MAKING BAIL AND MELTING ICE

by
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The federal executive branch's zealous enforcement of the Immigration and Nationality Act is, at times, in conflict with the Bail Reform Act which requires that, absent exceptional circumstances, federal criminal defendants be released from federal custody pending trial. That conflict has resulted in a pattern of improper pretrial detention of alien defendants accused of federal crimes. That trend is fueled in part by a legislative detention quota and enabled by a judiciary that is too often unduly reluctant to afford alien defendants the full protection of their statutory right to pretrial release.

Part I of this Comment considers the law and policy that has led to an increasing number of alien defendants being unjustly detained while they await criminal trial. Next, Part II considers the impact of improper pretrial detention on its immediate victims and American society as a whole. Finally, Part III proposes solutions.

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INTRODUCTION

This Comment examines a troubling and increasingly prevalent conflict in the Executive's application of the Immigration and Nationality Act ("INA")[1] and the requirements of the Bail Reform Act ("BRA").[2] The BRA forbids the detention of federal criminal defendants pending trial, unless there are no other reasonable means to prevent the defendant from posing a threat to the public or to ensure that the defendant will appear in court.[3] The INA grants the Executive broad authority to detain and deport unlawful aliens.[4] Criminal prosecutions of deportable aliens, therefore, implicate the authority of both the Department of Justice ("DOJ"), which is responsible for prosecuting federal criminal defendants,[5] and the Bureau of Immigration and Customs Enforcement ("ICE"), which is charged with enforcing the INA.[6]

This overlap of jurisdiction invites tension between the agencies—DOJ's prerogative is to prosecute and convict the alien defendant, ICE's is to detain and perhaps deport her. In *United States v. Trujillo-Alvarez*, the district court confronted the interagency conflict created by DOJ criminal prosecution of ICE detainees.[7] The magistrate judge in *Trujillo-Alvarez* had ordered the defendant released on conditions pursuant to the BRA, pending criminal trial on charges of illegal reentry.[8] Mr. Trujillo-Alvarez was released from DOJ custody, per the court's order, only to be taken into custody by ICE and held at an immigration detention facility.[9] While still in ICE custody, the defendant moved the district court, *inter alia*, to order ICE to comply with the magistrate's order by releasing him from

[1] 8 U.S.C. §§ 1101–1537 (2012).

[2] 18 U.S.C. §§ 3142–3150 (2012).

[3] *See id.* § 3142(b). In some cases this affirmative showing is presumed and subject to rebuttal. *Id.* § 3142(e)(2)–(3).

[4] *See* 8 U.S.C. § 1226 (2012).

[5] The United States Attorneys' Office is an agency within DOJ that is responsible for "the prosecution of criminal cases brought by the Federal Government." *Mission*, U.S. DOJ, OFFICES OF THE U.S. ATT'YS, http://www.justice.gov/usao/about/mission.html.

[6] ICE is an agency within the Department of Homeland Security. *See Overview*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/overview/.

[7] 900 F. Supp. 2d 1167, 1169 (D. Or. 2012).

[8] *Id.* at 1181.

[9] *Id.* at 1172.

ICE custody and returning him to the District of Oregon.[10] In an opinion granting the defendant's motion in part and denying it in part, the *Trujillo-Alvarez* court considered the choice facing federal authorities when they take custody of an unlawful alien charged with a federal crime. The court explained that:

> [I]f such an [unlawful] alien is believed to have committed a federal offense . . . ICE may choose to postpone the removal and deportation of that person while the U.S. Attorney's Office brings a criminal prosecution. Which pathway to take in any given case is a policy decision, and it is for the Executive Branch to determine.
>
> When the Executive Branch decides that it will defer removal and deportation in favor of first proceeding with federal criminal prosecution, then all applicable laws governing such prosecutions must be followed, including the BRA.[11]

The court then ordered the Executive to either release the defendant from federal custody within seven days or have the criminal charges against him dismissed with prejudice.[12]

While the *Trujillo-Alvarez* court protected the defendant's right to pretrial release pursuant to the BRA, that outcome is far from certain for alien criminal defendants in federal court. Too often, the Executive Branch proceeds with the criminal prosecution of alien defendants without adhering to the BRA. In many cases, aliens accused of federal crimes are improperly denied their statutory right to release from federal custody pending resolution of the charges against them.[13] Their unjust confinement is the consequence of an executive policy that prioritizes detention of suspected unlawful aliens. That policy is instigated in part by a legislative detention quota and enabled by a federal judiciary that is often unduly reluctant to order alien defendants' release.[14]

This Comment argues that the Executive must abide by the choice posited by the *Trujillo-Alvarez* court and that courts must not provide the Executive an escape valve by misconstruing the BRA as inapplicable to, or disfavoring the release of, a class of criminal defendants defined by their immigration status. Furthermore, courts should refuse to allow ICE to flout court orders releasing alien defendants from federal custody by de-

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[10] *Id.*

[11] *Id.* at 1169–70 (footnote omitted).

[12] *Id.* at 1181.

[13] This may be due to a denial of bail improperly based on immigration status, transfer from DOJ to ICE custody despite a release order, or the defendant's omission of a request for a bail hearing for fear of transfer to a distant ICE facility. *See generally* LENA GRABER & AMY SCHNITZER, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS (June 2013), [hereinafter NAT'L IMMIGRATION PROJECT], *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Federal_Bail_Advisory.pdf.

[14] *See infra* Part I.B–C.

taining them for the purpose of ensuring their appearance at trial, rather than removal.

This Comment proceeds in three Parts. Part I discusses the law and policy that has led to an increasing number of unlawful aliens being unjustly detained while they await criminal trial. Next, Part II considers the impact on the immediate victims, and American society as a whole, of the improper pretrial detention of alien criminal defendants. Finally, Part III proposes solutions.

I. THE CONFLICT

This Part discusses the applicable laws and policy choices that are currently causing the improper pretrial detention of some unlawful aliens who are charged with a federal crime. Section A analyzes the history, purpose, and text of the BRA, and concludes that the relevant provisions apply with equal force to all criminal defendants, irrespective of immigration status. Next, Section B discusses how immigration law and policy manifests a preference for the detention of unlawful aliens. Of particular concern is the so-called "bed mandate" that currently requires ICE to detain a minimum average of 34,000 aliens per day.[15] Finally, Section C considers the approaches that courts have taken in applying the BRA to alien criminal defendants and in attempting to reconcile the BRA's preference for pretrial release with an immigration policy that favors detention.

A. The Bail Reform Act

The history and purpose of the BRA strongly suggest that it was intended to reform federal bail practices to avoid discrimination against defendants based on class status and to mandate a strong preference for pretrial release. Further, the text of the BRA makes clear that those principles apply with equal force to all criminal defendants in federal court, irrespective of immigration status. This Section analyzes the history, purpose, and text of the BRA and concludes that the BRA should not be construed as discriminating against alien defendants' eligibility for pretrial release.

1. The History and Purpose of the BRA

The 8th Amendment to the Constitution prohibits the imposition of excessive bail requirements on criminal defendants in federal court.[16] Yet for the first 177 years of American history, monetary bail requirements

[15] *See Morning Edition: Little-Known Immigration Mandate Keeps Detention Beds Full* (NPR radio broadcast Nov. 19, 2013), *available at* http://www.npr.org/2013/11/19/245968601/little-known-immigration-mandate-keeps-detention-beds-full.

[16] U.S. CONST. amend. VIII.

discriminated against financially disadvantaged criminal defendants.[17] Congress passed the Bail Reform Act of 1966 in an effort to remedy the disparate treatment of defendants based on economic status.[18] As President Johnson put it at the signing ceremony of the BRA, the American monetary bail system prior to that time had inflicted "arbitrary cruelty" on indigent criminal defendants.[19] President Johnson went on to observe that "[w]hat is most shocking about [the] costs [of arbitrarily detaining criminal defendants]—to both individuals and to the public—is that they are totally unnecessary."[20]

The purpose of the BRA, therefore, was twofold. First, Congress sought to correct the widespread injustice caused by detaining criminal defendants based on their class status. Additionally, it recognized that pretrial detention imposes a substantial burden not only on the detainee, but also on the tax-paying public, and determined that incurring that cost is not justified absent exceptional circumstances. The BRA reflects Congres's belief that the only legitimate occasion to impose the costs of pretrial detention on the defendant and the taxpayers is where no less-restrictive measures are sufficient to protect the public from the defendant and to prevent him from attempting to evade facing charges.[21] Absent these extraordinary circumstances, the BRA expresses a strong congressional preference for pretrial release.[22]

Congress subsequently determined that the 1966 version of the BRA was inadequate to effectively protect the public from dangerous defendants.[23] Accordingly, the BRA was amended to its substantially current form in 1984 to refocus on ensuring more stringent criteria for releasing defendants who may pose a threat to public safety.[24] Although a defendant's flight risk remains relevant to the bail determination, after the 1984 amendments it is apparent that the primary purpose of pretrial detention is to prevent dangerous defendants from causing public harm while they await trial.[25]

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[17] Lyndon B. Johnson, Remarks at the Signing of the Bail Reform Act of 1966 in the East Room of the White House (June 22, 1966), *available at* http://www.presidency.ucsb.edu/ws/?pid=27666.

[18] *See id.*

[19] *Id.*

[20] *Id.*

[21] 18 U.S.C. § 3142(e) (2012).

[22] *See id.* § 3142(b).

[23] John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 1 (1985).

[24] *See id.*

[25] *See* S. REP. NO. 98-225, at 6–7 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3189 ("[T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial."); Goldkamp, *supra* note 23, at 1–2.

The fundamental tenets of the BRA have remained unchanged for almost 50 years.[26] The aims and preferences expressed in the BRA are in keeping with the most bedrock principle of American criminal justice—that the accused are presumed innocent until proven guilty beyond a reasonable doubt. Federal detention of a person presumed to be innocent, for the purpose of facilitating criminal prosecution, infringes on that person's liberty interest and is inappropriate unless the Executive can demonstrate that a sufficient, countervailing public interest requires it.[27] Nothing in the Constitution, in modern American jurisprudence, or in the BRA suggests that this principle applies with less than equal force to unlawful aliens than it does to American citizens.[28]

Although the specific purpose of the BRA was to eliminate bias against the economically disadvantaged, the broader meaning of the BRA is also clear—that criminal justice in America is not to be meted out according to class. The decision to detain a presumably innocent criminal defendant in order to deliver him to trial must be based on his individual character, not the group to which he belongs.[29]

2. The Statutory Text

The BRA, 18 U.S.C. § 3142, sets out the procedure for determining the pretrial disposition of individual criminal defendants. The text of the statute repeatedly illustrates that immigration status or the defendant's subjection to an immigration detainer[30] should not be considered as independent, much less dispositive, factors in determining a defendant's eligibility for pretrial release.

Section 3142(a) prescribes four pretrial status outcomes that the presiding judge must select from. At the defendant's bail hearing, § 3142(a) requires that a defendant must either be (1) released on his own recognizance; (2) released on a condition or combination of conditions deemed necessary to ensure appearance at trial and protect the public; (3) temporarily detained to permit deportation or revocation of conditional release; or (4) detained pending trial.[31] The ordering of pretrial disposition options illustrates the BRA's preference for pretrial release. A defendant's release on his own recognizance is the primary option and the burden is on the government to demonstrate that

[26] *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting) ("In our society, liberty is the norm, and detention prior to trial is the carefully limited exception.").

[27] *See* 18 U.S.C. § 3142; *Salerno*, 481 U.S. at 755 (Marshall, J., dissenting).

[28] *See* U.S. CONST. amend. VIII; 18 U.S.C. § 3142; *Salerno*, 481 U.S. at 748–51.

[29] *See* 18 U.S.C. § 3142; *see also* Johnson, *supra* note 17.

[30] Subjection to an "immigration detainer" is typically related to, but is distinct from an alien's immigration status. The meaning and implications of an alien being subject to an immigration detainer is explained in detail, *infra* Part II.B–C. For now, it is sufficient to note that the text of the BRA makes no reference to immigration detainers as relevant in assessing a defendant's eligibility for pretrial release.

[31] 18 U.S.C. § 3142(a).

conditional release or pretrial detention is necessary.[32] Pretrial detention, on the other hand, is a last resort, permitted only where it is determined after a hearing that no condition or combination of conditions would be adequate to ensure public safety and prevent pretrial flight.[33] In light of the strong statutory language favoring release, the proposition that any single factor, such as immigration status or the presence of an immigration detainer, would be sufficient to overcome that preference should be met with skepticism.

Additionally, § 3142(a)'s distinction between temporary detention for the purpose of transfer to immigration authorities to facilitate removal[34] and detention for the duration of the pretrial period[35] suggests that immigration status is not a factor to consider in determining whether the latter is appropriate. Section 3142(d), entitled "Temporary Detention to Permit . . . . *Deportation*," prescribes the conditions under which temporary detention pursuant to § 3142(a)(3) is proper.[36] Section 3142(d) permits the judicial officer to order a deportable alien to be held for a maximum of ten days in order to facilitate transfer to immigration authorities.[37] However, "[i]f [ICE] fails or declines to take such person into custody during [the ten day] period, such person shall be treated in accordance with the other provisions of [the BRA], notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings."[38] Thus, § 3142(d) makes clear that the Executive is to be provided an opportunity to transfer aliens from DOJ to ICE custody for the purpose of facilitating removal in lieu of prosecution. Transfer to ICE custody pursuant to § 3142(d), however, is only permissible to facilitate removal proceedings; it is not a loophole to circumvent the BRA's other provisions to detain unlawful alien defendants for the purpose of ensuring their appearance at criminal trial.[39] Once the Executive has waived transfer to ICE during the ten-day period, immigration status ceases to be relevant to the defendant's treatment under the BRA.

Section 3142(g) specifies the factors that are relevant to determining whether a defendant should be released pursuant to § 3142(a).[40] Despite listing numerous factors in considerable detail, § 3142(g) makes no reference to immigration status, and provides no basis for concluding that it

[32] In some cases there is a rebuttable presumption that the government has met its burden. *Id.* § 3142(e)(2).

[33] *Id.* § 3142(e)(1).

[34] *Id.* § 3142(a)(3).

[35] *Id.* § 3142(a)(4).

[36] *Id.* § 3142(d) (emphasis added).

[37] *Id.*

[38] *Id.*

[39] *Id. See also* United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1170 (D. Or. 2012) (holding that if the Executive does not take custody of the alien defendant for removal purposes, it must comply fully with the requirements of the BRA).

[40] 18 U.S.C. § 3142(g).

is a properly considered factor in the pretrial release calculus.[41] The omission of a reference to immigration status in § 3142(g) is especially significant in light of its inclusion in § 3142(d).[42] Congress knew how to include immigration status as relevant to ascertaining a defendant's rights under the BRA.[43] The omission of immigration status from § 3142(g)(3) indicates that Congress deliberately concluded that it was not relevant in determining whether an individual defendant is likely to pose a flight risk or threat to the community, the only suitable justifications for detention pending trial.[44] Had Congress intended immigration status to be considered in determining a defendant's eligibility for pretrial release, it would have included it in § 3142(g).

Section 3142(g)(3) does, however, include factors with which immigration status may correlate in some cases. For example, community ties and length of residence in the community, both of which are § 3142(g)(3) factors that are relevant to determining whether a defendant poses a flight risk,[45] may appear at first blush to implicate consideration of a person's immigration status. An alien who has unlawfully immigrated to the United States may be perceived as having inherently weaker ties to the community, or as being less likely to have resided in the community for a long period of time.

Even assuming, however, that unlawful aliens have, on average, weaker community ties than lawful aliens or American citizens, it does not follow that immigration status is relevant to determining the strength or weakness of a particular individual's ties to her community, and therefore her risk of flight. Such reasoning compromises an evaluation of the individual defendant by injecting class-based considerations into the pretrial-release determination, precisely the sort of evil that Congress enacted the BRA to remedy.[46] A defendant who, for example, has children enrolled in local public schools, attends a local church, and resides and works in the community, should not be considered to be a greater flight risk than her similarly situated neighbor, simply because she is an unlawful alien rather than a U.S. citizen. Similarly, although unlawful aliens may, on average, have resided in their communities for a shorter period

[41] *Id.* (properly considered factors include, *inter alia*, "the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device; . . . the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and . . . the nature and seriousness of the danger to any person or the community that would be posed by the person's release.").

[42] *See supra* notes 36–37 and accompanying text.

[43] *See* 18 U.S.C. § 3142(d).

[44] *See supra* note 21 and accompanying text.

[45] 18 U.S.C. § 3142(g)(3).

[46] *See supra* Part I.A.1.

of time than lawful aliens or U.S. citizens, this generalization should not be imputed to individuals within the class through consideration of immigration status in the bail determination. In many cases, unlawful aliens have established long-term residence in, and deep ties to, their community.[47] These defendants should not be denied the benefit of factors that militate in favor of their pretrial release by judicial substitution of immigration status as a basis for denying bail.

In sum, the text of the BRA, like its history and purpose, suggests that Congress did not intend immigration status to be a factor in determining a defendant's eligibility for pretrial release. Thus, while a higher percentage of unlawful-alien defendants, relative to the criminal defendant class as a whole, may be subject to pretrial detention based on a correlation between immigration status and certain properly considered release determination factors, similarly situated defendants should be treated equally under § 3142(g), irrespective of immigration status.

B. The INA, ICE, and Immigration Enforcement

The Immigration and Nationality Act is the body of statutory law that governs the entry and removal of foreign nationals into and out of the United States.[48] ICE, an agency within the Department of Homeland Security ("DHS"), was created in 2003 through an agency merger of the U.S. Customs Service and the U.S. Immigration and Naturalization Service.[49] ICE is the primary agency responsible for the enforcement of the INA, including facilitating the detention and removal of unlawful aliens.[50] Since its inception, ICE has pursued an aggressive enforcement policy, with an emphasis on detaining aliens who are suspected of being in the United States illegally or of having engaged in criminal activity while in the United States.[51] When ICE is in custody of, or seeks to detain, an alien who is also charged with a federal crime, it may create tension with the BRA. This Section examines the legal framework that molds ICE's behavior, and how ICE's enforcement actions interact with the BRA. Subsection 1 examines ICE's authority to detain aliens under the INA. It also explains the issuance and effect of immigration detainers, which request the transfer of aliens in the custody of state, local, or other federal agen-

[47] PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 3 (Dec. 1, 2011), *available at* http://www.pewhispanic.org/files/2011/12/Unauthorized-Characteristics.pdf (finding that 63 percent of adult, unauthorized immigrants had resided in the United States for at least ten years at the time of data collection).

[48] 8 U.S.C. §§ 1101–1537 (2012).

[49] *Overview*, IMMIGR. AND CUSTOMS ENFORCEMENT, http://www.ice.gov/about.

[50] *See Overview, supra* note 6.

[51] For a discussion of several of ICE's enforcement programs focused on the detention and removal of unlawful immigrants, see UNIV. OF ARIZ., CTR. FOR LATIN AM. STUDIES, IN THE SHADOW OF THE WALL: FAMILY SEPARATION, IMMIGRATION ENFORCEMENT AND SECURITY 28–34 (2013), *available at* http://las.arizona.edu/sites/las.arizona.edu/files/UA_Immigration_Report2013web.pdf.

cies to ICE upon the alien's release. Subsection 2 considers the impact of a legislatively mandated immigration-detention quota, in conjunction with declining unlawful immigration, on ICE's enforcement policy decisions.

1. ICE Detention and Immigration Detainers

The purpose of ICE detention is not to punish the detainee, but to ensure his appearance at an immigration hearing, and if the detainee is deemed to be subject to removal, to facilitate deportation and ensure compliance with a removal order.[52] ICE detention may be either mandatory or discretionary, depending on the alien's status at the time of arrest.[53] The INA requires that ICE "shall" detain aliens who have committed statutorily specified offenses upon their release from incarceration or detention by another agency.[54] ICE may take all other aliens suspected of being in the United States illegally into custody upon the issuance of a warrant by the Secretary of DHS, "pending a decision on whether the alien is to be removed from the United States."[55] In such cases, ICE then has discretion to either release or detain the alien pending the disposition of his immigration case.[56]

ICE obtains custody of aliens whom it suspects of being subject to removal in one of two ways. First, ICE may conduct an "ICE raid" in which it locates and arrests suspected unlawful aliens on its own initiative.[57] During a raid, ICE may arrest suspected unlawful aliens who are not the initial targets of the raid, whether or not ICE has reason to believe that the arrestee has engaged in criminal activity.[58] Because an ICE arrest does not constitute or require the initiation of criminal prosecution, it does not, in and of itself, implicate the BRA. If ICE arrests an alien who it believes has committed a federal crime, however, ICE may, and often does, refer that person to DOJ for prosecution.[59] If ICE does so, and if DOJ proceeds with prosecution, the defendant's rights under the

[52] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, PROTECTING THE HOMELAND: TOOL KIT FOR PROSECUTORS 8 (Apr. 2011), *available at* https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

[53] *See* 8 U.S.C. § 1226.

[54] *Id.* § 1226(c).

[55] *Id.* § 1226(a).

[56] *Id.*

[57] Albert Sabaté, *An ICE Home Raid Explainer*, ABC NEWS (Apr. 10, 2013), http://abcnews.go.com/ABC_Univision/News/ice-home-raid/story?id=18896252.

[58] *See id.*

[59] *See* HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF US BORDER PROSECUTIONS 2 (May 2013), *available at* http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_2.pdf (In fact, "[t]he US Department of Homeland Security (DHS), the agency that enforces US immigration laws, refers more cases for prosecution to the US Department of Justice than do the Federal Bureau of Investigations (FBI), the Drug Enforcement Administration (DEA), the Alcohol, Tobacco, Firearms, and Explosives agency (ATF), and the US Marshals service combined.").

BRA attach, and ICE's continued detention of the defendant may become problematic if the defendant is or should be released pending trial.[60]

Second, if ICE becomes aware that a federal, state, or local law enforcement agency ("LEA") has a suspected unlawful alien in custody, ICE may issue a form I-247 immigration detainer in order to notify the LEA of ICE's intention to take custody of the alien upon her release, request information regarding the alien's anticipated release, and request that the LEA detain the alien for up to an additional 48 hours in order to facilitate transfer to ICE custody.[61] When ICE places an immigration detainer on an alien who faces criminal charges in federal court, it can create conflict with the BRA by improperly dissuading the criminal court from granting the defendant pretrial release.[62] Furthermore, even if the district court applies the BRA and grants the defendant pretrial release, ICE often executes on the immigration detainer and seizes the defendant immediately upon his release from DOJ custody, effectively denying him the benefits of obtaining a release order.[63] In fact, transfer to ICE custody may actually prejudice the defendant relative to remaining in DOJ custody, leading some defendants who are subject to an immigration detainer to entirely forego seeking bail.[64]

2. The "Bed Mandate"

Beginning in 2007, DHS appropriations legislation has included a minimum detention quota that has become colloquially, and often pejoratively, referred to as "the bed mandate."[65] The bed mandate makes portions of DHS funding contingent on ICE detaining a minimum average of 34,000 inmates each day.[66] The purported purpose of the bed mandate is to ensure that ICE is doing its job of facilitating suspected removable aliens' appearance in immigration court, and if applicable, compliance with removal orders.[67] The bed mandate, however, ignores alternative,

[60] *See* 18 U.S.C. § 3142 (2012).

[61] *ICE Detainers: Frequently Asked Questions*, IMMGR. & CUSTOMS ENFORCEMENT (Dec. 28, 2011), http://www.ice.gov/news/library/factsheets/detainer-faqs.htm.

[62] *See infra*, Part I.C.1.

[63] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 1.

[64] *Id.*

[65] *See* Asylum Abuse: Is it Overwhelming Our Borders? Hearing, Comm. On the Judiciary, 113th Cong. 137 (2013) (statement of Mary Meg McCarthy, Executive Director, Heartland Alliance's National Immigrant Justice Center). For a comprehensive list of recent press articles condemning the bed mandate, see *Media Coverage of the ICE Detention Bed Mandate* (Nov. 4, 2013), http://immigrantjustice.org/sites/immigrantjustice.org/files/MediaCoverage_DetentionBedMandate_2013%2011%2004.pdf.

[66] *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251 (2013).

[67] *See* Jessica Vaughan, *Enforcement Metrics Support Case for Detention Bed Mandate*, CENTER FOR IMMIGR. STUD. (Nov. 24, 2013), http://cis.org/vaughan/enforcement-metrics-support-case-detention-bed-mandate.

less intrusive, and highly effective means of achieving that objective. Compliance measures such as ankle bracelets and supervised release, for example, are available at a fraction of the cost of detention and achieve similarly effective results.[68]

A legislative minimum detention mandate, tied directly to DHS appropriations, sends a clear message to ICE that its policy should favor detaining a large number of aliens regardless of whether that detention makes sense from an economic or security perspective. ICE maintains that it has no difficulty satisfying the bed mandate with individuals that warrant detention, either because they pose a threat to the community or because they are deemed unlikely to appear at an immigration hearing or comply with a removal order.[69] The statistics, however, suggest otherwise. In fact, between 2009 and 2011 more than half of all ICE detainees had no criminal record whatsoever, and many of those who did had been convicted of only minor traffic violations.[70] Furthermore, an overwhelming percentage of aliens who are released appear at their immigration hearing, and a large majority comply with removal orders.[71]

As unlawful immigration rates have declined in recent years, and as ICE has succeeded in removing large numbers of aliens convicted of serious crimes, it has increasingly targeted aliens with less egregious or no criminal record in an effort to comply with the bed mandate.[72] As discussed above, the scope of ICE's authorization to detain aliens is quite broad and subject to considerable executive discretion. ICE's need to satisfy the bed mandate influences its exercise of that discretion and tips the scales in favor of detaining aliens in cases where release is appropriate, or even legally required. Specifically, ICE has not hesitated to exercise on immigration detainers and take custody of aliens facing federal criminal charges, irrespective of whether the defendant has been ordered released pending trial pursuant to the BRA.[73]

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[68] NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 9–11 (Aug. 2013), *available at* http://cmjuristas.org/wp-content/uploads/2014/04/The-Math-of-Immigration-Detention.pdf.

[69] *See generally Detention Reform*, IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/detention-reform/.

[70] Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, WASH. POST (Oct. 13, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html; NAT'L IMMIGRATION FORUM, *supra note* 68, at 5.

[71] NAT'L IMMIGRATION FORUM, *supra* note 68, at 9–10.

[72] *See* Brad Plumer, *Graph of the Day: Illegal Immigration Has Slowed Since 2007*, WASH. POST: WONKBLOG (Jan. 28, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/28/graph-of-the-day-illegal-immigration-has-dropped-sharply-since-2007/ (discussing the decline in illegal immigration, particularly across the US-Mexico border, between 2007 and 2012); *see also* Miroff, *supra* note 70.

[73] *See, e.g.*, United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1172 (D. Or. 2012).

C. Court Approaches

Courts have considered several of the key issues, discussed above, facing alien defendants seeking pretrial release and have often reached divergent conclusions. Some courts have held that deportable aliens who are subject to an ICE detainer are ineligible for pretrial release.[74] Others have held that the BRA does apply to unlawful aliens, including those subject to ICE detainers, but have weighed immigration status as a factor militating against pretrial release.[75] Still other courts have ordered defendants released from DOJ custody after a bail hearing, but have allowed ICE to immediately detain the defendant, effectively muting the benefit of obtaining release.[76] Finally, cases such as the recent *Trujillo-Alvarez* decision from the District of Oregon, have recognized that the Executive may not maintain criminal charges against a defendant who has been ordered released pursuant to the BRA, while simultaneously detaining that person in an ICE facility.[77]

This Section addresses the various approaches taken and reasoning employed by courts in applying the BRA to alien defendants and reconciling that statute with the INA. It argues that many courts have misinterpreted and misapplied the BRA, resulting in the improper detention of alien defendants who might otherwise have obtained pretrial release. Those courts have done so either by accepting the Executive's argument that the BRA simply does not apply to unlawful aliens who are subject to an immigration detainer, or by improperly considering immigration status as a factor weighing against pretrial release. Further, courts that have ordered defendants released pursuant to the BRA but have permitted ICE to violate that order by detaining the defendant for the purpose of appearance at trial, rather than deportation, are also in error.

The judiciary, a coequal branch in the separation of powers, has an obligation to faithfully interpret the law enacted by Congress.[78] In the present context, that obligation requires courts to apply the BRA with full force to all criminal defendants, regardless of immigration status or subjection to an immigration detainer, and to ensure that the Executive does not, via ICE detention, violate the rights of defendants who have been ordered released from federal custody.

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[74] *See, e.g.*, United States v. Lozano, No. 1:09-CR-158-WKW [WO], 2009 WL 3834081, at *2 (M.D. Ala. Nov. 16, 2009); *see also* NATIONAL IMMIGRATION PROJECT, *supra* note 13, at 7–8.

[75] *See, e.g.*, United States v. Lechuga, No. 11 CR 783, 2011, 2011 WL 6318731, at *4–5 (N.D. Ill. Dec. 16, 2011); United States v. Ong, 762 F. Supp. 2d 1353, 1363 (N.D. Ga. 2010); United States v. Dozal, No. 09-20005-08/12/24-KHV, 2009 WL 873011, at *3 (D. Kan. Mar. 27, 2009).

[76] *See, e.g.*, United States v. Todd, No. 2:08cr197-MHT, 2009 WL 174957, at *1–2 (M.D. Ala. Jan. 23 2009); United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *4 (D. Neb. Jan. 13, 2009); *see also* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 12.

[77] *Trujillo-Alvarez*, 900 F. Supp. 2d at 1179.

[78] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The following Subsections consider three critical issues that confront courts applying the BRA to alien defendants and assess how courts that have addressed those issues have resolved them. The issues considered include: (1) whether subjection to an immigration detainer renders a defendant ineligible for pretrial release pursuant to the BRA; (2) the relevance of an alien defendant's immigration status in assessing flight risk; and (3) whether ICE may detain an alien defendant pending trial if the defendant has obtained a BRA release order. Each issue is addressed separately and in turn.

1. Immigration Detainers as a Bar to Pretrial Release

DOJ has argued that the existence of an immigration detainer renders the defendant ineligible for pretrial release.[79] The basis for this argument is that if the defendant is released pursuant to the BRA, he will be subject to removal by ICE, and will therefore inevitably fail to appear at trial.[80] Although some courts have accepted the Executive's argument, the judicial trend is to the contrary.[81]

Courts have rejected immigration detainers as a bar to alien defendants obtaining pretrial release for at least two primary reasons. First, courts have acknowledged that such an allowance would frustrate the statutory purpose of the BRA.[82] As the district court in *United States v. Barrera-Omana* put it, holding that the Executive could prohibit an alien defendant from obtaining a BRA release order simply by issuing an immigration detainer would mean that "Congress's carefully crafted detention plan, set forth in 18 U.S.C. § 3142, [could] simply be overruled by an [administrative action]."[83] Second, courts have recognized that the threat that an alien defendant will fail to appear in court due to having been deported by the Executive is distinguishable from risk of flight.[84] These courts have concluded that being considered a flight risk implies that the defendant is likely to attempt to evade facing charges through his own volition, not simply that he is involuntarily rendered unable to appear by "an externality" imposed by the Executive.[85]

Courts that have accepted the Executive's argument often did so because they mistook subjection to an immigration detainer as evidence that an alien is eligible for immediate removal and that ICE has decided to proceed with deportation.[86] The foundation of these courts' reasoning is in error. Although ICE may elect to execute on immigration detainers

[79] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 1.

[80] *See id.* at 5.

[81] *See id.* at 9.

[82] *See, e.g.*, United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1110 (D. Minn. 2009); United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *3 (D. Neb. Jan. 13, 2009).

[83] *Barrera-Omana*, 638 F. Supp. 2d at 1111.

[84] *See, e.g.*, *id.*

[85] *Id.* at 1110.

[86] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 8.

and, if appropriate, ultimately remove aliens who are subjected to them, issuance of an immigration detainer does not require, or even necessarily suggest, that removal of the alien defendant is imminent.[87] An alien against whom an immigration detainer is exercised may later be determined to be in the United States lawfully and therefore not subject to removal.[88] Furthermore, ICE may issue a detainer but elect not to apprehend the alien upon his release from the detaining LEA's custody.[89]

Courts that mistakenly believe that ordering the release of an alien defendant who is subject to an immigration detainer will necessarily result in his failure to appear at trial have sometimes refused to do so.[90] Thus, although alien defendants' ability to obtain a pretrial release order is usually not prejudiced by subjection to an immigration detainer, the unfortunate defendant who finds himself in a court that is less familiar with the nuance of immigration law may be improperly denied pretrial release on that basis.[91]

2. Considering Immigration Status in the Flight-Risk Analysis

Unlike subjection to an immigration detainer, courts generally do consider immigration status as being relevant, although not necessarily dispositive, in assessing a defendant's flight risk.[92] Even courts that have been sympathetic to the plight of alien defendants seeking bail have nonetheless been willing to consider immigration status as a factor weighing against their pretrial release.[93] In fact, some courts that have considered immigration status have found that, in light of other factors, the defendant did not present an impermissible flight risk and therefore granted pretrial release.[94] Thus, while courts are more likely to consider immigration status than an immigration detainer in the bail determination, consideration of the former does not necessarily entail as harsh of a prejudicial effect.

Courts that consider immigration status as one factor among many that may influence the outcome of an alien defendant's bail hearing tend to do so without hesitation or significant explanation. For example, in *United States v. Lechuga*, the court considered the fact that the defendant

[87] *See id.* at 5 n.25.

[88] *See id.*

[89] *Id.* at 6–7.

[90] *Id.* at 8; *see, e.g.*, United States v. Lozano, No. 1:09-CR-158-WKW [WO], 2009 WL 3834081, at *2 (M.D. Ala. Nov. 16, 2009).

[91] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 8.

[92] *See, e.g.*, United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) ("That the defendant is an alien may be taken into account, but alienage does not by itself 'tip the balance either for or against detention.'" (quoting United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985))).

[93] *See, e.g.*, United States v. Adomako, 150 F. Supp. 2d 1302, 1307 (M.D. Fla. 2001) (considering the defendant's alienage in the flight-risk analysis but concluding that it did not bar his pretrial release on conditions).

[94] *Id.*

was a Mexican citizen and was undocumented in the United States as among "[t]he Government's strongest arguments in terms of flight risk," without any further comment or citation to legal authority.[95] Similarly, the court in *United States v. Dozal*, found in a single sentence that the defendant's status as a deportable alien "weigh[ed] heavily in the risk of flight analysis," and concluded, therefore, that the defendant "present[ed] a significant risk of flight," and denied pretrial release despite her "strong family ties to [the community]" and "stable employment history" at a local restaurant.[96]

Courts' consistent and seemingly unquestioning willingness to consider immigration status in the flight risk calculus is dubious given the significant statutory arguments against it.[97] The improper consideration of immigration status may, as in *Dozal*, counteract properly considered factors that weigh against a defendant's flight risk and could result in the improper detention of an alien defendant who might otherwise be eligible for pretrial release.[98] Furthermore, even if the court ultimately grants pretrial release despite the defendant's immigration status, improper consideration of that factor may result in more restrictive, undue conditions on release.[99]

3. The Effect of a BRA Release Order on ICE Detention for the Duration of Prosecution

If and when the district court orders the pretrial release of an alien criminal defendant pursuant to the BRA, it is undisputed that DOJ must release her from its custody as long as she satisfies any applicable conditions of release.[100] If, however, the defendant is subject to an immigration detainer, DOJ is compelled to retain custody of the defendant for an additional 48 hours to facilitate transfer to ICE, in apparent violation of the release order.[101] Perhaps more significantly from the defendant's perspective, if ICE executes on the detainer and seizes custody of the defendant, the question arises whether that action infringes on her right to release. Courts are divided on this issue.

Historically, most courts have maintained that a BRA release order does not in any way restrict ICE's authority to detain alien criminal defendants pending trial.[102] Some courts, however, have held that a release order requires the defendant to be released from all federal custody, including ICE detention, if the purpose of detention is to ensure the de-

[95] No. 11 CR 783, 2011 WL 6318731, at *5 (N.D. Ill. Dec. 16, 2011).

[96] No. 09-20005-08/12/24-KHV, 2009 WL 873011, at *4 (D. Kan. Mar. 27, 2009).

[97] *See supra* Part I.A.

[98] 2009 WL 873011, at *4.

[99] *See* 18 U.S.C. § 3142(c) (2012).

[100] *Id.* § 3142(b)–(c).

[101] *See* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 9–10.

[102] *Id.* at 11–13; *see, e.g.*, United States v. Todd, No. 2:08cr197-MHT, 2009 WL 174957, at *1–2 (M.D. Ala. Jan. 23 2009); United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at * 4 (D. Neb. Jan. 13, 2009).

fendant's appearance at trial.[103] While these courts continue to acknowledge that ICE may detain released alien defendants for the purpose of removal, they have held that facilitating removal is inconsistent with an ongoing prosecution, and therefore that ICE may not detain a released alien defendant while criminal charges pend.

Courts that have recognized the conflict between DOJ prosecution and contemporaneous ICE detention of a bailed defendant have instructed the Executive to choose between detention to facilitate removal and pursuing criminal prosecution in full compliance with the BRA.[104] For example, in *United States v. Adomako*, the court held that if immigration authorities took custody of the defendant during the pretrial release period, it must be in lieu of criminal prosecution.[105] More recently, in *Trujillo-Alvarez*, the court threatened to dismiss criminal charges against the defendant with prejudice if ICE did not release and return him to the District of Oregon within one week of the court's order to comply with its previously issued pretrial release order.[106]

Cases such as *Adomako* and *Trujillo-Alvarez* represent a critical development in protecting alien defendants' rights under the BRA.[107] Other rights-protecting court decisions, such as refusing to consider an immigration detainer in the bail calculus, are essentially meaningless if courts permit ICE to flout release orders by detaining alien defendants for the purpose of delivering them to trial. Unfortunately, some courts continue to do precisely that, resulting in the denial of the benefit of pretrial release to deserving defendants based solely on their immigration status.

II. THE COST

Part I examined the conflict between the BRA and immigration law and policy. It argued that Congress intended the BRA to apply with equal force to all criminal defendants and that immigration status and subjec-

[103] *See* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 11–12.

[104] *See, e.g.*, United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1179 (D. Or. 2012) ("[T]he Executive Branch has a choice to make. It may take an alien into custody for the purpose of removing or deporting that individual or it may temporarily decline to do so while criminal proceedings are maintained against that person. If ICE takes custody of [the defendant] for the purpose of removing or deporting him, there is little (and probably nothing) that this Court can do about that . . . . If, however, ICE declines to take custody of [the defendant] for the purpose of removing or deporting him, then, as Congress plainly declared in the BRA, such a person shall be treated 'in accordance with the other provisions' of that law, which require his pretrial release subject to the conditions imposed by [the magistrate judge]. What neither ICE nor any other part of the Executive Branch may do, however, is hold someone in detention for the purpose of securing his appearance at a criminal trial without satisfying the requirements of the BRA." (quoting 18 U.S.C. § 3142(d))).

[105] 150 F. Supp. 2d 1302, 1303–04, 1307 (M.D. Fla. 2001).

[106] 900 F. Supp. 2d at 1181.

[107] *Adomako*, 150 F. Supp. 2d at 1307; *Trujillo-Alvarez*, 900 F. Supp. 2d at 1181.

tion to an immigration detainer are not appropriate factors for the court to consider in determining whether an individual defendant is eligible for pretrial release. Part I also explained how the Executive circumvents its obligations under the BRA with respect to alien defendants, pressured by the bed mandate and enabled by a judiciary that is often reluctant to hold it accountable. The result is the improper detention of alien criminal defendants who might otherwise obtain pretrial release pursuant to the BRA. This Part examines the cost, both economic and otherwise, of that detention.

This Part argues that the harm created by the conflict described in Part I is neither abstract nor *de minimis*. Rather, the practice of prosecuting alien criminal defendants without complying with the BRA has consequences that reverberate through society. This Part divides those consequences into three categories. Section A considers the cost, financial and otherwise, to improperly detained defendants and their families. Section B discusses the economic burden imposed on the tax-paying public. Finally, Section C reflects on a more abstract societal cost—the undermining effect of the arbitrary application of the law and denial of rights on the credibility of American government and the rule of law.

A. The Immediate Victims

The most immediate harm caused by improper pretrial detention is, of course, the harm to the detainees and their families. As explained, *supra*, the bed mandate, operating in conjunction with declining rates of illegal immigration, encourages the increased detention of aliens who have not, and are not suspected of having committed, violent or otherwise egregious crimes.[108] Often the alien defendant is charged solely with an immigration-related offense, and only after ICE notifies DOJ that it has custody of an alien who it suspects of being criminally chargeable.[109] The result is that many aliens who face federal criminal charges are otherwise law-abiding, wage-earning people with strong community and family ties—precisely the type of defendant that should be eligible for pretrial release.[110] The harm to these defendants of being improperly deprived of pretrial release can be catastrophic.

Unlawful aliens often are employed in unskilled, low paying jobs.[111] These jobs generally pay an hourly wage, and absence from work due to detention results in the direct loss of scarce financial resources, and per-

[108] *See supra* Part I.B.2.

[109] *From Anecdotes to Evidence: Setting the Record Straight on Immigrants and Crime*, IMMIGR. POL'Y CENTER 4 (July 25, 2013), http://www.immigrationpolicy.org/sites/default/files/docs/setting_the_record_straight_updated_2.pdf.

[110] *See* 18 U.S.C. § 3142(g) (2012).

[111] *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 14–15 (Apr. 14, 2009), *available at* http://www.pewhispanic.org/files/reports/107.pdf (finding that a disproportionate number of unlawful immigrants work in unskilled, low-paying jobs).

haps employment.[112] Pretrial release provides the defendant a critical opportunity to financially prepare for the possibility of incarceration or deportation. The period of time between a defendant's arrest and the disposition of criminal charges can span several months.[113] During that time, a defendant who is released on bail may have the opportunity to work extra hours, save money, help a spouse find employment, and make arrangements for the care of dependents. Improper denial of the defendant's rights under the BRA deprives her of that crucial opportunity.

If the defendant obtains a pretrial release order but is transferred to ICE pursuant to an immigration detainer upon release from DOJ custody, the adverse consequences for the defendant may be even worse than if she did not obtain the release order. Transfer from DOJ to ICE custody can result in the defendant being relocated to a detention center that is hundreds of miles away, potentially in another jurisdiction.[114] Remaining in a local DOJ facility may therefore be preferable in that it facilitates access to family members via visitation that geographic separation resulting from transfer to a distant ICE facility may render impracticable.

The geographic separation caused by ICE detention may effectively cut a defendant off not only from her family and communal support, but also from reasonable access to counsel. Deportable-alien defendants often lack financial resources and legal sophistication.[115] These defendants depend on the assistance of publicly provided or pro bono counsel, for whom travel to a distant ICE facility may not be feasible.[116] Thus, not only has a bailed defendant who is detained by ICE been denied her statutory right to pretrial release, she may also be prejudiced in her ability to ade-

[112] *See id.* at 15–16 (finding that unlawful immigrants' median family income is substantially less than that of U.S. citizens' and that unlawful immigrants are approximately twice as likely to live below the poverty line).

[113] In most cases in which the defendant enters a plea of not guilty, trial must commence within 100 days of the defendant's arrest. That period may, however, be extended under certain circumstances. *See* 18 U.S.C. § 3161(b)–(c).

[114] *See, e.g.*, United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1172 (D. Or. 2012) (explaining that after defendant was released from DOJ custody in the District of Oregon pursuant to the BRA, ICE executed on a previously lodged immigration detainer and removed the defendant to a detention facility in Tacoma, Washington).

[115] *See* PASSEL & COHN, *supra* note 111, at 10–12.

[116] Even DHS has acknowledged, and made some effort to mitigate, the prejudicial impact of removal of a defendant to a distant ICE detention center. *See* U.S. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 4 (Nov. 2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_10-13_Nov09.pdf ("When ICE transfers detainees far from where they were originally detained, their legal counsel may request a release from representation because the distance and travel time or cost make representation impractical. Transferred detainees have had difficulty or delays arranging for legal representation, particularly when they require pro bono representation.").

quately mount her criminal defense, raising constitutional concerns regarding access to counsel and fundamental fairness.[117]

Moreover, many ICE detention centers are notorious for subjecting detainees to deplorable conditions.[118] Reports of inmate mistreatment and lack of adequate medical care resulting in serious injury and even death are common.[119] Although detention in an ICE facility may ultimately be unavoidable for unlawful alien defendants following the disposition of criminal charges or release from incarceration, exposure to the perils of ICE detention during the pretrial period of ordered release imposes undue hardship on the defendant.

B. The Harm to the Public

As discussed above, the economic hardship imposed on detainees and their families can be devastating. The economic cost of improperly and disproportionately detaining a growing class of alien criminal defendants, however, extends beyond the immediate victims. An economic burden is also imposed on the tax-paying public, not only through the direct cost of detention and criminal prosecution, but also through increased pressure on social services that results from removing defendants from the household and the work force. Admittedly, some of the costs and consequences discussed below are not attributable solely to conflict between immigration enforcement and the BRA, but are the product of detention generally. Still, insofar as properly applying the BRA would alleviate or at least postpone incurring those costs, they are fairly attributed to a failure to do so.

ICE detention, it turns out, is quite expensive. In 2013 alone, the federal government will have spent over $2 billion to hold roughly 350,000 alien detainees in hundreds of ICE facilities across the United States.[120] Detention in an ICE facility costs taxpayers approximately $164

[117] *Trujillo-Alvarez*, 900 F. Supp. 2d at 1180 ("[The defendant] has been kept by ICE [outside of the district of prosecution] for more than one month. Not only has this deprived [the defendant] of the comfort and support of his family and friends, it has deprived him and his court-appointed counsel of the ability to meet and work together to prepare for his defense at trial without undue inconvenience or hardship, thereby jeopardizing not only his statutory rights under the BRA, but also his rights under the Fifth, Sixth, and Eighth Amendments and under basic principles of fundamental fairness.").

[118] For a detailed briefing of reported conditions in ICE detention centers including numerous anecdotal accounts of detainee mistreatment, see SUNITA PATEL & TOM JAWETZ, ACLU, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES, *available at* https://www.aclu.org/sites/default/files/pdfs/prison/unsr_briefing_materials.pdf.

[119] *Id.* at 3–6, 10–15.

[120] This total is more than double the amount spent on similar operations in 2006, when the bed mandate went into effect. Miroff, *supra* note, 70.

per detainee per day.[121] By contrast, alternatives to detention such as supervised release or the administration of an ankle bracelet typically cost between 30 cents and $14 per person per day.[122] These alternatives have been demonstrated to be highly effective. In fact, 96 percent of enrollees in ICE detention alternative programs appear at their final immigration hearings.[123] Despite their success, detention alternative programs account for only a minute fraction of DHS spending on ensuring immigration court appearance and compliance with removal orders.[124]

Of course, not all ICE detainees are being held pending criminal trial in federal court. Many ICE detainees either are not facing criminal charges during the period of detention or are facing charges in state courts, to which the BRA does not apply.[125] Some ICE detainees, however, are improperly held in violation of BRA release orders pending the disposition of federal criminal charges.[126] Additionally, DOJ detains alien defendants who, but for their immigration status or subjection to an immigration detainer would likely have been determined to be eligible for pretrial release.[127] The cost of DOJ and ICE detaining these defendants during the pretrial period is pure economic waste. That direct monetary cost to taxpayers could have been spent in a myriad of more productive ways, without compromising public safety or undermining the efficacy of immigration proceedings.[128]

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[121] Ruthie Epstein, *Immigration Detention Level "Mandate" is an Obstacle to Reform*, HILL (Apr. 12, 2013), http://thehill.com/blogs/congress-blog/homeland-security/293647-immigration-detention-level-mandate-is-an-obstacle-to-reform.

[122] *Id.*

[123] *Id.*

[124] *Immigration Detention: How Can the Government Cut Costs?*, HUMAN RIGHTS FIRST, (Apr. 2013), http://www.humanrightsfirst.org/wp-content/uploads/Immigration_Detention_FactSheet_March2013.pdf ("In 2013, the President's budget requested $112 million for alternatives—1/18 of its request for detention.").

[125] The BRA applies only to federal criminal defendants. No federal law prohibits a state court from considering immigration status as a factor in setting bail. Furthermore, even if a state judge did release a defendant pending trial, subsequent detention of that person by ICE, a federal agency, would not offend that order. *See* U.S. CONST. art. VI, § 2.

[126] In recent years, ICE detention statistics have reached all time highs, eclipsing 400,000 detainees annually. JOHN SIMANSKI & LESLEY SAPP, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2011 (Sept. 2012), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. During the same time period, prosecution of immigrants for federal crimes including illegal entry and illegal reentry have also steadily increased. In 2012 alone, over 85,000 immigrants faced such charges. HUMAN RIGHTS WATCH, *supra* note 59 at 13. While it is unclear exactly how many of these defendants are improperly detained by ICE during the course of criminal prosecution, the high total volume of detentions and prosecutions suggests that the number is likely to be significant.

[127] *See supra* Part I.C.1.

[128] *See supra* notes108–110 and accompanying text.

Like federal detention, criminal prosecutions by DOJ are expensive and financed by taxpayers. In 2013 alone, DOJ requested over $1.5 billion to finance its prosecutorial efforts.[129] During the same time period, minor immigration offenses were the most common lead charge in criminal prosecutions in the United States Magistrate Court.[130] In September 2013, for example, illegal entry and illegal reentry combined accounted for a majority of United States Magistrate Courts' criminal dockets.[131]

Just as properly affording pretrial release to all eligible alien criminal defendants would alleviate the internal executive conflict between DOJ and ICE and preserve taxpayer resources, so too would forgoing criminal prosecution of some alien defendants who, but for prosecution and the attendant rights afforded by the BRA, would be suitable for ICE detention and possibly removal. Prosecuting these cases diverts judicial, prosecutorial, and taxpayer resources away from other priorities. Furthermore, successful prosecution culminating in conviction usually requires taxpayers to foot the bill for incarcerating a defendant who might have been immediately deported at a much lower economic cost.[132]

To be sure, some alien defendants are accused of serious crimes. In those cases the public interest may well require postponing removal in favor of criminal prosecution.[133] For unlawful alien defendants who face only minor charges such as illegal entry or illegal reentry and have negligible, if any, criminal history, however, the public interest may be better served by avoiding the cost of prosecution and incarceration in favor of immediately proceeding to removal.

Beyond the direct cost of detaining and prosecuting removable-alien-criminal defendants, the conflict between the BRA and immigration en-

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[129] U.S. DOJ, U.S. Att'ys, FY 2013 Performance Budget Congressional Submission 15, *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-usa-justification.pdf.

[130] *See Immigration Prosecutions for September 2013* TRAC Immigr., (Nov. 25 2013), http://trac.syr.edu/tracreports/bulletins/immigration/monthlysep13/fil/.

[131] U.S. Magistrate Courts typically handle "less serious misdemeanor cases, including . . . 'petty offenses.'" *Id.*

[132] In fiscal year 2011, the average of incarcerating a federal inmate was $28,893.40. Annual Determination of Average Cost of Incarceration, 78. Fed. Reg. 16711 (Mar. 18, 2013). By comparison, ICE reported in 2011 that the average cost of deporting an unlawful alien was about $12,500. Mizanur Rahman, *ICE Reveals Cost for Deporting Each Illegal Immigrant*, Immigr. Chron. (Jan. 27, 2011), http://blog.chron.com/immigration/2011/01/ice-reveals-cost-for-deporting-each-illegal-immigrant/. In fiscal year 2010, the conviction rate in immigration-related criminal cases was 96 percent. Eighty percent of those convicted were sentenced to prison. U.S. DOJ, Exec. Office for U.S. Att'ys, United States Attorneys' Annual Statistical Report (2010), *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf.

[133] In cases where the deportable alien defendant is accused of a serious crime, conflict between the BRA and INA is less likely to arise because the defendant is more likely to be properly subject to pretrial detention under 18 U.S.C § 3142(a)(4) (2012).

forcement imposes an economic burden on society by exacerbating reliance on costly social programs. Many detainees are parents or guardians who would otherwise be working to support dependent family members.[134] Furthermore, dependent children of unlawful aliens are often American citizens who may be eligible for participation in entitlement programs and other federal aid.[135] Families that were previously self-sufficient or required only minimal government support may find themselves in need of more substantial aid if a breadwinning adult is improperly kept in federal custody.[136] Although a defendant's temporary release pending trial is obviously inadequate to completely remedy the impact of deportation or incarceration on a family's financial and caretaking resources, it would at least provide an opportunity to prepare for changing circumstances by saving money during the period of release, discussing a leave of absence with an employer, or making alternative arrangements for the care of dependents. Pretrial detention will likely eliminate those possibilities, and in the course of cases, will inevitably generate an increased strain on federal aid programs.

Lastly, by removing potentially positive and otherwise present role models from their families, improper pretrial detention of alien defendants who are also parents encourages a cycle of criminality and generational poverty that undermines economic development and middle-class growth. Children with absentee parents are significantly more likely to engage in criminal behavior as adults.[137] The loss of a parent or guardian to federal detention increases the probability that children from an already at risk population will deviate from positive social and economic integration.[138] The impact of their deviation will inevitably fall on the public's shoulders. Pretrial release would provide eligible defendants some opportunity to emotionally prepare their families for their impending departure, either to federal custody or their nation of origin, perhaps reducing the trauma to their children of losing a parent or guardian at a young age.

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[134] "The vast majority (95.1 percent) of immigrant households with children had at least one worker in 2009." Stephen Camarota, *Welfare Use by Immigrant Households with Children*, CENTER FOR IMMIGR. STUD. (Apr. 2011), http://www.cis.org/immigrant-welfare-use-2011.

[135] *See* Julia Preston, *Births to Illegal Immigrants Are Studied*, N.Y. TIMES, Aug. 11, 2010, at A19.

[136] *See generally* Camarota, *supra* note 134. Despite high rates of employment, many immigrant families rely on some government aid due to employment in unskilled, low paying jobs. *Id.*

[137] *See* Cynthia C. Harper & Sarah S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 369–71 (2004).

[138] For a frightening summary of relevant statistics and primary sources discussing the impact on children of growing up without a father, see *Statistics*, FATHERLESS GENERATION, http://thefatherlessgeneration.wordpress.com/statistics/.

C. Undermining the Government's Credibility

Whether an alien defendant remains in pretrial custody due to judicial misapplication of the BRA or an executive decision to persist in detaining her despite a court order for pretrial release, that detention undermines the government's credibility and promotes disrespect for the law. Many aliens, who are entangled in the web of American criminal and immigration law, have family members, often children, who are United States citizens.[139] These children will grow up in American society and will play a critical role in its future economic and social prosperity. For many children of removable aliens, their primary impression of American law and government will form through their parents' interaction with DOJ and ICE.[140] It may be inevitable that these young Americans will be harmed by the ordeal and perceive their alien parent as having been treated unfairly.[141] Tainting an already difficult experience with prejudicial treatment and improper detention can only serve to further diminish their own government's credibility in their eyes. This, in turn, will exacerbate the social and economic concerns discussed above.[142]

III. THE SOLUTION

Part I identified and analyzed a conflict between the requirements of the BRA and the Executive's enforcement of the INA, and explained how that conflict results in the improper pretrial detention of some criminal defendants due to their immigration status or subjection to an immigration detainer. Next, Part II assessed the cost of that conflict. This Part proposes solutions to alleviate the problem of improper pretrial detention and argues that some positive changes are already occurring or at least are gaining momentum.

The problem of eligible alien defendants being denied their statutory right to pretrial release requires a multifold solution. Each branch of government has a role to play, as does the public. This Part examines what each entity can do, or has already done, to contribute to the solution. Section A addresses the role of the judiciary in holding the Executive accountable. Next, Section B discusses legislative change, including amendment of the BRA and elimination of the bed mandate, that would clarify the law for courts and alleviate pressure on the Executive to aggressively detain suspected unlawful aliens. Section C proposes changes in executive policy that would conform with the law without compromis-

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[139] *See* Preston, supra note 135, at A19 ("Children of illegal immigrants make up 7 percent of all people in the country younger than 18 years old.").

[140] *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System*, IMMIGR. POL'Y CENTER, (Dec. 2012), http://www.immigrationpolicy.org/sites/default/files/docs/falling_through_the_cracks_3.pdf.

[141] *Id.*

[142] *See id.*; *supra* Part II.B.

ing national security. Finally, Section D argues that public action and community involvement is the ultimate catalyst for change.

A. The Courts

The district courts are the primary vehicle for ensuring that criminal defendants who have a statutory right to pretrial release under the BRA obtain that relief.[143] The first step in the process of ensuring that defendants who should be eligible for pretrial release are not improperly detained is applying the BRA consistently to all defendants, regardless of immigration status or subjection to an ICE detainer. The Executive can, and typically does, argue that alien defendants, especially those subject to an immigration detainer, are either per se ineligible for pretrial release under § 3142(a) or should otherwise be denied release due to risk of flight.[144] Courts should reject these arguments and consider only the factors that Congress included in § 3142(g) in determining release eligibility.[145] Alien defendants may still be subject to disproportionately high rates of pretrial detention based on a correlation between immigration status and other properly considered character traits.[146] Courts, however, should not allow immigration status or subjection to an immigration detainer to improperly, perhaps even inadvertently, influence the determination of a defendant's pretrial disposition.[147]

As discussed, *supra*, in Part I.C.1., many, if not most, courts have rejected the Executive's arguments that an immigration detainer per se precludes pretrial release under § 3142(a).[148] It is much more common, however, for courts to improperly consider a defendant's immigration status as a factor relevant to risk of flight.[149] Ultimately, clarification from Congress may be necessary to stem judicial consideration of those factors in determining whether a defendant is eligible for pretrial release.[150] Nonetheless, there is a significant and growing body of precedent protecting alien defendants' BRA rights and granting pretrial release that courts presented with similar cases should follow.[151]

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[143] In some districts, including the District of Oregon, this includes U.S. Magistrate Courts, which often preside over bail determination hearings for alien criminal defendants. *See, e.g.*, United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1172 (D. Or. 2012).

[144] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 1.

[145] *See* 18 U.S.C. § 3142(g) (2012).

[146] *See supra* Part I.A.2 (discussing correlation between immigration status and other factors such as ties to the community).

[147] *See supra* Part I.C.1–2.

[148] NAT'L IMMIGRATION PROJECT, *supra* note 13, at 5–8.

[149] *Id.* at 5. Even the *Trujillo-Alvarez* court endorses this approach. 900 F. Supp. 2d at 1173.

[150] *See infra* Part III.B.

[151] *See* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 12.

Unfortunately, some courts have been less willing to enforce pretrial release orders for alien defendants than they have been to issue them. Alien defendants are regularly detained by ICE pending trial, notwithstanding a court order for pretrial release.[152] Sometimes this is the product of the defendant failing to raise the issue.[153] In many cases, the defendant is detained by ICE after winning release at the bail hearing because he is unaware, or does not believe, that a BRA release order protects him from subsequent ICE detention for the purpose of delivering him to trial.[154] Indeed, a defendant's belief that ICE can detain him irrespective of a BRA release order remains consistent with the majority of case law.[155] A growing number of courts, however, are holding that a BRA release order forecloses ICE detention for the duration of the criminal process.[156] These courts have recognized the conflict between a BRA release order and detention pursuant to the INA, and have refused to allow the Executive to circumvent release orders merely by shifting custody of a defendant from DOJ to ICE.[157]

Courts should follow *Trujillo-Alvarez* in holding that a BRA release order requires that the defendant be released from *all* federal custody pending disposition of the criminal charges against him.[158] Furthermore, courts should be willing to impose the appropriate remedy if the Executive disregards the Court's order, namely, the dismissal with prejudice of criminal charges. The *Trujillo-Alvarez* court allowed the Executive seven days to decide between releasing the defendant and preserving criminal charges or keeping him in custody in order to proceed with deportation.[159] While the seven-day grace period was perhaps warranted in that

[152] *Id.* at 15–16.

[153] *See id.*; *supra* note 114 and accompanying text.

[154] *See* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 1. As the judicial tide continues to turn in favor of equal application of the BRA, and as courts begin granting and ensuring the pretrial release of more deportable alien defendants, the failure of defendants to contest ICE detention after a release order should naturally decrease.

[155] *Id.* at 15–16; *see, e.g.*, United States v. Ong, 762 F. Supp. 2d 1353, 1359 (N.D. Ga. 2010) ("The District Court has no authority to review removal decisions involving aliens," thus placing ICE detention beyond the scope of a BRA release order despite ongoing prosecution of criminal charges.).

[156] *See, e.g.*, United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1179 (D. Or. 2012) (ordering the Executive to choose between compliance with the BRA release order or foregoing criminal prosecution in favor of ICE detention for the purpose of facilitating removal); United States v. Adomako, 150 F. Supp. 2d 1302, 1308 (M.D. Fla. 2001) (granting defendant's motion for release from INS custody in compliance with a BRA release order). *See also* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 15.

[157] *See* NAT'L IMMIGRATION PROJECT, *supra* note 13, at 15.

[158] 900 F. Supp. 2d at 1180.

[159] *Id.* at 1181. The lack of subsequent proceedings in *Trujillo-Alvarez* suggests that the Executive opted to forgo prosecution and continue to detain Mr. Trujillo-Alvarez in an ICE facility pending deportation in light of the district court's order. The fact that ordered compliance with the BRA was sufficient to derail the prosecution casts

case due to the relative novelty of the scenario and to preserve the Executive's legitimate interest in making an informed decision on how to proceed, it should not be the norm. As the law becomes clearer that ICE may not detain a defendant who has obtained pretrial release, the Executive should be held more strictly accountable. In the future, courts should take a step beyond *Trujillo-Alvarez*, and order the improperly detained defendant to be immediately released from ICE custody and, if applicable, returned to the jurisdiction of prosecution. The Executive would then remain free to choose between prosecuting the defendant or proceeding with administrative detention and removal while the defendant enjoys the full benefit of her pretrial release order.

B. The Legislature

Although this Comment has focused primarily on the judicial misinterpretation of the BRA and the internal executive conflict between DOJ's and ICE's enforcement priorities, one should not conclude that Congress is blameless for the improper pretrial detention of alien defendants. Judicial misinterpretation of statutes is mitigated by clarity in statutory language. Likewise, executive policy is guided by legislative command, particularly when the command is in the form of an appropriations contingency.[160] The courts' confusion and the Executive's immigration and detention policy can be largely attributed to, and therefore remedied by legislative action.

Congress should clarify the BRA in two ways. First, § 3142(g) should be amended to include a subsection that proscribes consideration of immigration status or subjection to an immigration detainer in the pretrial release calculus. Section 3142(g)'s affirmative list of factors for the judicial officer to consider is adequate to determine whether the defendant poses a flight risk and ought to be exclusive.[161] Yet courts have consistently considered a defendant's immigration status as an additional factor.[162] The overlay or substitution of immigration status or subjection to an immigration detainer for properly considered factors such as community ties amounts to class treatment that augments an assessment of the individual defendant. This is precisely the sort of evil that Congress enacted the BRA to prevent.[163] Inclusion of a subsection proscribing improper, class-based considerations, including immigration status and subjection to an immigration detainer, would stem errant court interpretation and clarify that the BRA's pretrial release provisions apply with equal force to alien defendants.

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doubt on the prudence of the Executive's prior willingness to expend considerable resources to prosecute a defendant whom it was apparently content simply to deport.

[160] *See supra* Part I.B.2.

[161] *See* 18 U.S.C. § 3142(g)(3) (2012); *supra* Part I.A.2.

[162] *See supra* Part I.C.2.

[163] *See supra* text accompanying note 46.

Second, Congress should amend § 3142(a)(1) to (2) to clarify that a defendant who is ordered released pending trial must be released from *all* federal custody. This would specifically disallow the current practice of courts permitting ICE to detain a defendant who has been ordered released pursuant to the BRA.[164] Such an amendment would resolve the tension between ICE and DOJ and provide clear guidance to courts to force the Executive to choose between detention to facilitate removal and prosecution subject to the requirements of the BRA.

Congress has amended the BRA on several occasions.[165] Both of the proposed amendments are consistent with the purpose of the BRA, and neither would compromise its objectives of protecting the public and ensuring that the defendant does not voluntarily flee from prosecution.[166] Unfortunately, given the current partisan gridlock in Congress and conflict over immigration reform, successfully amending the BRA to clarify the rights of alien defendants appears to be a dubious proposition.[167] Nonetheless, Congress should recognize that amending the BRA as proposed would not substantively alter the statute, but rather, would clarify the law and facilitate more equal treatment of criminal defendants without regard to class.

Removing the bed mandate from DHS appropriations, though not as direct a solution as clarifying the BRA, would also reduce conflict between the BRA and the INA by reducing legislative pressure on the Executive to detain alien criminal defendants in ICE facilities.[168] ICE has no legitimate incentive, other than satisfaction of the bed mandate, to detain alien defendants pending criminal trial.[169] ICE retains the right to detain and remove unlawful alien defendants after the disposition of criminal charges and imposition of any resulting criminal sentence.[170] Thus, complying with pretrial release orders does not prejudice ICE's objective of facilitating the removal of unlawful aliens. By eliminating the bed mandate, Congress would enable the Executive to adopt a policy of compliance with BRA release orders without risking the loss of appropriated funding.

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[164] *See, e.g.*, United States v. Ong, 762 F. Supp. 2d 1353, 1359 (N.D. Ga. 2010).

[165] *See generally*, FED. JUDICIAL CTR., THE BAIL REFORM ACT OF 1984 (2d ed. 1993), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/bailref.pdf/$file/bailref.pdf.

[166] *See supra* Part I.A.1.

[167] *See generally*, Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES, July 8, 2013, at A3 (comparing 2013 unfavorably with even "some of the worst years of partisan gridlock").

[168] *See supra* Part I.B.2.

[169] *See supra* note 68 and accompanying text (discussing the efficacy of detention alternatives in ensuring aliens' appearance at administrative immigration proceedings).

[170] 8 U.S.C. § 1231(a)(1)(B)(iii) (2012) (The removal period is tolled while the removable alien is "detained or confined (except under an immigration process), [until] the date the alien is released from detention or confinement."); United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1179 (D. Or. 2012).

Elimination of the bed mandate may also be more politically feasible than amending the BRA. In fact, there is already bipartisan momentum in Congress to rescind the bed mandate, and a 2013 vote nearly succeeded in doing so.[171] Unfortunately, powerful lobbying interests, particularly the private prison industry which contracts for and profits immensely from immigration detention, are fighting tooth and nail to ensure that detention remains an immigration policy priority.[172] Still, as members of Congress continue to be pressured by their constituents' vocal dissatisfaction with the financial cost of satisfying the detention quota, its elimination becomes more likely.[173]

By amending the BRA as proposed, Congress would substantially, if not completely eliminate, the disparate treatment of alien defendants by providing clear guidance to courts applying the BRA and unambiguously instructing the Executive not to persist in detaining defendants who have been ordered released. Eliminating the bed mandate from DHS appropriations, while not as direct a remedy, would also mitigate the problem by removing an incentive for the Executive to employ a legally dubious detention policy. Each of these proposals would save taxpayers money and curb discriminatory class treatment of alien criminal defendants without undermining the Executive's interest in criminal prosecution or removal of unlawful aliens.

C. The Executive

As explained in Sections A and B of this Part, both Congress and the courts can help guide executive policy towards enforcing the INA consistently with the BRA. The Executive, however, need not and should not wait for the other branches to require it to do so. The choice between pursuing criminal punishment or detention and removal of an unlawful alien defendant is an executive policy choice.[174] That choice should be made in furtherance of the public interest. An executive policy that complies with the law and does not discriminate against criminal defendants based on immigration status has practical public benefits. Such a policy encourages respect for the law, preserves fiscal resources, and ensures

[171] Press Release, Human Rights First, Growing Bipartisan Support in Congress on Eliminating Immigration Detention Bed Mandate (June 5, 2013), *available at* http://www.humanrightsfirst.org/press-release/growing-bipartisan-support-congress-eliminating-immigration-detention-bed-mandate.

[172] William Selway & Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, BLOOMBERG (Sept. 23, 2013), http://www.bloomberg.com/news/2013-09-24/congress-fuels-private-jails-detaining-34-000-immigrants.html.

[173] For an expression of one citizen's vocal criticism of the bed mandate before the House Judiciary Committee, see Asylum Abuse: Is it Overwhelming Our Borders?, *supra* note 65, at 137 (statement of Mary Meg McCarthy, Executive Director, Heartland Alliance's National Immigrant Justice Center).

[174] *Trujillo-Alvarez*, 900 F. Supp. 2d at 1179–80.

that all criminal defendants enjoy the rights that Congress created with the BRA.[175]

As long as the bed mandate remains in effect, the Executive will be under statutory pressure to pursue an immigration enforcement policy that prioritizes detention. This policy, in and of itself, does not conflict with the BRA.[176] To the extent that satisfying the bed mandate encourages ICE to detain aliens accused of federal crimes, however, compliance with the BRA will likely require DOJ to be more conservative in exercising its discretion to prosecute aliens that ICE has a competing interest in detaining. This is not to suggest that the Executive should forgo prosecution of alien defendants accused of violent or otherwise serious crimes. In fact, cases involving violent crime or other serious charges are less likely to create conflict with the BRA, because defendants in such cases are less likely to warrant pretrial release.[177] Garden-variety criminal immigration cases such as illegal entry and illegal reentry, on the other hand, often involve defendants who are likely to be eligible for pretrial release.[178] Many such cases involve defendants who have only minimal, if any, criminal history and cannot reasonably be considered to pose a threat to public safety.[179] The Executive could alleviate tension with the BRA and facilitate the legitimate detention of more unlawful aliens in ICE facilities by foregoing prosecution of many criminal immigration cases.

Foregoing prosecution of some criminal immigration cases would, of course, forfeit the public benefit of general and specific deterrence of unlawful immigration. The significance of this benefit, however, is dubious and is outweighed by the costs of prosecution and incarceration. For example, illegal reentry is the most commonly charged federal crime, constituting the lead charge in nearly a quarter of all federal prosecutions.[180] Over 98 percent of illegal reentry convictions result in imprisonment, with the length of incarceration averaging 19 months.[181] Yet in recent years, illegal reentry prosecutions have continued to increase even as unlawful immigration as a whole has declined for other reasons including border security and the recession.[182] Thus, despite enforcing heavy-

[175] *See supra* Part II.

[176] *See* 18 U.S.C. § 3142(a) (2012) (The BRA applies only to criminal defendants).

[177] *See id.* § 3142(e)(2)–(3).

[178] *See supra* notes 108–110 and accompanying text.

[179] *See Quick Facts: Illegal Reentry Offenses*, U.S. SENT'G COMMISSION, http://www.ussc.gov/Quick_Facts/Quick_Facts_Illegal_Reentry.pdf (In 2012, 70.3 percent of defendants charged with illegal reentry had a criminal history of Level 3 or below).

[180] *Illegal Reentry Becomes Top Criminal Charge*, TRAC IMMIGR., (June 10, 2011), http://trac.syr.edu/immigration/reports/251/.

[181] *Quick Facts: Illegal Reentry Offenses*, *supra* note 179.

[182] *See Illegal Reentry Becomes Top Criminal Charge*, *supra* note 180; Pierre Thomas et al., *Fewer Illegal Immigrants Crossing Southwest Border*, ABC NEWS (Dec. 12, 2011), http://abcnews.go.com/blogs/politics/2011/12/fewer-illegal-immigrants-crossing-southwest-border/.

handed penalties, prosecution of illegal reentry does not seem to have effectively deterred that behavior. At the same time, the public incurs the enormous cost of prosecuting and imprisoning illegal reentrants rather than proceeding directly to removal.[183]

Any marginal deterrent value of prosecuting large numbers of garden-variety immigration cases is overshadowed by the immense monetary cost of prosecution and incarceration. The Executive should elect not to prosecute many of these cases, opting instead to proceed directly to removal. That would conserve taxpayer resources and allow ICE to continue to detain the would-be defendant without the risk of running afoul of the BRA.

D. The People

In American democracy, the elected branches of government are directly accountable to the will of the people.[184] Thus, to the extent that relief of the conflict between the BRA and the Executive's enforcement of the INA is contingent on legislative or executive action, ultimate responsibility for catalyzing change lies with the public. Courts, although not directly subject to public opinion, are also influenced by public action. Greater awareness, particularly in the legal community, of the arguments favoring pretrial release of eligible alien defendants leads to more effective advocacy, which impacts judicial precedent and legal trends.[185]

The American public, while perhaps largely unaware of the existence of the BRA, much less its conflict with INA enforcement, is in fact actively engaged in an effort to change elements of immigration policy that exacerbate the conflict. Several grassroots public interest and immigrants' rights organizations such as the ACLU, and Human Rights First, have taken up the cause of informing the public of the economic harm and human rights issues implicated by ICE's detention-first policy.[186] The bed mandate and the deplorable conditions present in many ICE detention facilities have become lightning rods for public criticism.[187]

Importantly, the bed mandate and the ICE's mass detention of aliens have drawn criticism from both the left and the right sides of the aisle.[188] Although immigrant rights are typically thought of as a "liberal" agenda

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[183] *See supra* Part II.B.

[184] At a minimum, the public holds its elected officials to a periodic vote on their continued employment. At best, elected officials will be responsive to their constituents' sentiments even when they are not currently up for reelection.

[185] Practice guides such as *The Bail Reform Act and Release from Criminal and Immigration Custody for Federal Criminal Defendants*, for example, provide an excellent resource for defense attorneys fighting for pretrial release of an alien client. *See* NAT'L IMMIGRATION PROJECT, *supra* note 13.

[186] *See, e.g.*, PATEL & JAWETZ, *supra* note 118, at 1–2; *see also* Press Release, Human Rights First, *supra* note 171.

[187] *See Media Coverage of ICE Detention Bed Mandate*, *supra* note 65.

[188] *See* Press Release, Human Rights First, *supra* note 171.

item, many "conservatives" support detention alternatives as well.[189] Conservatives, while perhaps less likely than their liberal counterparts to trumpet immigrant rights as a political priority, are nonetheless sensitive to the economic waste caused by ineffective immigration policy and detention en mass.[190] Thus, despite differing priorities among divergent political constituencies, opposition to the bed mandate and aggressive immigration detention policy retains a broad base of support.[191]

Both fiscal responsibility and immigration reform are current hot topics in domestic politics. In recent months, the media has become more vocal in criticizing immigration detention and support for revoking the bed mandate is increasing.[192] At the same time, Americans' approval of Congress has reached record lows due to legislative gridlock and the inability of Republicans and Democrats to work together on important issues.[193] The political climate is ripe for public pressure to effect legislative change, and recent reports suggest that congressional compromise on immigration reform could mitigate public ire.[194] The threat to congressional incumbents of being ousted in the upcoming 2014 elections provides the voting public with a critical opportunity to hold their elected leaders accountable and demand that Congress work together to remove the bed mandate from DHS appropriations. This in turn would help free the Executive to employ a detention policy that avoids conflict with the BRA.

CONCLUSION

Some alien defendants in federal court who are neither a flight risk nor a danger to the community are being improperly denied their statutory right to pretrial release pursuant to the BRA. They are the victims of errant judicial interpretation of the BRA, and the unduly aggressive enforcement policy of an executive agency whose funding is contingent on

[189] *See id.*

[190] *See id.* Even staunch conservative Grover Norquist has advocated for immigration reform as an economic "no-brainer." Grover Norquist, *Immigration Reform is a No-Brainer to Help the Economy*, GUARDIAN (Apr. 24, 2013), http://www.theguardian.com/commentisfree/2013/apr/24/immigration-reform-grover-norquist-support.

[191] *See* Press Release, Human Rights First, *supra* note 171.

[192] *See id.* (discussing bipartisan support for removing the bed mandate); *Media Coverage of ICE Detention Bed Mandate*, *supra* note 65 (collecting media articles criticizing the bed mandate).

[193] In October 2013, Congress's approval rating fell to five percent. To put that in perspective, one poll found that "Congress is less popular than hemorrhoids, jury duty and toenail fungus." Mollie Reilly, *Congress Approval Rating Drops to Dismal 5 Percent in Poll*, HUFFINGTON POST (Oct. 9, 2013), http://www.huffingtonpost.com/2013/10/09/congress-approval-rating_n_4069899.html.

[194] *See* Luis Ubiñas, *The Republican Party Needs Immigration Reform*, HUFFINGTON POST (Nov. 25, 2013), http://www.huffingtonpost.com/luis-ubi/the-republican-party-need_b_4337745.html.

satisfying an arbitrary detention quota. This class-based denial of alien defendants' statutory rights fails to meaningfully promote the public interest, while simultaneously imposing a significant burden on detainees, their families, and the public. Fortunately, there are signs of progress. A growing body of case law is protecting alien defendants' rights under the BRA. Thanks largely to public pressure, the bed mandate appears to be on thin ice.[195] Despite some meaningful developments, however, the fact remains that many alien criminal defendants seeking bail continue to have their liberty interests prejudiced based solely on class status. The American public must not be satisfied until that is no longer true.

[195] Pun intended.