



DUE PROCESS INSTITUTE

Support the Bipartisan *Smarter Pretrial Detention for Drug Charges Act*

When a person is arrested and accused of a crime, a judge must determine whether he or she will be released with certain conditions pending resolution of their case or be detained until their conviction or acquittal occurs. In federal court, the judge’s decision whether to release or detain someone pretrial is governed by 18 U.S.C. § 3142, which sets forth several factors for the judge to take into consideration. The main directive of the statute is that judges *should* release persons accused of unproven crimes who are not flight risks and who do not “pose a danger to any other person or the community.” The federal bail statute also, however, includes a small list of offenses for which a legal presumption *in favor of* incarceration is imposed based solely on the criminal charge instead of any specific assessment of the accused. While many of the offenses included in this presumptive list might make sense given the gravity of the accusation, the list also unfortunately includes many nonviolent federal drug offenses.

Persons accused of drug offenses represent over [42%](#) of those charged with non-immigration federal crimes. Statistics show that for them—the second largest group of people in the federal system—it is difficult to overcome this presumption. In fact, recent federal data show that [more than 60%](#) of those charged with drug offenses will be incarcerated before trial. In addition, data show that pretrial detention puts these defendants at a [greater sentencing disadvantage](#) if convicted versus those who are granted pretrial release. There is also persuasive evidence that the statutory presumption has failed to correctly identify which defendants actually even present a risk. Unfortunately, the racial disparities we see throughout the criminal system also appear in pretrial release rates in drug cases. Moreover, some of the most vulnerable people in our society are those currently locked inside jails amid the COVID-19 pandemic—people who have not been found “guilty” of anything and are merely incarcerated while they defend or resolve their charges. And this pro-carceral presumption is extremely [costly](#).

Eliminating the Unnecessary, Unfair, and Costly Presumption

The Smarter Pretrial Detention for Drug Charges Act presents a simple, effective solution supported by leaders and organizations from both sides of the aisle. It would merely remove the presumption of pretrial incarceration that currently applies to those charged with nonviolent drug offenses. The passage of this bill will not mean that all, or even most, accused federal drug offenders will be released before trial. It would, however, simply permit a federal judge to make a more individualized determination of whether to detain someone based on the same factors they use to evaluate practically everyone else. Anyone deemed a flight risk or a danger to public safety will still be detained. Anyone released can still be subject to multiple conditions and community supervision by pretrial services.

Pretrial supervision of someone released costs at least [90%](#) less each day compared with pretrial detention. It is also a fairer and more humane choice. The need to consider individual circumstances when deciding whether to incarcerate someone respects due process, maintains individual liberty, and maximizes public safety. It helps to increase racial and economic justice in our legal system. And it allows persons accused of nonviolent drug offenses to stay in the community with their families and with access to their jobs, health services, and other resources while their case is pending.

We strongly urge your immediate support of this bipartisan bill.