SWIMMING UPSTREAM: PRE-RELEASE DETAINES IN THE FACE OF RISING BONDS

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“Cursed is he who distorts the justice due an alien, orphan, and widow”
-Deuteronomy 27:19

Please note; the author welcomes comments and would be most happy to provide the results of the survey mentioned within the paper. Please direct all questions and comments to crandallnovak@gmail.com
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I. INTRODUCTION

Gazing out the barred window to the razor-wired perimeter, Charles, a Ghanan national wonders how he will survive the additional four months in the detention facility awaiting his trial before the Immigration Judge (IJ). 1 Charles, who came to the U.S. on a student visa, left college to travel the country with a woman with whom he fell in love. Held for a traffic violation in Irving, Texas, the Police Department cooperating with the Department of Homeland Security (DHS), ran Charles’s data and found a Notice to Appear2 listed for him. Charles was then manacled and taken to a holding facility at the Dallas County Jail. From there, he was placed on a bus, and sent to the DHS immigration facility in Laredo, Texas. Charles has no family in the United States. Changing her cell phone number, his former love could not be contacted. While he has some access to legal information in the detention library, he cannot make much sense of it. Charles has some money, $1000, in his account at school. Told by the IJ at his master calendar hearing3 that the DHS district office set his bond at 10,000, Charles did not know that he could have asked the judge to lower the amount. He is now “detained” in immigration vernacular: however from Charles viewpoint, he is simply imprisoned.

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1 This is a composite story derived from the experience of many immigrants. Charles is fictitious.
2 An NTA is the Immigration form of a summons.
3 A master calendar hearing is generally the first appearance before an Immigration Judge, where dates are set for the case.
Disturbed that some 14,000 non-criminal, non-violent immigrants are effectively incarcerated, and only thirty-five percent of whom have legal representation, this Note explores the immigration bond redetermination process and the complex trends that are pushing bond amounts beyond the reach of most detainees. Under a doctrine of simple fairness, this Note suggests straightforward changes that will afford immigration detainees the same level of justice as the accused, citizen criminal. Simple fairness and justice can be possible with little disruption to U.S. immigration policy.

A. Questions Seeking Answers

When an immigrant cannot afford a pre-release bond, has the spirit of bail envisioned by the forefathers of this country, been broken? Are immigrants afforded different treatment compared to the criminally accused citizen? What are the factors taken into consideration when making immigration pre-bond decisions?

Using the state of Texas as the crucible for this analysis, this Note concludes that Immigration Judges are raising bond amounts beyond what most detained immigrants can manage. The reasons for the bond amount increases are as complex as immigration law itself: whether its policy pressures of Congress linking crime and immigration, or the Administration’s continued meld of immigration with national security policy. Or even, the prison industry’s economic pressure on local communities through promises of jobs and federal government money if the community builds an immigration detention center. Lastly, there is our society’s willingness to vilify the illegal immigrant in response to our fears of: another 9/11, a diminishing economy, or a virus of criminal activities.

B. Methodology

This Note addresses only bonds for immigrants in pre-release, and does not concern itself with immigrants claiming a post-release Constitutional right against indefinite detention. Furthermore, this Note does not address those deportable for criminal reasons such as those defined under the wide umbrella of an “aggravated felon”, under the Immigration and Nationality Act (INA) §101(a)(43) (i.e. murder, drug crimes, theft crimes or other crimes of violence) nor those deportable for crimes involving moral turpitude (crimes that involve fraud or intent to defraud or acts of depravity or vileness in duties owed fellow man). Moreover, this Note does not address those immigrants who have been denied bond because of statutory reasons (e.g. Immigrants subject to a final order of deportation under 8 C.F.R. 236.1(c)(2)—the U.S. Code for Immigration) or due to alleged ties to terrorists or terrorist activities (an immigrant defined as inadmissible under INA § 212(a)(3)(B) or deportable under INA § 237(a)(4)).

Instead, hoping to deflect some of the moral indignation against illegal immigrants, this Note will focus only on the non-criminal immigrant: e.g. those detained immigrants who have violated immigration laws for re-entry, unlawful entry, or overstaying of visas. Finally, providing antidotal evidence to the trend of rising bonds, this Note surveyed a significant population of Texas based, American Immigration Lawyers Association (AILA), attorneys and gathered their opinions regarding immigration pre-release bonds. The survey had twelve questions asking practitioners to validate or invalidate a rising bond trend and to state their reasons for the trends. Additionally, the survey asked the practitioners to give a current average bond.

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6 See generally Zadvydas v. Davis, 533 U.S. 678 (2001) (Holding that an immigrant cannot be indefinitely detained if the government cannot find a suitable country to remove him or her to after an order of deportation.)
C. Why Texas as a focal point?

Texas is a major player in both immigration and incarceration. Texas completed twenty-eight percent of all immigration cases, before an Immigration Judge, in 2006\(^9\). Furthermore, the state has the second highest number of prisoners (inclusive of all types of criminals and immigrant detainees) in the U.S., 172,116\(^{10}\). Correspondingly, Texas spent close to $2.3 Billion dollars in corrections,\(^{11}\) has the highest national rate for using private prisons,\(^{12}\) has the nation’s highest percentage increase (seventy-six percent year over year 2005-2006) of immigration detainees, and, has sixteen DHS, and federal prison facilities that can be used for detainees\(^{13}\)(not including local jails that are also used for detainees). Determining the trends and policies effecting Texas should be a strong indicator for U.S. national trends.

D. Roadmap

Part II of this Note examines the purpose of bond and bail, starting from its English history up through modern, landmark Constitutional cases. This history provides the foundation for the law, spirit, and nature of bonds. The Note will finish with a short overview of the immigration bond laws and processes. Only by understanding the origination of bonds and bail, along with their historical purpose, can we have a meaningful dialogue about their use in our current system of law.

Part III of this Note, examines the trends and pressures on immigration bonds starting with U.S. Congressional attitudes towards the incarceration of illegal immigrants and then using the recent 2005 REAL ID Act debates as an example. The attitudes of the Department of

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\(^9\) FY 2006, \textit{supra} note 5 at B3.
\(^{10}\) \textit{Prisoners in 2006, supra} note 4 at 3.
\(^{12}\) \textit{Prisoners in 2006, supra} note 4 at 4.
Homeland Security, responsible for implementing the Administration’s immigration policy, will be reviewed for its published views towards the increasing incarceration of immigrants. Part III concludes with an analysis of the U.S. incarceration trends and how the prison industry provides economic pressure to keep illegal immigrants incarcerated.

Part IV of this Note details the anecdotal and statistical results of the Texas immigration law practitioner survey and their thoughts regarding the raising of bond rates for immigrants. Part IV synthesizes the current U.S. policy towards the detention of immigration law violators, and illustrates that the U.S. trend towards a rapidly increasing prison population makes this nation justly qualified for the Human Rights Watch’s moniker of “Incarcerated America.”


The Note concludes that bonds based upon what the immigrant can afford, and a minimal effort by the Government to publish the names of detainees to those who can assist in their legal representation, can bring the system to a level of justice and fairness once esteemed in this country.

II. Bonds and Bail

A. Earliest Known History

The Magna Carta of 1215, charter thirty-nine, provided that “no freeman should be arrested, imprisoned or destroyed except by the judgment of his peers or by the law of the

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15 Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 920 (D.C. Cir. 2003) (holding that the Immigration Service does not have to release any information regarding detainees).
16 Demore v. Kim, 538 U.S. 510, 528 (2003) (Stating that the Government does not have to use the least burdensome method to the accused to accomplish justice).
land.” Most historians reconcile the “law of the land” with the writ of Habeus Corpus, and while the Magna Carta is the most famous implementation of Habeus Corpus, it was not the first doctrine of releasing prisoners before the King. Traditionally, personal servitude was the medieval form of bailment. Here, a prisoner would ask friend or master to become surety for them which would result in their release from prison’s squalor. Should the previously incarcerated not show for court, then the person promising surety for their appearance would take their place in the court proceedings and would receive the intended punishment from the verdict.

B. Bonds in England and Early American History

Later in the 17th Century, the writ of Habeus Corpus was codified in the same named Act of 1679, and was hailed as “the most usual remedy by which a man is restored again to his liberty.” Judges under the rule of King James II (Reigning 1685-1688) begged to differ however, and were notorious for keeping people imprisoned by raising the amount of surety higher than the imprisoned could afford. A few years earlier, William Penn, residing in America, who while still under the reign of King Charles II (1660-1685) wrote the Frame of Government of Pennsylvania Article XI, which stated that “all prisoners shall be bailable by sufficient sureties, unless for capital offense, where the proof is evident, or the presumption great.” Influenced by Penn’s work, the Lords and Commons of England created the English Bill of Rights of 1689 that stated “And excessive bail hath been required of persons committed in

18 See id.
20 Id.
21 Id.
23 See id. at 190.
24 See id. at 218.
criminal cases to elude the benefit of the laws made for the liberty of the subjects; And excessive fines have been imposed.”

The English Bill of Rights of 1689 was a astounding departure from the rule of royalty (who allowed the judges great freedoms) and stated that Lords and Commons valued the liberties of man and imposed order to free the accused from the previous arbitrary and capricious bail requirements of the past.

C. Writing of the Constitution

Skipping over one hundred years to our own Constitution, Alexander Hamilton in the Federalist Papers No. eighty-four, believed that the written Constitution is its own Bill of Rights. The Constitution, Hamilton indicated, is a document far greater than that “primitive signification” (alluding to the English Bill of Rights in 1689) which is merely a stipulation between kings and their subjects, and not an agreement among free men. Therefore, no mention of bail was in the original Constitution because being a document implicit of the rights of free mankind, it was supposedly implied. Yet many reading the Constitution did not see how words missing from the Constitution could mean implied rights. Among these, George Madison prevailed in the addition of a Bill of Rights, and stated that “all power is subject to abuse and should be guarded against constitutionally securing the “great rights of mankind.”

Oddly enough, the Eighth Amendment to the Constitution reads quite like to the English Bill of Rights of 1689: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” In short, the spirit of bail, as written into the Constitution, was that America was free from the “hereditary aristocracy” and “despotic kings,” and that freed

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25 Id. at 205.
27 See id. at 262.
29 U.S. CONST. amend. VIII.
30 LEVY, supra note 25 at 138.
men should not live in fear of unjust imprisonment before trial without hope of excessive bond.

D. The Modern View of Bail and Bond

Bail is not an absolute right; it just cannot be excessive.31 “The right to release before trial is conditioned upon the accused giving adequate assurances that he will stand trial and submit to sentence Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is excessive under the Eight Amendment.”32 In the landmark case of Carlson v. Landon, where several active Communists brought a writ of habeus corpus action against the Attorney General when they were denied bail,33 the U.S. Supreme Court stated that bail is not a right in all cases, but “it shall not be excessive in those cases where it is proper to grant bail.”34 Little has changed in the fifty-six years since Carlson v. Landon, except further refinements to the meaning of excessive. For example, in U.S. v. Salerno, the Court stated that 1) bail must not be excessive in light of the perceived evil and 2) if the government’s interest is only in the prevention of flight, then the bail must be set no higher than that goal.35

Assuredly, the overriding principle of bail is to assure the defendant’s appearance for his proceedings before the court.36 Generally, persons who will endanger the safety of the community will be denied bail.37 The gray area of bailment law regards the defendant who cannot afford the required bond. Commonly, courts will not accept the argument that bail is excessive just because the accused is indigent and cannot find means for release prior to the proceedings.38 As pervasive as this thought seems to be, it is against the wording of 18 C.F.R. §3142(c)(2) that states “The judicial officer may not impose a financial condition that results in

32 See id. at 652 (quoting Stack v. Boyle, 342 U.S. 1 (1951)).
33 Id at 662 (quoting Carlson v. Landon, 342 U.S. 524 (1952)).
34 See id.
35 See id at 662 (quoting U.S. v. Salerno, 481 U.S. 739 (1987)).
37 Id. at 748.
38 LAFAVE, supra note 28 at 654.
the pretrial detention of the person.” Further making the bond issue gray is the U.S. Supreme Court’s statement in *Bell v. Wolfish* that pre-trial detention is not “inevitably punishment.” So the strange balance of U.S. bailment law is on the one hand to not impose bail higher than the financial resources of the pre-release detainees, yet the courts regularly allow this, and other the other hand, pre-release detention is not punishment, although those held in this manner are confined within jail cells.

History provides some answer to these confusing mandates. In the 1960s and the early 1970s, the concern was that due process of law was denied to the indigent, resulting in significant pre-trial releases during a “bail-reform movement.” The 1980s brought the U.S. a major crime wave, and law enforcement began publicizing that many pre-trial release defendants were committing crimes against witnesses and the community while out on bail. Congress responded with the Bail Reform Act of 1984 which resulted in a leap from two percent of federal detainees being denied bail to twenty-nine percent.

### E. Immigration Bonds

The immigrant has limited rights as compared to a criminal defendant: “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”

“(A)n alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of the national interest,” and “is consequently narrow.” The immigrant seeking bond is beholden to the Attorney General and

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39 See id. at 664 (quoting from *Bell v. Wolfish*, 441 U.S. 520 (1979)).
41 See id.
42 See SALTZBURG, supra note 18 at 944.
his designees, and if they consider that the immigrant warrants bond, it may be issued,\textsuperscript{45} or issued then revoked.\textsuperscript{46} The authority is near absolute because the Eighth amendment does not apply to immigrant bond amounts. Granting bond, releasing an immigrant on his or her own recognizance, or denying bond is a discretionary judgment not subject to judicial review.\textsuperscript{47}

1. The Bond Door Further Closes

Even prior to 9/11, national security was a factor in determining if an immigrant was a danger to the community, but only if the judgment for denying bond applied a “reasonable foundation”\textsuperscript{48} and was “rationally related to the statute.”\textsuperscript{49} In the \textit{Matter of Patel},\textsuperscript{50} the BIA held that unless the government had a justifiable belief that an immigrant was a threat to national security or bail risk, a bond must be granted.\textsuperscript{51} Post 9/11 however, shows a marked presumption towards detention because the burden is now placed upon the immigrant to prove to DHS that he is not a danger to the community, to national security, or a flight risk.\textsuperscript{52}

The notion that illegal immigrants are a threat to national security has been stretched to cover extraordinary lengths—even when the target immigrant is “armed” with no more than a leaky boat.\textsuperscript{53} Under the Bush Administration, it is also policy for all undesirable immigrant situations. In the above case of the leaky boat, the U.S. denied boat arriving Haitians entry, and detained and deported them. The Attorney General cited concerns that “release of such aliens

\textsuperscript{46} T. Alexander Aleinikoff et. al., \textit{IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS} 272 (2007) (quoting INA § 236(b) “The Attorney General may revoke a bond…[r]earrest the alien under the original warrant…
\textsuperscript{47} Id. at 273 (quoting INA §236(e) “The Attorney General’s discretionary judgment regarding the application of this section (bonds) is shall not be subject to review…[N]o court may set aside any action or decision by the Attorney General under this section (bonds and detainment of immigrants…”
\textsuperscript{49} \textit{See id.}
\textsuperscript{51} Id.
\textsuperscript{52} \textit{See IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK} 239 (10th ed. 2006).
would encourage future surges in illegal migration by seas” and this would detract the Coast Guard from their war against terrorism.54

2. The Immigrant Bond Process

Having reviewed the history and spirit of criminal and immigration bonds, this Note now briefly examines the pre-release bond process. Typically, after local law enforcement or DHS apprehends the illegal immigrant, the DHS District Officer determines whether the immigrant is eligible for a bond,55 and Immigration and Customs Enforcement (ICE) will issue a Notice of Custody Determination (“NCD”) that will state the bond amount.56 Once the detainee receives the NCD, he may, either pro se, or through counsel (if he can retain an attorney), request a bond redetermination hearing before an Immigration Judge to lower the bond or request to be released on the detainee’s recognizance.57

Considered as an entirely separate matter from the merits case, the bond redetermination hearing can be held at anytime and even requested orally.58 The Immigration Judge, in making the bond redetermination, may consider any information presented to him from any source;59 specifically he must consider whether the detainee is a threat to national security, the community, or a flight risk.60 The Immigration Judge may also raise the bond amount or deny bond,61 but

54 See id. at 578–79.
58 See id.
59 See Germain, supra note 55 at 171.
61 See Hutchins, supra note 50 at ¶¶ 38–39.
regardless, he must state his reasons for the bond amount explicitly in the record.\textsuperscript{62} Other factors that the Immigration Judge may use to determine if an immigrant warrants bond:

- Age
- Marital status
- Immigration status of spouse
- Children
  - Immigration status
  - Age
  - Health
- Manner of entry into US
  - Date of entry in US
  - Length of time in US
- Level of education completed
- Work history
- Prior immigration history
- Prior voluntary returns?
- Use of fraudulent documents?
- Prior removal?
- Criminal history
  - Circumstances, nature and seriousness of offense(s)
  - History of failure to appear
- Community ties/volunteer activities
- Capacity to pay a certain bond amount\textsuperscript{63}

Should the detainee not be able to afford the bond amount set by the IJ, he may request another bond redetermination hearing.\textsuperscript{64} In fact, the detainee, if he can prove “materially changed circumstances”\textsuperscript{65} may make a written request for another bond redetermination hearing.

\textsuperscript{62} See id.
\textsuperscript{64} See In re Valles-Perez, 21 I. & N. Dec. 769, 771 (B.I.A. 1982).
\textsuperscript{65} See Germain, supra note 55 at 172.
before the Immigration Judge at any time. Should the detainee desire review of the bond redetermination, he may appeal to the Bureau of Immigration Appeals ("BIA") as long as the appeal is within thirty days of the bond decision. Appealing to the BIA is no longer favored by many, and the fact remains that bond appeals have dropped dramatically since 2002 (by forty-one percent). Citing the long response time of six or more months, and blaming the Bush Administration’s reduction of the BIA’s size from twenty-three justices to eleven, and streamline, narrowed procedures (the BIA cannot write the opinion for its decision if its agrees with the IJ, if it believes the errors are harmless, or the issues are controlled by existing precedent or not substantial), the BIA are widely perceived as a “rubber stamp” for the Immigration Judge’s decision.

All of this procedure, while to some may seem to be of extraordinary due process, in reality, falls short. A majority of immigrant detainees are pro se, and if they can read, and if they can read in a language available at the detention center’s library, they must somehow sort through all their legal options without the guidance of experienced counsel. The result is a very one-sided confrontation where an ill-prepared immigrant faces a well-versed immigration trial attorney and immigration judge with the logical conclusion of a rout.

III. TRENDS AND PRESSURES ON PRE-RELEASE IMMIGRATION BONDS

A. U.S. Congressional Attitudes Towards Incarceration of Immigrants

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66 Id. at 772.
67 Germain, supra note 48 at 172.
68 FY 2006 Statistical Yearbook, supra note 2 at Table 2.
69 Germain, supra note 48 at 172.
71 Id. at 719.
James F. Sensenbrenner, Jr. (Republican Wisconsin) introducing his bill that became the REAL ID illustrates the Congressionally fused concept that immigrants and national security are one:

[T]his legislation will tighten our asylum system, which has been abused by terrorist. The 9/11 Commission staff report on terrorist travel states that “once the terrorist had entered the United States, their next challenge was to find a way to remain here.” Their primary method was immigration fraud. Irresponsible judges have made [l]aws subject to fraud and abuse. We will end judge-imposed presumptions that benefit suspected terrorists in order to stop providing a safe haven to some of the worst people on Earth.\footnote{151 Cong. Rec. H453 (daily ed. Feb. 9, 2005) (statement of Rep. Sensenbrenner).}

Senator Byrd (Democrat West Virginia) during the debate of REAL ID, equated the lack of detention space (“beds”) with uncontrolled illegal immigrant forays into the United States. In one case, the Senator stated, that the roving illegal immigrants were continually wandering onto a California Marine base, disrupting necessary training for deployment to Iraq.\footnote{Statement by Senator Byrd, 151 Cong. Rec. S 3984, April 20, 2005.} Senator Byrd concluded by quoting sources within the Senate Intelligence Committee who were convinced that “that al-Qaida has considered using the southwest border to infiltrate the United States. Several al-Qaida leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons.”\footnote{Id.} Yet as of 2006, according to the information stated in one study, “not one terrorist has entered the United States from Mexico”.\footnote{Kevin R. Johnson & Bernard Trujillo, Immigration Reform, National Security After September 11, and the Future of North American Integration, U.C. Davis Sch. of Law 39 (2007), \url{http://ssrn.com/abstract=962963}.} So, the majority of Congressional sentiments are apparent: illegal immigrants are a security threat to the nation and need to be stopped; however, the “facts” used to support this premise are not certain.
The favored Congressional method of stopping this influx seems to be detention. Even Senator Feinstein (Democrat California) who co-sponsored along with Texas Senator Cornyn (Republican), a proposal to stop the REAL ID bill (until vetted by meaningful dialog on immigration reform),\textsuperscript{77} stated that she was not necessarily against the proposed, but not passed, $10,000 bond requirement for detainees, but was concerned that “[w]e don't even know if we can hold everybody.”\textsuperscript{78} Congress responded to these leaders by proposing 100,000 detention beds.\textsuperscript{79} While Congress has not fully funded these facilities to date, proponents have launched no less than twenty-eight bills since the passing of REAL ID (2005) to realize this goal.\textsuperscript{80}

In summary, the Congressional majority opinion on illegal immigrants is that their presence creates national security issues, and the U.S. is simply safer with illegal immigrants incarcerated before they are removed.

\textbf{B. DOJ and DHS Attitudes and Policies Towards Detainees}

Not surprisingly, the Department of Justice, and the Department of Homeland Security have rather strong views about bond determination and the detention of immigrants:

There is no justification for imposing legislative blinders on the Executive Branch so that it may not consider factors beyond those that are entirely unique to the alien seeking a bond determination especially when it is clear that such bond determinations can have profound effects that reach beyond the alien [a]nd

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\item[79] 2005 Cong US HR 4044, 109\textsuperscript{th} Congress Sec. 201.
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undermine both our national security and the safety of future groups of migrant aliens themselves.\(^{81}\)

As a matter of fact, the Department of Justice, besides the statement above requesting that Congress stay out of its way in enforcing immigration bonds, made several very direct points on exactly where it stands on detainees:

- The detainee’s very existence in the United States is a continuing violation of the law, unlike the citizen criminal who is detained for a crime accomplished.\(^{82}\)
- DOJ considers detainee bonds as “an extraordinary act of sovereign generosity.”\(^{83}\)
- Detainment is a civil proceeding and detainees have no due process right to be liberated during the pendency of their removal.\(^{84}\)
- The United States, through Congress, has the plenary power to expel detainees under its sovereign right to determine which non-citizens shall be permitted to remain within our borders.\(^{85}\)
- A detainee is not like a criminal citizen because his detainment is quasi-voluntary; he can terminate it at any time by simply “withdrawing his application for admission and departing the United States”.\(^{86}\)

The Department of Homeland Security, through Immigration and Customs Enforcement (ICE), issued its own statement regarding illegal immigrants and future detainees in Operation Endgame.\(^{87}\) Operation Endgame is the published plan to remove all “removable aliens” by

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\(^{83}\) Id.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.

2012. “The Golden Measure of success is to endeavor to protect our homeland by ensuring that every alien who is ordered removed departs the US as quickly as possible.” In Dallas during the Summer of 2007, this Author and many other denizens began to witness Operation Endgame in action through the raids on the Swift Meat Packing Plant, and the Fossil Watch Company. Considering the statements by the DOJ and DHS, an illegal alien shall be removed regardless of the criminal context.

C. U.S. Incarceration Trends and the Prison Industry

America incarcerates nearly one percent (2,385,213) of its population. The federal prison population currently is 193,000, and the remainder is in state, private, and local jails. For comparison, the total number of U.S. incarcerated individuals is equivalent to eighty-four percent of Chicago’s population. “The country that holds itself out as the “land of freedom” incarcerates a higher percentage of people than any other country—including India and China—even though both countries have three times the U.S. population. ICE, through its own facilities and under contract to private firms or local governments detained 27,634 immigrants in 2006, an increase of 41.3 percent from year 2005. 14,015 of these detainees have only immigration law violations (no criminal charges) pending against them, and represent a 79.1 percent increase in non-criminal detainees over 2005.
Texas is the second largest incarceration state in the nation with 172,116 prisoners, and only slightly below the largest incarceration state, California.\textsuperscript{100} On the other hand, Texas leads the nation in the total number of persons incarcerated in private prisons, 18,626, an increase of 16.9 percent over year 2005.\textsuperscript{101} Exclusive of this number is an additional 3,261 immigration detainees who are housed in private “detention facilities” in Texas. With state, local and federal spending in corrections amounting to $38 Billion dollars per year, the prison industry cannot be ignored as a policy factor in America any longer.\textsuperscript{102} Texas, in particular, is home to sixteen federal correction centers, nine of which private corrections corporations administer, such as Emerald Companies,\textsuperscript{103} or the Corrections Corporation of America.\textsuperscript{104}

Detaining immigrants is a lucrative business for the corporations\textsuperscript{105} and theoretically for the local counties housing the detention centers. ICE pays private corporations $5,471 per immigrant detainee a month or a total of $17.8 Million per month for Texas detainees alone.\textsuperscript{106} The operational costs that the private corporations charge back to the local communities seem to range around $117-$170 Million dollars for a ten-year contract.\textsuperscript{107} The communities receive $1 a day per prisoner, and it begs the question that keeping the facility with as many detainees as possible would be a local goal.\textsuperscript{108} The private corrections firms choose rural environments for the location of the detentions centers; “Emerald Companies has created more than 150 jobs in the

\begin{thebibliography}{99}
\bibitem{100} Id. at 2.
\bibitem{101} Id. at 3.
\bibitem{102} Stephan, supra note 7 at 1.
\bibitem{103} \url{http://www.emeraldcompanies.com/locations}; \url{http://www.correctionscorp.com/facilitylist.cfm}
\bibitem{104} Id.
\bibitem{105} Revenue figures on Corrections Corporation of America (CXW) located at \url{http://www.cnnmoney.com} 2006 revenue: 1.33 Billion at 24.3 percent increase over 2005 revenue.
\bibitem{106} Amanda DeBard, \textit{Protests over unfair treatment Dispute over Hutto Facility}, The Daily Texan at University of Texas Austin, Oct. 31, 2007 at 1.
\bibitem{107} Ryan Burr, \textit{Bidder: Bay Jail Actions Illegal}, The Panama News Herald, January 14, 2006; Claude Duncan, \textit{Viewpoints: Round 2, Do some Louisiana Good ol’boys really have a shot at the jail contract?}, The Panama News Herald, December 18, 2005.
\bibitem{108} Bard, supra note 93.
\end{thebibliography}
community which allowed the county to profit economically and also stabilized the population.”

So how does a community receive a detention center? Is there a correlation between the immigration policy aims of the area’s U.S. Representative and the center’s location? After investigation at a tracking site for illegal immigration issues, tracking the voting records of U.S. Representatives (whose districts have ICE detention Centers) and their voting record on Immigration issues, there seems to be no correlation. Within Texas, the distribution of centers lay equally between those U.S. Congressman who lean both strongly for, and against immigration. According to the sources available, the initial and strongest push for a detention center starts at the county level. One or more private corrections corporations lobby(ies) the county government promising jobs and economic benefits. The county must convince its residents to let the bond(s) for building the detention center. Following the issue of the bond, the final phase is to bid ICE to “partner” with the community and send detainees to the center. The community, however, will be stuck with the bond payment regardless whether ICE produces a detainee contract or not. Speculation leads one to believe that a county with a $100 Million

110 Texas U.S. Representative Henry Cuellar (D), is over District 10 where LaSalle County Regional Detention Center is located; Texas U.S Representative Ciro Rodriguez (D), District 23 where Hudspeth Center is located; Texas U.S. Representative Mac Thornberry (R ) District 13 where Rolling Plains Regional Jail and Detention Center is located;Texas U.S. Representative Louie Gohmet (R ) District 1 where T.Don Hutto Residential Center is located; Texas. U.S. Representative K. Michael Conaway, District 11 where the Eden Detention Center is located; U.S. Representative Henry Cuellar (D), District 28 where both Laredo Processing Center and Webb County Detention Center are located. Voting records on Immigration obtained at http://profiles.numbersusa.com/
111 Id.
112 Kathi Bliss, County draws fire over “jail” project, Lockhart Post-Register, December 26, 2007.
113 Duncan, supra note 94.
dollar bond, needing federal revenue to pay the principle and interest, will solicit their U.S.
Representative’s help.

In summary, the pressure to incarcerate illegal immigrants comes from very high level
policy makers within the United States. Coupled with the economic pressure that local counties
place in their bid to obtain federal revenue through detention center placements, the plight of the
non-violent illegal immigrant becomes too evident: our system is designed to incarcerate them.

IV. RESULTS OF THE SURVEY TO TEXAS IMMIGRATION LAW PRACTITIONERS

A. Survey Origin

The initial stimulus for this Note was the anecdotal comments this Author heard from
local immigration law practitioners about the rising bond amounts for pre-relief immigrants.
This Author surveyed 167 (out of an entire population of 310) Texas members of the American
Immigration Lawyers Association (AILA) who stated that they were interested or specialized in
deportation issues. The survey was distributed in proportion to the immigration attorney
population in the cities of: Austin, Brownsville, Dallas, El Paso, Fort Worth, Houston, and San
Antonio. This Author received forty-seven responses, of which twenty had filled out the survey.
Those who replied but did not fill out the survey generally stated that they no longer were
involved in bond issues or had a different immigration specialization. Statistically, the results of
the survey shows an error rate (of the sample collected compared to the error rate if the whole
immigration practitioner population of Texas were surveyed) of twenty-one percent with a
confidence interval (how confident the survey is of the sample error rate) at ninety-five percent.
A higher sample return rate (of those who would fill out the survey) would equate to less of an
error rate. Translated, this means that if the survey shows an average bond amount of
$10,000, the actual average could be anywhere from $8,900 to $12,100.\textsuperscript{116}

\section*{B. Survey Results}

The survey responses confirmed the anecdotal information in the immigration law community. One hundred percent of the respondees stated that bond rates were going up dramatically. How dramatically? According the survey responses listed in Appendix B, the average bond rate in Texas for a non-criminal immigrant is $6,277. The minimum bond listed was $1,500 while $15,000 was the cited maximum. The median (middle figure) for all bonds is $5,000.00. Furthermore, ninety percent of all respondees stated that the reason that the bond amounts are rising is due to the increased political pressure upon the Immigration Judge to “not be the one who let THAT one (illegal immigrant) out”.

\section*{IV. SYNTHESIS OF THE TRENDS}

\subsection*{A. Is the Illegal Immigrant An Evil That The U.S. Must Cure?}

Should we view actions as the implementation of belief, this nation surely subscribes to the view that the illegal immigrant is a danger to our security and our economy. The U.S. has created a new legal model of what Stephen H. Legomsky has called Civil Regulatory:\textsuperscript{117} all the precepts of punishment from the criminal justice system, yet few of the rights and controls afforded by our criminal codes. The system came about through an ever tightening circle of: the population being worried about terrorism: followed by our law makers branding illegal immigrants as a threat to national security,\textsuperscript{118} followed by the general belief that illegal

\textsuperscript{116} The Author used the Roasoft® sample size calculator website available at http://www.raosoft.com/samplesize.html.


\textsuperscript{118} Senator Byrd statement, \textit{supra} note 65.
immigrants are inextricably linked to higher rates of crime.\textsuperscript{119} Leaving the conflagration of national security and illegal immigrants aside for other authors,\textsuperscript{120} the remainder of this Note will attack the misperception that illegal immigrants are a major driver of crime rates.

\textbf{B. Debunking Some of the Crime and Illegal Immigrant Myth}

While the estimated population of illegal immigrants in the United States rose in 2007 to 12 Million (2007) from 4 Million in 1994,\textsuperscript{121} a change of greater than two hundred percent, crime reduced in the same period with the U.S. by 34.2 percent.\textsuperscript{122} Moreover, the native born U.S. denizen, is seven times more likely to be incarcerated than a foreign born immigrant, legal or illegal.\textsuperscript{123} For instance, a native born U.S. denizen of Mexican origin has an incarceration rate of 5.9 percent, compared to a foreign born Mexican immigrant who has an incarceration rate of .7 percent.\textsuperscript{124} Considering that the actual trend and the perceived trend are diametrically opposite, what are the drivers that makes us, as a nation, believe that we are safer if the illegal immigrants are detained before being removed?

\textbf{C. Not a Group of Angels, but Men}

Like many generally false perceptions, some truth resides within. “If men were angels, no government would be necessary, if angels were to govern men, neither external nor internal


\footnotesize{\textsuperscript{121} Rumbaut, \textit{supra} note 106 at executive summary.}

\footnotesize{\textsuperscript{122} Id.}

\footnotesize{\textsuperscript{123} Id.}

\footnotesize{\textsuperscript{124} Id.}
controls on government would be necessary."125 James Madison knew that even people with the best education and highest calling to lead in government can also be driven by the nadir of human impulses. No less are the illegal immigrants. Illegal immigrants do commit crimes. Illegal immigrants do have a thirty to thirty-six percent failure rate showing up for their proceedings even under bond.126 (Just for comparison, the failure rate of the U.S. citizen criminal to attend his proceedings is 24 percent).127 If our system of justice extends affordable bonds to criminally accused U.S. citizens (even though a quarter of them do not show for proceedings), why cannot this same justice be extended to the illegal immigrant?

This Author’s theory is that the U.S., failing in international perception from our current policies, and still reeling from our wounds from 9/11, is in a rush to return to our previously respected status and our belief in our security. We are willing to scapegoat any perceived ill hoping that curing it, will lead us back onto the path of safety and greatness. Thinking that we are curing what is hurting us, we are willing to make small sacrifices of our cornerstones of justice and fair dealing.

Unfortunately, governments, both national and local, are willing participants. In 2005 for example, the Minnesota Department of Administration presented its Governor with a report calculating the costs of illegal immigrants.128 The report did not bother however, to offset the costs of the illegal immigrants by the monies that these same people pour into the state coffers. “Because they (the illegal immigrants) do not file tax returns, these funds are kept by the state and federal government resulting in stranded withholdings. Although some argue that the value

125 James Madison, The Federalist No. 51 (1787)
of these withholdings is significant, the exact dollar amount attributable to illegal immigrants is unknown.”

When a government chooses to implicitly castigate rather than investigate, it has created a policy based upon faulty information, and is irresponsible and unfair. Irresponsible, because the organization responsible for holding Minnesota’s revenues will not extend the effort to find out who is paying into it. Unfair, because now a policy maker has a one-sided analysis that concludes that his state has a growing burden without a benefit—like a cancer. And the treatment of cancer can require the sickening of the whole to eradicate the affliction of the part.

D. The Losing Mindshare

If our society believes that small (from the U.S. Citizen perspective) changes in our laws will cure the illegal immigrant problem, (such as requiring special driver’s licenses for U.S. Citizens, or causing a small segment of immigrants to be under mandatory incarceration if they commit two misdemeanors), then increasingly harsh changes to the law will not cause us any further discomfort—we start to become immune.

Lucy Dawidowicz, a historian attempting to understand the changes in German society pre-World War II called this process mithridatism. To mithridatize, small doses of poison are introduced until a system is immunized from the poison’s effects. In the case of the U.S. mindshare, even though recently proven that illegal immigrants do not drive the crime rates, we as a society are willing to subject these people to harsh treatment simply because we have accepted that incarceration is the just tariff of the illegal immigrant.

E. Why Care About a Rising Trend in Bonds?

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129 Id.
In December 2007, Michael Vick, former star Quarterback of the Atlanta Falcons, received twenty-three months in federal prison for arranging dog fights. The judge, before sentencing, received “thousands” of letters condemning Vick’s actions. The nation seemed outraged—because after all, six dogs did die and the remainder were treated poorly in this “inhumane sporting activity.” This Author ponders this story in light of the 14 thousand detained immigrants; could it be that we are indeed mithridatized if our nation is more outraged about the ill treatment of dogs than the humans we incarcerate?

So, for a moment let us look at the reality of the incarcerated immigrant. A majority of detainees have never been previously incarcerated. They are subject to the extreme stress of separation from friends and family, being handcuffed when moving between buildings, being told when to sit, stand, and sleep. Additionally, these non-violent detainees often have the hazard of being mixed in with the truly criminal. In fact, ICE admits that its detention and removal group has difficulty maintaining separate facilities for the criminal detainees, on the one hand, and the juveniles, asylum seekers and families on the other. While ICE may try to sugarcoat the incarceration experience for younger children through happy pictures on the wall, and even Halloween parties, overall detainees realize that they are in prison.

The Government is fond of quoting forty-seven days as the average period of detainment for the illegal immigrant, but this figure is skewed. Forty-seven days may be average for those immigrants who have no hope of relief and whose cases are quickly run through the system, but

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133 Id.
134 Id. at 2.
136 ENDGAME, supra note 77 at 2-11.
137 DeBard, supra note 93.
138 Hines, supra note 123 at 19.
in cases of certain detainees, such as those seeking asylum, the period can be one or more years.\(^{139}\)

The private facilities that are the fastest growing segment of ICE detention are rife with problems: beatings,\(^{140}\) abuse, and prison riots.\(^{141}\) The cells are cramped and oftentimes occupied by more than five detainees.\(^{142}\) And how did the detainees arrive at these centers? In some cases, the detainee was obtained by ICE kicking in the door of their home, during raids looking for the “criminally wanted alien.”\(^{143}\) Meanwhile the detainees’ last memories of family are of their spouses terrorized, and their children screaming while the armed ICE agents shackle the detainee and haul them off to detention.

1. The Cost to the Nation

Putting aside the cost to our humanity that immigration detention brings, the nation also pays hard costs for the detention of immigrants—upwards of $180 per day per detainee.\(^{144}\) Should the case be that the detainee was eligible to work, both the federal and state governments lose that tax revenue.\(^{145}\) In certain cases, the families left behind, if the mother is a Legal Permanent Resident (LPR), or the children U.S. Citizens, the local cost may include public assistance for the dependent spouse and children.\(^{146}\) Congress has already authorized 27,000 detainee beds with a push for another 100,000.\(^{147}\)

\(^{139}\) Id.


\(^{141}\) Houston Chronicle, August 23, 1996 available at: http://www.privateci.org/texas.htm


\(^{144}\) DeBard, supra note 93. Calculated by quoted monthly rate of $5471 divided by 30 days.

\(^{145}\) Legomsky, supra note 113 at 542.

\(^{146}\) Id.

\(^{147}\) supra note 70.
number of detainees are non-criminal, the United States is looking at $9 Million dollars a day, $3.28 Billion dollars a year.

Other costs to the nation are harder to quantify. Considering that some detainees, who are incarcerated for months if not a year or more, will win their cases and return to their jobs and homes, or the that some of the U.S. children of detainees experience emotional trauma through the plight of their loved ones, where do they turn if they need psychological care? And who will end up paying for this? Instead of raising families who will assimilate within the United States, long periods of incarceration can cause them to become disenfranchised, where they look to this nation as one of pain and not paternity. These same children, whether detainees or from detainee parents will later join our society, join our military, and join our neighborhoods. Even the Mayor of Irving, Texas, who prides himself on partnering with ICE’s Criminal Alien Program (CAP: detaining illegal immigrants found during routine traffic stops), realizes it is a growing issue: "We are concerned that young children, in fact, mostly American citizens in our city, spirits are being destroyed by this process and all this talk about their parents."

2. Towards Fundamental Fairness

The call of this Note is a call for fundamental fairness. In particular, this Note advocates for the removal of the obstacles to legal representation that stymie the non-violent detainee against the raising bond rate. Four impediments to legal representation face the detainee:

- The initial placement of an immigrant detainee can be far from their friends or family (the people who generally retain the attorney). Distant placement hampers the family from interacting with detainee and the attorney and slows the exchange of information necessary to a successful defense.

• DHS can move a detainee any time that it wants, to whatever facility it wants.

• DHS is under no obligation to publish the names or locations of any immigration detainee.

  o This is the result of DHS’ interpretation of Center for National Security Studies v. U.S. Department of Justice, 331 F. 3d 918 (D.C. Cir. 2003) (Holding that DHS does not need to publish names of detainees if they are under investigation or an interesting person in the 9/11 terrorist attacks.)

• DHS will only notify the detainee’s attorney that the detainee is being moved to another facility (sometimes across the country) after the detainee is in motion.

In essence, detainees are denied effective counsel if their families cannot locate them, and the attorney can not always represent them if the detainees are “shell-gamed” across the nation.

Representation is key to bond reduction. According to the Note’s survey, all attorneys stated that legal counsel can negotiate with the District Officer, (potentially alleviating the need for a bond redetermination), or can frame the detainee’s case in a more favorable light before the Immigration Judge. In both cases, legal representation yields a far better probability of an affordable bond. Representation can only occur, however, if either a friend or family member knows that ICE has detained their friend or loved one. Additionally, if charitable organizations know of the existence of the detainees, they can arrange for the detainee to contact an attorney through the phone network that ICE created for that purpose.\(^\text{150}\)

Requiring that DHS publish its list of detainees must be accomplished by challenging the agency’s use of Center for National Security Studies v. U.S. Department of Justice. DHS has used this case as a broad policy statement that no detainees need to be published, when in fact this is a very broad reading of the holding. In the actual cast, the court held that only those extremely few detainees who are suspect of terrorist activities, or who could be material

witnesses to terrorist activities should be not published. Thus remainder of the detainees should have their names made publicly available maximizing their chances of recognition from their friends or family.

Summarizing the list of needed changes to promote fairness in the bond process:

- Require that DHS publish the names, locations and hearing dates for all non-criminal detainees.
- Insist that distance limits be placed on where detainees will be incarcerated, and that DHS minimize the amount of detainee shuffling.
- Require that the attorney of record be notified before the detainee is transferred.
- Hold the Immigration Judge to stricter accountability on bond amounts and make them quantify the flight risk of the detainee (the actual reason that bond is let). Be willing to complain over the rising bond amounts when the circumstances do not warrant it.
- Promote a system of supervised release, where DHS diverts some of its “raid” funds to monitoring bracelets, release to humanitarian groups, or to the local parole system.\(^\text{151}\)

**VI. SUMMARY**

We have, as a nation, choices in how we can represent ourselves to the world, a nation of justice and fairness or a nation prone to incarceration. Our recent law journals certainly point to a wide spectrum of how we can proceed. We can choose the latter and work to further remove rights from the detainee because we are a “country built on Anglo-Saxon blood, sweat, culture that speaks English; a Christian country, primarily Protestant”\(^\text{152}\) that intuitively welcomes the same because it requires “less effort to assimilate” them.\(^\text{153}\) We can take the neutral position that immigrants, legal or not, have limited rights in the law— so there we have it— and continue to

\(^{151}\) This has significantly lowered the failure to show rate in U.S. Citizen criminal bond cases. *see*


\(^{153}\) *Id.* at 56.
do nothing to challenge a nation racing towards imprisonment of millions of men, women, and sometimes children. Or we can realize that many of the suppositions that paint illegal immigrants are not wholly true. And we can make small changes in how we view the need for incarcerating every illegal immigrant and uphold our fundamental ideals. Allowing affordable bonds to detainees is fair and just because not every illegal immigrant is destined for removal; some will win their cause to stay—just like every accused criminal is not destined for prison; some are innocent.

This Author believes that the American citizen, when honestly and correctly informed, will move towards fundamental fairness and justice. And fairness and justice call for the thousands of non-criminal detainees to receive a better chance of legal representation, and a better chance for freedom while awaiting their merits case.

APPENDIX A

SURVEY QUESTIONS

Survey on Asylum Bond Hearings/Redeterminations.

1.) Please indicate the number of bond hearings that you have had in the past year

2.) Of these hearings, how many were for clients seeking asylum? __________

Arriving Alien applicants: (DHS determined bonds at an arriving port)

(If you have not had any arriving alien bond hearings, please skip to next section)

3.) Of your bond cases for arriving aliens, what is the average amount of bond set by DHS?

4.) Did DHS deny any of your arriving aliens bond? If so how many?

5.) What number of your arriving aliens were petitioning for asylum?

6.) On a scale of 1, being none, or 10 extensive, how do you feel that representation influenced the bond determination of your arriving alien?

   1  2  3  4  5  6  7  8  9  10

Bond Re-determinations sought as part of relief:

7.) How many bond hearings were for non-criminal aliens?

8.) Of your total number of bond redetermination hearings, what is the average bond amount?

9.) How many of the bond redetermination hearings resulted in your clients leaving detention?
Opinion Section: Bond Determination (This section is for any comments about bond determination or to give any examples of your experience with bond determination.)

1. From a scale of 1-10 with 1 being reasonable and "appropriate in the circumstances.", to 10 being arbitrary and unreasonable, how would you rate how Immigration Judges are making bond determinations today?

   1  2  3  4  5  6  7  8  9  10

2. Do you believe that there is a trend upward or downward in the bond determinations amounts in the last five years?

   • What explanation do you offer for this trend?

3. The number of bond determination appeals submitted to BIA has dropped 64% since 2002. What is your opinion as to this dramatic change?

4. Do you see bond determinations as a problem area for your practice? If so what would you advise to change?

5. Describe your definition of “reasonable” in terms of bond determinations.
APPENDIX B

SURVEY RESPONSES