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ARTICLE

Bail the Rich: Armed Guards, Private Prisons, and Special Treatment for the Wealthy Under the Bail Reform Act

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In 2009, U.S. District Judge Jed S. Rakoff wrote an order granting bail to prominent New York attorney turned Ponzi-scheme defendant Marc Dreier. The constitutional right to which Judge Rakoff referred was the Eighth Amendment's mandate that "Excessive bail shall not be required."

Judge Rakoff applied that mandate by granting Dreier's request for bail on conditions that have long been a conundrum for district courts: 24/7 home detention, secured not only by electronic monitoring but by on-premises armed security guards, supplied by a third-party company, paid for by the defendant, his family, or his employer, and empowered to use force to thwart any attempt to flee. Judge Rakoff ratified the arrangement under the plain language of the Bail Reform Act, 18 U.S.C. §3141, et seq., and the Eighth Amendment.

In the decade since Judge Rakoff's decision, and even before it, courts in the Second Circuit have wrestled with public policy issues surrounding the "private prison" bail model—an arrangement exclusively available to those defendants with the significant means to fund it.

The issue was recently revisited when U.S. District Judge William F. Kuntz denied pre-trial release to defendant Jean Boustani. Boustani had proposed a "private prison" bail package very similar to the one approved in Dreier, but in an Order Judge Kuntz wrote that although Boustani "has vast financial resources to construct his own 'private prison,' the Court is not convinced 'disparate treatment based on wealth is permissible under the Bail Reform Act.'" *United States v. Boustani*, 18 Cr. 681 (WFK), 2019 WL 440642 (E.D.N.Y. Feb. 4, 2019).

This recurring issue has no simple solution. Should a wealthy defendant be permitted to "buy" his way out of pre-trial incarceration, when a defendant with less resources cannot? To date, the Second Circuit has offered little guidance, leaving district courts to (inconsistently) reach their own conclusions.

The Bail Reform Act and 'Risk of Flight'

Under the Bail Reform Act, a court is required to order the pre-trial release of a defendant on a personal recognizance bond, unless the court determines that such release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. §3142(b).

If the court determines that a defendant's release on an unsecured bond presents a risk of flight or a danger to the community, the Act still requires pre-trial release subject to "the least restrictive further condition, or combination of conditions" that the court determines will "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. §3142(c)(1)(B).

Going Forward

District courts appear destined to wrestle with the "private prison" issue unless and until the Second Circuit issues definitive guidance, or the legislature amends the Bail Reform Act.

The plain language of the Act allows defendants to propose creative bail solutions that minimize any risk of flight.

Until the Court of Appeals takes a firmer stand against it, attorneys representing defendants with the means to create a "private prison" can continue to argue, as Judge Rakoff opined in Dreier, that wealth inequality "is not a reason to deny a constitutional right to someone who, for whatever reason, can provide reasonable assurances against flight."

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