Truth in Testimony Disclosure Form

In accordance with Rule XI, clause 2(g)(5)*, of the *Rules of the House of Representatives*, witnesses are asked to disclose the following information. Please complete this form electronically by filling in the provided blanks.

Committee: Committee on the Judiciary

Subcommittee: Subcommittee on Crime, Terrorism, and Homeland Security

Hearing Date: November 14, 2019

Hearing Subject:

The Administration of Bail by State and Federal Courts: A Call for Reform

Witness Name: Alison Siegler

Position/Title: Director, Federal Criminal Justice Clinic

Witness Type: ○ Governmental ● Non-governmental

Are you representing yourself or an organization? ● Self ○ Organization

If you are representing an organization, please list what entity or entities you are representing:

If you are a non-governmental witness, please list any federal grants or contracts (including subgrants or subcontracts) related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current calendar year and previous two calendar years. Include the source and amount of each grant or contract. *If necessary, attach additional sheet(s) to provide more information.*

None

If you are a non-governmental witness, please list any contracts or payments originating with a foreign government and related to the hearing's subject matter that you or the organization(s) you represent at this hearing received in the current year and previous two calendar years. Include the amount and country of origin of each contract or payment. *If necessary, attach additional sheet(s) to provide more information.*

None

False Statements Certification

Knowingly providing material false information to this committee/subcommittee, or knowingly concealing material information from this committee/subcommittee, is a crime (18 U.S.C. § 1001). This form will be made part of the hearing record.

[redacted]

Witness signature

11/11/19

Date

Please attach, when applicable, the following documents to this disclosure. Check the box(es) to acknowledge that you have done so.

☑ Written statement of proposed testimony

☑ Curriculum vitae or biography

*Rule XI, clause 2(g)(5), of the U.S. House of Representatives provides:

(5)(A) Each committee shall, to the greatest extent practicable, require witnesses who appear before it to submit in advance written statements of proposed testimony and to limit their initial presentations to the committee to brief summaries thereof.

(B) In the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include a curriculum vitae and a disclosure of any Federal grants or contracts, or contracts or payments originating with a foreign government, received during the current calendar year or either of the two previous calendar years by the witness or by an entity represented by the witness and related to the subject matter of the hearing.

(C) The disclosure referred to in subdivision (B) shall include—

(i) the amount and source of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) related to the subject matter of the hearing; and

(ii) the amount and country of origin of any payment or contract related to the subject matter of the hearing originating with a foreign government.

(D) Such statements, with appropriate redactions to protect the privacy or security of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

Alison Siegler Bio

Alison Siegler is a Clinical Professor of Law at the University of Chicago Law School and is the founder and director of the Federal Criminal Justice Clinic (FCJC), the nation's only legal clinic solely devoted to representing indigent clients charged with federal felonies. The FCJC defends individual clients and pursues impact litigation in the U.S. District Court for the Northern District of Illinois, in the Seventh Circuit Court of Appeals, and before the United States Supreme Court. The FCJC also engages in broader efforts to reform the federal criminal justice system. The clinic's groundbreaking race discrimination litigation in federal court in Chicago earned Professor Siegler the Seventh Circuit Bar Association's Justice John Paul Stevens Award for Outstanding Public Service Work in the Seventh Circuit Court of Appeals. Since then, the FCJC has created a Federal Bail Reform Project that is changing federal pretrial detention practices in Chicago and nationwide. Before founding the FCJC, Professor Siegler served as an attorney with the Federal Defender Program in Chicago, a Prettyman Fellow at Georgetown University Law Center's Criminal Justice Clinic, and a law clerk for U.S. District Judge Robert W. Gettleman in Chicago. She graduated *magna cum laude* from Yale College, earned a J.D. from Yale Law School, and holds an LL.M. from Georgetown.

TESTIMONY OF ALISON SIEGLER
Clinical Professor of Law and Director of the Federal Criminal Justice Clinic
University of Chicago Law School

Before the Judiciary Committee of the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security

November 14, 2019, Hearing on
"The Administration of Bail by State and Federal Courts: A Call for Reform"

Chairwoman Bass, ranking member Ratcliffe, committee members: thank you for the opportunity to speak today. My name is Alison Siegler and I am the Director of the Federal Criminal Justice Clinic at the University of Chicago and a former federal public defender. I am here today because the federal pretrial detention system is in crisis, and I believe Congress should intervene and fix the Bail Reform Act of 1984.[1]

Today, the federal system detains people at an astronomical rate. The percentage of defendants incarcerated pending trial has increased from 19% in 1985—just a year after the Act's passage—to 61% in 2018.[2] But that was never what Congress intended. The Act was supposed to authorize detention for a narrow set of people: those who were highly dangerous or posed a high risk of absconding.[3] When the Supreme Court upheld the Bail Reform Act as constitutional in 1987, it emphasized that, "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception."[4] But in practice, pretrial detention is now the norm, not the exception, even though our Constitution says that every detainee is presumed innocent.[5]

The skyrocketing federal pretrial detention rate is problematic for several reasons. Studies show that detention actually makes society less safe because it increases a detainee's long-term risk of recidivism.[6] The longer someone is held in jail before their trial, the more prone they are to criminality and the less likely they are to stay on the straight and narrow.

This is particularly salient because most federal defendants are not violent. The data shows that violent offenders make up just 2% of those arrested in the federal system.[7] The data also shows that the vast majority of released defendants appear in court and do not reoffend while on bond. In 2018, 98% of released federal defendants nationwide did not commit new crimes while on bond, and 99% appeared for court as required.[8] What's really remarkable is that this near-perfect compliance is seen equally in federal districts with very high release rates and those with very low release rates.[9] So when release rates increase, crime and flight do not.

The high federal detention rate also imposes huge human and fiscal costs. On average, a defendant spends 255 days in pretrial detention,[10] often in deplorable conditions. For example, in the depths of winter last January, pretrial detainees at the Metropolitan Detention Center in Brooklyn, New York went without heat and electricity for days.[11] Moreover, while defendants

sit in jail awaiting trial, they can lose their jobs, [12] their homes,[13] their health,[14] and even their children.[15] The evidence also shows that pretrial detention leads to an increased likelihood of conviction[16] and results in longer sentences.[17] And federal pretrial detention imposes a high burden on taxpayers: It costs approximately $32,000 per year to incarcerate a defendant, but just $4,000 to supervise them on pretrial release.[18]

These problems make clear that the federal pretrial detention system is in crisis and reform is needed.

Today, I will highlight two crucial fixes to the Bail Reform Act: eliminating financial conditions that require people to buy their freedom, and modifying the blanket presumptions of detention that limit judicial discretion and unnecessarily lock up low-risk defendants. My written testimony provides additional suggestions for reform.

A primary goal of the Act was to end practices that conditioned freedom on a person's ability to pay.[19] But every day in federal courtrooms across the country, judges impose conditions of release that privilege the wealthy. For example, some judges impose bail bonds, while others require family members to co-sign the bond and meticulously document their net worth.[20] At best, this unnecessarily delays release; at worst, it results in the pretrial detention of indigent defendants. In other districts, indigent defendants are required to pay the costs of court-ordered electronic monitoring, which can be very expensive, particularly given how long federal cases last. Congress should end these injustices by modifying the Bail Reform Act to eliminate financial conditions and put rich and poor on equal footing.

Turning to my next proposal for reform, the statute contains a rebuttable presumption that puts a thumb on the scale in favor of detention in many federal cases.[21] These presumptions must be changed because they've had far-reaching and devastating consequences that were unforeseen and unintended by Congress.

First, the presumptions sweep too broadly, detaining low risk offenders and failing to accurately predict who will reoffend or abscond.[22] In fact, a federal government study has found that the presumptions are driving the high federal detention rate.[23] This study had a real world impact: It led the Judicial Conference, chaired by Chief Justice John Roberts, to recommend that Congress significantly limit certain presumptions of detention.[24] Today's hearing gives Congress a real opportunity to act on this sound recommendation.

Second, like mandatory minimum sentences, the presumptions of detention severely constrain judicial discretion, preventing judges from making individualized detention decisions. Federal judges lament that the presumptions tie their hands. Congress can empower judges to fulfill their vitally important role by modifying the presumptions.

Although the presumptions were created with good intentions, they've failed us in practice. They have, in the words of a government study, "become an almost de facto detention

order for almost half of all federal cases," and have "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."[25]

I urge you to take action to bring the federal pretrial detention system back in line with Congress' intent.

Thank you, and I look forward to your questions.

[1] 18 U.S.C. § 3142.

[2] *Pretrial Release and Detention: The Bail Reform Act of 1984*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, Table 1 (Feb. 1988) (18.8% of defendants detained pretrial in 1985); *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-14A (Sept. 30, 2018), https://www.uscourts.gov/statistics/table/h-14a/judicial-business/2018/09/30.

[3] *See United States v. Salerno*, 481 U.S. 739 (1987) (upholding preventative detention because the Act (1) "carefully limits the circumstances under which detention may be sought to the most serious of crimes," *id.* at 747, (2) "operates only on individuals who have been arrested for a specific category of extremely serious offenses" listed in § 3142(f), *id.* at 750, and (3) targets individuals that Congress specifically found "far more likely to be responsible for dangerous acts in the community after arrest," *id.*); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) ("The legislative history of the Bail Reform Act of 1984 makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute with the pretrial detention provision addressed to the danger from 'a small but identifiable group of particularly dangerous defendants.'") (quoting S. REP. NO. 98-225, at 6 (1983)).

[4] *Salerno*, 481 U.S. at 755.

[5] *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255–56 (2017) ("[A]xiomatic and elementary, the presumption of innocence lies at the foundation of our criminal law.") (citations omitted); *see also* 18 U.S.C. § 3142(j) ("Nothing in this statute shall be construed as modifying or limiting the presumption of innocence.").

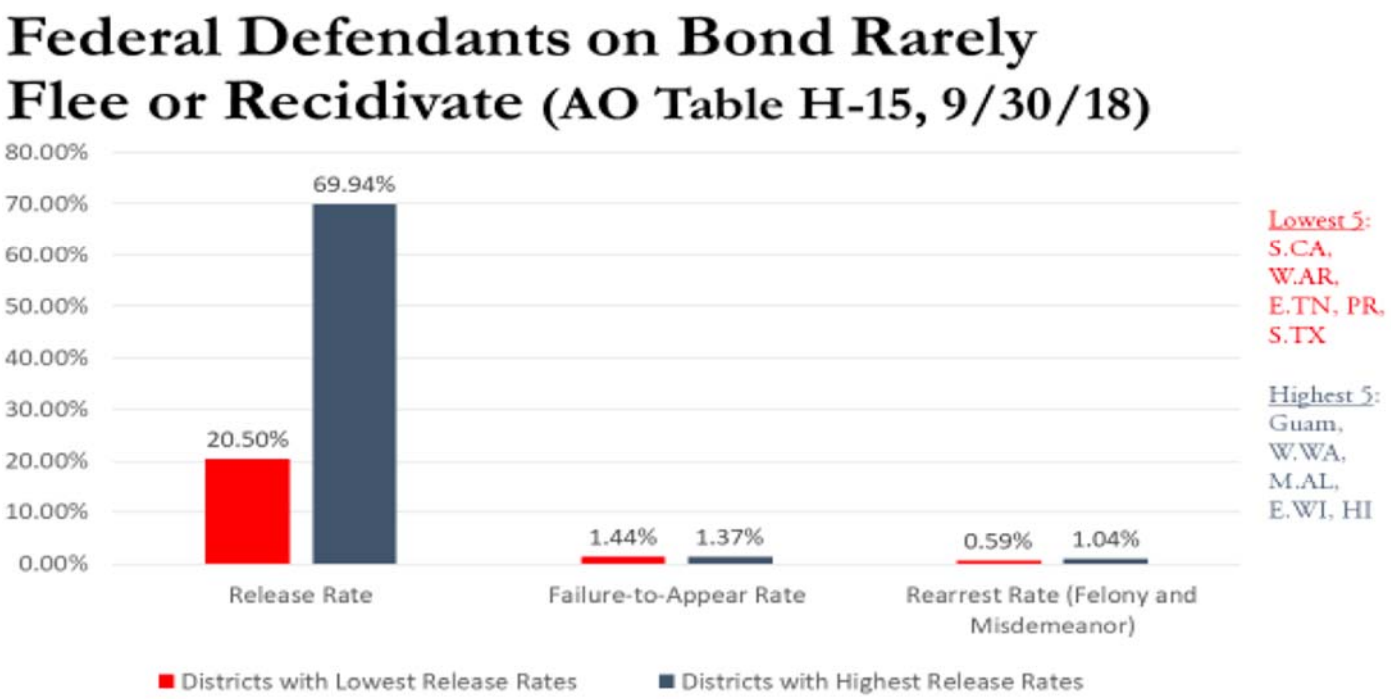
[6] *See, e.g.*, Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at https://perma.cc/R99T-5F2J (finding that, eighteen months post-hearing, pretrial detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges); Christopher T. Lowenkamp, *The Hidden Costs of Pretrial Detention*, THE LAURA AND JOHN ARNOLD FOUNDATION (2013), archived at https://perma.cc/XK2P-3UZT (regression analysis shows strong correlation between detention and future offending, even after taking into account risk level and offense type); *id.* at 22–23 (finding increased recidivism even two years after pretrial detention); Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. OF LEGAL STUDIES 471, 473 (2016), archived at https://perma.cc/YY8Y-UBBE (finding that the assessment of money bail "increases recidivism in our sample period by 6-9 percent yearly").

[7] *Felony Defendants in Large Urban Counties, 2009*, BUREAU OF JUSTICE STATISTICS, at 2 (2013).

[8] *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-15 (Sept. 30, 2018).

[9] Court data shows that the five federal districts with the lowest release rates (average 20.5%) have a failure to appear rate of 1.44%, while the five districts with the highest release rates (average 69.94%) have a failure to appear rate of 1.37%. *See* ADMIN. OFF. U.S. COURTS, Table H-15, *supra* note 8. The five districts with the lowest release rates have an average re-arrest rate of 0.59%, while the five districts with the highest release rates have an average re-arrest rate of 1.04%. *Id.* (The districts with the lowest release rates are the S.D. California, W.D. Arkansas, E.D. Tennessee, D. Puerto Rico, and S.D. Texas; the districts with the highest release

rates are D. Guam, W.D. Washington, M.D. Alabama, E.D. Wisconsin, and D. Hawaii. *Id.*) The below chart reflects this data:



[10] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81(2) FED. PROBATION 52, 53 (2017), https://www.uscourts.gov/federal-probation-journal/2017/09/presumption-detention-statutes-relationship-release-rates ("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 *Judicial Business: Federal Pretrial Services Tables*, ADMIN. OFF. U.S. COURTS, Table H-9A).

[11] Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates are Sick and 'Frantic,'* N.Y. TIMES, Feb. 1, 2019, https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html.

[12] *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 become employed or have income, 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(2) FED. PROBATION 39 (2018) (finding that, for individuals detained for 3 days or more, 76.1% report job loss or other job-related negative consequences and 44.2% 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.").

[13] Holsinger & Holsinger, *supra* note 12, at 42 (finding 32.7% 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% higher odds of housing insecurity).

[14] Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, BUREAU OF JUSTICE STATISTICS (2014) (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).

[15] Heaton, et al., *supra* note 6, at 713.

[16] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes,* 34 J. OF L. ECON. & ORG. 511, 512 (2018) (finding that pretrial detention leads to a 13% increase in the likelihood of conviction using data from state-level cases in Philadelphia); Dobbie et al., *supra* note 12, at 225 (finding that a defendant who is initially released pretrial is 18.8 percentage points less likely to plead guilty in Philadelphia and Miami-Dade counties); Mary T. Phillips, *A Decade of Bail Research*, 116 (2012), archived at https://perma.cc/A3UM-AHGW ("[A]mong nonfelony cases with no pretrial detention [in New York City], half ended in conviction, compared to 92% among cases with a defendant who was detained throughout," and in the felony context "[o]verall conviction rates rose from 59% for cases with a defendant who spent less than a day in detention to 85% when the detention period stretched to more than a week").

[17] A recent empirical study of the federal system found "that federal pretrial detention significantly increases sentences, decreases the probability that a defendant will receive a below-Guidelines sentence, and decreases the probability that they will avoid a mandatory minimum if facing one." Stephanie Didwania, *The Immediate Consequences of Pretrial Detention*, at 30 (2019), archived at https://ssrn.com/abstract=2809818.

[18] U.S. Courts, *Incarceration Costs Significantly More than Supervision*, JUDICIARY NEWS (2017), https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision.

[19] *See Bail Reform Act Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong. 243 (1984) (testimony of Ira Glasser) (explaining that the purpose of § 3142(c)(2) was to ensure that "the judicial officer may not impose excessive bail as a means of detaining the individual"); *see also* § 3142(c)(2) ("The judicial officer shall not impose a financial condition that results in the pretrial detention of the person.").

[20] The Bail Reform Act as currently written explicitly authorizes these practices. *See* § 3142(c)(1)(B)(xii) (condition of release that defendant "execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond").

[21] 18 U.S.C. § 3142(e)(2), (e)(3).

[22] Austin, *supra* note 10, at 57–58 (explaining data showing that low-risk defendants in presumption cases are detained pretrial at higher rates than low-risk defendants in non-presumption cases, and concluding that "it appears the presumption is influencing the release

decision for the lowest risk defendants, while having a negligible influence on higher risk defendants"); *id*. at 60 (finding that the presumptions inaccurately predict which defendants are likely to violate conditions of release: "In sum, high-risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, rearrested for a violent offense, failing to appear, or being revoked for technical violations.").

[23] *Id.* at 60–61.

[24] *Report of the Proceedings of the Judicial Conference of the United States* at 10–11 (Sept. 12, 2017), https://www.uscourts.gov/sites/default/files/17-sep_final_0.pdf.

[25] Austin, *supra* note 10, at 61.