

Utah's Hard-Won Bail Reforms Are in Jeopardy

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State lawmakers curbed cash bail last year, but now they're backtracking. Governor Spencer Cox could keep the reforms intact.

Utah is on the verge of either rolling back or reaffirming a bail reform law that passed in 2020 with an unusual amalgam of supporters. Lawmakers from both parties—alongside prosecutors, public defenders, and advocates—backed the reforms, which passed the GOP-controlled legislature last spring and curtailed the use of cash bail. But almost immediately after the bill took effect in October, some Republican lawmakers and sheriffs began criticizing the changes as a threat to public safety, and the legislature passed a bill to repeal the measures this month.

Now the repeal will either be signed or vetoed by Governor Spencer Cox, a Republican, who has indicated that he's on the fence about what to do.

The outcome will have implications for Utah residents awaiting trial, where cash bail has long been the most widely used pretrial tool. Nationwide, advocates have faulted the cash bail system for the disproportionate pretrial incarceration of poor people, especially people of color, who often face further consequences like job loss as a result.

State Representative Stephanie Pitcher, a Democrat, says she has pushed to reduce the use of cash bail in Utah out of frustration that people charged with crimes either remain in jail or go free based solely on whether they have means to pay. "This came from my own experiences in court and realizing it's such a nonsensical system that we decide pretrial release based on wealth," said Pitcher, who is a prosecutor. At the start of 2020, Pitcher introduced the bail reform—House Bill 206—which required judges to set the "least restrictive" conditions to ensure a defendant comes to court. In effect, the bill transitioned Utah's judiciary away from the bail schedule courts had long used, which assigned a specific dollar amount to every offense. Cash bail could still be used under HB 206, but judges would have more discretion and obligation to consider other factors. The bill gained traction in the legislature, which was and remains Republican-controlled, and ultimately passed; it took effect Oct. 1.

Utah's bail reform did not go as far as states like Illinois and New Jersey, which in recent years have sought to virtually end the use of cash bail. Pitcher did not clarify if she supported eliminating cash bail but told *The Appeal: Political Report* that she does not see that happening in Utah "anytime soon" because of the influence of the bail bond lobby. Still, local activists have said that despite its limitations, the new law is having a positive effect. Founders of the Salt Lake Community Bail Fund said they were able to free far more people after HB 206 took effect because bail sums dropped from the "astronomically large" amounts that defendants were held on before.

HB 206 wasn't the first time cash bail came under scrutiny in Utah. In 2015, a group of prosecutors, judges, defense attorneys, sheriffs, bail bond agents and academics prepared a report for the Utah Judicial Council on pretrial release best practices. A Republican state senator introduced a bill similar to Pitcher's in 2016, though it didn't make it out of committee. There have also been several legislative audits of Utah's pretrial system over the last few years. And Shima Baradaran Baughman, a criminal law professor at the University of Utah, has been urging bail reform in her state since 2010. She said she made the case that "conservative states should rely on bail reform to save money" to the Utah Commission on Criminal and Juvenile Justice. "Less people in jail means less money spent on jail beds. Since Utah ha[d] a problem with jail beds ... this was compelling," Baughman said.

Sim Gill, a Democrat who is the district attorney of Salt Lake County, has spoken against repealing the new bail law and pointed out that Utah has a history of embracing criminal justice reforms, particularly when they encourage fiscal savings. In 2019, Utah became the second state to pass a bill that

would automatically clear criminal records of people convicted of low-level crimes, and taxpayer savings was one benefit of the law that proponents touted.

Troy Rawlings, the chief prosecutor for Davis County, has also vocally opposed the repeal. Rawlings, a Republican, told the Political Report he grew interested in tackling cash bail about four years ago, when he started to learn of civil lawsuits in other states brought by individuals who argued they had been unconstitutionally detained because of their inability to pay for release. These judgments prompted conversations among people in Rawlings's office about cash bail-related issues.

Despite the growing bipartisan support for bail reform, criticisms started pouring in when HB 206 took effect—not just from those who opposed the new law, but also from advocates who say that it left too much room for prosecutors and judges to continue locking people up. Ben Aldana, a public defender in Utah County, said he noticed judges began holding more people without bail, even for low-level offenses. Although Aldana doesn't inherently oppose holding people without bail, he says everyone should be afforded a hearing to call witnesses before any decision like that is made. "When my clients were denied the right to bail I was told to go pound sand and prosecutors would later come to them with a plea agreement if they pled guilty," he said. "I was and still am very upset about this; it flies in the face of a fair system."

Leaders with the Salt Lake Community Bail Fund, which launched in September, say that although the monetary amounts of the bail requests they received decreased significantly after HB 206 took effect, the law was not applied retroactively, and it still allowed judges to include a lot of challenging stipulations for defendants, like electronic monitoring and requirements to show up at police departments at unusual times. "Yes, we saw more lower bails, but we still see high bails sometimes in excess of \$5,000," Emily Lyver, a co-founder, told the Political Report. "It's purely discretionary."

Meanwhile, a vocal campaign against the reforms emerged, led by the Utah Sheriffs' Association and House Majority Whip Mike Schultz, who introduced a bill to repeal HB 206 in January. Opponents argued that the reforms had failed and resulted in too many violent offenders going free, though they had no credible data to back up their assertions. Some of the actions they complained about, like judges issuing penny warrants to keep jail populations low, were actually driven by COVID-19 concerns. "Penny warrants are 100 percent COVID-related and not at all anything to do with House Bill 206," an assistant state court administrator testified in January.

Although no state-level data is yet available, Gill said data from his county showed the reforms were working as intended, with more low-level offenders released without cash bail and more violent offenders detained. Gill, Rawlings, and David Leavitt, the Republican chief prosecutor for Utah County, represent the state's three most populous counties; they called efforts to repeal HB 206 "bad faith." The executive director and president of the Utah Sheriffs' Association did not respond to multiple requests for comment.

One Republican state senator, Todd Weiler, sponsored a bill this winter to amend HB 206 rather than repeal it. He convened a working group of stakeholders to craft agreeable language. Aldana was involved and supported the "fix-it bill," which among other things would have ensured bail hearings. "That resolved a lot of the issues I had had, because instead of just willy-nilly denying someone the right to bail, a judge would have to really think about it and say well if I deny this person bail, the defendant will now have the right to subpoena witnesses," Aldana said. Pitcher and the ACLU of Utah also supported the fix-it bill, but instead Schultz's repeal bill passed and is now awaiting the governor's signature.

Rawlings suspects that proponents of full repeal are doing the bidding of the bail bond industry, which has stayed conspicuously quiet this year. "Everyone knows it," he told the Political Report. "They're propping up sheriffs as surrogates, and it will be very interesting to see the campaign contributions to legislators who voted in favor of repeal."

Governor Cox has said he is “not crazy” about approving the bail reform repeal bill, and is interested in convening a special session to address the issue. His deadline to make a decision on whether to veto is Thursday.

Supporters of HB 206 say one problem with repealing the bill is that the courts have already spent a year updating their rules and procedures, and eliminating the statute now would cause confusion. “It’s like unscrambling an egg,” said Aldana. “You can’t do it and you’ll be left with a mess.”

Rawlings said he thinks it would be tough to get consensus in a special session for a new bail reform bill, though he believes the judiciary will continue to consider risk factors and ability to pay regardless of what the governor decides. “We’re hearing from judges that they think this is the right thing to do, too,” he said.

Activists with the Salt Lake Community Bail Fund opposed the repeal effort, but say if it succeeds, then they will make every effort to be at the table for the next bill. “In some ways it would be a unique opportunity for us to be invited to the idea table,” said Lexie Wilson. “We want reforms to help build towards eliminating cash bail and not adding other carceral obligations.”

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