

Prioritizing Failure: Using the ‘Rocket Docket’ Phenomenon to Describe Adult Detention

Emily R. Summers*

ABSTRACT: Activists and scholars consistently target inhumane immigration detention practices in the United States. They note the physical conditions of the centers, the lack of legal representation available, and that detained immigrants are at a much higher risk of losing their immigration cases. It is clear from these analyses that detention procedures do not always function as intended. Yet absent from these studies is an analysis of the effect of docket timelines and enforcement priorities on a detained immigrant’s case. By comparing expedited removal proceedings—a truncated removal process—to formal removal proceedings, this Note demonstrates that docket timelines and enforcement priorities also contribute to this unequal balance in process to detained, as opposed to non-detained, immigrants. Even though the law does not recognize a truncated removal process for detained immigrants in formal removal proceedings, this analysis points to troubling similarities between a detained immigrant’s procedure and the expedited removal procedure. In response, this Note examines comprehensive immigration reform, criminal justice reform, and standalone solutions to balance the playing field for detained and non-detained immigrants. This Note advocates for re-examining the overreliance on immigration detention, re-thinking the current immigration docket framework, and re-evaluating immigration enforcement priorities in order to restore the process legally afforded to detained immigrants.

I.	INTRODUCTION.....	852
II.	BACKGROUND	854
	A. IMMIGRATION DETENTION AND ITS JUSTIFICATIONS	855
	B. EXPEDITED REMOVAL AND ITS POLITICAL AND LEGAL JUSTIFICATIONS.....	856

* J.D. Candidate, The University of Iowa College of Law, 2017; B.A., Grinnell College, 2010. Thank you to Professors Bram Elias and Stella Burch Elias for their guidance, thoughtful advice, and infectious enthusiasm for this area of the law; to all the advocates who work tirelessly for a more just and fair immigration system; and to the Volume 101 and Volume 102 editors and student writers of the *Iowa Law Review* for their meticulous edits and camaraderie. Finally, thank you to my mom, Debora, for her optimism and support during this journey.

C.	<i>FORMAL REMOVAL PROCEEDINGS: DETAINED AND NON-DETAINED DOCKETS</i>	862
D.	<i>BOND PROCEDURES</i>	865
III.	A DOCTRINAL AND PRACTICAL COMPARISON	867
A.	<i>THE IMPACT OF ADMINISTRATIVE PRIORITIES</i>	868
B.	<i>DOCKET TIMELINE</i>	870
1.	Detained vs. Non-Detained Docket in Formal Removal Proceedings	871
2.	Detained Docket vs. Expedited Removal Proceedings	871
C.	<i>ACCESS TO LEGAL REPRESENTATION</i>	872
1.	Access to Legal Representation in Detention	873
2.	Contributing Factors to the Lack of Legal Representation	873
D.	<i>LIKELIHOOD OF RELIEF OR TERMINATION</i>	875
IV.	IMPLICATIONS AND SOLUTIONS	876
A.	<i>COMPREHENSIVE IMMIGRATION REFORM</i>	876
B.	<i>STAND-ALONE SOLUTIONS</i>	878
V.	CONCLUSION	880

I. INTRODUCTION

In the midst of immigration debates in the United States today, the topic of immigration detention often draws significant attention. Scholars question the conditions of detention centers, the constitutionality of detaining immigrants, and, more broadly, the actual effectiveness of detention in the United States.¹ Current debates began to take shape in 1996 when Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act

1. See DORA SCHIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2–3 (2009), <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> (“With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.”); see also MARK NOFERI, AM. IMMIGRATION COUNCIL, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS 10 (2015), <http://cmsny.org/noferi-detention-asylum> (citing sources that show immigration detention costs \$158 per day, as compared to ICE alternatives to detention, which cost \$10.55 per day); 1 EILEEN SULLIVAN ET AL., VERA INST. OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM 31 (2000), http://archive.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf (concluding that “[a]sylum seekers do not need to be detained to appear”).

(“IIRIRA”).² IIRIRA, one of the most recent overhauls of the immigration system, enhanced immigration enforcement procedures, established new and expanded grounds of inadmissibility and forms of relief, and re-defined criminal actions as ways in which to remove immigrants from the United States.³ Significantly, IIRIRA provided for new forms of detention procedures under the Immigration and Nationality Act (“INA”), leading to an increased use of detention in the United States for immigrants of all ages, nationalities, and prior immigration statuses.⁴ Yet under IIRIRA and our current immigration enforcement priorities,⁵ detention procedures are not functioning as Congress envisioned them.

During fiscal year 2013, the Department of Homeland Security (“DHS”) apprehended 662,000 immigrants.⁶ Of those 662,000, some 441,000 were detained.⁷ Most of these immigrants violated an immigration law and were therefore placed into removal proceedings. In the same period, many more immigrants were also placed in removal proceedings but were not detained. Under the law, detained and non-detained immigrants should receive the same amount of process during removal proceedings: the same ability to build their case and find support for their claim, regardless of whether or not they are detained.⁸ But due to their detainment, detained immigrants are less likely to obtain counsel and less likely to be able to gather evidence to support their claims than non-detained immigrants.⁹ As such, detained immigrants are much more likely to lose their case in immigration court.¹⁰

Immigration advocates often note that detained immigrants are significantly disadvantaged by the immigration system in comparison to non-detained immigrants. In the quest for immigration and detention reform, advocates protest against conditions in detention centers and often cite a detainee’s inability to find representation, as well as the struggles in finding and developing evidence to bolster claims for relief from removal.¹¹ Yet few address the effect that docket timelines and enforcement priorities have on this phenomenon in the adult detention setting.

2. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

3. *See generally id.*

4. *See generally id.*

5. *See infra* Part II.B.

6. *See* JOHN F. SIMANSKI, U.S. DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2013 1 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

7. *Id.*

8. *See infra* Part III.

9. *See infra* Part III.C.

10. *See infra* Part III.D.

11. *See infra* Part III.

As described below, many immigration courts have one docket for the non-detained immigrants and another docket for detained immigrants.¹² As it stands, the detained docket moves much faster than the non-detained, both because fewer immigrants are on the detained docket than the non-detained, but also because the immigration system prioritizes the hearing and adjudication of detained cases. Scholars have used the term “rocket dockets” to describe this phenomenon in relation to unaccompanied alien children, yet it is rarely discussed in the context of detained, adult immigrants. This Note places the adult detained docket in the “rocket docket” context, and compares three distinct immigration procedures—expedited removal at the border, formal removal proceedings in immigration courts, and bond procedures—to demonstrate that detained immigrants in the United States do not receive the same process as those immigrants that are not detained, even though the law indicates that they should.¹³ The reality of the current docket system and administrative removal and enforcement priorities alter detainees’ procedural rights, and ultimately, the outcome of their case for immigration relief.¹⁴

Part II of this Note introduces the role of various agencies involved in these proceedings, then examines the legal justifications and current trends in expedited removal procedures, formal removal procedures, and bond proceedings. Part III compares these procedures, both doctrinally and in practice, pointing to a number of troubling similarities in docket timelines, access to legal representation in formal and expedited removal proceedings, and the likelihood of success for both detained and non-detained immigrants. Part IV explores potential solutions and suggests a multifaceted approach—involving criminal justice reform, the elimination of bed quotas, and the use of alternatives to detention—to change enforcement priorities and, ultimately, to address the disconcerting differences in process afforded to detained and non-detained immigrants.

II. BACKGROUND

The Immigration and Nationality Act (“INA”) authorizes the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) to enforce and adjudicate certain immigration laws.¹⁵ DHS, through agencies

12. See *infra* Part II.C.

13. See *infra* Part III.

14. This Note typically refers to “relief” as a broad term to include multiple claims to relief from deportation.

15. See Homeland Security Act of 2002 § 402(3), 6 U.S.C. § 202(3) (2012) (vesting the Secretary of DHS with the administration and enforcement of most provisions of the INA); ALISON SISKIN, CONG. RESEARCH SERV., R43892, ALIEN REMOVALS AND RETURNS: OVERVIEW AND TRENDS 1 n.6 (2015) (“[T]he Attorney General retained responsibility for the adjudication of immigration removal cases through the Executive Office for Immigration Review (EOIR).”). Prior to 2003, the Immigration and Nationality Service (“INS”) controlled the enforcement of immigration laws. It is now referred to as “Legacy INS” in discussing actions prior to the creation

like Immigration and Customs Enforcement (“ICE”) and Customs and Border Patrol (“CBP”), enforces certain removal procedures and decides which immigrants the government will prosecute for immigration infractions.¹⁶ The U.S. Attorney General adjudicates other removal cases through the Executive Office for Immigration Review (“EOIR”) and immigration courts, and operates with authority separate and distinct from DHS.¹⁷

This Part details DHS and EOIR practices, particularly within detention center contexts (overseen by ICE) or within a court setting (overseen by the EOIR). It discusses what detainment is and why certain immigrants are detained while others are not. This Part then describes certain immigration proceedings to detail the intersection of various agencies and explain the justifications behind such procedures.

A. IMMIGRATION DETENTION AND ITS JUSTIFICATIONS

Immigration detention is the effective equivalent to criminal imprisonment.¹⁸ The difference between immigration detention and criminal prison is that an immigrant is detained temporarily during their removal proceedings until an immigration judge decides to either grant them relief from removal or deny relief, thereby effectuating an order of deportation.¹⁹ An immigrant may receive approval to be released on bond, but she will still be detained unless she can pay it.²⁰

Despite the insistence on deeming immigration proceedings as civil proceedings, the current framework detains some immigrants during removal proceedings, just like the criminal justice system imprisons individuals who commit certain crimes.²¹ Furthermore, detention centers look increasingly like criminal prisons.²² A detained immigrant is not allowed to leave the premises of the detention center and has limited access to family or friends. Detainees are only allowed visitors during certain hours, have their personal

of DHS. See *Save Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/directorates-and-program-offices/save-program> (last visited Nov. 10, 2016).

16. See SISKIN, *supra* note 15, at 1 n.6.

17. See *id.*

18. See Raul A. Reyes, *America’s Shameful Prison Camps*, CNN (July 23, 2015, 11:00 PM), <http://www.cnn.com/2015/07/23/opinions/reyes-immigration-detention> (“To be clear, ‘immigration detention’ is really a euphemism for the network of roughly 250 prisons and jails around the country that house detainees.”).

19. See *infra* Part II.C.

20. See *infra* Part II.D.

21. See *infra* note 91 and accompanying text.

22. See generally SUNITA PATEL & TOM JAWETZ, *CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES* (2007), https://www.aclu.org/sites/default/files/field_document/unsr_briefing_materials.pdf.

belongings confiscated, must wear jumpsuits, and are guarded by officers in uniform.²³

The justifications for immigration detention often relate to alleged public safety concerns.²⁴ Immigrants are mandatorily detained when an immigration judge or a detention officer determines that they are a danger to public safety or when immigrants have a criminal history of crimes involving moral turpitude or aggravated felonies.²⁵ Yet even if an immigrant does not fall into the mandatory detention category, an immigration judge may nonetheless deem the immigrant a flight risk or danger to public safety and place her in detention without bond.²⁶ As discussed below in Part IV, many scholars argue that public safety is not a concern at the level the government believes it to be, and these scholars advocate for alternatives to detention and other reforms to address concerns with current detention practices.²⁷

This Note takes this discussion a step further, evaluating how docket timelines and administrative priorities negatively impact a detained immigrant. To do this, it is helpful to compare three immigration proceedings: expedited removal, formal removal proceedings, and bond procedures.

B. EXPEDITED REMOVAL AND ITS POLITICAL AND LEGAL JUSTIFICATIONS

As of April 1, 1997, the INA authorized immigration officials to remove immigrants who materially misrepresent themselves or who lack proper documentation²⁸ without a hearing before an immigration judge and without administrative or judicial review.²⁹ Removing immigrants without providing them any formal removal process is known as expedited removal. Congress enacted expedited removal procedures—originally called “summary exclusion”³⁰—to combat the influx of immigrants entering the United States without proper documentation and those fraudulently claiming fear of

23. Dagmar R. Myslinska, *Living Conditions in Immigration Detention Centers*, NOLO, <http://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html> (last visited Nov. 10, 2016).

24. *See Urena*, 25 I. & N. Dec. 140, 140 (B.I.A. 2009) (holding that the immigration judge should only set a bond if she first determines that the immigrant does not present a danger to the community).

25. *See Guerra*, 24 I. & N. Dec. 37, 39–40 (B.I.A. 2006) (holding that when security grounds are raised, an immigration judge has discretion to uphold denial of bond).

26. *See id.* at 38, 40.

27. *See infra* Part IV.A.

28. *See* Immigration and Nationality Act § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2012) (referring to material misrepresentation); *see also id.* § 212(a)(7), 8 U.S.C. § 1182(a)(7) (referring to lack of immigrant or non-immigrant visa documents).

29. *See id.* § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i).

30. ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 3 (2005).

persecution.³¹ As compared to formal removal procedures,³² expedited removal strips immigrants of certain procedural rights because of the circumstances in which they entered, or attempted to enter, the United States.³³ Expedited removal procedures typically occur at the border when an immigrant attempts to enter the United States, but the provision can also apply to immigrants who have not been admitted or paroled³⁴ into the United States and cannot prove continuous presence in the United States for two or more years.³⁵

In 2004, Congress expanded the expedited removal provisions to include immigrants who are found within 100 miles of the United States–Mexico border and who cannot establish continuous physical presence in the United States for the preceding 14 days.³⁶ In 2005, DHS expanded the expedited removal authority in order to “reduc[e] the number of [immigrants.] Other Than Mexicans (OTMs) [,] who have spent less than 14 days in the United States and who are apprehended within 100 miles of the border.”³⁷ The 2005

31. *Id.* (explaining that the policy began in the 1980s to address the mass migrations of Cuban and Haitian asylum seekers. “The [original] goal of ‘summary exclusion’ was to stymie unauthorized migration by restricting the hearing, review, and appeal process for aliens arriving without proper documents at ports of entry.”); *see also* *Immigration Inspections When Arriving in the U.S.*, TRAC IMMIGR. (Apr. 4, 2006), <http://trac.syr.edu/immigration/reports/142> (Congress “[a]uthorized [expedited removal] to get tough on egregious violators of entry laws by sending them back out of the country as quickly as possible with a record . . . that prevents them from returning for five years.”).

32. Exclusion and deportation proceedings were the two main procedures in place to either deport immigrants already in the United States from the country or exclude them before they physically entered. *See* IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 9 (15th ed. 2016). In 1996, IIRIRA replaced exclusion and deportation proceedings with just one removal process that applied to immigrants seeking entry, those arriving in the United States who were suspected terrorists, stowaways, or for immigrants already in the United States. *Id.*; *see also* *infra* Part II.C.

33. *See supra* Part II.A; *see also* *infra* note 68 and accompanying text. Generally, an immigrant must be deemed “admissible” in order to lawfully enter the United States. *See* KURZBAN, *supra* note 32, at 63 (“Admission is defined as the ‘lawful entry of the alien into the United States after inspection and authorization by an immigration officer.’” (quoting Immigration and Nationality Act § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2012)). An immigrant can be inadmissible for a number of reasons, including: committing certain crimes, being ineligible for his or her visa application, or being too ill to enter the country. *See id.* at 71–73, 89–91.

34. An immigration officer can parole an immigrant into the United States for “urgent humanitarian reasons,” or when the immigrant’s “entry is determined to be for significant public benefit.” This immigrant is technically inadmissible, and being paroled into the United States “does not constitute a formal admission to the United States.” When “conditions supporting . . . parole cease to exist,” that immigrant must leave the United States. *See Definition of Terms*, U.S. DEP’T HOMELAND SECURITY OFF. IMMIGR. STAT. (Nov. 3, 2016), <http://www.dhs.gov/definition-terms#116> (discussing the definition of “Parolee”).

35. Immigration and Nationality Act § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (2012). Those who have “entered the United States without inspection and admission or parole” are also known to have “entered without inspection” or “EWI”. 7 USCIS POLICY MANUAL Part B, Ch. 3B (2016).

36. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (U.S. Dep’t of Homeland Sec. Aug. 11, 2004).

37. Press Release, U.S. Dep’t of Homeland Sec., DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005) (on file with the DHS Office of Public Affairs)

expansion targeted all immigrants crossing the border, not just Mexicans, and included a 14-day rule as a catch-all to expeditiously remove those apprehended. In 2006, Congress expanded expedited removal procedures to all borders.³⁸

There are exceptions to the provision, and not all immigrants who meet the above criteria can be subjected to expedited removal.³⁹ Immigration officers must ask arriving immigrants certain “‘protection questions’ to identify anyone who is afraid of return.”⁴⁰ If an immigrant expresses a fear of persecution or torture if returned to their home country, or if he or she intends to file for asylum, “the alien is supposed to be detained by the Immigration and Customs Enforcement (ICE) Bureau and interviewed by an asylum officer from DHS’s Bureau of Immigration and Citizenship Services (USCIS).”⁴¹ If USCIS finds that there is no credible fear,⁴² the immigrant may request that an immigration judge review that decision.⁴³ That “review must be conducted as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the asylum officer’s finding of no credible fear.”⁴⁴ Although ICE has discretion to release the immigrant, it is likely that he or she is detained throughout this process.⁴⁵ If an officer finds that the immigrant does have a credible fear, that individual is placed in formal removal proceedings and can apply for relief as a defense

(explaining that the expansion allows Border Patrol “to break the cycle of illegal migration” and will “disrupt the vicious human smuggling cycle that occurs along the southwest border”). The surge in illegal migration, both at the border and through ports, has consistently been the source of concern and a driving force behind expedited removal expansion.

38. Press Release, U.S. Dep’t of Homeland Sec., DHS Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006) (AILA Doc. No. 06013018). This Note cites to several documents located on the American Immigration Lawyers Association (“AILA”) website, which requires login credentials. For access or questions regarding the documents located herein, please contact AILA, <http://aila.org/infonet>.

39. SISKIN & WASEM, *supra* note 30, at 1 n.3 (“Aliens from Western Hemisphere countries with which the United States does not have full diplomatic relations . . . are excluded from expedited removal.”).

40. *Id.* at 4.

41. *Id.*

42. *Id.* at 1–2 n.5 (explaining that officers complete a “credible fear hearing to determine if there is support for their asylum claim”). “[T]he term ‘credible fear of persecution’ means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim . . . that the alien could establish eligibility for asylum” Immigration and Nationality Act § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (2012). “Those who pass the credible fear hearing are placed into formal removal proceedings under INA § 240.” SISKIN & WASEM, *supra* note 30, at 1–2 n.5.

43. SISKIN & WASEM, *supra* note 30, at 4–5.

44. *Id.* at 5 (internal quotations omitted).

45. *Id.*

against removal to their home country.⁴⁶ The formal, or non-expedited, removal process is discussed in detail below.⁴⁷

After IIRIRA passed, Legacy INS⁴⁸ published a memorandum on expedited removal provisions discussing the implementation of the procedure and instructing field officers about the new procedures.⁴⁹ Under IIRIRA, if an immigrant meets the expedited removal requirements, the immigrant

must be processed under expedited removal and may not be referred for an immigration hearing under section 240. If additional charges are lodged, the alien may be referred for a section 240 hearing, but this should only occur in extraordinary circumstances. Generally speaking . . . additional charges should not be brought and the alien should be placed in expedited removal.⁵⁰

The instructions indicate a priority to remove certain immigrants as seamlessly as possible, without the lengthy formal removal process. The numbers clearly indicate this priority: in fiscal year 2013, DHS removed 438,000 immigrants from the United States.⁵¹ Over 192,000—approximately 44%—of those removal orders stemmed from expedited removal orders.⁵²

In expedited removal proceedings, ICE typically provides the immigrant reasonable notice of the charges, the privilege of legal representation, the opportunity to inspect evidence and rebut the charges, and a determination on the record maintained for judicial review.⁵³ But an immigrant in expedited removal proceedings does not have certain adjudication and post-adjudication rights available to immigrants in formal removal proceedings.⁵⁴ For instance, an expedited removal order is not subject to administrative review unless a person claims to be a lawful permanent resident, a refugee, an asylee (i.e. someone who has previously been granted asylum), or a United

46. ALISON SISKIN, CONG. RESEARCH SERV., IN10122, ADULTS AND ADULTS WITH CHILDREN (FAMILY UNITS) APPREHENDED BY BORDER PATROL: A PROCESSING FLOW CHART 2 (2014).

47. *See infra* Part II.C.

48. *See supra* note 15 and accompanying text (discussing Legacy INS).

49. *See* Memorandum from Chris Sale, Deputy Comm'r, Immigration & Naturalization Serv., to Mgmt. Team et al., INS Memo on Expedited Removal (March 31, 1997) (AILA Doc. No. 97033192) (introducing a field manual for expedited removal procedures along with general guidelines in enforcement requirements).

50. *Id.* A hearing under section 240 means that an immigration judge will eventually hear the immigrants' case in immigration court thus placing them into regular or formal removal proceedings, not expedited removal proceedings. *See* Immigration and Nationality Act § 240(a)–(b), 8 U.S.C. § 1229a(a)–(b) (2012).

51. SIMANSKI, *supra* note 6, at 1.

52. *See id.*

53. Immigration and Nationality Act § 238(b)(4), 8 U.S.C. § 1228(b)(4).

54. *See supra* Part II.B.

States citizen.⁵⁵ Moreover, judicial review is not afforded, except for habeas corpus review, to determine permanent residency, refugee, or asylee status.⁵⁶

Several circuit courts considered these provisions and found that such procedures comport with due process requirements in the Constitution.⁵⁷ Despite such precedent, advocates continue to express concern over the constitutionality of expedited removal, especially for asylum seekers who do not pass their credible fear interviews after the protective questioning at the border.⁵⁸ For example, The Immigration Policy Center asserts that current processes are

so truncated that frequently a person with an expedited removal order has no idea why he or she was deported. Individuals subject to expedited removal generally are not informed of their right to counsel. Likewise, they are not provided a sufficient opportunity to contact counsel to help them challenge the charges against them or present evidence that is not with them at the time of apprehension.⁵⁹

Moreover, there is significantly less process afforded to immigrants subjected to expedited removal than that afforded to immigrants in formal removal proceedings.⁶⁰ As discussed further in Part III, detained immigrants are also afforded less process than non-detained immigrants, and the process afforded to detained immigrants in formal removal proceedings is shockingly similar to the process in expedited removal procedures.

Other scholars advocate against the use of expedited removal procedures and argue that the conditions of the procedure lack due process and violate

55. 8 C.F.R. § 235.3(b)(2)(ii) (2016); *see also* Immigration and Nationality Act § 235(b)(1)(a)(i), 8 U.S.C. § 1225(b)(1)(a)(i).

56. Immigration and Nationality Act § 242(e), 8 U.S.C. § 1252(e). Other exceptions to the Immigration and Nationality Act's limitation of judicial review include a review of whether a section of the expedited removal regulation is constitutional or whether written guidelines from DHS are consistent with the Act and do not otherwise violate the law. *Id.* § 242(e)(3)(A), 8 U.S.C. § 1252(e)(3)(A).

57. *See, e.g.*, Francis v. U.S. Attorney Gen., 603 F. App'x 908, 911–13 (11th Cir. 2015); United States v. Rangel de Aguilar, 308 F.3d 1134, 1136–38 (10th Cir. 2002); United States v. Garcia-Martinez, 228 F.3d 956, 960–63 (9th Cir. 2000); United States v. Benitez-Villafuerte, 186 F.3d 651, 657–60 (5th Cir. 1999).

58. *See* Alvaro Peralta, Note, *Bordering Persecution: Why Asylum Seekers Should Not Be Subject to Expedited Removal*, 64 AM. U. L. REV. 1303, 1307 (2015) (arguing that “expedited removal . . . violates various legal safeguards for noncitizens seeking protection from persecution in their home countries”); *see also* LEGAL ACTION CTR., AM. IMMIGRATION COUNCIL, BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL 11 (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/behind_closed_doors.pdf (discussing the use of videoconferencing between clients and attorneys and how the practice undermines confidentiality).

59. IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, REMOVAL WITHOUT RECOURSE: THE GROWTH OF SUMMARY DEPORTATIONS FROM THE UNITED STATES 2 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/expedited_removal_fact_sheet_final_o.pdf.

60. *See infra* Part III.B.

human rights.⁶¹ Many hold this view because of recent events. In 2014, the United States saw an influx of adults and adults with children entering the country at the southwestern border.⁶² Most families were subjected to expedited removal when apprehended at the border and were “mandatorily detained by ICE until ICE [could] effectuate the aliens’ removal.”⁶³

The Obama Administration attempted to address this influx by prioritizing certain immigrant groups to move through the procedures at a faster rate.⁶⁴ Yet this consequence is not necessarily beneficial: in explaining the impact of President Obama’s 2014 Executive Action on enforcement statistics, the Migration Policy Institute stated that the new priorities will likely “be a reduction in deportations from within the interior of the United States,” whereas “[r]emovals at the U.S.-Mexico border remain a top priority” that could increase the use of expedited removal.⁶⁵ Marc Rosenblum argues that in order to keep up with changing enforcement priorities, the number of detained immigrants will decrease because the use of expedited removal will

61. IMMIGRATION POLICY CTR., *supra* note 59, at 4 (“[J]udicial proceedings ensure a basic level of due process, help safeguard against unlawful removals, and permit noncitizens to pursue legal status in the United States One of the hallmarks of the U.S. justice system is the right to have a day in court before an impartial decision-maker, yet the vast majority of immigrants who are removed never see the inside of a courtroom.”); *see also* SU KIM & KAREN LUCAS, AILA’S TAKE ON NO-PROCESS REMOVALS (2014), <http://www.aila.org/infonet/ailas-take-on-no-process-removals> (AILA Doc. No. 14060349) (describing the following problems with the expedited removal process: (1) it offers no review for mistakes by immigration officers with relatively little experience; (2) it is a “woefully inadequate process” that does not afford the right to consult legal representation or to present evidence; (3) decisions are “made so quickly that no time is taken to see if an individual merits discretion or needs protection”; and (4) if an immigrant is subject to expedited removal, such immigrant could be barred from re-entering the United States for “anywhere from 5 to 20 years”); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 480–81 (2013) (arguing that expedited removal orders are not a solution to enforcement priorities or the lack of resources in detention centers or immigration courts).

62. SISKIN, *supra* note 46, at 1.

63. *Id.*

64. Press Release, U.S. Dep’t of Justice, Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S. (July 9, 2014), <http://www.justice.gov/opa/pr/departement-justice-announces-new-priorities-address-surge-migrants-crossing-us>. In November 2014, the Obama Administration articulated the general enforcement and removal priorities for the immigration population in the United States. *See* Memorandum from Jeh Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to ICE, CPB, USCIS, & Acting Assistant Sec’y for Policy (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (regarding “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”). Although the title implies that only undocumented immigrants are affected, the policy articulates enforcement priorities for immigrants who have certain criminal charges and for those who have recently entered the United States. *Id.* at 3. As such, these enforcement priorities affect all immigrants, regardless of their status.

65. MARC R. ROSENBLUM, MIGRATION POLICY INST., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 1 (2015), <http://www.migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement> (select “download report”).

increase.⁶⁶ Some immigrants simply want to be out of detention centers, and based on the characterization of the facilities, it is an understandable reaction. However, for those who wish to stay and fight their case, being placed in expedited removal significantly diminishes their chances of finding representation and winning.⁶⁷

As Congress intended, expedited removal procedures remove certain procedural rights from categories of immigrants.⁶⁸ The cases are processed quickly, often without legal representation.⁶⁹ Though Congress intended for this expedited removal process to only impact immigrants expressly listed in that provision,⁷⁰ in practice the truncated procedure is not limited to only those immigrants.

C. FORMAL REMOVAL PROCEEDINGS: DETAINED AND NON-DETAINED DOCKETS

This subpart explores current trends in formal removal proceedings. Formal removal proceedings are different from the expedited removal procedures explained in Part II.B. Administered by the EOIR, formal removal proceedings allow ICE to “present[] the government’s case on why the foreign national should be removed,”⁷¹ and allow the immigrant to present her claim for relief from removal or waiver of inadmissibility in front of an immigration

66. See *id.* (“[F]alling interior removals may be offset to some extent by increases at the border . . .”).

67. See *infra* Part III.C (discussing access to legal representation for immigrants in removal proceedings).

68. See Immigration and Nationality Act § 235(b)(1)(A)(iii), 8 U.S.C. § 1225(b)(1)(A)(iii) (2012). The INA creates a “newly designated class who are placed in expedited removal proceedings,” indicating that not all immigrants can be subjected to this procedure. Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Dep’t of Justice Nov. 13, 2002).

69. See DUSTY ARAUJO ET AL., NAT’L IMMIGRANT JUSTICE CTR., ISOLATED IN DETENTION: LIMITED ACCESS TO LEGAL COUNSEL IN IMMIGRATION DETENTION FACILITIES JEOPARDIZES A FAIR DAY IN COURT 3 (2010), https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf (“Most of the immigrants detained in the surveyed facilities have insufficient access to legal counsel because the facilities are isolated and legal aid organizations do not have the resources to serve them. More than a quarter of the surveyed facilities had no access to legal aid outreach from non-governmental organizations (NGOs), including direct representation and legal orientation programs.”); see also JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS 8 (2011), http://web.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf (“The overwhelming majority of noncitizens selected for stipulated removal—nearly 96 percent—did not have lawyers.”).

70. See *supra* note 68 and accompanying text.

71. SISKIN, *supra* note 46, at 2 (noting that the judge makes a decision either to order the immigrant removed, grant relief from removal, or terminate the case “if the government fails to prove removability”). Siskin also asserts that immigrants who entered without inspection—typically apprehended at or near the border—concede that they are removable but continue to apply for relief from removal, such as asylum. See ALISON SISKIN, CONG. RESEARCH SERV., RL32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 8–9 (2012).

judge.⁷² This presentation is either done by the immigrant pro se or, if she is able to afford and find legal representation, by counsel.⁷³

When ICE issues a Notice to Appear (“NTA”) informing the immigrant that she is in removal proceedings, the notice lists the provisions of the INA the immigrant allegedly violated.⁷⁴ This notice places her in removal proceedings.⁷⁵ This charge is the first indication of whether or not she must be detained or is eligible for bond⁷⁶ while in removal proceedings.⁷⁷ Immigrants in removal proceedings are typically eligible for release on bond unless they must be mandatorily detained based on an accusation or prior conviction for certain crimes, accusation of association with terrorist organizations,⁷⁸ or unless they are classified as an arriving alien.⁷⁹ These sections cover a range of offenses from espionage to basic drug offenses.⁸⁰ However, even if an immigrant does not meet the mandatory detention requirements, DHS and the Attorney General have discretion to deny bond, thereby detaining an immigrant throughout proceedings.⁸¹ If an immigrant is eligible for bond and cannot pay it, she will remain detained until her case is completed or closed.⁸²

72. An immigrant can be removed from the United States based on grounds of inadmissibility, all of which fall under INA section 212, or based on grounds of removability (also known as deportation grounds), all of which fall under INA section 236. Grounds of inadmissibility and removability often overlap, but this Note does not delve into those differences and similarities.

73. See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (stating that an immigrant in removal proceedings has the right to obtain counsel at his or her own expense).

74. *Id.* § 239(a)(1), 8 U.S.C. § 1229(a)(1) (The NTA must contain, among other information, the charges against the immigrant and the statutory provisions allegedly violated and the acts or conduct alleged to be in violation of the law.). The initial stages of the removal process will differ for immigrants that are already detained either by a state or local law enforcement agency or by ICE.

75. See *id.*

76. See *infra* Part II.D.

77. But see Kotliar, 24 I. & N. Dec. 124, 126 (B.I.A. 2007) (holding that an immigrant need not be charged in the NTA with the crime that would subject him to mandatory detention).

78. See generally Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c) (listing the ways in which an immigrant may be subject to mandatory detention).

79. *Id.* “An arriving alien . . . includes persons apprehended at the border seeking admission even if paroled into the [United States] . . . and those returning [legal permanent residents] who are considered to be seeking admission under INA § 101(a)(13)(C).” KURZBAN, *supra* note 32, at 205.

80. Immigration and Nationality Act § 237(a)(2)(A)(ii)–(iii), 8 U.S.C. § 1227(a)(2)(A)(ii)–(iii); *id.* § 237(a)(2)(B)–(D), 8 U.S.C. § 1227(a)(2)(B)–(D).

81. See *id.* § 236(a), 8 U.S.C. § 1226(a); see also Patel, 15 I. & N. Dec. 666, 666 (B.I.A. 1976) (showing that, even without a showing of a threat to national security, danger or flight risk, there is no presumption of release).

82. Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a). The statute also allows ICE to use its prosecutorial discretion to refrain from detaining an immigrant. See *id.*; see also *infra* Part II.D. Though beyond the scope of this Note, the Department of Justice recently discussed the idea of “debtor prisons” and the constitutionality of imprisoning defendants because they

Depending on the volume of cases, certain jurisdictions have separate dockets for detained and non-detained immigrants.⁸³ The detained and non-detained dockets are mainly in place for immigration courts' use to facilitate the flow and ease of the immigration dockets. This Note examines the differences between these dockets more closely in Part III.B.1.

As discussed above, formal removal procedures are quite similar to the general notion of a trial. Immigrants are the defendant, and the government is the prosecution. Generally, an immigration judge hears evidence from both sides and decides whether or not an immigrant is deportable and, if so, whether or not she is eligible for relief from deportation. Yet, in immigration proceedings, administrative priorities have a significant impact on formal removal proceedings. Though many immigrants are detained because of their criminal backgrounds, a sizable number of immigrants are detained because of certain enforcement priorities.⁸⁴ Administrative policies have a notable impact on the length of detention, which categories of immigrants are detained, and how quickly cases are heard and move through the docket.⁸⁵ According to Marc Rosenblum, President Obama's 2014 changes to immigration enforcement priorities will increase the number of prioritized cases "over time . . . as more unauthorized immigrants enter the United States or are ordered removed after January 1, 2014."⁸⁶ Agencies use a docketing system that divides individuals by their location in either a detention center or as non-detained, and those agencies are required to change their processes

could not afford bail. *See* Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein at 29, *Walker v. City of Calhoun*, No. 16-10651 (11th Cir. Aug. 18, 2016), <https://www.schr.org/files/post/files/2016.08.18%20USDOJ%20AMICUS%20BR.pdf> (arguing that "a bail scheme violates the Fourteenth Amendment, if, without a court's meaningful consideration of ability to pay and alternative methods of assuring appearance at trial, it results in the detention of indigent defendants pretrial").

83. OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 10 (2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/02/04/practice_manual_-_02-08-2016_update.pdf ("There are more than 200 Immigration Judges in more than 50 Immigration Courts in the United States. . . . Immigration Judges sometimes hold hearings in alternate locations, such as designated detail cities where the caseload is significant but inadequate to warrant the establishment of a permanent Immigration Court. Immigration Judges also conduct hearings in Department of Homeland Security detention centers nationwide, as well as many federal, state, and local correctional facilities. . . . [H]earings before Immigration Judges are sometimes conducted by video conference or, under certain conditions, by telephone conference.").

84. *See generally* Memorandum from Jeh Johnson, *supra* note 64; *see also generally* DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE ACTIONS TO ADDRESS THE INFLUX OF MIGRANTS CROSSING THE SOUTHWEST BORDER IN THE UNITED STATES (2014), <https://www.justice.gov/iso/opa/resources/214201479112444959.pdf> (stating that the EOIR is refocusing its docket priority to focus on border crossers; this will impact other detained cases).

85. *See generally* ROSENBLUM, *supra* note 65 (explaining the projected impact of President Obama's 2014 changes to immigration enforcement priorities).

86. *Id.* at 9-10.

according to changing priorities. Because detained immigrants remain a priority, regardless of the current immigration situation, cases on the detained docket are often adjudicated much faster than those on the non-detained docket.⁸⁷

The data indicate that there is a significant difference in the average amount of time from start to finish of a detained case as opposed to a non-detained case.⁸⁸ This Note demonstrates that this difference in time between the detained and non-detained dockets negatively affects the outcome of a case for detained immigrants. In theory, detained and non-detained immigrants should have the same procedural rights because they are both in formal removal proceedings,⁸⁹ as opposed to expedited removal procedures. Docket timelines should not affect the outcome of a case. Yet, as this Note explores and explains in Part III and Part IV, the comparison between the detained docket procedures and expedited removal procedures is more similar than anticipated. Justifications for detention, docketing practices, and enforcement priorities must be re-examined in order to reverse this phenomenon.

D. BOND PROCEDURES

Eligibility for bond illustrates another procedural distinction between detained and non-detained immigrants. The INA states that immigrants should be released on bond unless they are subject to mandatory detention under INA section 236(c).⁹⁰ Although ICE initially determines whether or not an immigrant is a risk to public safety or a flight risk at the initial bond determination, the immigration judge does have jurisdiction—and wide discretion—to reconsider these conditions.⁹¹ This hearing is not the same as a removal hearing discussed above.⁹² A bond redetermination hearing must be “separate and apart from, and shall form no part of, any deportation or removal hearing.”⁹³

87. *Immigration Court Processing Time by Outcome: By Removals, Voluntary Departures, Terminations, Relief, Administrative Closures*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last visited Nov. 10, 2016) (data available through October 2016).

88. *See infra* Part III.B.

89. *See supra* Part II.B.

90. Immigration and Nationality Act § 236(a), 8 U.S.C. § 1226(a) (2012); 8 C.F.R. § 236.1(c) (2016). Immigrants are mandatorily detained under section 236(c) of the INA as criminals or terrorists or as arriving aliens. Immigration and Nationality Act § 236(c), 8 U.S.C. § 1226(c); *see* 8 C.F.R. § 1.2 (defining “[a]rriving alien” as “an applicant for admission coming or attempting to come into the United States at a port-of-entry”).

91. *See* Garcia-Garcia, 25 I. & N. Dec. 93, 95 (B.I.A. 2009); 8 C.F.R. § 1003.19. Moreover, immigrants not subject to mandatory detention are entitled to discretionary release if they can demonstrate that release “would not pose a danger to property or persons, and that [they are] likely to appear for any future proceeding.” Adeniji, 22 I. & N. Dec. 1102, 1111–13 (B.I.A. 1999).

92. *See supra* Part III.B.

93. 8 C.F.R. § 1003.19(d); *see* R-S-H, 23 I. & N. Dec. 629, 630 n.7 (B.I.A. 2003). However,

IIRIRA amended the INA to specify which immigrants are eligible for bond and which are required to be detained (mandatory detention).⁹⁴ For those eligible for bond, the minimum bond amount is \$1,500, but the immigration judge can raise that amount.⁹⁵ In bond redetermination hearings, the immigration judge assesses a number of factors, enumerated in the Immigration Judge Benchbook, to determine whether an individual is eligible for bond and what bond amount should be set.⁹⁶ Generally, the judge must assess whether or not the immigrant will reappear at later proceedings and if she is a danger to the public.⁹⁷

Immigration bond proceedings play a significant role in the outcome of a removal or relief case. As Emily Ryo notes, “[A] denial of bond or a prohibitively high bond amount may mean prolonged separation from families and severance from basic sources of social and economic support that might otherwise enable a noncitizen to effectively pursue legal relief from removal.”⁹⁸ Ryo also examined the judicial decision-making process in immigration bond hearings more closely and found that bond hearings have the potential to expand the number of immigrants detained in the United States.⁹⁹ This study, focusing on immigration detention facilities in the Central District of California, found that “average bond amounts ranged from \$10,667 to \$80,500” and that “[t]he average grant rates ranged from 22 to 75 percent.”¹⁰⁰ Another report found that “[w]hen bail is . . . set for detained

the same immigration judge is allowed to hear both the bond and formal removal hearing. *See Flores–Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001) (rejecting a motion for recusal where an immigration judge heard both the bond and merits hearing).

94. SISKIN, *supra* note 71, at 3.

95. Immigration and Nationality Act § 236(a)(2), 8 U.S.C. § 1226(a)(2); Spiliopoulos, 16 I. & N. Dec. 561, 562 (B.I.A. 1978) (“[N]othing in 8 C.F.R. [section] 242.2(b) precludes an immigration judge from increasing the amount of bond initially set by the District Director where deemed appropriate under the circumstances. To hold otherwise would prevent a full and independent assessment of the necessity for detention and the amount of bond, if any, to insure the presence of the respondent at the deportation hearing.”).

96. Exec. Office of Immigration Review, U.S. Dep’t of Justice, *Introductory Guides: Bond*, in IMMIGRATION JUDGE BENCHBOOK 6–7, <https://www.justice.gov/eoir/file/830231/download> (last visited Nov. 15, 2016). The Benchbook is a guide for Immigration Judges. The legally relevant factors to determine bond eligibility and whether or not a foreign national is a danger to the community or a flight risk are as follows: (1) whether the foreign national has a fixed United States address; (2) how long the foreign national has resided in the United States; (3) what family ties the foreign national has in the United States, particularly family ties that can confer immigration benefits to the foreign national; (4) employment history in the United States, including the length and stability of that employment; (5) a foreign national’s immigration record; (6) any prior attempts to avoid prosecution or authorities; (7) any prior failures to appear for scheduled court dates; (8) the foreign national’s criminal record, including the recency and extensiveness, consistent disrespect for the law and ineligibility for relief from removal. *Id.*

97. *See generally id.*

98. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC’Y REV. 117, 118 (2016).

99. *Id.*

100. *Id.* at 119.

immigrants, the national average is approximately \$5,200.”¹⁰¹ Ryo’s study also demonstrates that an immigrant’s chances of obtaining legal representation significantly impact her ability to argue successfully for bond eligibility.¹⁰² These reports consistently emphasize the need for legal representation for detained and non-detained immigrants in many procedures: bond; formal removal and relief cases; expedited removal procedures; and credible fear interviews, among others.¹⁰³

Doctrinally, it is clear that expedited removal proceedings differ significantly from formal removal proceedings. As Congress intended, only immigrants who fall into certain prioritized groups or who meet certain prerequisites can be subjected to the truncated procedural process of expedited removal.¹⁰⁴ In theory, detained immigrants who do not meet those prerequisites cannot be subjected to expedited removal proceedings. However, the reality of being detained is very different than that of non-detained immigrants.

III. A DOCTRINAL AND PRACTICAL COMPARISON

To compare what process is afforded to immigrants, it can be helpful to envision those rights on a linear scale: on one side we see that immigrants subject to expedited removal have very limited procedural rights, whereas those who are not subjected to expedited removal are afforded a right to a hearing in front of an immigration judge and the ability to present evidence and witnesses.¹⁰⁵ This Note, however, demonstrates that in practice, being a

101. U.S. COMM’N ON CIVIL RIGHTS, WITH LIBERTY AND JUSTICE FOR ALL: THE STATE OF CIVIL RIGHTS AT IMMIGRATION DETENTION FACILITIES 115 (2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

102. Ryo, *supra* note 98, at 135 (“Extralegal factors are generally not significantly related to grant/deny decisions. One exception is that detainees with an attorney at their bond hearings are much more likely to be granted bond. The only legally relevant factors significantly related to bond grant/deny decisions are those pertaining to the detainees’ criminal history. Detainees with more recent convictions, and drug and property convictions . . . are more likely to be granted bond. On the other hand, detainees with felony convictions, DUI convictions, and sex-related convictions . . . are much less likely to be granted bond.”). Moreover, bond amounts are often influenced by educational level and the number of felony convictions. *Id.* at 135–37 (“Those with a high school degree or more are given higher bond amounts on average, compared to those who did not receive a high school degree. . . . A separate analysis . . . indicates that detainees with felonies have an average bond amount of \$47,133 while those without felonies have an average bond amount of \$20,040 . . .”).

103. *See infra* Part III.C.1.

104. *See supra* text accompanying note 68.

105. *See* Immigration and Nationality Act § 240(b)(4)(A)–(B), 8 U.S.C. § 1229a(b)(4)(A)–(B) (2012); Koh, *supra* note 61, at 487–88 (explaining that procedural due process applies to deportation hearings). The Supreme Court “has stated . . . that ‘the Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.’” Koh, *supra* note 61, at 487 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001)). Consequently, “a number of statutory rights . . . apply to immigration proceedings [including] a statutory right to counsel (at no government expense), the right to examine the evidence presented by the government, the right to cross-examine witnesses, and

detained immigrant places you much closer to the expedited removal side of this scale instead of the side of non-detained immigrants where the law states that they belong. While studies expose the conditions in detention centers and due process concerns regarding the detention process,¹⁰⁶ this Note demonstrates the consequences of mass detention practices coupled with immigration enforcement priorities: detained immigrants are at a significant disadvantage, both procedurally and in regards to chances of being granted relief, as compared to non-detained immigrants. In fact, detained immigrants experience a formal removal process that more closely mirrors that of an immigrant subject to expedited removal procedures.

This Part first explores administrative priorities and events that shape current immigration docketing practices. It then examines the timeline of a detained case in formal removal proceedings, a detainees' ability to find legal representation, the likelihood of relief for detainees, and, finally, compares these findings to similar factors in the expedited removal procedure. From this comparison, it is clear that detained immigrants often find themselves in a similarly truncated process. Although Congress recognized procedural limits for immigrants subject to expedited removal, it has not recognized such limitations in process for immigrants detained for other reasons, such as the inability to pay bond or for falling under a certain enforcement priority.¹⁰⁷

A. THE IMPACT OF ADMINISTRATIVE PRIORITIES

The detained and non-detained dockets are primarily in place for immigration courts to facilitate the flow and ease of the immigration dockets.¹⁰⁸ Because courts experience volume and backlog at different rates, the detained and non-detained dockets can differ significantly in terms of length of processing time.¹⁰⁹ Although numerous factors affect the length of an adjudicatory period, one factor is quite significant: in directing courts to adjudicate certain cases more quickly, administrative enforcement priorities play a major role in this docket distinction.¹¹⁰ For example, the Obama

the right to present evidence." *Id.* at 488. In addition to a hearing in front of an immigration judge, an immigrant in formal removal proceedings has "the right to assert a claim to remain in the United States and the right to retain an attorney to assist in pursuing that claim." Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937 (2015) (footnote omitted).

106. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 101, at 32-42, 44 (determining that some ICE facilities did not comply with various medical, LGBT, or food services standards, and calling for a "[d]eeper examination . . . [of] privately contracted detention facility compliance").

107. See *supra* text accompanying note 68. The use of expedited removal was meant to curb illegal migration and preventing loss of life, but the regulation did not contemplate the truncated removal process for other immigrants not meeting the requirements of this section.

108. See *supra* text accompanying note 87 (explaining why the EOIR often distinguishes between detained and non-detained dockets in court practices).

109. See *supra* Part II.C.

110. See Memorandum from Brian M. O'Leary, Chief Immigration Judge, U.S. Dep't of Justice, to All Immigration Judges (Sept. 10, 2014), <http://www.justice.gov/sites/default/files/eoir/legacy/2014/09/30/Docketing-Practices-Related-to-UACs-Sept2014.pdf> (regarding "Docketing Practices

Administration recently prioritized the influx of unaccompanied children (“UAC”) crossing the southwest border of the United States.¹¹¹ Yet with each new influx of immigrants that the administration has to handle, detained cases continue to remain a priority. As the EOIR reallocated its resources to quickly process UAC cases, for example, all detained cases also became a target.¹¹²

While scholars use the term “rocket docket” to refer to the unaccompanied alien children’s docket,¹¹³ the term could easily refer to the detained docket as well. The fact that the administration continues to prioritize detained cases, along with the influx of children and families from Central America, means that immigration judges are required to adjudicate detained cases at a much faster rate than non-detained cases. This burden ultimately falls to the detainee to gather evidence, sometimes in as little as two weeks, in order to present her case. As a result of this administrative influence, detained docket timelines differ significantly from non-detained docket timelines, and the difference impacts the outcome of a case for relief from removal.¹¹⁴ The type of relief applied for in the case—criminal histories, and prior immigration statuses—can all impact the outcome of a case,¹¹⁵ but the difference in docket timelines is a major factor, especially when compounded by the inability to gather evidence or find legal representation.

Relating to Unaccompanied Children Cases in Light of the New Priorities”). “This summer [2014], we added new priorities to our pre-existing priority for detained cases. . . . The shift in docketing practices to address these priorities has affected individuals . . . that interact with the Immigration Court” *Id.*; see also ROSENBLUM, *supra* note 65, at 9–10 (explaining that, even though Obama’s 2014 enforcement changes will protect about 14% more unauthorized immigrants from falling into a certain enforcement priority, “[t]he number of priority cases will grow over time . . . as more unauthorized immigrants enter the United States or are ordered removed after January 1, 2014”). It is too early to predict how quickly the Trump Administration will change our current immigration enforcement and detention policies. Yet it is clear that the new administration will take a drastically different approach to enforcement practices, and as to whether or not the administration prioritizes certain categories of immigrations over others. See *Immigration*, TRUMP–PENCE, <https://www.donaldjtrump.com/policies/immigration> (last visited Nov. 17, 2016) (“Move criminal aliens out day one, in joint operations with local, state, and federal law enforcement. We will terminate the Obama administration’s deadly, non-enforcement policies that allow thousands of criminal aliens to freely roam our streets.”). These new policies could significantly impact which immigrants we detain, how long immigrants are in detention, and for what kinds of relief they may be eligible.

111. See DEP’T OF JUSTICE, *supra* note 84.

112. See *id.* (“To allocate resources with these priorities, EOIR will reassign immigration judges in immigration courts around the country from their current dockets to hear the cases of individuals falling in these four groups.”).

113. See Eagly, *supra* note 105, at 975 (explaining that the author “routinely observed judges explaining to detainees that their Washington Headquarters required them to complete all detained cases in sixty days. This expedited scheduling practice, known as the rocket docket, has pressurized case review” (footnotes omitted)).

114. See *infra* Part III.B–D.

115. Distinguishing each of these factors would lead to an interesting discussion and interpretation but is beyond the scope of this Note.

Through a comparison of docket timelines, access to legal representation and likelihood of success, this Part ultimately demonstrates that detention processes are more similar to expedited removal procedures than to an immigrant's experience on the non-detained docket. This consequence is devastating for detainees and the priorities must be reconsidered.

B. DOCKET TIMELINE

Much of the discussion surrounding immigration detention focuses on the inhumane conditions of detention¹¹⁶ and the length of time immigrants are detained.¹¹⁷ Such arguments point to detention conditions and human rights violations to demonstrate the failures of the detention process.¹¹⁸ A variety of studies assert that the detention process is much harsher, both procedurally and substantively, than the removal process for those out on bond.¹¹⁹ Yet there is no literature specifically comparing expedited removal procedures with the formal removal procedures for detained immigrants. In demonstrating the difference in timelines between detained and non-detained dockets, and compounding those differences with each groups' access to legal representation and the likelihood of relief, this Note illustrates that the detained docket experience is significantly different from that of non-detained immigrants, but is very similar to the expedited removal experience. This consequence can lead to disastrous outcomes for the immigrant, especially one without legal assistance.¹²⁰

116. See *supra* note 106 and accompanying text; see also generally PATEL & JAWETZ, *supra* note 22 (providing details of ICE standards in detention centers but also detailing how those standards are not often followed and that detainees in private prisons or other state or local prisons are not necessarily protected under those standards).

117. *Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts*, TRAC IMMIGR., http://trac.syr.edu/phptools/immigration/court_backlog (last visited Nov. 15, 2016) (showing that as of the end of September 2016, the United States Immigration Courts had over 516,000 pending immigration cases); see also Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUD., <http://cmsny.org/immigration-detention-behind-the-record-numbers> (last visited Nov. 9, 2016).

118. See Noferi, *supra* note 117 ("A detainee's wait time has particularly severe impact, i.e. deprivation of liberty and separation from work and family. . . . These prolonged detention times also potentially have constitutional impact."). This Note recognizes and agrees with scholars who argue that being detained, for any amount of time, can severely impact family and community ties. When pointing out that "[t]he 2012 data showed that the longest average detention time (131 days) was for those whom had proceedings terminated because a judge determined they were lawfully present, and never should have been detained," Mr. Noferi is correct in stating that that amount of time in detention setting is prolonged and often unnecessary. *Id.* However, the aim of this Note is to use this data to compare detained timelines to non-detained and to show that, in comparison, being detained puts you on a significantly shorter timeline than if you could post bond and be placed on the non-detained docket. This does not negate the arguments against the length of detention, but examines the data in a different way. The aim of comparing the two dockets is to pinpoint just how similar detention in formal removal procedures is to truncated processes like expedited removal. This comparison bolsters arguments that being detained puts immigrants at a significant disadvantage.

119. See *infra* note 141 and accompanying text.

120. See *supra* Part II.B.

1. Detained vs. Non-Detained Docket in Formal Removal Proceedings

By comparing the non-detained and detained docket timeline in an immigration court, it is easy to see how similar the detained docket and expedited removal dockets are. Compared to non-detained immigrants, detained immigrants face a much faster adjudication process. The data provide insight into how long court proceedings take and how much faster that process can be for detained immigrants in the United States. For example, the average number of days to completion for all outcome types for an immigrant on the detained docket in Chicago, Illinois, is 151 days.¹²¹ In comparison, the average days to completion in Chicago for non-detained cases is 971.¹²² In New York, the comparison is similar: a non-detained immigrant generally waits 958 days for her case to be heard, but an average of just 234 days if she is detained.¹²³ These numbers illustrate how quickly detained immigrants move through the formal removal proceedings as compared to non-detained immigrants, and why the “rocket docket” phenomenon may also apply to adult detention.

2. Detained Docket vs. Expedited Removal Proceedings

It is possible to roughly compare the detained timeline to the expedited removal timeline. The average number of days to complete an expedited

121. TRAC Reports can separate the data for voluntary departures, relief, terminations, removal orders, and other administrative closures. For the purposes of this Note, I rely on TRAC data, which includes all such possible outcomes to measure average days to completion for an overall sense of how long the detained docket can take, regardless of outcome. *Immigration Court Processing Time by Outcome: By Removals, Voluntary Departures, Terminations, Relief, Administrative Closures*, *supra* note 87. Here, the TRAC data look exclusively at Illinois data for all types of outcomes.

122. *Id.*

123. *Id.* (looking exclusively at New York data for all types of outcomes); *see also supra* text accompanying note 87. Professor Susan Long, the Director at TRAC Research Center Syracuse, stated that TRAC did not separate the data simply between detained and non-detained cases because there is a concern that the Immigration Court and ICE data are unreliable; immigrants are moved between dockets, even jurisdictions, so the data can be unreliable in that way. E-mail Interview with Susan Long, Director, TRAC Research Center Syracuse (Oct. 16, 2015) (on file with author). This gap of information is interesting, considering that conventional wisdom asserts that detainees are at such a disadvantage and that the detention system does not function effectively. *See* Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 137 (2013) (“Reliance on mandatory detention . . . create[s] a presumption of detention. As a result, decision makers lack the means or the incentive to collect and use information to release individuals who do not pose a flight risk or danger . . .”); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 63 (2012) (“While incarcerated, [the immigrant] will likely be unable to acquire a lawyer, access family who might assist him, obtain key evidence, or contact witnesses. In these circumstances, he will nearly inevitably lose his deportation case . . .”). However, hard data are not currently available to simply distinguish between the length of time a case is pending on the detained and non-detained dockets. Such data, along with other factors including the ability to find legal representation or pay bond, could lead to concrete evidence of this phenomenon.

removal proceeding varies, depending on whether an immigrant expresses a fear of returning to her home country.¹²⁴ However, if credible fear is denied, and if the immigrant requests a review of that application, that review “must be concluded ‘as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days’ after the asylum officer’s finding of no credible fear.”¹²⁵ Review often takes longer than those seven days, but those are the goals set by the administration and agency.¹²⁶ As we saw above, the Chicago detained docket takes just 151 days on average from start to completion.

On its face, 151 days is much longer than a week. Yet most detained immigrants do not have an attorney when they are detained and, even if they are able to connect with an attorney, it can take a long time to build a case. Without representation, the chance of relief decreases significantly.¹²⁷ If a detained immigrant is to have the same procedural rights as a non-detained immigrant, she should have enough time to find adequate representation or adequate time to build her own case. With less time between court dates to find representation, detainees are at a serious disadvantage, not unlike those in expedited removal proceedings, as compared to non-detained immigrants who have more time between hearings to find legal representation, collect evidence, witnesses, and support. It does not matter whether an immigrant is given 151 days or seven to prepare—neither amount of time is enough to find an attorney, collect evidence, and prepare for a formal hearing, particularly when one lacks access to resources.

C. ACCESS TO LEGAL REPRESENTATION

The ability to find legal representation significantly impacts an immigrant’s case. Although immigrants have a right to counsel, immigration infractions are not criminal; therefore, the government does not provide counsel.¹²⁸ As we see in this subpart, there is a notable disparity between detained and non-detained immigrants and their ability to find representation.

124. See *supra* Part II.B.

125. SISKIN & WASEM, *supra* note 30, at 4–5 (describing the basic steps for expedited removal procedures when an immigrant expresses a fear of returning to their home country); see also Immigration and Nationality Act § 235(b)(1)(B)(iii)(III), 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012) (explaining the requirements for review of credible fear determinations).

126. See generally Memorandum from Asa Hutchinson, Under Sec’y for Border & Transp. Sec., to Robert C. Bonner, Comm’r, U.S. Customs & Border Prot. & Michael J. Garcia, Assistant Sec’y, U.S. Immigration & Customs Enf’t (Oct. 18, 2004), https://www.ice.gov/doclib/foia/dro_policy_memos/detention_prioritization_and_notice_to_appear_documentary_requirements-oct2004.pdf (regarding “Detention Prioritization and Notice to Appear Documentary Requirements”). The memorandum articulates the detention priorities and requirements for handling those cases. See generally *id.*

127. See *infra* Part III.C.

128. See Immigration and Nationality Act § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (“[T]he alien shall have the privilege of being represented, at no expense to the Government . . .”).

1. Access to Legal Representation in Detention

One study, focusing specifically on proceedings in California over a six-year period, found that “only 14% of detained respondents were represented, whereas 66% of the nondetained were represented . . . [and] nondetained respondents were almost five times more likely to obtain counsel than detained respondents.”¹²⁹ The same study found “that detained immigrants were less likely than nondetained immigrants to be granted additional time to find counsel . . . [as] only 14% of detained immigrants . . . were granted time to find counsel, compared to 29% of nondetained immigrants.”¹³⁰ Furthermore, just 36% of detained immigrants found legal representation compared to 71% of immigrants who were never detained.¹³¹

The percentage of immigrants represented in expedited removal proceedings are lower, but not by much: the Transactional Records Access Clearinghouse (“TRAC”) data demonstrates that, as of January 2015, 73.1% of women and children crossing the southern border of the United States, who are often subjected to expedited removal, did not have legal representation.¹³² The study also found that “[w]ithout [such] representation, women with children almost never prevail even after they are able to demonstrate ‘credible fear’ of returning to their own country—only 1.5 percent were allowed to stay.”¹³³ Moreover, the Center for Migration Studies points out that “[d]etention without legal assistance . . . leads some to abandon their asylum applications despite having a credible fear of persecution or torture.”¹³⁴ The lack of legal representation is yet another way in which detained immigrants are so similarly situated to those immigrants subjected to expedited removal.

2. Contributing Factors to the Lack of Legal Representation

Scholars consistently name legal representation as the single-most important factor in the outcome of a case, particularly for asylum-seekers and

129. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32–33 (2015).

130. *Id.* at 33.

131. *Id.* at 34.

132. *Representation is Key in Immigration Proceedings Involving Women with Children*, TRAC IMMIGR. (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377>. The study cautions that, at this date, TRAC knew of few cases where families had legal representation and, thus, the numbers may not be completely representative of the outcome of such cases.

133. *Id.*

134. NOFERI, *supra* note 1, at 8.

unaccompanied children,¹³⁵ but also for immigrants generally.¹³⁶ Regardless of the immigrant's nationality, criminal history, or type of relief sought, "detention impedes access to legal assistance."¹³⁷ Because detention centers are located outside of city centers and away from legal services—particularly affordable ones—it is difficult for detainees to even contact a lawyer.¹³⁸ Even if an immigrant can contact one, "some [detention centers] have restrictive access policies that inhibit effective *pro bono* representation. Detention also makes it difficult to collect evidence, especially without a lawyer."¹³⁹ For example, some detention centers and prisons have legal libraries, where immigrants can look up the laws they are accused of violating. Yet the research necessary to demonstrate to the immigration judge why an immigrant, for example, fears returning to her home country, can take a lot of time. Depending on the center's policies, detainees can be limited to certain hours and days for which they can access those records.¹⁴⁰ As such, without a lawyer to complete this research thoroughly, helpful evidentiary support is very difficult to obtain. Access to legal representation, along with all the other factors mentioned in this section, significantly impacts the outcome of a case.

135. *Id.* at 7 ("Many asylum seekers are afraid to talk to U.S. government officials, which inhibits their already-limited ability to advocate for themselves. . . . Often the asylum seeker has little education or ability to speak or understand English and is without friends or family to help prepare her claims. Judges review asylum seekers' statements for exacting consistency and may deny relief based on an inconsistency." (footnotes omitted)).

136. Though Ryo's study examined bond hearings specifically, the lack of legal representation in most immigration proceedings "has caused growing public concern, as studies have shown a significant association between legal representation and favorable case outcomes." See Ryo, *supra* note 98, at 124.

137. NOFERI, *supra* note 1, at 7.

138. *Id.*

139. *Id.* (footnote omitted). One of the reports cited by Noferi describes a New York Immigration Representation Study that proposed to implement the first deportation defense system in the United States to "protect New York families, lessen dependence on government safety net programs, ensure a measure of justice for New York residents, and become a model for other cities and states that value their immigrant communities." N.Y. IMMIGRANT REPRESENTATION STUDY, STUDY GRP. ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 2 (2012), http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

140. As a legal intern with the South Texas Pro Bono Asylum Representation Project (ProBAR) during the summer of 2016, I visited detainees in the detention center located in the Port Isabel Processing Center in Los Fresnos, Texas. As a legal orientation project, ProBAR tries to assist as many detainees as possible with their pro se representation. This entails talking to detainees about their options, assisting detainees in filling out the asylum application, and putting together court packets with evidence that helps to bolster their claim. Many detainees were applying for asylum, and they required a large amount of evidence to prove their credibility. But their access to the library was minimal: the days and hours they could visit the library depended on their gender, and *why* they were detained in the first place. It was unlikely for a detainee to have more than two days a week in the library, significantly decreasing her chances of finding material to support her claim. While ProBAR assisted many detainees in researching their claims and putting together the evidence, the organization could not help every detainee.

This is true for detained immigrants in formal proceedings and for those subjected to expedited removal at the border.

D. LIKELIHOOD OF RELIEF OR TERMINATION

A study from the Northern California Collaborative for Immigrant Justice found that “[r]epresented detainees were at least three times more likely to prevail in their removal cases than detainees who were not represented by counsel.”¹⁴¹ In the asylum context, one advocate argues that “45.6 percent of represented asylum seekers in formal removal proceedings were successful, compared to 16.3 percent of unrepresented asylum seekers. . . . [I]n New York, 84 percent of represented individuals who brought persecution-based claims in immigration court were successful, compared to 21 percent of unrepresented individuals who brought persecution-based claims.”¹⁴² The inability to find an attorney, obtain evidence, and a prioritized detained docket all aid in barring a detainee from effectively presenting her case.

Immigrants in expedited removal face bleaker challenges, but the outcome is comparable. The use of the truncated procedure has increased dramatically over the last few years, and as administrative priorities change, the number of immigrants removed through the expedited removal process increases regularly.¹⁴³ In the 2012 fiscal year, expedited removals made up 74.6% of all removals.¹⁴⁴ A 2011 report indicated that out of the 160,000 immigrants in expedited removal proceedings, 157,751 of them did not have legal representation during those proceedings.¹⁴⁵ Again, the inability to find legal representation significantly decreases the chance that an immigrant will be able to prove to an immigration official that they have a valid fear of returning to their home country.

141. JAYASHRI SRIKANTIAH & LISA WEISSMAN-WARD, N. CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA 9 (2014), <http://www.lccr.com/wp-content/uploads/NCCIJ-Access-to-Justice-Report-Oct.-2014.pdf>; see also Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 542 (2009) (“Detained respondents are even less likely to secure legal representation, and, over the last decade, the number of immigrants in detention has tripled, with Immigration and Customs Enforcement (ICE) detaining approximately 200,000 people a year.” (citation omitted)). Markowitz also states that “[p]ro se respondents are ill equipped to navigate what the Second Circuit has called the ‘labyrinthine character of modern immigration law.’” Markowitz, *supra*, at 544 (quoting *Drax v. Reno*, 338 F.3d 98, 99 (2d Cir. 2003)); see also *id.* at 556–57.

142. NOFERI, *supra* note 1, at 7 (footnote omitted).

143. ROSENBLUM, *supra* note 65, at 6–7.

144. See Noferi, *supra* note 117 (stating that “[r]emovals under these summary processes now constitute the vast majority of US removals in FY 2012.” The two forms of expedited removal processes “increased from 56.2 percent of all removals in FY 2009 to nearly 75 percent [of all removals] in FY 2012.”).

145. See KOH ET AL., *supra* note 69, at 9.

Detained immigrants in formal removal proceedings and those in expedited removal are both removed from the United States more often than winning on the merits of their case. Being on the non-detained docket gives immigrants greater access to legal representation, additional time to find adequate counsel, evidence to bolster their case and, in some cases, the ability to work and support their families.

These trends point to a consequence of immigrant enforcement priorities, and yet another troubling consequence of our current immigration detention system. Is there a justification for prioritizing detained immigrants over non-detained immigrants? Some may use similar safety justifications, as mentioned in Part II.A. But if our political leaders decide that both detained and non-detained are entitled to the same procedural rights, and only carve out procedural limitations for immigrants who meet expedited removal requirements, then security reasons cannot justify the practical outcome of these priorities. The need for reform is clear.

IV. IMPLICATIONS AND SOLUTIONS

After analyzing the available data, it is evident that being detained puts an immigrant at a considerable disadvantage. Indeed, the challenges faced by immigrants on the detained docket, when compounded, make detained removal proceedings unfortunately similar to expedited removal proceedings rather than normal, non-detained removal proceedings. The implications of these similarities are startling and suggest the need for reform to ensure that all immigrants in formal removal proceedings receive the same process, regardless of whether they are detained, bonded out, or never detained in the first place.

The following subparts address the most recent iteration of comprehensive immigration reform (“CIR”). Subpart IV.A assesses why the most recent attempt does not adequately address the issue presented here, and describes what ideal reform looks like. Subpart IV.B suggests multiple, stand-alone approaches that do address the issue presented here. This Note then concludes that it is possible to effectively address this problem using a multifaceted policy approach focusing on the stand-alone solutions described here. Any future CIR must include these solutions, but there is no need to wait for CIR to effectuate change.

A. COMPREHENSIVE IMMIGRATION REFORM

The most recent CIR attempt in 2013 recognized the need for additional protections for immigrants in removal proceedings. The bill pushed for effective counsel for certain categories of immigrants in removal proceedings, as well as additional court staff and training programs for immigration courts.¹⁴⁶ The bill also planned to improve the administration of the removal

146. See Border Security, Economic Opportunity, and Immigration Modernization Act, S.

system—by using alternatives to detention (“ATDs”) and providing resources to immigration courts in order to process cases—and to ensure humane treatment of those detained.¹⁴⁷

Additional access to appointed counsel in certain removal proceedings, trainings for court staff and immigration judges, and increasing the number of judges hired could be an improvement.¹⁴⁸ Yet while these provisions may alleviate the significant backlog in the courts, it does not change our current systems’ propensity to detain. Even with reform and the use of ATDs, individuals trying to enter the United States who are not “unaccompanied . . . children,” do not have a “serious mental disability,” or are not “particularly vulnerable,” still will not have access to appointed counsel.¹⁴⁹ Those fleeing violence or those with a criminal history continue to be detained at alarmingly high rates because of our mandatory detention laws.¹⁵⁰ Moreover, other provisions in the 2013 CIR work against the aforementioned positive changes. The same bill also advocates for additional border security and higher penalties for certain crimes.¹⁵¹ These provisions endorse our need to detain, criminalize more conduct, and effectively counterbalance much of the positive work done in the protection provisions.

Until CIR recognizes the need to revisit our current priorities to detain immigrants in addition to using ATDs and re-evaluating the conduct we criminalize, reform as it is currently articulated will not alleviate this issue. We must re-evaluate the use of mandatory detention¹⁵² as well as the power states

744, 113th Cong. §§ 3501–3505 (as passed by Senate, June 27, 2013).

147. See *id.* §§ 3503, 3715; see also IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, A GUIDE TO S.744: UNDERSTANDING THE 2013 SENATE IMMIGRATION BILL 15 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/guide_to_s744_corker_hoeven_final_12-02-13.pdf (“The changes proposed to both systems begin to address long-standing criticisms of the government’s failure to adequately use alternatives to detention, to provide sufficient resources to immigration courts to process cases, and to ensure humane treatment of those in the government’s custody.”).

148. The helpfulness of these provisions depends on whether the new resources are used to reduce non-detained timelines or to further reduce already-prioritized detained timelines. The former could significantly improve the issue this Note identifies, but the latter would only exacerbate the problem. The bill is not clear about where and how the new resources would be distributed.

149. S. 744 § 3502.

150. See *supra* notes 78–81 and accompanying text.

151. S. 744 §§ 3701–3717.

152. See *supra* note 78 and accompanying text; see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 53–54 (2010) (“[T]he government could interpret the criminal mandatory custody statute not to apply to individuals with bona fide challenges to removal, individuals who are not taken into ICE custody immediately after being released from criminal custody, or individuals whose release from criminal custody does not involve circumstances connected to any removable offense—permitting instead the individualized custody and bond hearings to which noncitizens ordinarily are entitled. DHS also could . . . more actively exercise its parole authority or prosecutorial discretion to release returning permanent residents who have been detained As with prolonged detention, however, the government has instead largely opted for aggressive interpretations of mandatory custody provisions.” (footnotes omitted)).

have in setting sentencing guidelines and criminal convictions.¹⁵³ Yet the ideal immigration reform is not only limited to immigration issues, either. The conversation stretches to advances in criminal justice reform and societal shifts in perspective about what conduct we find so abhorrent and why we feel the need to detain.

B. STAND-ALONE SOLUTIONS

Reform based on the above social and legal changes could take many years. Fortunately, a number of stand-alone solutions can effectively address this issue. While future CIR iterations must include stand-alone approaches, there is no need to wait for CIR to change current outcomes. This Note advocates for a multifaceted approach, one that relies on criminal justice reform solutions (that include documented and undocumented immigrants), changes in enforcement polices, and additional support for ATDs that focus on community support services to adequately address this problem.

One practical initiative is to lower bond amounts so that the amounts are not prohibitively high.¹⁵⁴ ICE has the discretion to set a bond amount, and an immigration judge may increase or decrease that amount.¹⁵⁵ Reinforcing the idea that ICE and judges can use prosecutorial discretion to lighten their case load, particularly when there is no evidence of public safety concerns, increases the chance that an immigrant can afford bond and be placed on the non-detained docket. This does not, however, address the fact that the United States still mandatorily detains some immigrants without the option to bond out. If we continue to expand criminal grounds that influence immigration outcomes, like the 2013 CIR bill would, the use of detention will only grow. However, reiterating to immigration judges that they indeed have the discretion to lower a bond amount, as well as reminding ICE of that discretion, may keep certain immigrants out of detention.

Another way to decrease our reliance on immigration detention centers is to insist on using physical detention as “a last resort, used only when other means of supervision are not feasible, and especially when more cost effective alternatives are available.”¹⁵⁶ The United States Commission on Civil Rights’ report recommended, among other things, that DHS “look at alternatives to detaining families, such as releasing the families to custodial agents in the United States” and “begin to transform the detention system to one of services provided versus enforcing black letter law.”¹⁵⁷ These services can be

153. The debate involving federalism and immigration issues is beyond the scope of this Note, but very relevant to the discussion of immigration reform.

154. See *supra* note 98 and accompanying text.

155. See *supra* Part II.D.

156. *AILA’s Take on Detention*, AILA (Apr. 2, 2014), <http://www.aila.org/infonet/ailas-take-on-detention> (AILA Doc. No. 14040252).

157. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 101, at 127–28. Importantly, the Department of Justice recently stepped away from the use of private prison contracts in an effort to ensure that

community support programs, or formal monitoring programs, which often involve “electronic ankle monitor[ing], . . . unannounced home visits, . . . and in-person reporting.”¹⁵⁸ Many of these alternatives to detention are effective, but do not rely on a complex, costly and often inhumane system of current detention practices.¹⁵⁹ Noferi reasons that when social service resources are available to immigrants in removal proceedings, they are less likely to be a flight risk.¹⁶⁰ Moreover, this places more immigrants on the non-detained docket, thus subjecting them to somewhat longer wait times to find counsel and build their case.

Another solution related to use of ATDs is removing the “bed quota” from ICE guidelines. This guideline “requires . . . (ICE) to hold an average of 34,000 individuals in detention on a daily basis. . . . No other law enforcement agency is subject to a statutory quota on the number of individuals to hold in detention.”¹⁶¹ Immigration detention costs more than \$2 billion every year, and bed quotas prevent ICE from using ATDs that would decrease the number of immigrants in detention centers.¹⁶² According to National Immigrant Justice Center, “[t]axpayers could save \$1.44 billion each year . . . if ATDs were more widely used.”¹⁶³ By eliminating the assumption that detention is an effective way to manage and control immigrants, ICE will not feel the pressure to fill beds in detention centers, lowering the cost and

detention facilities are used correctly and for the purpose of rehabilitation. *See* Memorandum from Sally Q. Yates, Deputy Attorney Gen., to Acting Dir., Fed. Bureau of Prisons, Reducing our Use of Private Prisons (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download>. Unfortunately, the move does not impact the use of private prisons for immigration detention since the Department of Homeland Security continues to contract with private companies to detain immigrants. *See* Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html; Mark Joseph Stern, *The Federal Government is Finally Ending Its Use of Private Prisons. That's Not Enough*, SLATE (Aug. 18, 2016, 3:55 PM), http://www.slate.com/blogs/the_slatest/2016/08/18/federal_government_disassociates_with_private_prisons.html. While this move is not directly related to this Note, it is an acknowledgment that the federal government is capable of moving away from traditional detention practices.

158. AM. CIV. LIBERTIES UNION, ALTERNATIVES TO IMMIGRATION DETENTION: LESS COSTLY AND MORE HUMANE THAN FEDERAL LOCK-UP 1 (2014), https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf.

159. *See* RUTGERS SCH. OF LAW—NEWARK IMMIGRANT RIGHTS CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 25 (2012), <http://afsc.org/sites/afsc.civicactions.net/files/documents/Freed-but-not-Free.pdf> (“Congress should clearly signal to ICE that [Alternatives to Detention] programs should be used as true alternatives to detention by increasing funding for ATD programs while simultaneously decreasing a proportionate amount of funding for detention in detention facilities.”).

160. *See* NOFERI, *supra* note 1 at 4–5.

161. *Eliminate the Detention Bed Quota*, NAT’L IMMIGRANT JUST. CTR., <http://www.immigrantjustice.org/eliminate-detention-bed-quota> (last visited Nov. 15, 2016).

162. *Id.*

163. *Id.*

resources needed to maintain those centers and also reducing the number of immigrants on the detained docket.

Criminal justice reform movements articulate other potential solutions for this issue. Some advocacy groups argue that criminal justice sentencing reform, particularly for drug possession offenses, can protect immigrants from deportation for certain “low-level drug offenses.”¹⁶⁴ By decriminalizing certain drugs, or the amount in which they are carried, there are fewer reasons to apprehend, and mandatorily detain, immigrants. Doing so decreases the population of detained immigrants. Although the administration has articulated these types of reforms for citizens, immigrants are often left out.¹⁶⁵ Activists argue that excluding

immigrants from . . . efforts to end mass incarceration and the bias in our police practices suggests that immigrants are unworthy of equal protection under the law. This is unconscionable at a time when criminal justice reform, biased policing, and epidemic rates of mass incarceration are at the forefront of the national agenda.¹⁶⁶

Although reforming our criminal sentencing and drug laws will not necessarily change the government’s reliance on detention and removal practices, such reform could have a significant impact on the number of immigrants detained.

Each of these solutions decreases the number of immigrants ICE is required, or has the discretion, to detain. A decrease in detainees reduces the number of immigrants caught in enforcement priorities that do not involve them, and may, in fact, reduce the perceived need to prioritize certain cases over others in the first place. Moreover, this closes the gap in processing times for detained and non-detained immigrants, and ultimately reduces the similarities between expedited removal proceedings and detained removal proceedings. These solutions are an effective way to handle this issue without the coverage of real reform that encompasses the legal and social changes discussed above.

V. CONCLUSION

Though some data are available through TRAC, pinpointing the exact numbers to compare detained immigrant situations with those in expedited removal procedures is difficult. The gap in knowledge regarding the length of time it takes for detainees to make their way through the formal removal

164. *Reducing Mass Incarceration Through Criminal Justice Sentencing Reform*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/about-us/departments-and-state-offices/california/reducing-mass-incarceration-through-criminal-justice-immigrants> (last visited Nov. 15, 2016).

165. Glenn Martin & Angie Junck, *Those Left Behind by Obama’s Criminal Justice Reforms*, IMMIGRANT LEGAL RES. CTR. (Nov. 11, 2015), <http://www.ilrc.org/those-left-behind-obama-criminal-justice-reforms>.

166. *Id.*

process is interesting. More data are necessary from DHS and immigration courts for a broader investigation of this occurrence, but the month-to-month comparison from TRAC detention procedures with expedited removal processes certainly indicates a breakdown of the current detention system.

Despite this lack of hard data, Congress intends for both detained and non-detained immigrants to receive the same amount of process in formal removal procedures. Yet regardless of congressional intent, detained immigrants receive significantly less process, not only because of the lack of representation and little access to evidence, but also because of docket timelines and administrative priorities. As a result, detainees suffer disproportionately negative outcomes in their immigration cases than their non-detained counterparts.

Comprehensive immigration reform, with a focus on decreased use of detention practices in the United States, can mitigate the consequences of the current situation. But short of such an overhaul, greater attention should be paid to the influence of administrative enforcement priorities, and how those priorities negatively affect other objectives that should, doctrinally, provide equal process for detained and non-detained immigrants. That immigration detention practices are procedurally similar to expedited removal processes is not only inhumane but legally problematic.

That “[c]onfinement . . . is an end in itself” still rings true today.¹⁶⁷ To be detained is often, in practice, the functional equivalent of removal from the United States. When Congress envisions a set of limited procedures for certain immigrants, at the exclusion of others, immigrants who fall outside of this category should not be subjected to similarly truncated procedures. Re-evaluating reliance on enforcement priorities and recognizing that those priorities significantly disadvantage some over others in a way that is unintended is the first step in advocating for this change.

167. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 227 (1953) (Jackson, J., dissenting). In his dissent, Justice Jackson asserted that, after a respondent was excluded from multiple countries upon his removal from the United States, an indefinite confinement on Ellis Island violated the Due Process Clause. *Id.* Justice Jackson reasoned “that confinement of respondent no longer can be justified as a step in the process of turning him back to the country whence he came. Confinement . . . can now be justified only as the alternative to normal exclusion.” *Id.*