Rethinking Federal Bail Advocacy to Change the Culture of Detention

I. Introduction
The federal bail system is in crisis, with three out of every four people locked in a cage despite the presumption of innocence. The federal pretrial detention rate has skyrocketed since the Bail Reform Act (“BRA”) was enacted in 1984, rising from 19 percent in 1985 to 75 percent in 2019. The federal system jails people before trial at a far higher rate than state systems. This is especially mystifying given the cash bail crisis plaguing the states and the much lower rate of violent offenses in the federal system. Disheartening as these numbers are, defense attorneys have the power to free their clients through zealous advocacy at bail hearings.

The federal bail crisis can be traced to two sources. First, in federal courts across the country, the law as it operates in practice has become untethered from the law as written in the statute. Second, the BRA itself needs revision — most importantly, the presumption of detention that is driving high federal detention rates must be eliminated. We have testified before Congress about the second problem, but this article will focus on the first problem, since it can be addressed by defense advocacy.

Imagine if, over time, people playing Monopoly forgot the written rules and assumed that people could be sent to jail whenever they passed Go. That is akin to what is happening in the federal bail arena, although the consequences are far more serious. As in Monopoly, the BRA only authorizes pretrial jailing under very limited circumstances. But many of the players have forgotten the statutory rules, and in some cases, judges and prosecutors are jailing people for reasons not authorized by those rules. Because defense attorneys have also forgotten the rules, they are not always aware that clients’ legal rights are being violated. Over time, the practice has deviated further and further from the law, and people charged with federal crimes are paying the price.

Bond advocacy is even more urgent now. As the COVID-19 pandemic ravages federal jails, pretrial release has become a matter of life or death. To change the culture of detention, defense attorneys need to radically rethink their advocacy and ensure that all of the players follow the BRA’s defense-friendly rules. This article provides statistics to illustrate the contours and costs of the federal bail crisis as well as action steps for bringing federal pretrial detention practices back in line with the law.

II. The Federal Bail Crisis
The BRA was supposed to authorize detention for a narrow set of people: those who are highly dangerous or pose a high risk of absconding. When the Supreme Court upheld the BRA as constitutional in 1987, it emphasized, “[i]n our society liberty is the norm, and detention prior to trial … is the carefully limited exception.” But in practice, pretrial detention is now the norm, not the exception.
Chair of the House Judiciary Committee Jerrold Nadler said of the BRA during a recent bail reform hearing: “[T]he reforms of the past have proven to be insufficient in balancing a defendant’s liberty interest and ensuring that the communities remain safe.” He lamented that federal “release rates have steeply declined” since the passage of the BRA, and said, “surely community safety does not justify this trend.”

Federal pretrial detention rates are far higher than in state felony cases. To get a sense of how much higher, compare the federal detention rate of 75 percent with the 38 percent rate for state felonies in large urban counties nationwide, and the 45 percent detention rate for violent felonies in those same counties. Only one offense — murder — has a higher detention rate than the federal system. The astronomical federal pretrial detention rate is being driven by the rate at which prosecutors request detention. Their detention request rate has risen dramatically over time, from 56 percent in 1997 to 77 percent in 2019, with prosecutors in the Fifth Circuit requesting detention for a whopping 87 percent of clients last year.

These high federal detention rates do not make sense. They are not necessary to ensure the primary goals of pretrial detention — community safety and appearance in court — because violent offenders make up just 2 percent of those arrested in the federal system. Moreover, nearly everyone released before trial appears in court and does not reoffend. In 2019, 99 percent of released federal defendants nationwide appeared for court as required, and over 98 percent did not commit new crimes on bond. What is really remarkable is that this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates. So when release increases, crime and flight do not. This proves that the federal system is jailing far more people than necessary. Figure 1 reflects this data.

Caging so many people also exacts high human and fiscal costs. On average, a person charged with a federal crime spends over eight months in jail, often in deplorable conditions, and in some districts, the average time spent in a cage before trial is two and a half years! While people sit in jail, they can lose their jobs, their homes, their health, and even their children. Pretrial detention also increases the likelihood of conviction and results in longer federal sentences. And pretrial detention imposes a high burden on taxpayers: It costs approximately $36,299 per year to incarcerate someone in federal prison, far more than the average college tuition. Meanwhile, it costs just $4,000 to supervise someone on pretrial release.

While there is disturbingly little published data about the race effects of federal pretrial detention, the few studies that exist show consistent racial disparities over time, with people of color being detained at higher rates than White people. Figure 2 shows the disparities.

### III. Defense Attorneys Must Bring Federal Bail Practices Back in Line with the Law

In 2018, the Federal Criminal Justice Clinic (“FCJC”) at the University of Chicago Law School created a Federal Bail Reform Project to address the federal bail crisis, designing the first courtwatching project ever undertaken in federal court. During Phase 1 of courtwatching, volunteer gathered and logged data from 173 federal bail-related hearings in Chicago over the course of 10 weeks, both Initial Appearance Hearings and Detention Hearings. FCJC learned that prosecutors often request detention for reasons not authorized by the statute and that, in some cases, clients are illegally detained. After Phase 1, FCJC convened its findings to a supervisor at the U.S. Attorney’s Office and federal magistrate judges in Chicago. In mid-2019, FCJC ran Phase 2 of the courtwatching project and was heartened to see that prosecutors, defense attorneys, and judges had begun adhering more closely to the statute in the wake of FCJC’s interventions.

This section clarifies the law that applies at Initial Appearance Hearings and Detention Hearings and offers action steps for litigation. Defense attorneys can protect their clients’ liberty and prevent unwarranted detention by ensuring that the practice at federal bail hearings aligns with the BRAs’ legal requirements. Counsel must also remind judges that Congress intended to create a culture of release, not a culture of detention, and that the Supreme Court upheld the BRA as constitutional in that spirit. At the Initial Appearance, defense attorneys can empha-
size the limitations on judicial discretion — the BRA carefully circumscribes the kinds of cases in which detention is authorized. At the Detention Hearing, attorneys can emphasize the expansiveness of judicial discretion — the BRA gives judges great leeway to grant release, even when a presumption of detention applies.

At both stages, defense counsel should file more written motions and appeal more often. Just as filing written sentencing motions in the wake of United States v. Booker has won below-Guidelines sentences for clients, filing written bond motions will win clients' release. It is crucial to include in defense motions the statistics proving that people on bond virtually never flee or reoffend, even in districts that release most people on bond.

A. The Initial Appearance Hearing

The defense bar must emphasize that the BRA limits the types of federal criminal cases that are eligible for pretrial detention. Most important, the statute and case law make clear that neither “danger to the community” nor ordinary “risk of flight” is a legitimate basis for detention at the Initial Appearance Hearing. This may come as a surprise to many federal criminal defense attorneys, judges, and prosecutors, but it is clear from the plain language of the statute. In many instances, the government moves for detention on these impermissible grounds, the defense does not object, and the judge simply orders the client detained until a Detention Hearing. It is very rare that the Detention Hearing is held immediately; often it is set several days after the Initial Appearance. In the interim, the person is taken from the courtroom in handcuffs and caged at the federal jail. While they wait for the Detention Hearing, clients can lose their jobs and their financial stability.  

During Phase 1 of FCJC’s courtwatching project, prosecutors routinely requested detention at the Initial Appearance on the impermissible basis of “danger to the community” or “risk of flight,” and judges regularly granted those requests. In the first 7 weeks of Phase 1, the prosecutor sought detention in 80 percent of the cases observed by the courtwatching project team, and in all but one case the person was detained and held in custody until a Detention Hearing. In approximately 95 percent of those detained cases, the prosecutor based the detention request on reasons not authorized by the statute, citing “danger to the community” as the basis for detention in approximately 56 percent of the cases and ordinary “risk of flight” in approximately 60 percent of the cases. Prosecutors only provided a valid basis for detention in 5 percent of cases and only provided evidence to support the request in one case. Figure 3 illustrates these alarming results.

In most Phase 1 cases, a legitimate statutory basis for detention existed under § 3142(f), though the prosecutor did not invoke it. However, in nearly 10 percent of the Phase 1 cases, there was no statutory basis for detention whatsoever, rendering the resulting detention illegal. Information gathered from attorneys around the country reveals that this kind of disregard for the statute at the Initial Appearance is a nationwide problem. Fortunately, it appears that the very process of courtwatching — along with the FCJC’s other interventions — led to significant improvements in how prosecutors and judges alike approached Initial Appearances in Chicago. For example, during Phase 2, prosecutors either explicitly cited the statute or used the words “serious risk of flight” in 82 percent of the Initial Appearances in which clients were detained without conceding detention. In contrast to Phase 1, the FCJC courtwatching team did not observe a single case in Phase 2 where a judge detained a client without a legitimate statutory basis under § 3142(f).

FCJC’s courtwatching also revealed troubling racial disparities in federal detention practices in Chicago. Prosecutors sought detention at higher rates for people of color at the Initial Appearance: 58 percent of the time for White clients as compared with 82 percent of the time for Black clients and 92 percent of the time for Latino clients. To combat these problems, we offer the following action steps for advocacy.

a. Action Step #1:
   Ensure that there is a statutory basis for the prosecutor’s detention request.

Whenever a prosecutor seeks to detain a client, defense counsel must explain that it is illegal to do so on the mere allegation that the client is a “danger to the community” or an ordinary “risk of flight,” and counsel must demand that the prosecutor cite a § 3142(f) factor to justify detention. If one of the factors in § 3142(f) is met, the judge is authorized to hold a Detention Hearing. Without a § 3142(f) factor, however, the prosecutor cannot move for detention at the Initial Appearance, the judge cannot subsequently hold a Detention Hearing, and there is no legal basis to detain the client before trial. In that situation, the BRA requires immediate release, either on personal recognizance or an unsecured bond under § 3142(b), or on conditions under § 3142(c).

The BRA only authorizes the judge to hold a Detention Hearing when a § 3142(f) factor is met: “The judicial officer shall hold a [detention] hearing only ‘in a case that involves’ one of the seven factors in § 3142(f)(1) and (f)(2). Section (f)(1) lists five case-specific factors that authorize pretrial detention:

1. most drug offenses;
2. gun offenses and minor victim offenses;
3. crimes of violence and terrorism offenses;
4. offenses with a maximum term of life imprisonment or death; and
5. certain rare recidivist offenses.
Section (f)(2) authorizes detention on two additional bases:

6. when there is "a serious risk that such person will flee"; and

7. when there is "a serious risk" of obstruction of justice, or of a threat to a witness or juror.

Congress intended § 3142(f) to serve as a gatekeeper to detention. Salerno confirms that a person may only be detained at the Initial Appearance if one of these seven § 3142(f) factors is present: "The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes," specifically the crimes enumerated in § 3142(f). When no § 3142(f) factor is met, the judge is flatly prohibited from holding a Detention Hearing; the client must be released.

Case law further supports § 3142(f)'s role as a gatekeeper. Since Salerno, all six federal courts of appeals to address the issue have agreed that it is illegal to detain someone — or even to hold a Detention Hearing — unless the prosecutor affirmatively invokes one of the § 3142(f) factors. For example, the First Circuit holds: "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." The D.C. Circuit has articulated the procedure judges must follow at the Initial Appearance: "First, a [judge] must find one of six circumstances triggering a detention hearing … [under] § 3142(f). Absent one of these circumstances, detention is not an option." The Second Circuit has agreed and has even set an evidentiary standard for the Initial Appearance, holding that the judge "must first determine by a preponderance of the evidence" that § 3142(f)(1) or (f)(2) is met.

Notably, when a judge detains someone without a statutory basis in § 3142(f), the BRA as applied becomes unconstitutional.

b. Action Step #2:
   Be vigilant in cases charging fraud or other offenses not listed in § 3142(f)(1).
   The defense attorney must be especially attentive when the prosecutor seeks detention at the Initial Appearance for an offense not listed in § 3142(f)(1) — such as fraud or illegal entry. In such cases, the prosecutor typically justifies the detention request on the ground that the client poses a "danger/financial danger" or an ordinary "risk of flight." If the prosecutor makes such an argument, alarm bells should go off and defense counsel should object because the only legitimate basis for detention is "serious risk" of flight under § 3142(f)(2)(A).

If the prosecutor invokes "danger to the community" or "financial danger" as a basis for detention at the Initial Appearance, counsel must argue that detention violates the statute, case law, and the Constitution. Dangerousness is simply not a § 3142(f) factor. Every court to have addressed the issue agrees that it is illegal for a judge to detain someone at the Initial Appearance as a "danger" or a "financial danger." As the Fifth Circuit has said: "[W]e find ourselves in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pretrial detention."

Alternatively, if no § 3142(f)(1) factor is met and the prosecutor invokes ordinary "risk of flight," defense counsel must object and explain that the statute only authorizes detention at the Initial Appearance "in a case that involves a "serious risk" that such person will flee." According to a basic canon of statutory interpretation, a "serious risk" is necessarily more signif-
icant or extreme than an ordinary risk.” In addition, the BRA’s legislative history makes clear that detention for serious risk of flight should occur only in extreme and unusual cases.26

When the only possible basis for detention at the Initial Appearance is serious risk of flight, the defense should use the plain language of § 3142(f)(2)(A) to contend that the prosecutor must proffer some evidence to demonstrate the case indeed involves a risk that is “serious” — evidence that relates to the client’s history and characteristics (e.g., past failures to appear in court) or to the circumstances of the offense (e.g., the client led the police in a high-speed chase). Case law supports the defense position that the government must provide evidence, explaining that when the only basis for detention is § 3142(f)(2)(A), a client “may be detained only if the record supports a finding that he presents a serious risk of flight.”27

The defense lawyer should also proffer evidence to show that the client does not pose a “serious risk” of flight, such as evidence that the client has lived in the same community for a long time or has no record of failing to appear in court. The defense can rely on the Second Circuit’s reasoning in Friedman, reversing a detention order for “serious risk of flight” where the client was a lifelong resident of the district, was married with children, had no prior record, had been steadily employed before his arrest, and had been on bond for related state charges without incident.28

FCJC’s courtwatching suggests that defense attorneys rarely object to detention or request release at the Initial Appearance. During Phase 1, defense attorneys objected in just 9 percent of cases.29 However, these numbers improved significantly during Phase 2. After FCJC’s training and other interventions, defense attorneys raised some objection to detention at the Initial Appearance in 29 percent of cases, a very heartening development.30

c. Action Step #3: Appeal.

If defense counsel loses at Step #2, she should strongly consider filing a written motion to reconsider or appealing to the district court, and ultimately to the court of appeals.31 A written motion or appeal can be especially powerful in reminding the judge of the legal requirements for detention in jurisdictions where the practice has drifted far from the statutory tether. For example, if the prosecutor presents little to no evidence of serious flight risk or the defense has countervailing evidence that there are conditions of release that would “reasonably assure” the client’s appearance, much can be gained by presenting those arguments in a written motion.

d. Action Step #4:

Request an immediate detention hearing.

When the prosecutor is seeking detention and a legitimate factor applies under § 3142(f)(1) (as in a drug, gun, crime of violence, or minor victim case), defense counsel should ask that the Detention Hearing be held immediately. The BRA’s default is for the hearing to be “held immediately upon the person’s first appearance” unless the prosecutor or defense counsel seeks a continuance.32 Since the prosecutor’s continuance “may not exceed three days,”33 the defense should push back and request a Detention Hearing sooner.34

B. The Detention Hearing and the Presumption of Detention

There is also widespread misunderstanding about the law that applies at Detention Hearings. The defense bar must bring the practice back in line with the law by litigating more Detention Hearings, filing more motions, reminding judges of the favorable law and data, and linking clients’ mitigating facts to those sources.35

At the Detention Hearing, there is a statutory presumption of release for most offenses, including crimes of violence, § 922(g) felon in possession of a gun, illegal entry, and fraud cases.36 In contrast, a presumption of detention applies in a narrow set of cases: most drug cases, plus § 924(c) gun cases, terrorism cases, and minor victim cases.37 Congress enacted the presumption of detention in such cases “to detain high-risk defendants who were likely to pose a significant risk of danger to the community if they were released pending trial.”38 But rather than applying narrowly to high-risk defendants, the presumption applies to nearly half of all federal criminal cases and to 93 percent of all drug cases.39

The courtwatching data confirms the vast reach of the presumption, particularly in drug cases. During Phase 1, the presumption applied in approximately 40 percent of the contested Detention Hearings the courtwatching team observed.40 Nearly 90 percent of those presumption cases were drug cases, 94 percent involved people of color, and all of the clients detained in presumption cases were people of color.41 The courtwatching also revealed that courts sometimes misapply the presumption or give it too much weight, effectively treating it as a mandate for detention. Judges found that the presumption was rebutted 64 percent of the time, yet still detained defendants in 47 percent of presumption cases.42

In addition, courtwatching revealed racial disparities at the Detention Hearing stage, with prosecutors again seeking detention at higher rates for people of color: 43 percent of the time for White clients as compared with 88 percent of the time for Black clients and 68 percent of the time for Latinx clients.43 Judges likewise detained clients of different races at different rates: 50 percent of White clients were detained at the contested Detention Hearings watched, as compared with 67 percent of Black clients and 50 percent of Latinx clients.44 To align the practice with the law at the Detention Hearing, we provide the following action steps for advocacy.

a. Action Step #1:

In presumption cases, highlight data demonstrating the problems with the presumption of detention.

A recent government data study shows that the presumption of detention is driving the high federal detention rate, applies in too many cases, and detains the wrong people. After examining every federal pretrial case from 2005 to 2015, the study concluded: “[T]he presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”45

The study further found that the presumption increases the detention rate without advancing community safety. Rather than jailing the worst of the worst, the presumption over-incarcerates the lowest-risk offenders in the system, people who are stable, employed, educated, and have minimal to no criminal history.46 When a low-risk individual is not facing a presumption, he or she is released 94 percent of the time.47 Yet an identically low-risk individual in a presumption case is released just 68 percent of the time.48 The study similarly finds that in weapons and sex offense cases specifically, “the presumption may be targeting lower-risk defendants rather than higher-risk” ones.49

Moreover, the presumption results in the jailing of people who do not pose a high risk of violating bond.
Although the entire point of the BRA is to ensure that people do not flee or endanger others, “the presumption does a poor job of assessing risk” on both of those fronts. Specifically, “[t]he presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, [or] fail to appear.” In this way, too, the presumption does not further the goals of the BRA.

Defense counsel should file motions highlighting this government data study. Such motions should also encourage judges to exercise their discretion to find that the defense has rebutted the presumption and to grant release despite the presumption. In any federal drug case where the presumption applies, it is important to tell the judge that the government study led the Judicial Conference of the United States to ask Congress to dramatically narrow the presumption in drug cases, limiting it to people with very serious criminal records.

Prosecutors benefit when defense attorneys do not fight at the Detention Hearing stage. If defense attorneys force prosecutors to defend more Detention Hearings, prosecutors may seek detention less often. In addition, when clients see defense counsel fighting early on, it builds trust and shows that defense lawyers are willing to fight for clients’ best interests, regardless of the result. And, of course, the more defense attorneys fight, the more they will win. This was borne out by FCJC’s courtwatching: clients were released in 40 percent of the contested Detention Hearings.

It is also vital to cite the data showing how exceedingly rare it is for clients on bond to flee or reoffend.

b. **Action Step #2:**

Litigate more detention hearings and highlight how rarely clients on bond flee or reoffend.

Clients who are charged in detention-eligible cases have a right to a Detention Hearing. Attorneys should not waive the Detention Hearing, even in presumption cases, without a very compelling reason. FCJC’s courtwatching revealed that the defense waived Detention Hearings 35 percent of the time. But after FCJC held its training, the defense waived the hearing just 22 percent of the time.

Prosecutors benefit when defense attorneys do not fight at the Detention Hearing stage. If defense attorneys force prosecutors to defend more Detention Hearings, prosecutors may seek detention less often. In addition, when clients see defense counsel fighting early on, it builds trust and shows that defense lawyers are willing to fight for clients’ best interests, regardless of the result. And, of course, the more defense attorneys fight, the more they will win. This was borne out by FCJC’s courtwatching: clients were released in 40 percent of the contested Detention Hearings.

It is also vital to cite the data showing how exceedingly rare it is for clients on bond to flee or reoffend.

c. **Action Step #3:**

Emphasize the defense-friendly aspects of the BRA.

The BRA is a defense-friendly statute, particularly in non-presumption cases, so it is critical that defense attorneys remind judges of what the law actually says.

First, the BRA’s presumption of release means that the judge must release the client unless the prosecutor proves (1) by at least a preponderance of the evidence that there are absolutely no conditions of release that would reasonably assure the client’s appearance, or (2) by “clear and convincing evidence” that there are no conditions of release that will reasonably assure community safety.

Second, the defense does not have to guarantee that the client will appear or is not a danger; the question is simply whether there are conditions of release that will “reasonably assure” appearance and safety, and the judge must impose “the least restrictive” conditions that meet that goal.

d. **Action Step #4:**

Structure release arguments around the § 3142(g) factors.

Counsel must link the client’s facts to the § 3142(g) factors. In determining the least restrictive conditions of release that
will reasonably assure appearance and safety, the judge “shall . . . take into account the available information concerning” the client’s personal history, the circumstances of the offense, and the weight of the evidence under § 3142(g). Defense counsel should focus on the “history and characteristics of the person,” which include “the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.” Because the § 3142(g) factors are so wide ranging, they provide ample room to argue that there are conditions that can mitigate any flight or safety concerns. If release is warranted under § 3142(g), the conditions should be narrowly tailored. Consequently, defense lawyers should not suggest or agree to excessive conditions just because a case is detention-eligible.

e. Action Step #5: In presumption cases, emphasize that the prosecution bears the burden of proof and the presumption is easily rebutted. The presumption of detention applies to a narrow subset of offenses; all other offenses enjoy a statutory presumption of release. It is important to know when the presumption applies and when it does not. It is just as important to fight back if the prosecutor or judge erroneously claims it applies to a crime-of-violence, § 922(g) gun, illegal reentry, or fraud case.

Defense counsel should also emphasize the limits of the presumption orally and in written motions. While a presumption ordinarily shifts the burden of proof to one party, the § 3142(e) presumption does not. Instead, the burden of proof continues to rest with the prosecution; the presumption merely imposes on the defense a burden of production. That burden “is not a heavy one to meet,” simply requiring “some evidence” that the client will not flee or pose a danger to the community.

To ensure that judges and prosecutors adhere to this legal framework, it is critical to emphasize how easy it is to rebut the presumption. The presumption can be rebutted by “[a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g) . . ., 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).” Once this burden of production is met, the presumption is rebutted. While the rebutted presumption does not disappear, a judge must weigh it against all of the mitigating evidence that the defense presents, and assign it no more weight than any other § 3142 factor. Even in a presumption case, the burden of persuasion remains with the prosecution at all times and never shifts to the defense. Therefore, the prosecutor always bears the burden of convincing the judge that detention is warranted despite all the mitigating evidence that the defense presents.

f. Action Step #6: File written motions and appeal. For both presumption and non-presumption cases, defense counsel should file written motions before the Detention Hearing linking the facts to the § 3142(g) factors. In presumption cases, these motions must emphasize that the presumption is rebuttable and apply the defense-friendly appellate law. Whenever possible, these motions should be filed between the Initial Appearance and the Detention Hearing; otherwise, they should be filed as motions for reconsideration. And the defense should consider appealing when judges misinterpret or misapply the presumption.

C. Seeking Bond for Non-Citizen Clients

Federal criminal defense lawyers also need to redouble their advocacy on behalf of non-citizen clients. They must file bond motions and make the same efforts to secure the release of non-citizen clients as they do for other clients. This bears emphasizing since some defense attorneys do not seek bond for non-citizen clients, either out of a sense of futility or out of a fear that their client will be detained by U.S. Immigration and Customs Enforcement (“ICE”) and will not get credit for time served in ICE custody. But defense attorneys can win release for non-citizen clients in federal court, and anecdotal evidence suggests that ICE will not necessarily take them into immigration custody afterwards.

Defense lawyers must first disabuse judges of the misconception that non-citizens pose a high risk of flight. The government’s own data reveals that so-called “illegal aliens” released on federal bond have the same low rate of non-appearance as U.S. citizens, appearing 99 person of the time. When compared with U.S. citizens, undocumented clients are actually more likely to comply with other conditions of release and significantly less likely to have their bond revoked.

In representing non-citizen clients at the Initial Appearance, defense counsel must again bring the practice in line with the law. For clients charged with immigration offenses, the only possible basis for detention is serious risk of flight, not dangerousness. And the existence of an ICE detainer does not itself render the client a serious risk of flight because any flight must be voluntary. Accordingly, it is improper for a judge to deny bond based solely on a client’s immigration status or a detainer. In addition, the Executive Branch has the discretion to “defer removal and deportation in favor of first proceeding with federal criminal prosecution.”

In representing non-citizen clients at Detention Hearings, defense lawyers must remind judges that the presumption of release extends to immigration offenses. If the prosecutor alleges that the client poses a serious risk of flight, it is crucial to present all the facts that weigh against flight risk, such as the client’s strong family and community ties, employment history, and the staleness of any past convictions.

IV. Conclusion

In view of the federal bail crisis and its race effects, all lawyers who represent clients in federal court have a responsibility to fight harder to win their clients’ release. Otherwise, defense lawyers are complicit in a system that devalues the lives and liberty of people of color. Counsel can change the culture of detention by using the above action steps, tethering arguments to the statute and the data, and filing more bond motions.

Since the Federal Criminal Justice Clinic at the University of Chicago Law School created the Federal Bail Reform Project in 2018, federal criminal defense attorneys across the country have increased their bond advocacy. At the same time, federal prosecutors’ detention request rates climbed from 2018 to 2019, as reflected in Figure 4. The judiciary’s response has been heartening: rather than climbing in tandem with the government’s requests, judicial detention rates leveled off in 2019. This is not an accident, but is rather a direct response to the defense bar’s advocacy. If defense lawyers redouble their efforts to preserve their clients’ fundamental right to liberty, perhaps detention will someday become the exception, not the rule.

The authors thank Elisabeth Mayer, Anna Porter, Lilly Ramser, Alexandra Schrader, Adam Simon, and Sam Taxy for their extraordinary research assistance and
data analysis; Keri Coble, Katerina Kokkas, Erica Maricich, and Claire Rogerson for their leadership of the court-watching project; Alex Aparicio and David Silberthau for their legislative reform contributions; and the many other Federal Criminal Justice Clinic students involved in the Federal Bail Reform Project.

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Notes


2. "From New Jersey to California, and Rand Paul to Bernie Sanders, there is widespread agreement that the cash bail system is broken." David Feige & Robin Steinberg, Opinion: Replacing One Bad Bail System with Another, N.Y. TIMES, Sept. 12, 2018, at 25, https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html. Financial conditions are also a problem in the federal system, especially in certain districts. However, judges rarely impose cash bail given the BRA's admonition that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).

3. According to the Department of Justice, just 2 percent of federal arrests are classified as violent. Mark Motivans, Federal Justice Statistics 2015–2016, BUREAU OF JUST. STAT., at 3 (Jan. 2019), https://www.bjs.gov/content/pub/pdf/fsj1516.pdf (Table 2) (just 2.3 percent of the 151,460 federal arrests in FY 2016 involved a violent offense as the most serious offense). In contrast, fully 25 percent of all state felony arrests are classified as violent offenses. Brian A. Reaves, Felony Defendants in Large Urban Counties, 2009, BUREAU OF JUST. STAT., at 2 (Dec. 2013, https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (25 percent of the 56,000 felony cases filed in the largest urban counties during the study involved a violent offense).


7. See Reaves, supra note 3, at 17 (Table 12).

8. See id. (showing an 88 percent detention rate for murder).


10. See Motivans, supra note 3, at 11 (Table 2).


the 10 districts with the highest release rates (average 65.58 percent) have an even lower failure-to-appear rate of 0.87 percent. See AO Table H-15, supra note 16; AO Table H-14A, supra. With regard to recidivism, the 10 districts with the lowest release rates have an average rearrest rate of 1.19 percent, while the 10 districts with the highest release rates have an average rearrest rate of 2.29 percent. See AO Table H-15, supra note 16; AO Table H-14A, supra. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, and C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, and D. Northern Mariana Islands. See AO Table H-14A, supra.

18. Austin, supra note 5, at 53 (“As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention.”) (citing AO Table H-9A; see also AO Table H-9A (Sept. 30, 2019), https://perma.cc/646M-WY2Y (showing that as of 2019, the average pretrial detention period nationwide was 253 days).


20. Austin, supra note 5, at 53.

21. See, e.g., Will Dobbie et al., The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges, 108(2) AMER. ECON. REV. 201 (2018) (finding that, when compared with people on pretrial release, people detained pretrial are less likely to get a job once their case concludes, and have lower incomes if employed); Alexander M. Holsinger & Kristi Holsinger, Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes, 82 Fed. Probation 39, 41–42 (2018), archived at https://perma.cc/LQ2ML-P8L3 (finding that, for individuals detained for 3 days or more, 76.1 percent report job loss or other job-related negative consequences, and 44.2 percent report that they are less financially stable); Curry v. Yachera, 835 F.3d 373, 377 (3d Cir. 2016) (“Unable to post his bail, Curry was sent to jail and waited there for months for his case to proceed. While imprisoned, he missed the birth of his only child, lost his job, and feared losing his home and vehicle.”).

22. Holsinger & Holsinger, supra note 21, at 42 (finding 37.2 percent of people detained pretrial for 3 days or more reported that their residential situation became less stable); Amanda Geller & Mariah A. Curtis, A Sort of Homecoming: Incarceration and Housing Security of Urban Men, 40 SOC. SCI. RESEARCH 1196, 1203 (2011) (finding that, among those already at risk for housing insecurity, pretrial incarceration leads to 69 percent higher odds of housing insecurity).

23. See generally Laura M. Maruschak et al., Medical Problems of State and Federal Prisoners and Jail Inmates, BUREAU OF JUST. STAT. (2014), https://www.bjs.gov/content/pub/pdf/mpsfpj1112.pdf (concluding that people in local jails are less likely to get diagnostic or medical services and are more likely to report worsened health as compared to those in state or federal prison); Faye S. Taxman et al., Drug Treatment Services for Adult Offenders: The State of the State, 32 J. SUBSTANCE ABUSE TREATMENT 239 (2007) (finding that, in state facilities, physical and mental health treatment is of poorer quality in jails than in prison).


25. Megan T. Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, 34 J. L. ECON. & ORG. 511, 512 (2018) (finding that pretrial detention leads to a 13 percent increase in the likelihood of conviction using data from state-level cases in Philadelphia); Dobbie et al., supra note 21, at 225 (finding that a person who is initially released pretrial is 18.8 percent less likely to plead guilty in Philadelphia and Miami-Dade counties); Mary T. Phillips, A Decade of Bail Research in New York City, N.Y.C. CRIM. JUST. AGENCY, at 116 (Aug. 2012), archived at https://perma.cc/A3UM-AHGW (“Among nonfelony cases with no pretrial detention [in New York City], half ended in conviction, compared to 92 percent among cases with a defendant who was detained throughout,” and in the felony context “[o]verall conviction rates rose from 59 percent for cases with a defendant who spent less than a day in detention to 85 percent when the detention period stretched to more than a week.”).

26. A recent empirical study of the federal system found that “federal pretrial detention appears to significantly increase sentences, decrease the probability that a defendant will receive a below-Guidelines sentence, and decrease the probability that they will avoid a mandatory minimum sentence if facing one.” Stephanie Holmes Didwania, The Immediate Consequences of Federal Pretrial Detention, 22 AM. L. & ECON. REV. 24 (forthcoming 2020), https://ssrn.com/abstract=2809818.
Courtwatching project spanned 10 weeks, from November 1, 2018, to December 7, 2018, and 173 hearings total: 107 Initial Appearance Hearings and 66 Detention Hearings. The first 7 weeks of Phase 1, in 49 out of the 54 cases in which clients were detained at the Initial Appearance (91 percent), a legitimate basis for detention existed under § 3142(f).

41. In 3 of the 55 cases in which prosecutors sought detention at the Initial Appearance, they based the detention request on reasons not authorized by § 3142(f): in 31 of the 55 cases prosecutors cited danger to the community (56 percent); in 33 of the 55 cases they cited ordinary risk of flight (60 percent). In a number of cases, they cited both.

42. During the first seven weeks of Phase 1, in 49 out of the 54 cases in which clients were detained at the Initial Appearance (91 percent), a legitimate basis for detention existed under § 3142(f).

43. During the first seven weeks of Phase 1, in 5 of the 54 cases in which clients were detained at the Initial Appearance (9 percent), judges detained clients without a basis under § 3142(f)(1) and without making a finding that the client presented a "serious risk of flight" under § 3142(f)(2)(A). Likewise, in those five cases, the government did not allege that the client posed a "serious risk of flight" under § 3142(f)(2)(A) or present any evidence to support such a finding.

44. For example, despite clear First Circuit authority to the contrary, a federal magistrate judge in the District of Puerto Rico detained an individual based on ordinary "risk of flight," even though no § 3142(f)(1) factor was met and there was no determination that the person posed a "serious risk of flight" as required by the statute. United States v. Martinez-Machuca, No. 18-cr-568, at 4–6 (D.P.R. Apr. 30, 2019), ECF No.49 (acknowledging that First Circuit law only authorizes detention when "one of the § 3142(f) conditions for holding a detention hearing exists") (quoting United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988)).

45. The courtwatching project team observed a total of 38 Initial Appearances Hearings during Phase 2. In 13 of the 38 cases, the client was released without objection from the government (34 percent). In 25 of the 38 cases, the government moved for detention (66 percent); in all those cases, the client was detained. In 8 of the 25 cases in which the government moved for detention at the Initial Appearance, the defense waived the issue of detention (32 percent). That left 17 cases in which the government moved for detention and the defense did not waive. In 14 of those 17 cases (82 percent), the government cited a proper statutory basis for detention at the Initial Appearance under § 3142(f).

46. During Phase 2, in all the 17 Initial Appearance Hearings where the government moved for detention and the defense did not waive, the judge detained the client until a Detention Hearing. Notably, in 14 of those 17 detained cases, the nature of the offense triggered detention under § 3142(f)(1). In the remaining 3 detained cases, the prosecutor moved for detention under § 3142(f)(2) and the judge concluded that there was sufficient evidence in the record to establish a serious risk of flight under § 3142(f)(2)(A) or, in one case, a serious risk to a witness under § 3142(f)(2)(B).

47. All the race data in this article comes from Phase 1 of courtwatching (10 weeks). In analyzing the race effects of detention in the courtwatching data, we have not controlled for any variables. We observed 107 Initial Appearances; prosecutors sought detention for 7 of the 12 White clients (58 percent), 41 of the 50 Black clients (82 percent), and 35 of the 38 Latinx clients (92 percent).

48. 18 U.S.C. § 3142(f) ("The judicial officer shall hold a [detention] hearing ... (1) upon motion of the attorney for the government, in a case that involves ..." any of the offenses listed in § 3142(f)(1)).

54. 18 U.S.C. § 3142(f)(2)(A) (on motion of the government or on the judge’s own motion).

55. 18 U.S.C. § 3142(f)(2)(B) (on motion of the government or on the judge’s own motion).

56. Salerno, 481 U.S. at 750 (stating that the BRA targets individuals whom Congress considered “far more likely to be responsible for dangerous acts in the community after arrest”) (citing § 3142(f)).

57. Id. at 747 (emphasis added). The Court continued by saying, “detention hearings [are] available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders”—that is, detention hearings are available only if one of the § 3142(f) factors is present. Id. (emphasis added); see also id. at 750 (the BRA “operates only on individuals who have been arrested for a specific category of extremely serious offenses” listed in § 3142(f)); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) (“[d]etention until trial is relatively difficult to impose” given the limitations in § 3142(f)); United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992) (stressing the limitations § 3142(f) places on detention and stating, “[t]here can be no doubt that this Act clearly favors nondetention”).

58. See, e.g., Ploof, 851 F.2d at 9 (“Section 3142(f) . . . specifies certain conditions under which a detention hearing shall be held.”); id. at 10 (reiterating that “§ 3142(f) does not authorize a detention hearing whenever the government thinks detention would be desirable, but rather limits such hearings to the circumstances listed in §§ 3142(f)(1) and (f)(2)(B);” United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (“[T]he requisite circumstances for invoking a detention hearing [enumerated in § 3142(f)] in effect serve to limit the types of cases in which detention may be ordered prior to trial.”) (quoting S. Rep. No. 225, at 20 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3189)).

59. See, e.g., Ploof, 851 F.2d at 9–11; United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (“[The BRA] limits the circumstances under which a district court may order pretrial detention. . . . Motion seeking such detention is permitted only when the charge is for certain enumerated crimes, 18 U.S.C. § 3142(f)(1) . . . , or when there is a serious risk that the defendant will flee or obstruct . . . justice. . . § 3142(f)(2)” (reversing detention order because the government had not established a § 3142(f) factor); Himler, 797 F.2d at 160 (reversing detention order and directing release in a fraud case because “Mr. Himler’s case does not involve any of the offenses specified in subsection (f)(1), nor has there been any claim that he would attempt to obstruct justice. . . .”); Byrd, 969 F.2d at 109–10 (“A [detention] hearing can be held only if one of the six circumstances listed in (f)(1) and (2) is present. . . .”) (reversing detention order); United States v. Twine, 344 F.3d 987, 987 (9th Cir. 2003) (reversing detention order); Singleton, 182 F.3d at 9 (affirming release order).

60. Ploof, 851 F.2d at 11.

61. Singleton, 182 F.3d at 9.

62. Friedman, 837 F.2d at 49.

63. Salerno’s holding that the BRA does not violate substantive due process depends in part on the fact that the statute only authorizes detention at the Initial Appearance under certain narrow and limited circumstances. 481 U.S. at 747. It was the § 3142(f) limitations, among others, that led the Court to conclude that the Act was “regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.” Id. at 748. “Any reading of the [BRA] that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the Salerno Court to uphold the statute as constitutional.” United States v. Gibson, 384 F. Supp. 3d 955, 963 (N.D. Ind. 2019).

64. Barring the rare circumstance where the prosecutor has evidence that the client poses a serious risk of obstructing justice or threatening a witness/juror under § 3142(f)(2)(B).

65. This argument should be made during the Initial Appearance Hearing. See Initial Appearance In-Court Checklist and Flowchart in Federal Criminal Justice Clinic’s In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

66. Ploof, 851 F.2d at 11 (where none of the subsection (f)(1) conditions were met, pretrial detention solely on the ground of dangerousness . . . is not authorized”); Friedman, 837 F.2d at 49 (“[T]he BRA does not permit detention on the basis of dangerousness in the absence of flight, obstruction of justice or an indictment for the offenses [in § 3142(f)(1)];”); Himler, 797 F.2d at 160 (“[T]he statute does not authorize the detention of the defendant based on danger to the community from the likelihood that he will if released commit another offense involving false identification.”); Byrd, 969 F.2d at 110 (“[A] defendant who clearly may pose a danger to society cannot be detained on that basis alone.”); Twine, 344 F.3d at 987 (“We are not persuaded that the [BRA] authorizes pretrial detention without bail based solely on a finding of dangerousness. This interpretation of the Act would render meaningless 18 U.S.C. § 3142(f)(1) and (2).”) (collecting cases); see also United States v. Morgan, 2014 U.S. Dist. LEXIS 93306, at *14–15 (C.D. Ill. July 9, 2014) (concluding that financial dangerousness was not a legitimate ground for detention at the Initial Appearance and denying the prosecution’s detention request in an access device fraud case); United States v. Glaster, 969 F. Supp. 92, 94 (D.D.C. 1997) (if none of the factors in § 3142(f) is met, “then no matter how dangerous or antisocial a defendant may be, Congress has concluded that such a defendant must be released, either on personal recognition or on the least restrictive condition[s] of release that will reasonably assure appearance and safety.”).
should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”) (quoting 

70. See *Bail Reform Act of 1983: Rep. of the Senate Comm. on the Judiciary* on S. 215, 98th Cong., S. Rep. No. 98-147, at 48 (1983) (“Under subsection (f)(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer’s own motion in three types of cases. … [Those types] involve serious risk that the defendant will flee … reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.”) (emphasis added) (citing *United States v. Abramov*, 575 F.2d 3, 8 (1st Cir. 1978) — which held that only a “rare case of extreme and unusual circumstances [ ] justifies pretrial detention” — as representing the “current case law”) (emphasis added).

71. *Himler*, 797 F.2d at 160 (emphasis added).

72. *Friedman*, 837 F.2d at 49–50. At the time *Friedman* was decided, minor victim cases were not covered by § 3142(f)(1); the statute has since been amended to include such cases in § 3142(f)(1)(E). However, *Friedman* is still instructive on the proper approach to cases not listed in § 3142(f)(1), where the government’s only possible basis for detention is § 3142(f)(2).

73. During Phase 1, the defense objected to detention in 8 of the 89 Initial Appearances where the government was seeking detention (9 percent).

74. During Phase 2, the defense raised an objection to detention in 5 of the 17 Initial Appearances where the government sought detention and the defense did not waive (29 percent).

75. See *Template Motion for Immediate Release and Template Appeal of Magistrate Judge’s Detention Order* in Federal Criminal Justice Clinic’s In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

76. 18 U.S.C. § 3142(f).

77. *Id.*

78. While the BRA does not speak to this issue, defense attorneys should argue that it is not legitimate for prosecutors to request a continuance to either investigate the client’s criminal record or wait for the Pretrial Services Report.

79. See *Detention Hearing In-Court Checklist and Flowchart and Template Motion for Release in a Presumption Case* in Federal Criminal Justice Clinic’s In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

80. *Salerno*, 481 U.S. at 755 (“In our society liberty is the norm, and detention prior to trial … is the carefully limited exception.”).

81. 18 U.S.C. § 3142(e)(3). Note that there is a separate presumption of detention if the person is charged with a detention eligible crime under § 3142(f), has been convicted of a similar offense, was on release when the prior offense was committed, and not more than five years have elapsed since conviction or release for that prior offense. See § 3142(e)(2). This § 3142(e)(2) presumption is extraordinarily rare.


83. Austin, supra note 5, at 55 (finding that from 2005 to 2015, the presumption “applied to between 42 and 45 percent of [all federal] cases.”).

84. All the courtwatching data in the Detention Hearing section of this article comes from Phase 1 of the courtwatching project (the first 10 weeks). The § 3142(e) presumption applied in 17 of the 42 cases where detention was contested (40 percent).

85. Of the 17 cases with contested Detention Hearings where the presumption of detention applied, 15 were drug cases (88 percent) and 16 involved people of color (94 percent). Of the 8 clients detained in presumption cases, all 8 were people of color (100 percent).

86. Of the 17 cases with contested Detention Hearings where the presumption of detention applied, the judge found the presumption rebutted in 11 (64 percent) and detained the client in 8 (47 percent).

87. Of the 66 total Detention Hearings observed in Phase 1, the prosecutor sought detention for 3 of the 7 White clients (43 percent), 30 of the 34 Black clients (88 percent), 13 of the 19 Latinx clients (68 percent), and 5 of the 5 Middle Eastern clients (100 percent).

88. Of the 42 contested Detention Hearings observed in Phase 1, one of the 2 White clients was detained (50 percent), 16 of the 24 Black clients were detained (67 percent), 4 of the 8 Latinx clients were detained (50 percent), and 3 of the 5 Middle Eastern clients were detained (60 percent).

89. Austin, supra note 5, at 61.

90. *Id.* at 57.

91. *Id.*

92. *Id.*

93. *Id.* at 55.

94. *Id.* at 58.

95. *Id.* at 60.

96. See *Template Motion for Release in a Presumption Case* in Federal Criminal Justice Clinic’s In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs.

97. The Judicial Conference is a powerful body presided over by Chief Justice Roberts that includes the chief judge of every federal circuit. See *Report of the Proceedings of the Judicial Conference of the United States* (Sept. 12, 2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf. The Conference’s proposed revision reads as follows (new language underlined): “(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 if the judicial officer finds that there is probable cause to believe that the person committed — (A) an offense for which a maximum term of imprisonment of 10 years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or chapter 705 of title 46 and such person has previously been convicted of two or more offenses described in subsection (f)(1) of this section, or two or more state or local offenses that would have been offenses described in subsection (f)(1) of this section if a circumstance giving rise to federal jurisdiction had existed, or a combination of such offenses.” *Id.* at 10–11. The Judicial Conference reiterated this same recommendation during the COVID-19 pandemic. See *Letter from the Judicial Conference of the United States to the House and Senate Appropriations Committees* (April 28, 2020), https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf.

98. During the first 7 weeks of Phase 1, the defense waived the Detention Hearing in 29 of the 83 cases where the prosecutor had sought detention at the Initial Appearance and was still seeking detention at the Detention Hearing (35 percent).

99. As noted above, FCJC held a CLE training after the first 7 weeks of Phase 1 of courtwatching. See * supra* note 31. During the final 3 weeks of Phase 1, the defense waived the Detention Hearing in 13 of the 58 cases where the prosecutor had sought detention at the Initial Appearance and was still seeking detention at the Detention Hearing (22 percent).

100. During Phase 1, the courtwatching project team observed 42 contested Detention Hearings; 17 clients were released (40 percent).

101. See *Template Motion for Release in a Presumption Case* in Federal Criminal
Justice Clinic’s In-Court Checklists and Template Motions, available at https://www.nacdl.org/FederalCriminalJusticeClinicDocs. Defense counsel can cite this article for that data, as well as AO Table H-15, supra note 16, and Figure 1.

102. There is a constitutional argument that the standard for flight risk should be clear and convincing evidence. Currently, courts interpret the burden to establish risk of flight as the lower preponderance of the evidence standard. See United States v. Motamedi, 767 F.2d 1408, 1404 (9th Cir.1985) (stating that the prosecutor must establish by a preponderance of the evidence that [the defendant] poses a flight risk); United States v. Cisneros, 328 F.3d 610, 612 (10th Cir. 2003) (same); Himler, 797 F.2d at 161; United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Vortis, 785 F.2d 327, 329 (D.C. Cir. 1986); United States v. Medina, 775 F.2d 1398, 1402 (11th Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405–06 (2d Cir. 1985); United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985). While the text of the BRA is silent on the standard of proof for a finding of flight risk, the Constitution requires a higher standard of proof than preponderance of the evidence for deprivations of liberty. It is unconstitutional to use the preponderance of the evidence standard — employed in ordinary civil cases involving “mere loss of money” — where a person stands to lose his physical liberty in the face of pretrial detention. Addington v. Texas, 441 U.S. 418, 424 (1979). Where deprivation of physical liberty is at stake, the Supreme Court consistently applies the clear and convincing evidence standard. See, e.g., Foucha v. Louisiana, 504 U.S. 71, 82 (1992) (holding that clear and convincing evidence is the appropriate standard of proof for a state to confine a mentally ill defendant); Cruzan ex rel. Cruzan, 497 U.S. 261, 282–83 (1990) (upholding Missouri’s statute requiring clear and convincing evidence for withdrawal of life support); Santosky v. Kramer, 455 U.S. 745, 756 (1982) (holding that the Fourteenth Amendment at minimum requires the clear and convincing evidence standard before a state can terminate parental rights); Addington, 441 U.S. at 427 (concluding that preponderance of the evidence is insufficient for civil commitment of mentally ill individuals, and that due process requires the heightened standard of clear and convincing evidence). In each of these cases, the Supreme Court reasoned that clear and convincing evidence strikes the “appropriate balance between scrupulous protection of individual liberty interests and the government interest in public safety.” Caliste v. Cantrell, 329 F. Supp. 3d 296, 313 (E.D. La. 2018). The same logic applies in the context of pretrial detention. People have a fundamental liberty interest in not being confined pending trial, and the Fifth Amendment requires that any deprivation of liberty be attended by robust procedural protections. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

103. 18 U.S.C. § 3142(f); Salerno, 481 U.S. at 750 (confirming that “[t]he 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”). 104. 18 U.S.C. § 3142(e)(1), (c)(1)(B). The BRA’s “reasonably assure” language recognizes that the possibility of flight exists for “every defendant released on conditions; [b]ut it is also not the standard authorized by law for determining whether pretrial detention is appropriate.” United States v. Xulam, 84 F.3d 441, 444 (D.C. Cir. 1996).

105. 18 U.S.C. § 3142(g)(1)–(4). Courts have held that the weight of the evidence is the least important factor for the judge to consider. See, e.g., United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) (“The weight of the evidence against the defendant is a factor to be considered but it is ‘the least important’ of the various factors.”) (quoting Motamedi, 767 F.2d at 1408)); United States v. Gray, 651 F. Supp. 432, 436 (W.D. Ark. 1987) (“[T]he court does not believe that … any court should presume that every person charged is likely to flee simply because the evidence against him appears to be weighty. … Such a presumption would appear to be tantamount to a presumption of guilt, a presumption that our system simply does not allow.”).


110. See, e.g., United States v. Jessup, 757 F.2d 378, 380–84 (1st Cir. 1985), abrogated on other grounds by United States v. O’Brien, 895 F.2d 810 (1st Cir. 1990) (holding that the prosecutor bears the burden of persuasion at all times while a defendant just bears a burden of production, which entails producing “some evidence” under § 3142(g)); Dominguez, 783 F.2d at 707 (analyzing the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing “some evidence” under § 3142(g), and concluding that after it is rebutted, “[the presumption] 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);” United States v. Gamble, No. 20-3009, 2020 U.S. App. LEXIS 11558 at *1–2 (D.C. Cir. Apr. 10, 2020) (holding that “[t]he district court erred in concluding that appellant failed to meet his burden of production to rebut the statutory presumption” regarding dangerousness because “appellant did offer some credible evidence contrary to the statutory presumption,” including information that he had a job offer) (unpublished) (quoting United States v. Alatishe, 768 F.2d 364, 371 (D.C. Cir. 1985)); Chimurenga, 760 F.2d at 405; United States v. Stone, 608 F.2d 939, 945 (6th Cir. 2010); United States v. Hurtado, 779 F.2d 1467, 1479-80 (11th Cir. 1985).

111. Dominguez, 783 F.2d at 707. As long as a defendant “come[s] forward with some evidence that [the defendant] will not flee or endanger the community if released,” the presumptions of flight risk and dangerousness are definitively rebutted. Id. 112.Id. (quoting Jessup, 757 F.2d at 384).

113. Jessup, 757 F.2d at 384 (finding (Continued on page 63)}
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(Continued from page 59)

that after the defendant produces "some evidence" to rebut the presumption, the "judge should then still keep in mind the fact that Congress has found that offenders, as a general rule, pose special risks of flight. The ... judge should incorporate that fact and finding among the other special factors that Congress has told him to weigh when making his bail decision. See § 3142(g) ... Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors."; see also Dominguez, 783 F.2d at 707.

114. See Jessup, 757 F.2d at 384 ("[T]he presumption is but one factor among many.").


117. However, Ninth Circuit law grants non-citizen clients credit toward their federal sentence for time served in ICE custody. Zavala v. Ives, 785 F.3d 367, 380 (9th Cir. 2015) ("We hold that when immigration officials detain an alien pending potential prosecution, the alien is entitled under § 3585(b) to credit toward his federal sentence. We also hold that an alien is entitled to credit for all time spent in ICE detention subsequent to his indictment or the filing of formal criminal charges against him.").

118. Cohen, supra note 30, at 15.

119. Id.

120. United States v. Alien-Alion, 875 F.3d 1334, 1337 (10th Cir. 2017) ("[A]lthough Congress established a ‘serious risk that [the defendant] will flee’..."").

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