Pretrial Release Hearings in Tribal Criminal Courts: Bail and Conditions of Pretrial Release

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WHAT WE WILL DISCUSS

- Background: the U.S. Constitution and the right to bail
- The primary purpose of bail in our judicial system
- The difference between “bail” and “bond”
- The factors that Tribal judges consider in setting bail, and the importance of a well-drafted order on bail conditions
- Federal laws pertaining to bail in federal courts
- Whether our bail system is discriminatory
- The manner in which tribal courts have implemented the right to bail

BACKGROUND: THE TWIN GOALS OF THE U.S. CONSTITUTION

The Framers of the Constitution had two overarching goals: (1) create a democracy, and (2) guarantee liberty for all.

In most governmental matters, the majority rules. But the Bill of Rights ensures that even the majority cannot take away certain rights guaranteed to the individual.

The right to be free of excessive bail is one of the liberties protected by the Bill of Rights. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

BAIL IS NOT AN ABSOLUTE RIGHT

The Eighth Amendment does not guarantee an *absolute* right to bail but it does guarantee, the Supreme Court has explained, that an unnecessary restriction on bail will violate the Eighth Amendment, which is protected through the Due Process Clause against arbitrary loss. *United States v. Salerno*, 481 U.S. 739, 748-55 (1987).

BAIL IS ALSO PROTECTED BY THE INDIAN CIVIL RIGHTS ACTS (ICRA)

The Indian Civil Rights Act was passed by Congress in 1968 to provide to all persons subject to tribal law nearly all of the guarantees contained in the Bill of Rights. One of these is the protection against excessive bail.

Section 1302(a)(7)(A) of the ICRA provides: "No Indian tribe in exercising powers of self-government shall . . . require excessive bail, impose excessive fines, or inflict cruel and unusual punishments."

This protection applies to *all* criminal defendants in tribal court, even those being prosecuted under TLOA or VAWA.

THE PRIMARY PURPOSE OF BAIL

Bail serves two goals.

First, bail helps preserve our civil liberties by permitting criminal defendants to remain free and maintain their normal lives, consistent with their presumption of innocence.

Second, bail protects society by providing a financial incentive for criminal defendants to return to court for their trial.

WHAT IS THE DIFFERENCE BETWEEN BAIL AND BOND?

Bail money and bond money both have the same effect: they allow for the release of the defendant from jail pending the outcome of the trial.

Bail money, however, is paid to the court *by the defendant*.

Bond money is posted on behalf of the defendant *by someone else*.

Failure to appear for trial, or to comply with the conditions set by the Tribal court, can result in a forfeiture of the bail money or posted bond.

BAIL AND BOND OPTIONS

BAIL:

- Cash bail.
- *Secured* bail (secured by property).
- *Unsecured* bail (a promise to pay, no money down).
- Personal recognizance (“ROR”).

BOND

- Cash posted by a third party for the full amount.
- A percentage, with a promise to pay the rest.

IS THERE A TIME LIMIT ON SETTING BAIL?

The Fourth Amendment guarantees that no person will be arrested and detained without “probable cause.” In *City of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court held that, in most situations, a person arrested and detained must be afforded a hearing to determine probable cause within 48 hours. *Id*. at 56-57.

This 48-hour deadline might not apply to the setting of bail, however. The Supreme Court hasn’t addressed the question of how promptly a person arrested must have a bail hearing.

IS THERE A TIME LIMIT ON SETTING BAIL? (cont.)

Many states statutorily impose a 48-hour deadline, but the prevailing view is that the Eighth Amendment does not require a bail hearing within 48 hours. *See, e.g.*, *Mitchell v. Doherty*, 37 F.4th 1277, 1279 (7th Cir. 2022) ("Plaintiffs argue that Supreme Court and circuit precedent requires a bail hearing within forty-eight hours after a suspect's arrest. We disagree.")

A number of states allow for longer periods of time, such as Ohio (3 days), N.M. (5 days), and AZ (7 days). The federal Bail Reform Act requires that the bail hearing occur "immediately upon the person's first appearance" but the Act authorizes the prosecutor to request a five-day extension.

IS THERE A TIME LIMIT ON SETTING BAIL UNDER ICRA?

Accordingly, the Indian Civil Rights Act (ICRA) doesn’t likely impose a 48-hour deadline for a tribal bail hearing. It’s unclear exactly when a delay would cross the line. *See Reynolds v. Flynn*, 2022 WL 20538911 (D. Colo. 2022) (holding that delaying a bail hearing for 15 days raises a constitutional claim). All jurisdictions should determine bail “in a reasonably prompt manner.” *Holder v. Town of Newton*, No. CIV. 08-CV-197-JL, 2010 WL 432357, at *13 (D.N.H. Feb. 3, 2010) (citing cases).

WHAT FACTORS ARE CONSIDERED IN SETTING BAIL?

Most tribal codes, like most state codes, rely on the following factors in setting bail:

- The severity of the crime
- The defendant’s criminal history
- The likelihood that the defendant may flee, e.g., the defendant’s ties to the community
- Public safety

In some instances, the court may impose conditions on release, such as wearing an ankle bracelet or a prohibition on contacting the alleged victim. It is important, of course, for tribal release orders to detail any restrictions the court intends to impose on the defendant.

OTHER FACTORS CONTAINED IN TRIBAL CODES (pt.1)

Navajo Rule of Criminal Procedure 15(d):

Denial of Release. If there is reason to believe that the defendant is dangerous to public safety or that the defendant will commit a serious crime, or will seek to intimidate any witness, or will otherwise unlawfully interfere with the administration of justice if released, or for any other reason allowed by law, then the court may deny release or may order the defendant to abide by any other condition(s) necessary to the orderly administration of justice. The court must state the reasons for the record.

OTHER FACTORS CONTAINED IN TRIBAL CODES (pt.2)

The Chickasaw Nation Rules of Criminal Procedure, Sec. 5-1001.6, lists nine factors the court must consider:

1. the seriousness of the crime charged against the Person; 2. the apparent likelihood of conviction and the extent of the punishment prescribed by law; 3. the Person's criminal record, if any, and previous record on Bail, if any; 4. the Person's reputation and mental condition; 5. the length of residency in the community; 6. the Person's family ties and relationships; 7. the Person's employment status, record of employment and financial condition; 8. the identity of responsible members of the community who would vouch for the Person's reliability; and/or 9. Any other factors indicating the Person's mode of life, or ties to the community or bearing on the risk of failure to appear.

OTHER FACTORS CONTAINED IN TRIBAL CODES (pt. 3)

Rosebud Sioux Tribe, Tribal Law and Order Code, Sec. IV(2), provides that the Court must set “appropriate bail” but the Code provides no factors that must be considered. The Code also states that the defendant “may be released upon his own recognizance . . .upon his promise to appear before the Court at the times set for such appearance.”

Similarly, the Code of Ordinances of the Eastern Band of Cherokee Indians, Sec. 58-17, provides that the granting of bail and the conditions of bail “shall be in the discretion of the Court.”

BAIL IN FEDERAL COURTS: THE BAIL REFORM ACT OF 1984

Bail in federal courts is governed by the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq*.

Under Sec. 3141(b), the judicial officer having authority to determine pretrial release must release the defendant on "personal recognizance" or "unsecured appearance bond" unless the officer determines that those options would not "reasonably assure" the defendant's appearance at court proceedings, or will "endanger the safety of any other person or the community."

BAIL IN FEDERAL COURTS: THE BAIL REFORM ACT OF 1984 (cont.)

In that situation, the officer must consider the factors listed in Sec. 3141(g) in determining whether to release the defendant on bail and in setting an amount:

1. the nature and circumstances of the offense, such as whether the offense is a crime of violence or involves narcotics;
2. the weight of the evidence against the person;
3. the character and history of the person --
   A. character -- including physical and mental condition, family ties, community ties, employment, past conduct relating to drug or alcohol abuse, criminal history, record of court appearances; and
   B. whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other conditional release; and
4. the nature and seriousness of the danger to any person or to the community that would be posed by the person’s release.

IS OUR BAIL SYSTEM DISCRIMINATORY? (pt.1)

More than 600,000 people are incarcerated each day in U.S. jails. According to a 2015 report from the Vera Institute, (a) the majority are pretrial detainees who are in jail *only* because they cannot afford bail, and (b) three-fourths of them were arrested for nonviolent offenses.

Many people view this as wealth-based discrimination. After all, people who cannot make bail typically suffer severe consequences that wealthier people avoid, in addition to the loss of their freedom.

IS OUR BAIL SYSTEM DISCRIMINATORY? (pt.2)

First, as the Vera report emphasized, incarceration for even a few days often has dire consequences, such as being fired from employment, eviction for nonpayment of rent, and loss of child custody.

Second, incarceration can leave permanent psychological scars, particularly in Indian country where tribal jails are often brutally substandard.

Third, pretrial detainees who cannot make bail are more inclined to plead guilty, especially those arrested for minor crimes who face more time awaiting trial than what their sentence likely would be if convicted.

IS OUR BAIL SYSTEM DISCRIMINATORY? (pt.3)

Moreover, this predicament has spawned the growth of bond companies that earn an estimated $2 billion a year, almost wholly from poor people who lack the money to post bail. Whereas wealthier defendants will have their bail returned at the end of trial, poor families that obtain bonds will never get their money back even if the defendant is acquitted or the charges are dropped.

WHAT REFORMS ARE AVAILABLE?

A number of states are experimenting with bail reforms:

- Illinois abolished cash bail entirely in 2023 and considers only public safety. Studies show that crime has not increased as a result.
- New York is experimenting with supervised release rather than bail.
- Connecticut requires that a pretrial detainee arrested for a misdemeanor be released ROR after 14 days.

WHAT HAVE TRIBAL COURTS BEEN HOLDING ON THE RIGHT TO BAIL? (pt.1)

Case law shows that tribal courts have been respectful of, and sensitive to, the ICRA's prohibition against the imposition of excessive bail. *See, e.g.,*

Norris v. Hopi Tribe, No. 97-CR-001269, 1998 WL 35281683 (Hopi C.A. Nov. 23, 1998) (invalidating a high bail not supported in the record, explaining that "Any restriction upon the defendant's liberty which is greater than the amount necessary to provide reasonable assurance of appearance at trial is inherently punitive."

WHAT HAVE TRIBAL COURTS BEEN HOLDING ON THE RIGHT TO BAIL? (pt.2)

Apachito v. Navajo Nation, No. SC-CV-34-02, 2003 WL 25794140 (Navajo Aug. 13, 2003) (holding that, on appeal, a bail setting challenged as being excessive will be overturned unless "clear and convincing evidence" exists in the record to support it).

Parisian v. Coleville Confed. Tribes, 11 Am. Tribal Law 308 (Colv. Confed. Ct. App. 2014) (holding that access to reasonable bail "is a question touching on a defendant's fundamental rights, [and therefore] the Judge needs to state on record the basis of her decision" to impose money bail and the court's findings must support the amount set.

WHAT HAVE TRIBAL COURTS HOLDING ON THE RIGHT TO BAIL? (pt.3)

Someone denied bail or assessed excessive bail would remain incarcerated, which would qualify that person to file a writ of habeas corpus in federal court under 25 U.S.C. § 1303. A Westlaw search found not a single federal court decision reviewing a tribal court order relating to bail. Admittedly, not everyone in a tribal jail would have the ability to file a writ of habeas corpus or know that such an option exists, but the lack of any such ruling suggests that tribal courts are handling bail issues appropriately.

QUESTIONS

Thank You!

Please email us at WOCG@TLPI.org if you have more questions

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