

Preventative Detention and Due Process

October 1, 2025





Roadmap

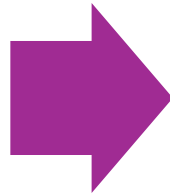
Preventative detention is coming.

What procedures are required to implement?

We give a few additional suggestions.

Constitutional Foundation: The 14th Amendment

Liberty cannot be
deprived without
due process of law



Due process is
notice, hearing,
and an opportunity
to be heard

“In our society liberty is the norm, and detention prior to trial or without trial is the **carefully limited exception.**”

-- *United States v. Salerno*, 481 U.S. 739 (1987)



Constitutional Summary

Preventive detention is facially valid but **the interest in pretrial liberty is “fundamental.”**



Fundamental liberty interests cannot be deprived without due process.



Therefore, due process protections are required before a person is detained without bail.

Practical Reasons to Act in 2026

A system without rules risks arbitrariness and invites judicially crafted rules



This means litigation, delays, and inconsistent rules across counties.

The Required Procedural Safeguards

Prompt hearing

Right to counsel (appointed if indigent)

Right to present and cross-examine witnesses

Clear and convincing evidence

Written findings and reasons for decisions

Speedy trial protections

Right to appeal

Additional Recommendations

A Brave New World



Preventive
Detention

Ordinary
Pretrial Release

Double Down on Evidence-Based Decisions

Expand IRAS
and IYAS

Continuously
Refine

Create a Progression of Options

No Risk

- “Shall” release without bail

Some Risk

- Impose conditions accordingly

Unreasonable Risk

- Move to preventive detention

Questions?

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