices, in which courtwatchers gathered data from hundreds of pretrial hearings. Based on our empirical courtwatching data and interviews with nearly 50 stakeholders,[3] we conclude that a "culture of detention" pervades the federal courts, with habit and courtroom custom overriding the written law.[4] As one federal judge told us, "nobody's . . . looking at what's happening [in these pretrial hearings], where the Constitution is playing out day to day for people."

Our Report aims to identify why the federal system has abandoned the norm of liberty, to illuminate the resulting federal jailing crisis, and to address how the federal judiciary can rectify that crisis. This Report also fills a gaping hole in the available public data about the federal pretrial detention process and identifies troubling racial disparities in both pretrial detention practices and outcomes.

Federal pretrial jailing rates have been skyrocketing for decades. Jailing is now the norm rather than the exception, despite data demonstrating that releasing more people pretrial does not endanger society or undermine the administration of justice. Federal bond practices should be unitary and consistent, since the federal bail statute—the Bail Reform Act of 1984 (the BRA)—is the law of the land and governs nationwide.[5] Yet this study exposes a very different reality than that envisioned by the Supreme Court, one in which federal judges regularly deviate from and even violate the law, and on-the-ground practices vary widely from district to district.

This Report was researched and written by Professor Alison Siegler and students and interns in the Federal Criminal Justice Clinic at the University of Chicago Law School (FCJC).[6] Over the course of two years, our team conducted an extensive courtwatching study in which we observed over 600 bail hearings across 4 federal district courts: The District of Massachusetts in the First Circuit, the District of Maryland in the Fourth Circuit, the District of Utah in the Tenth Circuit, and the Southern District of Florida in the Eleventh Circuit. With the help of faculty and clinic students from 4 other law schools, we gathered, coded, and analyzed data about federal pretrial detention, and mined the docketing system for additional information. We also generated qualitative data by interviewing 48 federal magistrate judges and federal public defenders from 36 federal district courts across 11 federal circuits.[7]

In this Report, we document the federal bail crisis on a national scale.[8] Professor Siegler previously testified before Congress: "The federal pretrial detention system is in crisis . . . but its problems have been largely overlooked."[9] We use both quantitative and qualitative data to bring attention to this disturbing reality. Our Report highlights a troubling divergence between the written bail law and on-the-ground practices across the country, as well as racial disparities in pretrial detention practices.[10] The legal violations that we identify in this Report are surely unintentional. Federal judges respect the law and do their best to follow it. But based on our research, we conclude that federal courts have allowed misguided and entrenched practice norms to overshadow the law.

To rectify the situation, judges must adhere more closely to the laws governing the pretrial process and take decisive steps to shift the culture from one that prioritizes detention to one that prioritizes release. This Report seeks to encourage that culture shift by:

- Describing our courtwatching data, which reveal the myriad ways in which judges detain federal arrestees in contravention of the legal standards in the BRA, and clarifying those legal standards;
- Furnishing qualitative evidence that our findings are replicated beyond the 4 districts where we engaged in courtwatching;
- Highlighting the racial disparities that result from judges' detention and release decisions and prosecutors' requests for pretrial detention;

- Illuminating the individual and societal harms of jailing; and
- Providing a set of concrete recommendations and best practices for judges to rectify the crisis.

Although the existing evidence shows that the federal bail system is in crisis, it does not show why or how that crisis is occurring. Our data provide insight into federal pretrial detention practices that cannot be evaluated via publicly available information published by the Administrative Office of the United States Courts (AO) or the Bureau of Justice Statistics (BJS). **The AO and BJS provide zero data about basic and fundamental aspects of the federal pretrial detention system.** The AO's national public data often effaces information about racial disparities and provides little insight into the drivers of mass pretrial jailing. Although the AO retains vast quantities of data,[11] it sharply curbs public access to information pertaining to race,[12] the length of pretrial detention,[13] and the miniscule rate at which people released on bond reoffend or flee.[14] The AO also fails to disaggregate data into the two distinct stages of the federal pretrial process—the Initial Appearance and the Detention Hearing—frustrating researchers' abilities to understand how pretrial detention plays out in practice.[15] And neither the AO nor BJS publicly tracks the rate at which indigent individuals go unrepresented by counsel during the Initial Appearance hearing, let alone the race and citizenship status of people locked in jail without lawyers at that hearing.

1 Pretrial Detention Is Now the Norm, Not the Exception.

The BRA prioritizes pretrial release, placing the burden on prosecutors to establish that a person who is presumed innocent should be locked in jail pending trial rather than released into the community. Under the statute, there is a *presumption of release* for most arrestees.[16] The BRA's preference for pretrial release is further evinced in § 3142(j), which mandates: "Nothing in this section shall be construed as modifying or limiting the presumption of innocence."[17]

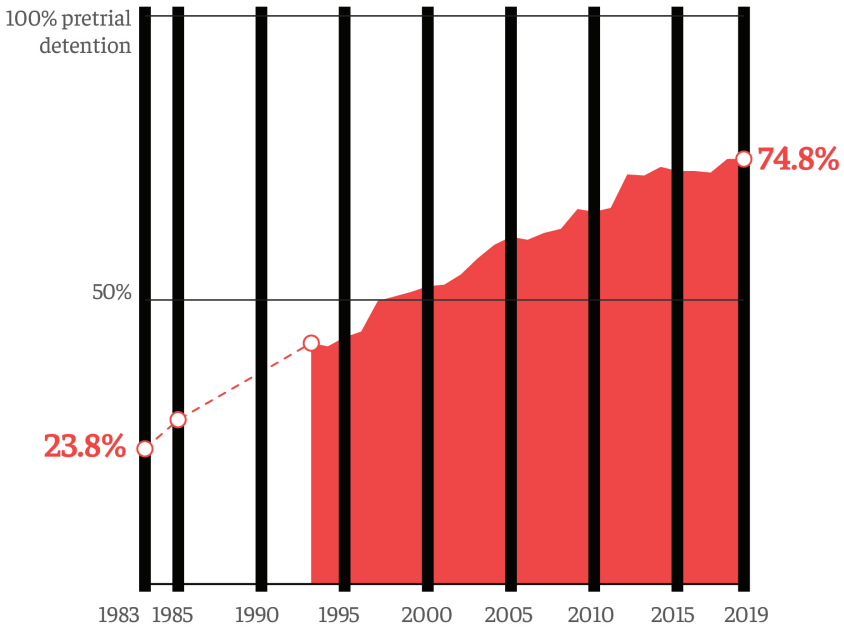
In *United States v. Salerno*,[18] the Supreme Court deemed the BRA constitutional based on provisions that—on paper—protect the rights of the accused. Because the statute contained procedural and substantive "safeguards" for arrestees, the Court found that "the provisions for pretrial detention in the BRA" protect pretrial liberty and render pretrial detention "[the] carefully limited exception."[19] Appellate courts agree that "[t]he default position of the law . . . is that a defendant should be released pending trial."[20]

This Report illustrates that many of the safeguards implemented by Congress and trumpeted by *Salerno* are not honored in practice. Since the BRA was enacted in 1984, the rate at which people charged with federal crimes are locked in jail pending trial has been on the rise. In 1983, less than 24% of people charged with federal crimes were detained pending trial.[21] The year after the BRA was enacted, the federal system's pretrial detention rate increased to 29% (with 19% of arrestees held without bail and an additional 10% held on

This Report illustrates that many of the safeguards implemented by Congress and trumpeted by *Salerno* are not honored in practice.

financial conditions they could not meet).[22] Pretrial detention rates proceeded to soar; by 2019, people charged with federal crimes were detained at a rate of 75%.[23] *See* Figure 1. Even during the COVID-19 pandemic, pretrial jailing rates have remained extremely high.[24] In addition to demonstrating how far federal practice has strayed from the presumption of innocence and the statutory presumption of release, these exorbitant rates of pretrial detention have staggering consequences. Every person "detained" pending trial is removed from the community and locked in a jail cell, while every person released returns home.[25]

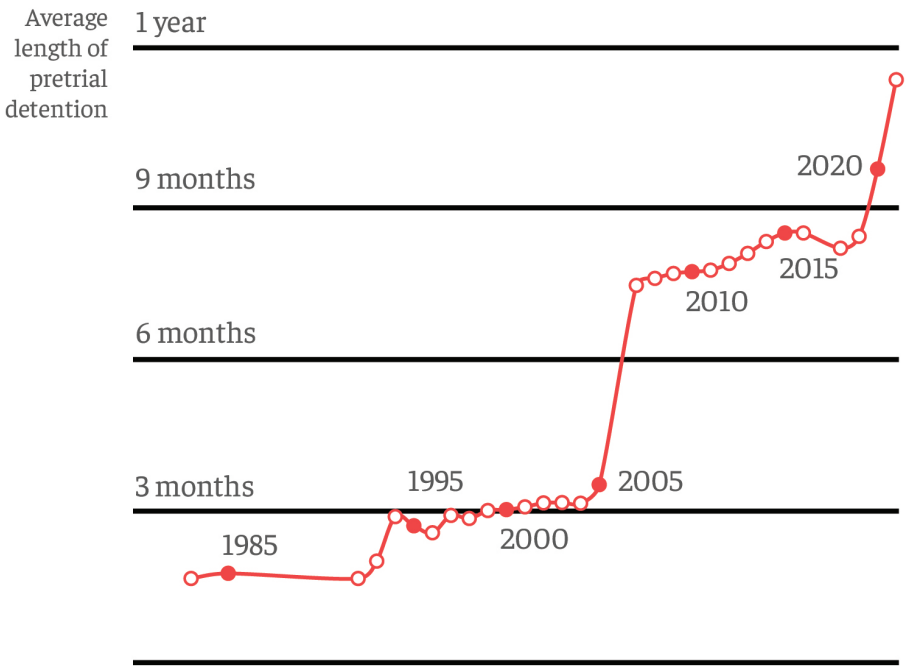
Figure 1: Federal Pretrial Detention Rates Have Skyrocketed Since the BRA Was Enacted (1983–2019).



These rising jailing rates cannot be explained by prosecutors charging individuals with more serious offenses. A recent study by the federal courts found that, over the past ten years, the federal detention rate has increased across all offense types, "even [after] adjusting for the changing composition of the federal defendant population."[26] Differences in charging practices between state and federal systems likewise do not explain the ballooning federal detention rates. The states see a markedly higher rate of violent crime than the federal system.[27] Yet the states detain just 38% of people in felony cases and 45% of people charged with violent felonies, both a far cry from the 75% pre-pandemic federal detention rate.[28]

Not only have pretrial detention rates risen in recent decades, but over the past 40 years, the length of time people spend in federal jail awaiting trial has increased nearly sevenfold.[29] *See* Figure 2. Today, an individual who is detained pretrial spends, on average, nearly a year in jail.[30] Contrast this with the less than 2 months that the average person who was detained pretrial spent in a federal jail cell in 1985, the year after the BRA was enacted.[31]

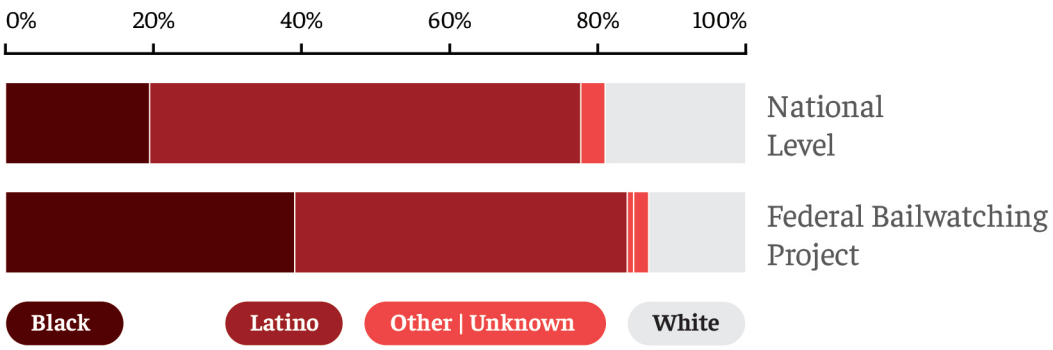
Figure 2: The Average Length of Federal Pretrial Detention Has Ballooned Since the BRA Was Enacted (1983–2021).



High detention rates and lengthy jail terms impose exorbitant and unnecessary costs on taxpayers. In 2021, it cost $35,758 to put a single person in jail for a year, a figure more than 8 times higher than the $4,340 it cost to supervise that same person on bond in the community.[32] Based on the number of people detained pretrial each year and the average length of their detention, we estimate that taxpayers spend more than one billion dollars per year to pay for federal pretrial jailing.[33] The total cost of mass detention is a substantial portion of annual allocations for all federal carceral facilities,[34] yet such high expenditures are not necessary to ensure appearance at trial and community safety.

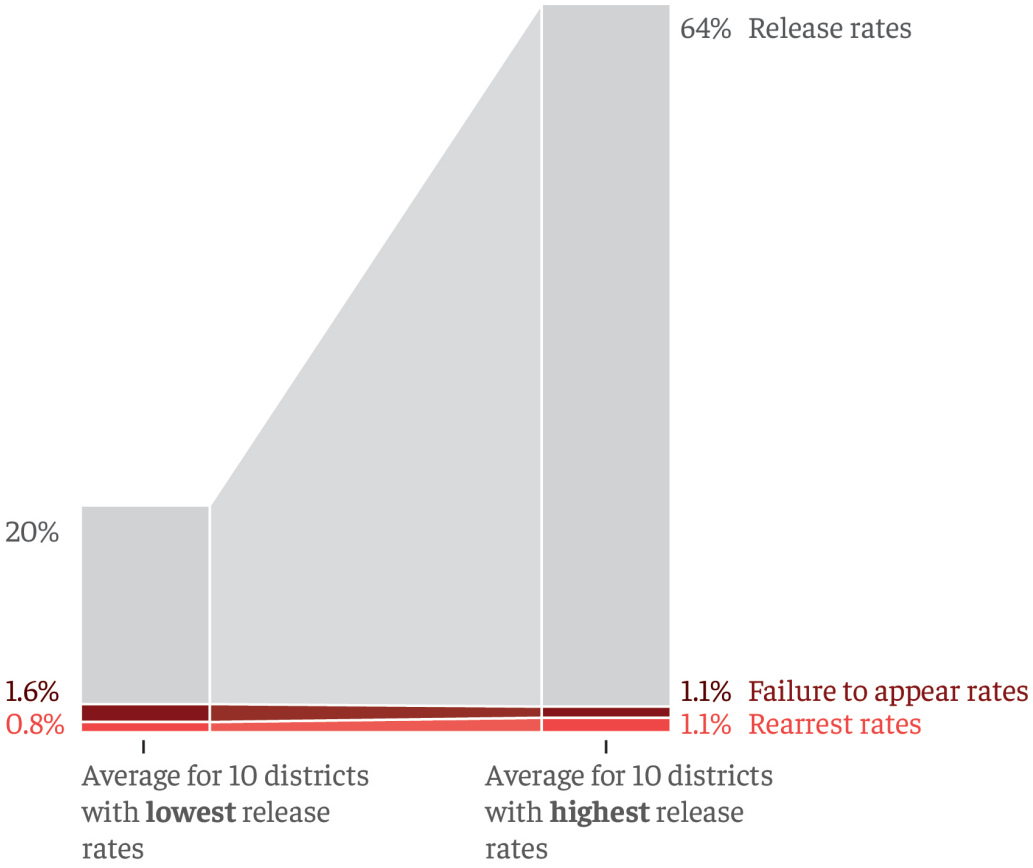
The fiscal cost of federal pretrial detention pales in comparison to the human costs. The burden of federal pretrial detention overwhelmingly falls on poor people of color. Nationally, 81% of those charged with federal crimes are non-white.[35] In our study, 87% of the arrestees whose cases we observed were people of color. *See* Figure 3. The federal bail crisis thus exacerbates racial disparities in the system writ large.[36] On the economic front, 90% of people charged with a federal crime do not have the money to hire their own lawyer,[37] a clear indicator that most people facing pretrial detention are poor.

Figure 3: People of Color Are Disproportionately Charged with Crimes in the Federal System.



Data prove that locking away so many human beings is not necessary to promote the two goals at the heart of the BRA: ensuring that people released on bond appear in court and do not commit additional crimes.[38] Releasing more people does not lead to increased rates of flight or crime. In fact, the rates at which people on federal pretrial release either fail to appear for court or are rearrested for new crimes are extraordinarily low across the board, with both sitting at approximately 1–2%.[39] *See* Figure 4. Those rates have remained vanishingly low over time, from the 1980s through today, regardless of any changes in the federal criminal population or the types of crimes charged.[40]

Figure 4: Even When Release Rates Increase, Arrestees Almost Never Flee or Recidivate.



Strikingly, rates of nonappearance and rearrest are just as low in the federal courts with the *highest* pretrial release rates as they are in the districts with the *lowest* release rates.[41] *See* Figure 4. And those rates remained similarly low even as judges released slightly more people during the pandemic.[42] Moreover, these low rearrest rates certainly overestimate recidivism, because they capture those people who were *arrested* for any type of offense while on pretrial release (even a misdemeanor or driving violation).[43] There is no public information about *conviction* rates on pretrial release, but they are necessarily even lower than rearrest rates.[44]

This evidence proves that federal judges could release far more people pending trial without making their communities any less safe or risking non-appearance. In fact, the federal rates are far lower than the approximately 10% failure-to-appear and rearrest rates in what

are considered to be "high-performing" state-level courts, such as the District of Columbia (D.C.) system.[45] For example, the D.C. Pretrial Services Agency reported that, over the past 5 years, D.C.'s failure-to-appear rate was 10%[46] and its rearrest rate was 12%,[47] and the agency set a "strategic goal"[48] of maintaining these rates. A recent study of bail reform in Harris County, Texas, similarly found an approximately 10% failure rate for both measures and concluded that this "did not substantially impede the resolution of cases."[49] That same study further "obtain[ed] unambiguous results that clearly show that the increase in release rates [after reform] . . . was not associated with an increase in future crime."[50]

Given the lack of publicity around federal bail practices, it is entirely possible that judges who jail people pretrial are neither aware of these low failure rates nor relying on them in their detention decisions. Instead, judges respond to institutional pressures and misplaced fears that contribute to the culture of detention. Some federal magistrate judges over-detain in response to the classic "Willie Horton problem"—the fear that a released arrestee may commit a new crime[51]—despite data showing that this is a statistical improbability in the federal system. Other federal magistrate judges may over-detain out of the more personal fear of losing their jobs, since they serve limited terms at the discretion of the district court.[52]

High pretrial detention rates also fly in the face of overwhelming evidence demonstrating that pretrial jailing does not advance its stated purpose of ensuring appearance and community safety. **Although federal judges may believe that detaining more arrestees will ensure community safety, evidence shows that pretrial detention is instead criminogenic, harming individuals and imposing additional costs on society.** A series of studies has proven that even short-term detention increases the likelihood of reoffending by more than 25%.[53] These data cast significant doubt on the notion that pretrial detention curbs criminal activity and benefits society. Rather, as one United States District Court judge has observed, "Mass detention creates mass incarceration."[54]

Our system of pretrial detention places significant burdens on individuals, families, and society while providing little provable benefit. When jailed pending trial, people can face physical threats, such as violence or difficulties in accessing necessary healthcare. Detained people also suffer personal costs, such as employment instability, housing instability, and the lost custody of children—all at a higher rate than those who are released before trial.[55] In addition to the

criminogenic effects of pretrial detention itself, jailing an individual pending trial increases the likelihood that they will be convicted,[56] sentenced to longer terms of incarceration, and face mandatory minimums,[57] which in turn impede their reentry into society.[58]

This Report seeks to understand why some federal courts detain people at higher rates than are necessary to ensure community safety. The BRA itself is partly to blame, as many of its provisions are vague, confusing, or overbroad, and have therefore failed to provide adequate guidance to the federal courts. The statute's murkiness helps explain why courts have developed pretrial detention practices that violate the spirit or the letter of the law, as well as practices that diverge across districts, undermining the unitary nature of the federal system. But judges are frequently tasked with applying convoluted laws. The complexity of the statute does not justify allowing courthouse custom to effectively override the language and intent of the BRA.

Our primary explanation for the legal violations documented in this Report is the phenomenon we have labeled the culture of detention. When the BRA offers ambiguous guidance, judges and prosecutors interpret its provisions in ways that favor detention, either through inadvertence, risk aversion, or both. Even when the BRA contains clear instructions, judges and prosecutors frequently ignore those instructions in favor of longstanding district practices, substituting courtroom habits for the plain text of the statute and overincarcerating people in the process. For example, one judge we interviewed justified those deviations by saying: "Oh, that's just the way we do it." Chief Federal Defenders repeatedly told us that when they object that the courthouse culture does not align with the law, the response they are met with is usually some variation of: "Well, we've always done it that way." One Defender even coined a phrase: "We're up against the 'this is the way we've always done it' attitude."

The federal judiciary can rectify the federal bail crisis by scrupulously enforcing the BRA's substantive and procedural protections. As Justice John Paul Stevens famously said: "It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[59]

2 Findings

Our courtwatching study of 4 federal district courts focuses on 343 cases in which we observed the entire pretrial detention and release process.[60] To supplement our quantitative data, we interviewed judges and federal public defenders in the same 4 districts,[61] as well as in 32 additional federal districts. A detailed explanation of the project's origins, contours, and methodology can be found in Appendix A: Background & Methodology.

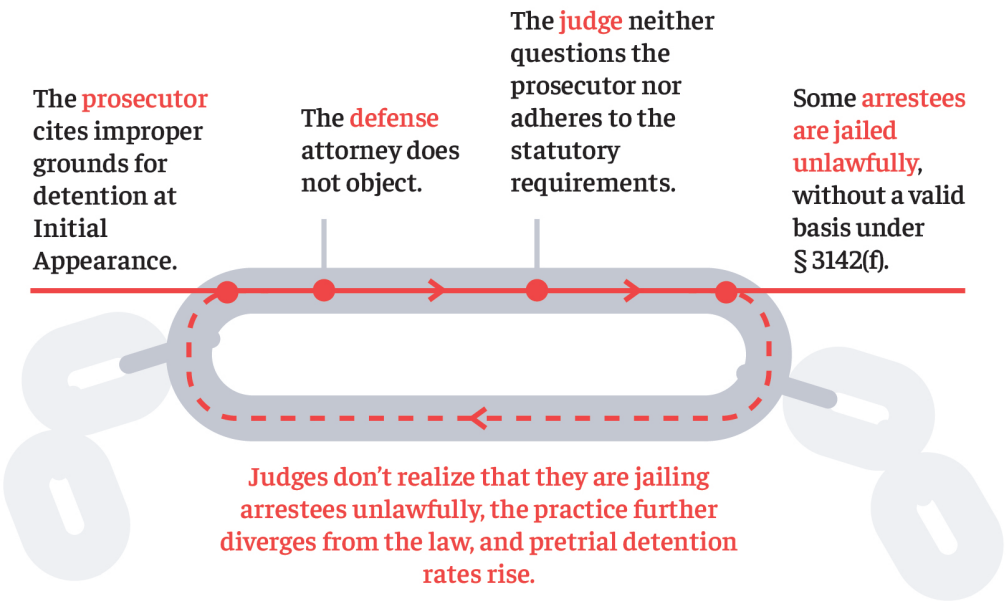
Based on these data, our Report reveals serious defects at each stage of the federal pretrial process.

We present 4 findings about the federal pretrial detention system, illustrating in each instance that courtroom practices deviate sharply from the written law and fuel a culture of detention.

A Finding 1: At the Initial Appearance Hearing, Federal Judges Jail People Unlawfully.

Our data expose a severe misalignment between the BRA's prescribed Initial Appearance process and the practice that unfolds in federal courthouses around the country. We observed a problematic feedback loop play out during Initial Appearances: the prosecutor requests pretrial detention for reasons not authorized by the law, the defense attorney does not object, and the judge neither questions the prosecutor nor adheres to the statutory requirements, sometimes jailing people unlawfully. *See* Figure 5. When judges rubber stamp prosecutorial detention requests that deviate from the legal standard, prosecutors continue disregarding the law and judges continue jailing people improperly in a subset of cases—in an endless cycle. The illegal detentions that result from this mutually-reinforcing process ultimately lead to higher jailing rates at the Initial Appearance and beyond, and fall disproportionately on people of color. For more detail, see **Findings & Recommendations—Federal Judges Must Follow the Correct Legal Standard at the Initial Appearance Hearing and Stop Jailing People Unlawfully**.

Figure 5: Problematic Feedback Loop at Initial Appearance



The Law

Congress and the Supreme Court envisioned the BRA as having a narrow "detention eligibility net" that authorizes pretrial jailing for a small subset of those charged with federal crimes.[62] The parameters of that net are explicitly set forth in 18 U.S.C. § 3142(f). Section 3142(f) was intended to serve as a gatekeeper for federal pretrial detention during the Initial Appearance hearing, which is the first of two potential bond hearings authorized by the BRA. At the Initial Appearance, a prosecutor must establish that one of the factors listed under § 3142(f) is met in order for the judge to even hold the second bond hearing—the Detention Hearing—where the judge determines whether the arrestee should be detained pending trial.[63] However, if none of the § 3142(f) factors is met, the judge must immediately release the accused at the Initial Appearance, and is forbidden from holding a Detention Hearing at all.

If a case involves a charge listed under § 3142(f)(1) and the prosecutor requests detention during the Initial Appearance, the judge must hold a Detention Hearing and may order the arrestee detained pending that hearing.[64] But for cases that do not involve such enumerated charges—which we call "non-(f)(1) cases"—the judge may hold a Detention Hearing and detain the arrestee pending that hearing *only* if there is a serious risk that the arrestee will flee, obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.[65]

Although federal judges may believe that detaining more arrestees will ensure community safety, evidence shows that **pretrial detention is instead criminogenic, harming individuals** and imposing additional costs on society.

Initial Appearance Standard

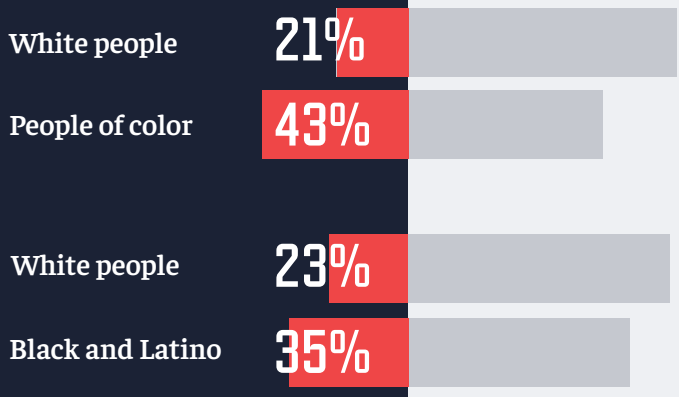
Federal Bailwatching Findings

- **In 81% of Initial Appearances in our study where the prosecutor requested detention, the prosecutor asked the judge to hold a Detention Hearing without citing any legal basis under § 3142(f).** In some of these cases, prosecutors cited invalid bases for requesting a Detention Hearing, such as danger to the community or non-serious risk of flight.

- In over 99% of Initial Appearances where the prosecutor requested detention without citing a valid basis under § 3142(f), judges detained people without questioning prosecutors' grounds for detention. **This created a problematic feedback loop in which a prosecutor's request for detention at the Initial Appearance almost always resulted in a judicial order of detention, even when based on improper grounds.**

- **In 12% of Initial Appearances where the prosecutor was seeking detention, judges entered a detention order even though no statutory basis for detention existed under § 3142(f).** These detention orders, therefore, were flatly illegal under the BRA.

99%

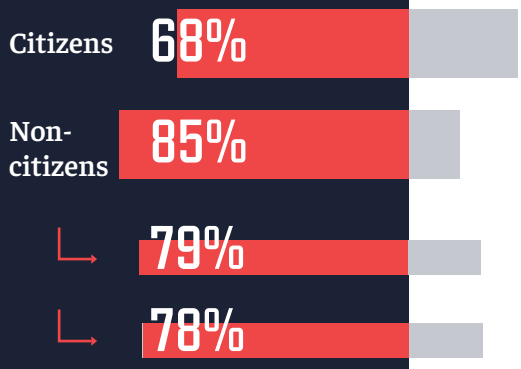


Racial Disparities

at the Initial Appearance

- **Prosecutors sought detention in cases that did not qualify for a Detention Hearing under § 3142(f)(1) more than twice as frequently for non-white arrestees.**

- Prosecutors similarly cited improper grounds for detention more frequently against Black and Latino arrestees.



Citizenship Status Disparities

at the Initial Appearance

- **Prosecutors requested detention nearly 20% more frequently if the arrestee was identified as a noncitizen.** At 79% of these hearings, prosecutors failed to cite a valid basis for detention under § 3142(f).

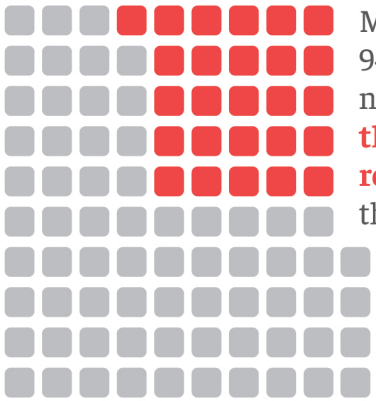
- **In noncitizen cases, no judge questioned the prosecutor's grounds for detention** when they failed to cite a valid basis for detention at the Initial Appearance, leading judges to detain arrestees in 78% of these cases.

B

Finding 2: At the Initial Appearance Hearing, Federal Judges Unlawfully Jail Poor People Without Lawyers.

Our study uncovered an egregious access-to-counsel problem in the federal system: judges in more than one-quarter of federal district courts do not provide every arrestee with a lawyer to represent them during the Initial Appearance. *See* Figure 6. In fact, 72% of the 36 districts where we interviewed or surveyed stakeholders deprive at least some individuals of counsel at this first bail hearing.[66] This finding is particularly concerning given that 90% of those charged with a federal crime cannot afford a lawyer.[67] Jailing people without lawyers definitively violates federal law and may violate the Constitution. These deprivations of counsel also contribute to high pretrial detention rates and exacerbate racial disparities. In our study, every arrestee who was deprived of a lawyer at the Initial Appearance was jailed, and nearly all were Black or Latino. For more detail, see **Findings & Recommendations—Federal Judges Must Stop Unlawfully Jailing Poor People Without Lawyers at the Initial Appearance Hearing.**

Figure 6: There is a Nationwide Access-to-Counsel Crisis in the Federal System.



More than one-quarter of the 94 federal district courts nationwide **do not ensure that every single arrestee is represented by a lawyer** at the Initial Appearance.

The Law

Federal law requires judges to ensure that anyone who cannot afford a lawyer is represented by court-appointed counsel during their Initial Appearance hearing. Under the law, every individual accused of a federal crime must be represented by counsel "at every stage of the proceedings *from his initial appearance*,"[68] rendering it unlawful for a judge to fail to appoint lawyers to represent indigent arrestees at the Initial Appearance. The right to counsel at the Initial Appearance is further supported by the principles underlying the Fifth and Sixth Amendments and public policy.

Access to Counsel at Initial Appearance

Federal Bailwatching Findings

- Our interviews and survey data revealed that **more than one-quarter of federal district courts fail to appoint a lawyer for every arrestee at the Initial Appearance**, with at least 26 of the 94 federal districts exhibiting this problem.

- In one district where we courtwatched, **11% of arrestees went unrepresented for the entirety of their Initial Appearances**, with no lawyer by their side to advocate for their liberty interests.

- In that district, **every single individual who faced their Initial Appearance without a lawyer was jailed after the hearing, a 100% detention rate.**

- In all 4 districts in our courtwatching study, when arrestees were forced to proceed without counsel for some part of their Initial Appearance, there was a notable increase in pretrial detention: **across court-watched districts, partially represented individuals were detained 89% of the time, while fully represented individuals were detained 67% of the time.**

100%

92%

Racial Disparities

in the failure to provide counsel before deprivations of liberty

- **92% of the arrestees who were unrepresented at their Initial Appearances were people of color.**

- Judges *unlawfully* detained unrepresented individuals in violation of § 3142(f) in some of the Initial Appearances we observed, compounding the harm of not providing a lawyer.

- We also observed Initial Appearances where **arrestees made incriminating statements while judges questioned them without a lawyer**, jeopardizing the person's Fifth Amendment right against self-incrimination and their ability to fight the case in the future.

C

Finding 3: Federal Judges Misapply the Presumption of Detention.

Judges have the power and responsibility to limit the impact of the statutory "presumption of detention" that sometimes applies during the Detention Hearing, but our study finds that they routinely apply the presumption incorrectly, giving it more weight than the law allows and failing to assess whether the presumption has been rebutted.

At the Detention Hearing—the second pretrial hearing in the federal system—a rebuttable presumption of detention applies in certain types of cases.[69] The presumption *does not mandate* detention. Instead, courts of appeals have set an easy-to-meet rebuttal standard.

Our study found that judges overwhelmingly fail to find the presumption rebutted, a clear indication that they are not adhering to the legal standard in presumption cases. This misuse of the presumption of detention causes many more people to be detained pending trial than necessary, and it results in more burdensome conditions of release in the rare cases in which judges grant release. Additionally, since people of color face charges triggering the presumption more often than white arrestees, the misapplication of the presumption exacerbates racial disparities in the federal criminal system. Judges' treatment of the presumption of detention is particularly important given the prevalence of presumption-triggering charges; nationally, the presumption of detention applies to 93% of all federal drug offenses.[70] For more detail, see **Findings & Recommendations—Federal Judges Must Follow the Correct Legal Standard in Presumption-of-Detention Cases to Reduce Racial Disparities and High Federal Jailing Rates**.

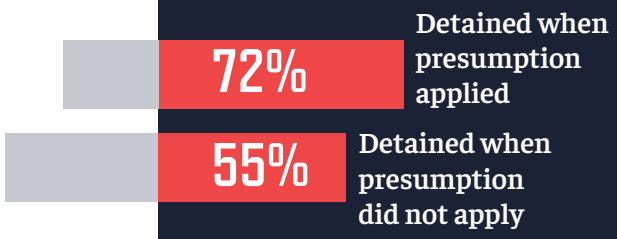
The Law

The BRA creates a rebuttable presumption of detention for certain offenses. Because the presumption imposes such a heavy cost on individual liberty, courts have set a standard that should make it easy for an arrestee to rebut the presumption.[71] This low rebuttal standard matches Congress's original intent for the presumption, which was to lock up only "the worst of the worst" offenders.[72] In every Detention Hearing in a presumption case, the law requires a judge to: (1) determine whether the presumption has been rebutted under the legal standard articulated in case law; and (2) weigh the presumption against all of the other pretrial release factors listed in § 3142(g),[73] keeping the burden of proving that detention is warranted on the prosecution at all times.

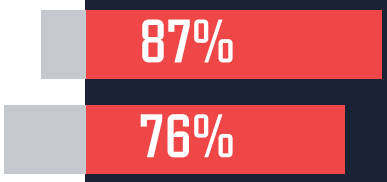
Presumption of Detention

Federal Bailwatching Findings

- In our study, **arrestees facing a presumption of detention were detained at a rate of 72%, which exceeded the rate of detention among arrestees to whom a presumption did not apply by nearly 20%.**

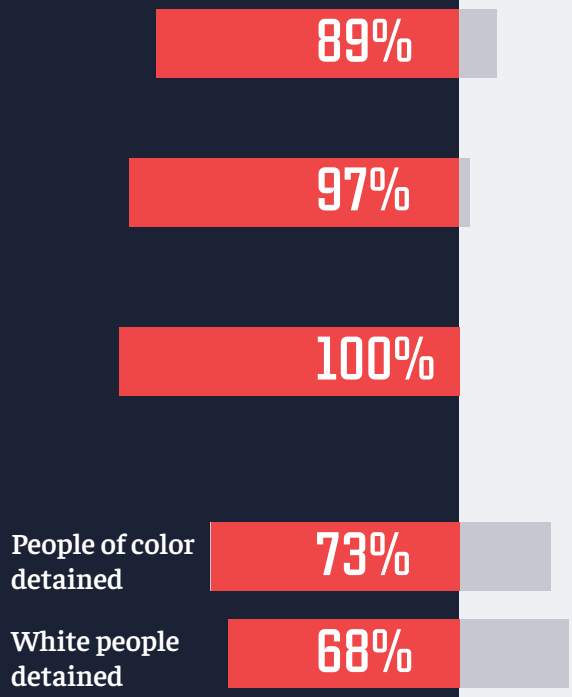


- Judges detained arrestees facing a presumption of detention in 87% of the cases in which the prosecutor explicitly invoked the presumption during the Detention Hearing, compared to 76% of the time when the prosecutor did not invoke the presumption.



- In 95% of the contested Detention Hearings we observed where the presumption of detention applied, judges either failed to mention whether the presumption of detention was rebutted or concluded that the presumption was not rebutted.

- **In 100% of Detention Hearings where the judge found that the presumption had not been rebutted, the judge detained the arrestee.**



Racial Disparities

in presumption-of-detention cases

- In the cases where a presumption of detention applied, 89% of the arrestees were people of color.
- Among the Detention Hearings where prosecutors invoked the presumption of detention, 97% of the arrestees were people of color.
- **Prosecutors erroneously invoked the presumption of detention exclusively against Black or Latino arrestees.**
- **Judges detained people of color at higher rates than white individuals**: the detention rate in presumption-of-detention cases involving people of color was 73%, while the detention rate in presumption-of-detention cases involving white arrestees was just 68%.

100%

Finding 4: Federal Judges Impose Excessive Financial Conditions that Violate the Law and Jail People for Poverty.

Our study shows that judges consistently impose inequitable and burdensome financial conditions of release. Some courts jail arrestees simply because they are too poor to pay for their release, thereby violating the BRA. These practices contribute to high pretrial detention rates and have a disproportionate racial impact, further aggravating racial disparities in the federal system. For more detail, see **Findings & Recommendations—Federal Judges Must Stop Unlawfully Jailing People for Poverty Through Excessive Financial Conditions**.

The Law

The BRA unequivocally states that judges "may not impose a financial condition that results in the pretrial detention of the person."[74] Congress intended this provision to end the practice of imposing "pretrial detention through the arbitrary use of high money bail."[75] Congress hoped the statute would end one of the primary evils of cash bail systems: caging poor individuals by conditioning their release on their ability to pay. Although the statute authorizes judges to condition release on financial requirements,[76] such conditions are prohibited if they result in the accused being jailed for poverty.

Because many people charged with federal crimes are indigent, financial conditions of release run a serious risk of serving as **de facto detention orders**, an indisputable violation of the BRA.

Financial Conditions

Federal Bailwatching Findings

- **In 37% of cases in our study, judges imposed financial conditions, such as personal surety bonds, corporate surety bonds, and the upfront posting of collateral.**

- **In 34% of all cases and 91% of cases where financial conditions were imposed, judges required arrestees to post a secured bond**, reintroducing the evils of cash bail systems that the BRA sought to avoid.

- In one district where we courtwatched, arrestees were *detained* in 40% of cases involving financial conditions solely because they did not have the money to pay for their release. Judges in that district regularly imposed federal bail bonds known as corporate surety bonds (CSBs). **In 92% of cases where a CSB was imposed, the accused was locked in jail because they were unable to obtain a bail bond. Every single individual subjected to a CSB was a person of color.**

- Across all 4 districts, **arrestees did not have the money to meet financial conditions in 36% of cases where such conditions were imposed.** In fact, 21% of all arrestees detained at the Initial Appearance remained in jail after the Detention Hearing because they could not meet financial conditions of release. For these individuals, the financial conditions acted as de facto detention orders, in violation of the law.

95%

Racial Disparities

in the imposition of financial conditions of release

- Black and Latino arrestees were much more likely to face financial conditions of release than white arrestees; among arrestees on whom secured bonds were imposed, 95% were people of color.

95%

3 Recommendations

In *Salerno*, the Supreme Court described the accused's "strong interest in liberty" as "importan[t] and fundamental."[77] Our study shows courtroom custom overriding the legal standards that were supposed to preserve that fundamental right. To comply with the law, federal judges must start from the statutory premise that pretrial release is the default and that pretrial detention can be justified only if no conditions of release will reasonably assure the accused's appearance in court and community safety. Judges can mitigate the culture of detention by abiding by the BRA and other federal laws. Adhering to the rule of law, as we describe in the below recommendations, would also mitigate racial and socioeconomic disparities in the federal criminal system. To align the on-the-ground practices with the law, we recommend that judges do the following.

A

Recommendation 1: At the Initial Appearance, judges must prevent unlawful detentions by following the § 3142(f) legal standard.

Judges violate federal law during Initial Appearance hearings when they set or hold Detention Hearings without any legitimate basis for detention under § 3142(f). Judges must understand the legal standard that applies at the Initial Appearance and enforce the strict limitations on pretrial detention provided in the written law.

First, judges must break the problematic feedback loop by requiring prosecutors seeking detention at the Initial Appearance to cite a specific § 3142(f) factor listed in the BRA. If a prosecutor presents improper grounds for holding a Detention Hearing, such as "danger to the community" or non-serious "risk of flight," the judge must deny the prosecutor's request and promptly release the arrestee (unless § 3142(f)(1) independently authorizes a Detention Hearing). Second, in cases that do not fall under § 3142(f)(1), judges must hold prosecutors to their burden of proof under § 3142(f)(2). In such cases, a judge must release the arrestee at the Initial Appearance unless the prosecutor justifies their request for a Detention Hearing by presenting *individualized facts and evidence* establishing a "serious risk" of flight or obstruction of justice. In all cases, judges should vigilantly adhere to the statute and ensure that no arrestee is unlawfully jailed at the Initial Appearance.

Our recommendations relating to the Initial Appearance are discussed in **Findings & Recommendations—The Solution: At the Initial Appearance, Judges Must Prevent Unlawful Detentions by Following the § 3142(f) Legal Standard**.

B

Recommendation 2: At the Initial Appearance, judges must follow the law and appoint lawyers to actively represent every indigent arrestee.

Judges violate federal law, the Federal Rules of Criminal Procedure, and potentially the Sixth Amendment when they jail poor people without lawyers or force someone to appear *pro se* opposite a federal prosecutor during the Initial Appearance. To comport with the law and safeguard the accused's liberty interest and constitutional rights, judges must provide every indigent arrestee with an appointed lawyer to actively represent them throughout their entire Initial Appearance hearing. It is not sufficient to have a defense lawyer on standby. Rather, the law entitles every arrestee to a lawyer who is functioning in an adversarial capacity and can vindicate their client's rights under the legal standard in § 3142(f). Judges should follow best practices by appointing counsel *before* questioning people, therefore protecting arrestees' Fifth Amendment right against self-incrimination.

Our recommendations relating to the appointment of counsel at the Initial Appearance are discussed in **Findings & Recommendations—The Solution: At the Initial Appearance, Judges Must Follow the Law and Appoint Lawyers to Actively Represent Every Indigent Arrestee**.

C

Recommendation 3: At the Detention Hearing, judges must adhere to the low standard for rebutting the presumption of detention and never treat the presumption as a mandate for detention.

Judges give the presumption of detention more weight than the law authorizes, treating it as a heavy thumb on the scale in favor of pretrial jailing. Courts must instead treat the presumption as genuinely rebuttable and give it the low weight to which it is entitled. To adhere to the law, during every Detention Hearing in a presumption case, a judge should apply a two-step analysis.

First, the judge must determine whether the presumption is rebutted, a question that turns not only on the defense presentation but also on all of the evidence in the record (including the Pretrial Services Report). In this rebuttal analysis, the judge should follow case law and hold that an arrestee has rebutted the presumption as long as there is "*some* evidence" that the arrestee will not flee or endanger the community if released.[78] The judge's finding as to whether the presumption of detention has been rebutted should be stated on the record.

Second, regardless of whether the presumption has been rebutted, the judge must weigh all of the factors listed in § 3142(g) to reach the ultimate release or detention decision. That ultimate determination must adhere to the legal standard in § 3142(e): as in any case, the judge must release an arrestee in a presumption case if the prosecutor has not proven by clear and convincing evidence that there are no conditions that would "reasonably assure" that person's appearance in court and the safety of the community. Throughout the analysis, the judge should never shift the burden of proof to the defense or treat the presumption as a mandate for detention.

Our recommendations relating to the presumption of detention are discussed in **Findings & Recommendations—The Solution: At the Detention Hearing, Judges Must Adhere to the Low Standard for Rebutting the Presumption of Detention and Never Treat the Presumption as a Mandate for Detention.**

Recommendation 4: At both pretrial hearings, judges must stop imposing financial conditions that result in detention and tailor release to each arrestee's individual economic circumstances.

Judges violate federal law when they impose inequitable and burdensome financial requirements for release, especially when they jail people who are too poor to pay for their freedom. In such cases, financial conditions of release function as de facto detention orders, contravening the plain language and spirit of the BRA. Instead, judges must recommit to making individualized release decisions and thoroughly consider whether financial conditions—including bail bonds, cash bonds, and "solvent surety" requirements—are truly the least restrictive conditions available. Such individualized determinations are critical to aligning the practice with the law as written, since the vast majority of people charged with federal crimes are poor.

Our recommendations relating to financial conditions of release are discussed in **Findings & Recommendations—The Solution: At Both Pretrial Hearings, Judges Must Stop Imposing Financial Conditions that Result in Detention and Tailor Release Conditions to Each Arrestee's Individual Economic Circumstances.**

FREEDOM DENIED REPORT

Table of Contents Overview

The Federal Criminal Justice Clinic's full *Freedom Denied* Report introduced in this Executive Summary is available at this link: http://freedomdenied.law.uchicago.edu.

The *Freedom Denied* Report proceeds as follows:

Contextualizing the Culture of Detention (1) describes the limited nature of existing data about the federal pretrial system, (2) explains that COVID-19 did not markedly change the way judges approach federal pretrial detention, (3) details the devastating and enduring effects of pretrial jailing, and (4) provides an overview of the legal standards governing federal bond hearings.

Findings & Recommendations describes our groundbreaking findings about 4 aspects of the federal pretrial system, where courtroom practices deviate sharply from the written law and fuel a culture of detention. Our findings draw on quantitative data from courtwatching and qualitative data from interviews with federal judges and federal public defenders.

- (1) In a section entitled *Judges Must Follow the Correct Legal Standard at the Initial Appearance Hearing and Stop Jailing People Unlawfully*, we discuss a severe misalignment between the law that applies during Initial Appearance hearings and on-the-ground practices, with judges failing to follow the correct legal standard and jailing people unlawfully.

- (2) In a section entitled *Judges Must Stop Unlawfully Jailing Poor People Without Lawyers at the Initial Appearance Hearing*, we focus on another legal problem that arises at the Initial Appearance—in more than one-quarter of federal courts, judges lock poor people in jail without lawyers, creating a host of statutory and constitutional issues.

- (3) In a section entitled *Judges Must Follow the Correct Legal Standard in Presumption-of-Detention Cases to Reduce Racial Disparities and High Federal Jailing Rates*, we show that, during Detention Hearings, judges do not follow the correct legal standard in presumption-of-detention cases, increasing racial disparities and exacerbating the federal jailing crisis.

- (4) In a section entitled *Judges Must Stop Unlawfully Jailing People for Poverty Through Excessive Financial Conditions*, we establish that federal judges regularly impose excessive financial conditions of release that arrestees are unable to meet, resulting in their unlawful pretrial detention.

Conclusion reiterates our study's important intervention as the first data-driven examination of the federal bail crisis. **Appendix A: Background & Methodology** provides additional information about our methodology. **Appendix B: District-Specific Data Comparisons** provides points of comparison across the 4 districts.

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ENDNOTES

1 United States v. Salerno, 481 U.S. 739, 755 (1987).

2 The terms "jailing" and "detention" are used interchangeably in this Report to refer to the process by which an arrestee is detained in jail pending trial. The terms "bond" and "bail" are used interchangeably as a shorthand for the pretrial detention and release process more generally. We refer to the monetary aspects of pretrial release as "financial conditions" generally, or name the specific type of monetary requirement imposed.

3 We have de-identified our interview subjects throughout this Report to ensure their anonymity, and therefore will not be providing citations for interview quotes. To promote candor, we promised interviewees that we would de-identify them, would not list their names in this Report, and would not attribute quotes to them directly. The identity of the individual federal magistrate judge and Federal Defender who made each statement quoted in this Report is on file with the authors.

4 Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, The Champion 46, 46 (July 2020), https://perma.cc/GA48-BY6Z.

5 18 U.S.C. § 3141 *et seq*.

6 The courtwatching component of our research was conducted and co-supervised by faculty and students at the University of Maryland Law School's Criminal Defense Clinic, Harvard Law School's Criminal Justice Institute, Boston University School of Law's Criminal Law Clinical Program, and Campbell Law School's Restorative Justice Clinic.

7 We interviewed stakeholders from the following 11 federal courts of appeals: The First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, and Eleventh Circuit. Those stakeholders were located in the following 36 federal districts: the District of Arizona, the Northern District of California, the Southern District of California, the District of Colorado, the District of Delaware, the Southern District of Florida, the Central District of Illinois, the Northern District of Illinois, the District of Maryland, the District of Massachusetts, the Eastern District of Michigan, the Northern District of Mississippi, the Southern District of Mississippi, the Western District of Missouri, the Southern District of New York, The Eastern District of New York, the District of New Mexico, the Eastern District of North Carolina, the Western District of North Carolina, the District of North Dakota, the Northern District of Ohio, the Southern District of Ohio, the Eastern District of Pennsylvania, the District of South Carolina, the District of South Dakota, the Eastern District of Tennessee, the Western District of Texas, the Southern District of Texas, the District of Utah, the District of the Virgin Islands, the Western District of Virginia, the Eastern District of Virginia, the Western District of Washington, the Western District of Wisconsin, the Eastern District of Wisconsin, and the District of Wyoming.

8 *See* Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra* note 4, at 46 (coining the term "federal bail crisis").

9 *The Administration of Bail by State and Federal Courts: A Call for Reform, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 116th Cong. 3 (Nov. 14, 2019) (written statement of Alison Siegler, Dir. Federal Criminal Justice Clinic, University of Chicago Law School), https://www.congress.gov/116/meeting/house/110194/witnesses/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf [hereinafter Siegler Bail Hearing written statement].

10 The data underlying this Report is on file with the authors. Given the relatively small size of our dataset, our Report relies on summary statistics, rather than regression analyses. The arrestees in our study were overwhelmingly people of color: Black individuals constituted 39% of our sample, Latino individuals 45%; courtwatchers coded 2% of our sample "race unknown" (we assume, given the high percentage of people of color in our sample overall, that these arrestees were most likely people of color of ambiguous ethnicity), and 1% "other." Accordingly, our ability to estimate differences in the treatment of white arrestees versus nonwhite arrestees is naturally somewhat limited from a statistical perspective. Moreover, our data do not allow us to identify whether racial discrimination, in the purposeful sense that constitutional law focuses on, played a role in outcomes. However, we can say with certainty that the vast majority of those bearing the brunt of the federal bail crisis are Black and Latino. Some of the phenomena we documented were inflicted against only people of color—for example, every single individual locked up for their inability to pay was Black or Latino. People of color experienced other improper practices at higher rates than their representation in our sample.

11 Admin. Off. of U.S. Courts, *Caseload Statistics Data Tables*, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/FXS5-U8CY].

12 None of the AO's publicly available H-Tables provides race information.

13 AO Table H-9. This annually updated table is not publicly available and can only be seen by insiders granted access to the federal judiciary's intranet system (the "J-Net").

14 AO Table H-15. This annually updated table is not publicly available and can only be seen by insiders granted access to the J-Net.

15 *See, e.g.*, AO Table H-14, H-14A, H-3, H-3A.

16 18 U.S.C. §§ 3142(b)–(c) (mandating that the court "*shall order* . . . pretrial release . . . on personal recognizance, or upon execution of an *unsecured* appearance bond . . . *unless* . . . such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," in which case the court "*shall order* . . . pretrial release . . . subject to the least restrictive . . . condition, or combination of conditions, that . . . will reasonably assure the appearance of the person as required and the safety of . . . the community" (emphasis added)); *see also* United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) (finding the Bail Reform Act of 1984 "codified . . . the traditional presumption favoring pretrial release 'for the majority of Federal defendants'" (quoting S. Rep. No. 98-225, at 6–7 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3189))); United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985) ("[T]he statutory scheme of 18 U.S.C. § 3142 continues to favor release over pretrial detention.").

17 18 U.S.C. § 3142(j).

18 481 U.S. 739 (1987).

19 *Id.* at 755.

20 United States v. Stone, 608 F.3d 939, 940 (6th Cir. 2010); *see also* United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015) ("Only in rare cases should release be denied, and doubts regarding the propriety of release are to be resolved in favor of the defendant."); United States v. Sabhnani, 493 F.3d 63, 75 (2d Cir. 2007) ("[T]he law thus generally favors bail release."); United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors nondetention."); United States v. Torres, 929 F.2d 291, 292 (7th Cir. 1991) (deeming pretrial detention "an exceptional step").

21 *Pretrial Release and Detention: The Bail Reform Act of 1984*, Bureau of Just. Stat. Special Rep., at 1 (Feb. 1988), https://perma.cc/7A6U-S5XV [hereinafter BJS 1988 Report].

22 *Id*. ("The percent of defendants held on pretrial detention, that is, without bail, increased from less than 2% before the Act to 19% after."); *see also id*. at 2 tbl.1 & tbl.2 (10% of arrestees failed to meet bail conditions and were held until trial).

23 *See* AO Table H-14 (2019); *see also* Alison Siegler & Kate M. Harris, *How Did the 'Worst of the Worst' Become 3 out of 4?*, N.Y. Times (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html [https://perma.cc/JN6N-LKVL]. We take the 2019 rate as our reference point because it represents the state of the system before the COVID-19 pandemic hit.

24 AO Table H-14 (2020, 2021).

25 *See infra* Contextualizing the Culture of Detention—A Judge's Decision to Jail Someone Pretrial Has Damaging and Enduring Effects. Myriad studies demonstrate the devastating and long-lasting consequences of pretrial detention. Pretrial detention adversely affects an individual's physical and mental wellbeing, an individual's case outcome, and their economic stability, among other factors. *See, e.g.*, *Corruption, Abuse, and Misconduct at U.S. Penitentiary Atlanta: Hearing Before the Homeland Sec. and Governmental Affairs Comm. Permanent Subcomm. on Investigations*, 117th Cong. 3–5 (July 26, 2022) (testimony of Rebecca Shepard, Assistant Federal Public Defender, Northern District of Georgia), https://www.hsgac.senate.gov/subcommittees/investigations/hearings/corruption-abuse-and-misconduct-at-us-penitentiary-atlanta [https://perma.cc/6KSB-93B2] [hereinafter Shepard testimony] (listing unacceptable food and hygiene conditions and denials of mental health treatment); Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 Ga. L. Rev. 235, 250 ("A group of studies published in the past five years shows a compelling empirical connection between bail and convictions and bail and guilty pleas, specifically."); *id.* at 251–52 ("All of these studies controlled for factors not associated with bail that could affect the likelihood of conviction and release, including, for example, race, age, gender, prior offenses, and number of charged offenses . . . . [Pretrial detention is] a factor driving the higher conviction rates for pretrial detainees."); Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effect of Pretrial Detention on Self-Reported Outcomes*, 82 Fed. Prob. 39, 40–41 (2018), https://www.uscourts.gov/sites/default/files/fedprobation-sept2018_0.pdf [https://perma.cc/2DZJ-Q6BE] (finding adverse and prolonged effects on detainees' economic and housing stability, as well as intergenerational effects for detainees who have dependent children at the time of their jailing).

26 Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82(2) Fed. Prob. 3, 10 (2018), https://www.uscourts.gov/sites/default/files/82_2_1_0.pdf [https://perma.cc/2SVY-A9TA]; *see also id.* at 6 (finding that among those not charged with immigration-related offenses, "the percentage of defendants released pretrial has declined to a greater extent among defendants with less severe criminal profiles than among defendants with more substantial criminal histories").

27 Roughly 2% of federal cases involve violent offenses, as opposed to 25% of state felony cases. *Compare* U.S. Dep't of Just. Bureau of Just. Stat., *Federal Justice Statistics 2015–2016*, at 3, 11 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/fjs1516.pdf [https://perma.cc/X95K-QZT6], *with* U.S. Dep't of Just. Bureau of Just. Stat., *Felony Defendants in Large Urban Counties, 2009*, at 2 (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/DJQ2-H6Y8].

28 In large urban counties, state systems only detained 38% of individuals charged with felonies in 2009. *See Felony Defendants in Large Urban Counties, 2009*, *supra* note 27, at 15. The detention rate for *violent* state felonies in 2009 was only 45%. Unfortunately, 2009 is the most recent year for which such nationwide state-level pretrial detention data is available, preventing an exactly parallel comparison between the state and federal numbers.

29 *See* BJS 1988 Report, *supra* note 21, at 5 tbl.10; AO Table H-9A (1997–2021).

30 AO Table H-9A (2021).

31 BJS 1988 Report, *supra* note 21, at 5 tbl.10 (showing an average of 53 days of pretrial detention in 1985).

32 *See* Memorandum, *Costs of Community Supervision, Detention, and Imprisonment*, Admin. Off. of U.S. Courts (Aug. 2021) (finding that the daily cost of supervision is $12, compared to $98 for pretrial detention). The cost of incarceration rises annually. *See, e.g.*, *Incarceration Costs Significantly More than Supervision*, Admin. Off. of U.S. Courts (Aug. 17, 2017) https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision [https://perma.cc/Y4VU-8ZE9] (showing that in 2017, the cost was $31,842 for detention and $4,026 for supervision).

33 *See* AO Table H-9, for the 12-Month Period Ending December 31, 2021 (2021) (showing that at the start of 2021, there were 31,763 individuals detained pretrial, and by the end of the year, 32,004 individuals were jailed, for an average of 31,884 individuals detained pretrial). At an average of $35,758 annually per person, federal pretrial detention costs taxpayers upwards of $1.14 billion each year.

34 U.S. Dep't of Just., FY 2021 Budget Request at a Glance 3 (2021) https://www.justice.gov/doj/page/file/1246841/download [https://perma.cc/E89P-JNY4] (showing costs of $9.2 billion in FY2021 towards "Prisons and Detention." This funding comprised nearly 30% of the Department of Justice's (DOJ) discretionary budget in FY2021).

35 Mark Motivans, *Federal Justice Statistics, 2019*, U.S. Dep't of Just. Bureau of Just. Stat. Special Rep. at 8 tbl.5 (Oct. 2021), https://bjs.ojp.gov/content/pub/pdf/fjs19.pdf [https://perma.cc/J66J-6CV4] [hereinafter BJS 2019 Report].

36 *See, e.g.*, Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences*, 122 J. Pol. Econ 1320, 1349 (Dec. 2014) ("[B]lack male federal arrestees ultimately face longer prison terms that whites arrested for the same offenses with the same prior records."); *id*. at 1350 ("In the federal system, more than half of the black-white sentence disparity that is unexplained by the arrest offense and offenders' prior traits can be explained by initial charge decisions, particularly the prosecutors' decision to file charges that carry 'mandatory minimum' sentences. Ceteris paribus, they do so 65 percent more often against black defendants.").

37 *See* Ad Hoc Comm. to Review the Criminal Justice Act, 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act at xiv (2018), https://www.uscourts.gov/sites/default/files/2017_report_of_the_ad_hoc_committee_to_review_the_criminal_justice_act-revised_2811.9.17.29_0.pdf [https://perma.cc/FM2Z-8GW3] [hereinafter The Cardone Report] (finding that "90 percent of defendants in federal court cannot afford to hire their own attorney").

38 *See, e.g.*, 18 U.S.C. § 3142(b), (c), (e), (g) (repeatedly highlighting that the goals of the BRA are to reasonably assure "the appearance of the person as required" and "the safety of the community"); Guide to Judiciary Policy, Vol. 8B, "Alternatives to Detention and Conditions of Release" (Monograph 110) at § 150 (finding that "by imposing conditions of release and alternatives to detention, judicial officers are able to promote the responsible use of public funding to protect the rights of defendants and to reasonably assure the appearance of the defendant and the safety of the community as required").

39 AO Table H-15 (2007–21). These tables show that federal failure-to-appear and rearrest rates have remained consistently low over the past fifteen years, regardless of the detention rate. Although AO data regarding failure-to-appear and rearrest rates are unavailable prior to 2007, some annual compendia from the Bureau of Justice Statistics include these data. *See, e.g.*, Laura Winterfield et al., *Compendium of Federal Justice Statistics, 2004*, U.S. Bureau of Just. Stat. at 53 tbl.3.8 (Dec. 2006), https://bjs.ojp.gov/library/publications/compendium-federal-justice-statistics-2004 [https://perma.cc/4GN9-UHVF].

40 *See* AO Table H-15 (2007–21).

41 *Id.*; *see also* Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra* note 4, at 47 & fig.1.

42 While release rates increased from 25% in 2019 to 29% in 2020 to 36% in 2021, the rates at which people on pretrial release failed to appear in court or were rearrested remained extremely low. *See* AO Table H-14 (2019–21); *see also* AO Table H-15 (2019) (showing a failure-to-appear rate of 1.16% and a rearrest rate of 1.83%); AO Table H-15 (2020) (showing a failure-to-appear rate of 1.17% and a rearrest rate of 1.94%); AO Table H-15 (2021) (showing a failure-to-appear rate of 1.32% and a rearrest rate of 2.25%). The federal Probation and Pretrial Services Office recently emphasized that the slight increase in release rates during the pandemic was not accompanied by any rise in the perennially low failure-to-appear and rearrest rates. *See* William E. Hicks et al., *Pretrial Work in a COVID-19 Environment*, 85 Fed. Prob. 24, 29–30 (June 2021), https://www.uscourts.gov/sites/default/files/usct10024-fedprobation-june2021_508.pdf [https://perma.cc/3YK9-NA4E] (noting that "for the 12-month period ending in March of 2021, national failure rates remained low as follows: failure to appear (1.7 percent), new criminal arrests (2.3 percent), and technical violations (4.1 percent)," and that the increase in pretrial release rates during the COVID-19 pandemic came "without adverse effects on pretrial supervision outcomes").

43 *See* AO Table H-15 (2007–21) (listing "rearrest violations" for "felony," "misdemeanor," and "other").

44 *See, e.g.*, BJS 2019 Report, *supra* note 35, at 3 tbl.3, 6 tbl.10 (showing that there were fewer than half as many federal convictions as arrests in 2019, at 78,254 and 206,630, respectively).

45 Paul Heaton, *The Effects of Misdemeanor Bail Reform*, Quattrone Ctr. (Aug. 16, 2022), https://www.law.upenn.edu/institutes/quattronecenter/reports/bailreform/#/lessons/298QqaqdYgFhhsKx7ei9zGKvT8ILGEVt [https://perma.cc/BWK5-NRNQ].

46 D.C. Pretrial Services Agency, Congressional Budget Justification and Performance Budget Request 41 (Mar. 24, 2022), https://www.psa.gov/sites/default/files/FY%202023%20PSA%20CBJ.pdf [https://perma.cc/X8R2-DLNM].

47 *Id.* at 39.

48 *Id.* at 39, 41.

49 Heaton, *supra* note 45.

50 *Id.*

51 *See* John Pfaff, *Op-Ed: The Never-Ending "Willie Horton Effect" Is Keeping Prisons Too Full for America's Good*, L.A. Times (May 14, 2017), https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html [https://perma.cc/ZCZ9-JY6K] ("No matter how successful an 'early release' prison program is, one single failure can impose huge political costs . . . [i]t didn't matter that overall the reforms appeared to be safely addressing the state's mass incarceration problem; one murder derailed the effort."); *cf.* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 Harv. L. Rev. 1125, 1140 (2018) ("Even after pretrial reforms, judges and prosecutors retain the incentive to be too cautious releasing people pretrial because some released people will commit new crimes that will bring public scrutiny upon the judge or district attorney . . . it's a 'covering your ass' problem.").

52 U.S. Const. art. I; *see also About Federal Judges*, Admin. Off. of U.S. Courts, https://www.uscourts.gov/judges-judgeships/about-federal-judges [https://perma.cc/86QT-EWJG] ("Magistrate judges are judicial officers of the U.S. district court appointed by the district judges of the court.").

53 Erica Zunkel & Alison Siegler, *The Federal Judiciary's Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 Ohio St. J. Crim. 283, 306 (2020) (quoting Christopher L. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, Arnold Found. 19 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [https://perma.cc/FE39-BR7E]).

54 Judge James G. Carr, *Why Pretrial Release Really Matters*, 29 Fed. Sent'g Rep. 217, 220 (2017).

55 *See, e.g.*, Holsinger & Holsinger, *supra* note 25, at 40–41.

56 Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. Crim. L. & Criminology 775, 805 (2019).

57 Christopher Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Nat'l Institute of Corr. 3 (Nov. 2013) ("Compared to defendants released at some point pending trial, defendants detained for the entire pretrial period are more likely to be sentenced to jail or prison – and for longer periods of time.").

58 Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 221 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/200-240_Online.pdf [https://perma.cc/Y3BS-M6A5].

59 Bush v. Gore, 531 U.S. 98, 106 (2000) (Stevens, J., dissenting).

60 The District of Massachusetts in the First Circuit, the District of Maryland in the Fourth Circuit, the District of Utah in the Tenth Circuit, and the Southern District of Florida in the Eleventh Circuit.

61 We interviewed Chief Federal Public Defenders in all 4 of the districts where we courtwatched, yet we were able to interview federal judges in only 3 of those districts (Baltimore, Boston, and Miami).

62 The detention eligibility net is a set of offenses and factors for which the BRA authorizes pretrial detention. Timothy R. Schnacke, "Model" Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention 78–80 (2017), https://perma.cc/8V4M-S9TF. This eligibility net "limits the type of federal criminal cases that are eligible for pretrial detention." Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra* note 4, at 48. The BRA's detention eligibility net is defined in § 3142(f). In *Salerno*, the Court emphasized that the BRA's detention eligibility net is quite narrow, and "carefully limits the circumstances under which detention may be sought to the most serious of crimes." 481 U.S. at 747; *see also Bail*, 50 Geo. L.J. Ann. Rev. Crim. Proc. 394, 397–98 (2021) ("If at the Initial Appearance the government requests that the defendant be detained, the judge is *only* authorized to hold a detention hearing and detain the defendant if one of the factors in § 3142(f) is satisfied. If none of the § 3142(f) factors are satisfied, however, the judicial officer is prohibited from holding a detention hearing or detaining the defendant pending trial." (citing cases) (footnotes omitted)).

63 United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) ("Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists.").

64 18 U.S.C. § 3142(f)(1).

65 18 U.S.C. § 3142(f)(2).

66 We interviewed and surveyed stakeholders in 36 districts; 26 of those districts exhibited an access-to-counsel problem at the Initial Appearance.

67 *See* The Cardone Report, *supra* note 37, at xiv.

68 18 U.S.C. § 3006A(c); *see also* Fed. R. Crim. P. 44(a).

69 *See* 18 U.S.C. § 3142(e)(3) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community.").

70 Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Fed. Prob. 52, 55 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf [https://perma.cc/BL9D-D7LC].

71 *See e.g.*, United States v. Wilks, 15 F.4th 842, 846 (7th Cir. 2021) (holding that the defense bears only a "light burden of production" to rebut the presumption); United States v. Jessup, 757 F.2d 378, 380–84 (1st Cir. 1985) (same); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986) (same); United States v. Alatishe, 768 F.2d 364, 371 (D.C. Cir. 1985) (same); *see also Bail*, *supra* note 62, at 404 (2021) (collecting cases).

72 Siegler & Harris, *supra* note 23 (quoting Austin, *supra* note 70, at 61).

73 This analytic step was noted by the enacting Congress, which observed that all § 3142(g) factors must be considered. *See* S. Rep. No. 98-225, at 24–25, *as reprinted in* 1984 U.S.C.C.A.N. at 3208–09 ("[A] court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community.").

74 18 U.S.C. § 3142(c)(2).

75 S. Rep. No. 98-225, at 9, *as reprinted in* 1984 U.S.C.C.A.N. at 3192.

76 *See* 18 U.S.C. § 3142(c)(1)(B)(xii).

77 *Salerno*, 481 U.S. at 750.

78 *Dominguez*, 783 F.2d at 707 (emphasis added); *see also supra* note 71 and accompanying text.

This Report reveals a fractured and freewheeling federal pretrial detention system that has strayed far from the norm of pretrial liberty.

To begin to remedy the many harms of mass pretrial detention and support the positive outcomes of pretrial release, federal judges must shift the culture from one prioritizing pretrial detention to one prioritizing pretrial release.

It is incumbent upon judges to act boldly and to be guided by data, not institutional pressures. Ultimately, federal judges have the power to uphold the rule of law, to make detention prior to trial the rare exception, and to be champions of liberty.

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