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Federal Bail Priorities for the Biden-Harris Administration: Executive Branch Policies

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Top line recommendation: The new administration should create clear guidelines for its constituent U.S. Attorney's Offices (USAO) aimed at reducing federal pretrial detention rates, limiting pretrial detention to cases where it is genuinely necessary, reducing racial disparities in pretrial detention, and eliminating all financial considerations from the detention calculus. This administration should recognize that decisions about whether to seek pretrial detention are "among the most fundamental duties of federal prosecutors."[1] Such decisions—like charging and sentencing decisions—involve "the reasoned exercise of prosecutorial discretion" and require "an individualized assessment."[2] Accordingly, rather than seeking detention across the board in, for example, every case involving a statutory presumption of detention or a drug offense, USAO's must use their discretion to realign pretrial outcomes with the spirit of the Bail Reform Act (BRA), 18 U.S.C. § 3142.

Background: Federal bail reform is essential to reducing mass incarceration and advancing racial equity. The 75% federal pretrial detention rate stands in stark contrast to a 45% detention rate for state-level violent felonies.[3] Incarceration at such levels is unnecessary and counterproductive. For decades, federal prosecutors have asked judges to jail even more people than they ultimately do, with prosecutors' detention request rates rising from 56% in 1997 to 77% in 2019.[4] The Executive Branch's discretionary decisions are thus a key driver of the high federal detention rates.

Base DOJ's pretrial detention guidelines on data, not fear.

- Government statistics show that 99% of people released pretrial return to court and 98% do not reoffend on bond.[5] This evidence indicates that prosecutors overestimate both flight risk and dangerousness when seeking detention.
- Government statistics show that the presumptions of detention overdetain low-risk individuals in drug and gun cases.[6] A bipartisan coalition in the Senate has relied on this government study to propose legislation eliminating the presumption of detention in drug cases.[7] The same data indicates that prosecutors must rethink their approach to presumption cases.
- The vast majority of individuals charged in federal cases are indigent and do not have the funds, means, or wherewithal to flee. Many are rooted in urban communities that they have never left, making it highly unlikely that they will leave if released on bond.

Implement new DOJ policies for pretrial release and detention.

- Presumption cases: The government's overreliance on the BRA's presumption of detention in § 3142(e)(3) is a major driver of high federal incarceration rates and accompanying racial disparities.[8] Do not rely on the presumption to determine whether to request detention. Instead, only request detention when other objective indicators genuinely demonstrate a high risk that the person will fail to return to court or pose a genuine danger. Such indicators might include numerous proven failures to appear in court or prior convictions involving violence.

- Drug cases: Only request detention when the evidence suggests that the person is a leader, organizer, or manager or other objective indicators genuinely demonstrate that there is a high risk that the person will fail to return to court or poses a genuine danger. In a drug case where these concerns are not present, the default should be release with the least restrictive conditions under § 3142(c).
- Gun cases and other cases from the state: When the USAO decides to prosecute a state case federally and the person is on bond in the state case and performing satisfactorily, there should be a presumption that the person remain on bond in the federal case.
- Eliminate financial conditions of release: Congress intended the BRA to eradicate a system that let rich people buy their freedom while jailing poor people who could not pay for release. As the statute says: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person."[9] But in practice, federal prosecutors have long requested conditions of release that privilege the wealthy. Going forward, prosecutors must instead use their discretion to propose alternative conditions for release that are equally effective and do not violate the spirit of the BRA.
    - Request unsecured bonds in the vast majority of cases involving defendants with appointed counsel.
    - Eliminate all reliance on corporate surety bonds. Such bonds result in the needless detention of indigent individuals and are an end-run around the BRA's prohibition on financial conditions. Corporate surety bonds are like cash bail by another name and partake of the same problems. Given the 99% appearance rate of people on federal pretrial release, corporate surety bonds are unnecessary.
    - Do not request that family members or third-party custodians demonstrate that they are "solvent" before co-signing a bond.
    - Ask judges not to burden indigent defendants with the administrative costs of their own release, such as paying for electronic monitoring.
- Immigration cases, cases involving a defendant who is not a U.S. citizen, and cases involving an ICE detainer: Do not automatically seek detention in such cases. Instead, conduct an individualized assessment of the defendant to determine whether there is a high risk that they will fail to return to court. Coordinate with ICE to alleviate any concern that a released individual will be deported before the completion of the criminal case or detained by ICE and not made available to the federal court presiding over the criminal case.
- Initial Appearance hearing:
    - In cases listed in § 3142(f)(1), do not automatically seek detention. Instead, make the discretionary decision to request detention only when other objective indicators demonstrate a high risk that the person will fail to appear or poses a genuine danger.
    - In cases not listed in § 3142(f)(1), do not seek detention under § 3142(f)(2)(A) unless objective indicators genuinely demonstrate that there is a high risk that the person will fail to appear in court.
    - In all cases, conduct an individualized assessment that accounts for the history and characteristics of the person under § 3142(g)(3), not just offense-related factors.
    - As a general rule, hold Detention Hearings on the same day as the Initial Appearance and do not seek continuances.

- Criminal history considerations (at Initial Appearance and Detention Hearing):
    - If the person has a minimal criminal history (i.e., Criminal History Category I or II), the prosecutor should not move for detention unless objective indicators demonstrate a high risk that the person will fail to appear or poses a genuine danger.
    - In determining whether to seek detention, the prosecutor should give minimal weight to prior convictions under the following circumstances: (1) the arrest occurred over 10 years earlier, (2) the person received less than one year in prison, (3) the person successfully completed supervised release or probation, or (4) the conviction was for a non-violent drug offense.
- Work with other stakeholders to solve systemic problems
    - *Denial of counsel at Initial Appearance*: Work with the Court and the local Federal Public Defender's office to ensure representation of indigent defendants in all bond-related hearings. Refuse to proceed with a hearing if an indigent defendant is not represented by appointed counsel during the entirety of the Initial Appearance hearing or any other hearing.
    - *No Pretrial Services Report provided at Initial Appearance*: Work with the Court and the local Pretrial Services/Probation Office to ensure that Pretrial Services Reports are provided promptly to all parties at the Initial Appearance hearing.

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[1] Memorandum from Att'y Gen. Eric Holder to all Fed. Prosecutors, *Memorandum to All Federal Prosecutors: Department Policy on Charging and Sentencing* at 1 (May 19, 2010) (stating, "Decisions about whether to initiate charges, what charges and enhancements to pursue, when to accept a negotiated plea, and how to advocate at sentencing, are among the most fundamental duties of federal prosecutors"). The Holder memo noticeably failed to include pretrial detention decisions on this list, an omission that this administration should correct.

[2] *Id*.

[3] See Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009*, BUREAU OF JUST. STAT., at 17, Table 12 (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

[4] Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, THE CHAMPION, July 2020, at 47, https://www.law.uchicago.edu/files/Rethinking%20Federal%20Bail%20Advocacy%20to%20Change%20the%20Culture%20of%20Detention%20%28NACDL%20Champion%20July%202020%29.pdf (citing AO Table H-3 (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf; AO Table H-3 (Sept. 30, 1997), https://www.uscourts.gov/sites/default/files/statistics_import_dir/h03sep97.pdf.).

[5] Siegler & Zunkel, *Rethinking Federal Bail Advocacy*, *supra*, at 47 & Figure 1; AO Table H-15 (Dec. 31, 2019), archived at https://perma.cc/LYG4-AX4H (showing a failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

[6] *See* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROBATION 52 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf.

[7] *See* the Smarter Pretrial Detention for Drug Charges Act of 2020 (Sept. 19, 2020), co-sponsored by Sen. Dick Durbin (D-IL), Sen. Mike Lee (R-UT), and Sen. Chris Coons (D-DE).

[8] *See* Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, supra at 53; Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. (forthcoming 2021) (on file with author) (detailing the results of an empirical study of 300,000 federal cases from 2002 to 2016 that showed that people of color are detained before trial at a higher rate than whites, even after controlling for other factors that are predictive of detention or release).

[9] 18 U.S.C § 3142(c)(2); *see also 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*, 115th Cong. (Nov. 14, 2019), Written Statement of Alison Siegler, at 10–11, https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf.