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

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1. Background: The Twin Goals of the U.S. Constitution

The Framers of the Constitution had two overarching goals, the first of which was to create a democracy, and the second of which was to guarantee liberty. A democracy, the Framers believed, was the best protection against autocratic rule by a monarch, such as those who had been ruling European countries for centuries as dictators.

The Framers were aware that although a democracy is the best overall form of government, it does not guarantee liberty. That is because, in a democracy, the majority rules, and thus any majority—political, ethnic, or religious—can eliminate the rights of all minority groups. The Framers wanted to ensure that *all* persons could exercise their inalienable liberties. Therefore, they added the Bill of Rights to the Constitution—the first ten amendments—to ensure that even the majority cannot deny certain civil liberties without just cause. In most matters, then, the majority rules (and not some autocrat), but even the majority cannot take away certain rights guaranteed to the individual.

One of these individual liberties is the right to be free of excessive bail. Under the judicial system created by the U.S. Constitution, all persons arrested for a crime are presumed innocent and, for that reason, have a right to be considered for bail. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Eighth Amendment does not confer 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).

2. The ICRA contains a similar provision regarding bail

Bail is also protected by the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301 *et seq.* Congress enacted the ICRA 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.

3. What is 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 (both at home and at work), consistent with their presumption of innocence.

Second, bail also protects society by providing a financial incentive for criminal defendants to return to court for their trial. In short, when someone is arrested for a crime, society has a legitimate need to ensure that the defendant will appear at trial, while the defendant, who is presumptively innocent, has a right to remail free until guilt is proven in a court of law. Bail provides the vehicle to satisfy both needs.

4. What is the difference between the terms "bail" and "bond"?

Bail money and bond money both have the same effect: they allow for the release of the defendant 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*.

After trial, the money deposited as bail is returned by the court to the defendant (although a small administrative fee may be charged). Not so for bond money. To obtain a bond, the defendant typically must give a bail bond company—sometimes called a "bondsman"—a percentage of the total bail amount, often at least 10%. The bond company deposits the entire bail (unless the court permits a lessor amount with a promise to pay the remainder if the defendant fails to appear at trial) but, when the court returns the bail to the company after trial, the company keeps the defendant's payment as its fee.

5. What are some bail and bond options?

A. *Bail options*:

One bail option is for the defendant to submit the entire bail to the court. Some courts permit the defendant to post a *secured* bond, such as title to a house, without requiring the defendant to deposit money; in that instance, if the defendant fails to appear, the court will sell the property and retain the amount of the bail. Some courts also permit a criminal defendant to post an *unsecured* bond. In that situation, no money is paid up front, but the defendant promises to pay a set amount if the defendant fails to appear.

In addition, some courts permit a defendant to be *released on their own recognizance* (ROR) sometimes called "Personal Recognizance." In that situation, the defendant is released without the payment of any money. ROR is typically limited to those situations in which the defendant is accused of having committed a minor offense and the defendant has strong ties in the community and is thus unlikely to flee prosecution.

B. *Bond options*:

There are two basic bond options: either the bond is for the full amount of the bail or, as some courts allow, the bond is for a percentage of the bail with a promise to pay the entire amount if the defendant fails to appear for trial.

6. 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.

Although many states statutorily impose a 48-hour deadline, consistent with the Court's ruling in *McLaughlin*, *see, e.g.,* N.J.S.A. 2A:162–16(a), 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 three days in Ohio, *see* Ohio Rev. Code Ann. § 2937.222(A) (2022); five days in New Mexico, *see* N.M. R. Crim. P. 5-401(A)(1); and seven days in Arizona, *see* Ariz. R. Crim. P. 7.2(b)(4)(B). The federal Bail Reform Act provides that the bail hearing should be held "immediately upon the person's first appearance" but the Act authorizes the prosecutor to request a five-day extension. 18 U.S.C. § 3142(f)(2)(B).

Accordingly, the 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).

7. What factors are considered in setting the amount of bail?

Many tribal codes, like many state codes, rely on the following factors in setting bail:

a. The severity of the crime. (When the crime is severe—and especially if the crime was violent—bail may be set high, and could be denied.)
b. The defendant's criminal history. (If the defendant has a long criminal history, bail will likely be set high out of a fear that the defendant may reoffend while on bail.)
c. The likelihood that the defendant may flee. (If the defendant has no ties to the community, bail could be set high to discourage the defendant from fleeing, whereas if the defendant lives in the community and is employed there, bail could be lower.)
d. Public safety.

As a general rule, the judge wants to set bail high enough to entice the defendant to appear at trial. In some instances, the court may impose conditions on release, such as wearing an ankle

bracelet, a prohibition on leaving the jurisdiction, periodic drug testing, 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.

8. Other factors contained in some tribal codes

Some Tribal Codes contain additional factors that the court must consider. For example, Navajo Rule of Criminal Procedure 15(d) provides:

> **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.

The Chickasaw Nation Rules of Criminal Procedure, Sec. 5-1001.6, lists nine factors to 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.

Some tribal codes leave bail to the discretion of the court, providing no factors that the court must consider. For instance, 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."

9. 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. 3141-3156.

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."

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. Those factors are:

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.

10. Is our bail system discriminatory?

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. *See* Vera Institute, "Incarceration's Front Door: The Misuse of Jails in America" (2015), available at https://vera-institute.files.svdcdn.com/production/downloads/publications/incarcerations-front-door-summary.pdf.

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.

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.

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.

11. What reforms are available?

Nationally, there is a growing movement towards basing release on a risk assessment, not the defendant's wealth. This way, offenders, including repeat offenders, cannot simply buy their way out of jail.

In 2023, Illinois became the first state to abolish cash bail entirely in favor of other conditions of release. Under the Illinois legislation, judges must notify the alleged victim and consider public safety but *not* base release on the defendant's wealth. Since passage of the legislation, crime has not increased, according to a recent study. *See WTTW News*, "It's Been a Year Since Illinois Eliminated Cash Bail. Prosecutors, Researchers Examine the Impact" (Sept. 18, 2024).

Currently, New York is experimenting with supervised release. A 2024 report from the Brennan Center shows that it's working well. *See* https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now.

A law passed in Connecticut in 2017 provides that the maximum time a person can remain in jail pending trial on a misdemeanor is 14 days, regardless of whether they can post bail.

12. What have tribal courts been holding on the right to bail?

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):

> The practice of requiring admission to bail balances the individual's liberty interest with the government's interest in preventing the risk of flight. 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.
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> [T]he court may only impose bail if it finds that a monetary condition is necessary to provide assurance of the defendant's return to court. Without such a showing, *the imposition of any bond amount is punitive* and represents an excessive response to the tribe's asserted interest. . . . The trial court's findings in this case do not support the denial of the defendant's request for release on recognizance.

Apachito v. Navajo Nation, No. SC-CV-34-02, 2003 WL 25794140 (Navajo Aug. 13, 2003)

> The prosecution need not prove that pretrial release should not be granted beyond a reasonable doubt; but pretrial detention based on the mere

> preponderance standard would violate a defendant's right to the due process. This Court has previously held that *clear and convincing evidence is required in cases involving personal freedoms*, and today we adopt that standard for pretrial detention proceedings, including bail hearings.

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. *abrogated on other grounds by Colville Confederated Tribes v. Jake*, No. AP23-002, 2023 WL 4580844 (Colville C.A. June 5, 2023).

It would appear that tribal courts are doing a good job regarding access to bail. I base that on the following information. 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.