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## HOW NEW JERSEY'S BAIL REFORM AND PRESIDENT TRUMP'S IMMIGRATION POLICIES MAY AFFECT UNDOCUMENTED IMMIGRANTS

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### I. Introduction

In January 2017, bail reform went into effect in New Jersey, turning the system from a resource-based assessment to a risk-based assessment. Indigent defendants, who previously could not post bail for minor crimes committed in the state, are no longer detained just because they cannot afford to pay. However, also in January 2017, President Donald Trump's strict policies against undocumented immigrants went into effect. Since then, the priority to remove people from the country has increased and thus the number of immigration arrests has also increased. Formerly, undocumented immigrants who could not post bail and were convicted of crimes would serve their sentence before the removal process was started. But now, individuals who are released under the reformed bail policy are being picked up by immigration officials and possibly removed from the country before their criminal cases are resolved. This will result in some victims failing to get justice, which is ironic because the president has also created a special office for victims of crimes committed

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by undocumented immigrants. This issue also puts some undocumented immigrants at a strange, unique advantage over American citizens who have no choice but to face their criminal charges and face the punishment that comes with their conviction.

This note will first discuss the old and new bail systems in New Jersey and explain why there was reform. The second section provides an overview of the deportation process for undocumented immigrants subjected to immigration detainers under both President Obama's and President Trump's enforcement policies. The last section is an analysis of how bail reform and President Trump's immigration policies affects the criminal justice system within the context of undocumented immigrants.

## **II. Bail Reform in New Jersey**

In August 2014, Governor Chris Christie signed P.L.2014, c. 31, the Bail Reform Law, amending the pretrial release system in New Jersey effective January 1, 2017.<sup>2</sup> Goals of the legislation include protecting the safety of victims, witnesses, and the community at large, and ensuring that defendants who pose a low risk to society are not detained in county jails while awaiting disposition of their cases.<sup>3</sup>

### **A. Old Bail System**

Prior to the bail reform legislation, the monetary bail system in place was based not on public safety, but on a defendant's ability to pay.<sup>4</sup> Indigent defendants suffered under the system, with some

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<sup>2</sup> STATE OF N.J. OFFICE OF ATT'Y GEN., ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2016-6 8 (2016) [hereinafter N.J. ATT'Y GEN.].

<sup>3</sup> *Id.* at 11. The purposes and goals of the legislation are also found in N.J. REV. STAT. § 2A:162-15 (2017). The legislation is known unofficially as the Bail Reform and Speedy Trial Act. See John DeRosier, Jail Population Down 19 Percent in N.J. Since New Bail Reform Law, PRESS OF ATLANTIC CITY (July 17, 2017), [https://www.pressofatlanticcity.com/news/jail-population-down-percent-in-n-j-since-new-bail/article\\_2d8d9e4e-73af-5e83-8e27-04a2a12250e4.html](https://www.pressofatlanticcity.com/news/jail-population-down-percent-in-n-j-since-new-bail/article_2d8d9e4e-73af-5e83-8e27-04a2a12250e4.html).

<sup>4</sup> N.J. ATT'Y GEN., *supra* note 2, at 9.

unable to pay even the lowest bail amounts for crimes that made them a low risk to society.<sup>5</sup> Meanwhile, defendants who were wealthy, even from their criminal enterprises like those involved in organized crime, could get out of jail and be back on the streets no matter how serious of a risk to society they were.<sup>6</sup>

Shortly before the reform, “12% of NJ’s county jail population remained in custody because they could not post a bail of \$2,500 or less.”<sup>7</sup> A study in 2013 found that 38.5% “of all inmates in New Jersey jails were there only because they couldn’t pay their own bail.”<sup>8</sup> Over “two-thirds of indigent defendants [in county jails] were members of racial and cultural minority groups.”<sup>9</sup> Statewide, roughly 20% of men in county jails identified as Hispanic and about 55% identified as black, while about 10% of women in county jails identified as Hispanic and 44% identified as black.<sup>10</sup> According to New Jersey Chief Justice Stuart Rabner, “whether a defendant is released pretrial is one of the most significant decisions in the criminal justice system.”<sup>11</sup> While poor defendants who cannot afford bail sit in jail awaiting resolution of their cases, they may lose their jobs, may lose contact with family, or even lose custody of their children.<sup>12</sup> It costs taxpayers and the state at least \$100 a day to house a low-risk defendant who is unable to post bail.<sup>13</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> THE JOINT COMM. ON CRIMINAL JUSTICE, Report of the Joint Committee on Criminal Justice 1 (2014), [https://www.njcourts.gov/pressrel/2014/FinalReport\\_3\\_20\\_2014.pdf](https://www.njcourts.gov/pressrel/2014/FinalReport_3_20_2014.pdf). The Joint Committee on Criminal Justice was formed in 2013 by New Jersey Chief Justice Stuart Rabner to focus on issues within the criminal justice system regarding bail and the right to a speedy trial. *Id.* The committee was made up of judges, prosecutors, public defenders, private attorneys, court administrators, and staff from the legislature and governor’s office. *Id.*

<sup>8</sup> Joe Hernandez, *N.J. Will Eliminate Cash Bail, Speed Up Criminal Trials in 2017*, WHYY (Dec. 21, 2016), <https://whyy.org/articles/nj-will-eliminate-money-bail-and-speed-up-criminal-trials-next-year/>.

<sup>9</sup> THE JOINT COMM. ON CRIMINAL JUSTICE, *supra* note 7, at 1.

<sup>10</sup> MARIE VANNOSTRAND, PH.D., NEW JERSEY JAIL POPULATION ANALYSIS 9 (Mar. 2013), [https://www.drugpolicy.org/sites/default/files/New\\_Jersey\\_Jail\\_Population\\_Analysis\\_March\\_2013.pdf](https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf). The data also shows that almost 90% of those in county jails were male. *Id.* 66.3% of those in jails were awaiting trial in superior court. *Id.* at 11. Only 19 of New Jersey’s 21 counties contributed data, so Bergen and Passaic Counties are left out. *Id.* at 8.

<sup>11</sup> Stuart Rabner, Chief Justice: Bail Reform Puts N.J. at the Forefront of Fairness, NJ.COM (Jan. 9, 2017, 10:32 AM), [http://www.nj.com/opinion/index.ssf/2017/01/nj\\_chief\\_justice\\_bail\\_reform\\_puts\\_nj\\_at\\_the\\_forefr.html](http://www.nj.com/opinion/index.ssf/2017/01/nj_chief_justice_bail_reform_puts_nj_at_the_forefr.html).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

In connection with the bail reform legislation, New Jersey's constitution was amended following a vote by state citizens.<sup>14</sup> Prior to the amendment, the state's constitution mandated that bail be set for every defendant so judges could not detain even those accused of the most violent crimes; however this led to potentially dangerous defendants being released if they could afford bail.<sup>15</sup> Under the old bail system, indigent defendants who may have only been a low risk to society were held in jail for rather petty crimes.<sup>16</sup> Generally, people detained because they cannot pay bail are more likely to plead guilty, be convicted, and receive harsher prison sentences than those who may post bail and be released while their cases are pending.<sup>17</sup>

## **B. New Bail System**

The new procedure requires that defendants be assessed, either detained or released no later than 48 hours after their initial arrest on a complaint-warrant rather than a summons, and be committed to jail.<sup>18</sup> The court is to rely on the Pretrial Services Program's risk assessment tool and its recommendation on conditions of release as well as any additional information presented by the prosecution or defense.<sup>19</sup> Using a risk-based assessment rather than a resource-based one, pretrial services officers review a "defendant's criminal history, record of prior court appearances and other

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<sup>14</sup> N.J. ATT'Y GEN., *supra* note 2, at 8. The vote occurred in November 2014 and the amendment passed with over 60% of the votes. Rabner, *supra* note 11.

<sup>15</sup> THE JOINT COMM. ON CRIMINAL JUSTICE, *supra* note 7, at 2. The only exception in the state constitution was for capital cases, in which defendants could be held without bail "when the proof is evident or presumption great." Law Journal Editorial Board, *One Year In, Bail System Not Perfect, But Much Better*, N.J. L.J. (Jan. 15, 2018), <https://www.law.com/njlawjournal/sites/njlawjournal/2018/01/15/one-year-in-bail-system-not-perfect-but-much-better/> (quoting N.J. CONST. art. I, para. 11).

<sup>16</sup> THE JOINT COMM. ON CRIMINAL JUSTICE, *supra* note 7, at 2.

<sup>17</sup> *Id.* Defendants who are released pending trial "often end up receiving lesser sentences or no prison time, sometimes even avoiding a conviction altogether." Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (July 24, 2016), <https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/>. A study by the National Bureau of Economic Research based on cases in Philadelphia and Miami-Dade Counties found that "pretrial detention makes defendants more likely to plead guilty by 27.5% and more likely to be found guilty by a jury by 27.3%." Antoine Goldet, *Can't Post Bail? Jail Before Trial Increases Odds of Conviction*, REVEAL (Aug. 25, 2016), <https://www.revealnews.org/blog/cant-post-bail-jail-before-trial-increases-odds-of-conviction/>.

<sup>18</sup> See N.J. REV. STAT. §§ 2A:162-16(a) – (b)(1) (2017).

<sup>19</sup> *Id.* § 2A:162-16(b)(2).

objective information”<sup>20</sup> for the judge to determine “the likelihood that a defendant will flee, commit new criminal activity, or obstruct justice by intimidating victims and other witnesses.”<sup>21</sup> The presumption is against detention “except in cases where a defendant is charged with murder or is facing an ordinary or extended term of life imprisonment.”<sup>22</sup> In all other cases, this presumption is overcome when the prosecutor “establishes by clear and convincing evidence that no release condition or combination of conditions will reasonably assure” defendant’s appearance in court, the safety of individuals or the community, or that the defendant will not obstruct justice.<sup>23</sup>

Prosecutors must file a motion to detain a defendant and, typically, may only do so where the defendant has been accused of a serious crime,<sup>24</sup> or otherwise when “certain special conditions exist to justify preventive detention,” which constitutes a large majority of cases.<sup>25</sup> When determining whether the presumption to detain is overcome or sustained, prosecutors should consider facts or circumstances “that [have] a material bearing on the risk that defendant, if released, will not appear in court when required, will endanger the safety of any other person or the community, and/or will obstruct or attempt to obstruct the criminal justice process, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.”<sup>26</sup>

The judge may select one of four options for the defendant based on all the circumstances in consideration.<sup>27</sup> He or she may release a defendant on his or her own recognizance “or on execution

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<sup>20</sup> Rabner, *supra* note 11.

<sup>21</sup> N.J. ATT’Y GEN., *supra* note 2, at 9.

<sup>22</sup> *Id.* at 58.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 59. “Serious crime” means murder or another crime where the ordinary punishment is life imprisonment. N.J. REV. STAT. § 2A:162-19(b).

<sup>25</sup> N.J. ATT’Y GEN., *supra* note 2, at 59; *See* N.J. REV. STAT. § 2A:162-19(a) (list of other justifications for prosecutors to file a motion to detain a defendant).

<sup>26</sup> N.J. ATT’Y GEN., *supra* note 2, at 63.

<sup>27</sup> *See* N.J. REV. STAT. § 2A:162-20 (list of the types of information judges may consider when determining whether a defendant should be detained pretrial).

of an unsecured appearance bond.”<sup>28</sup> A judge may also release a defendant on non-monetary condition(s) as a means to reasonable ensure that a defendant will appear in court on all required dates, to ensure protection of the community or any individual(s), and to ensure a defendant will not obstruct justice.<sup>29</sup> A defendant may also be released on monetary bail with the same types of conditions.<sup>30</sup> Monetary bail is therefore still an option, but “only as a last resort when the court finds that release on non-monetary conditions will not reasonably ensure the defendant’s appearance in court when required,” and may not be imposed merely to prevent the defendant’s release.<sup>31</sup> The last option for a judge is to detain the defendant in jail, “upon motion of the prosecutor, pending a pretrial detention hearing.”<sup>32</sup>

At pretrial detention hearings, after a prosecutor has moved to detain, defendants have the right to counsel, and may call witnesses, cross-examine witnesses, testify, and present evidence that is not subjected to the rules of admissibility as it would be during a trial.<sup>33</sup> If the defendant is released, conditions upon release may include that he or she does not commit any more offenses, does not contact victims or witnesses, must undergo treatment or counseling for substance abuse, or must be placed on house arrest or an electronic monitoring device.<sup>34</sup>

The legislation also aims to ensure that defendants “are indicted and tried swiftly,” under the speedy trial provision; however it applies to only those who are detained.<sup>35</sup> Thus, cases of those defendants are designed to move more quickly than those who are released pending trial or otherwise

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<sup>28</sup> *Id.* § 2A:162-16(b)(2)(a).

<sup>29</sup> *Id.* § 2A:162-16(b)(2)(b).

<sup>30</sup> *Id.* § 2A:162-16(b)(2)(c).

<sup>31</sup> N.J. ATT’Y GEN., *supra* note 2, at 55. See also N.J. Rev. Stat. § 2A:162-17(c)(1). Monetary bail may only be imposed with the purpose to discourage flight “by setting monetary bail at an amount that the defendant can afford to post but could not afford to forfeit.” N.J. ATT’Y GEN., *supra* note 2, at 55.

<sup>32</sup> N.J. REV. STAT. § 2A:162-16(b)(2)(d).

<sup>33</sup> *Id.* § 2A:162-19(e)(1).

<sup>34</sup> N.J. ATT’Y GEN., *supra* note 2, at 53-55. See N.J. REV. STAT. § 2A:162-17 for a more comprehensive list of possible conditions that a judge may impose on a released defendant.

<sup>35</sup> N.J. ATT’Y GEN., *supra* note 2, at 10.

waiting for the disposition of their case.<sup>36</sup> The effect is that more resources are poured into cases of detained defendants to ensure the statutory deadlines set for indictment and trial are met.<sup>37</sup> Because detention cases are a priority under the new law, “fewer personnel resources and court dates will be available to deal with” cases of defendants who have been released under the new system and thus their cases may move more slowly.<sup>38</sup> Additionally with the reforms, there is an incentive for those who are released to not plead guilty, as a means to delay their incarceration, which may also have the effect of dragging the case on.<sup>39</sup>

As of November 2017, the bail reform system in New Jersey overall has been “phenomenal.”<sup>40</sup> The Pretrial Justice Institute, a nonprofit that advocates for bail reform, gave New Jersey an ‘A’ grade in its latest report on pretrial detention programs.<sup>41</sup> From January to June 2017, there was an overall 20% decline in the number of people detained in jail while awaiting trial.<sup>42</sup> From January 1 to November 30, 2017, 78% of defendants were released under some conditions while 18% were detained because they were deemed too dangerous to be released.<sup>43</sup> Compared to the 38% of people held in New Jersey jails in 2013 because they could not afford bail, 18% remaining in jail under bail reform policies is a significant improvement, especially considering they remain detained as a result of a risk-based assessment rather than for financial reasons. Notably, only 44 people in the whole state had cash bail set in 2017.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Rebecca Everett, *Here’s How N.J. Scores on Bail Reform (Hint: It’s Better Than Other States)*, NJ.COM (Nov. 1, 2017), [http://www.nj.com/news/index.ssf/2017/11/nj\\_only\\_state\\_to\\_get\\_a\\_grade\\_from\\_national\\_bail\\_re.html](http://www.nj.com/news/index.ssf/2017/11/nj_only_state_to_get_a_grade_from_national_bail_re.html).

<sup>41</sup> *Id.* States are scored based on “having a low pretrial detention rate, a ‘validated’ pretrial assessment tool, and [for] effectively eliminating cash bail,” and New Jersey received the only A grade in the report. *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Chart A: Initial Release Decisions for Criminal Justice Reform Eligible Defendants, January 1 – November 30, 2017, <https://www.judiciary.state.nj.us/courts/assets/criminal/cjrreport.pdf> [hereinafter Chart A]. The 78% also includes 7.5% who were released on their own recognizance. *Id.*

<sup>44</sup> Maddie Hanna, *What Happened when New Jersey Stopped Relying on Cash Bail*, THE INQUIRER (Feb. 16, 2018), [http://www.philly.com/philly/news/new\\_jersey/new-jersey-cash-bail-risk-assessment-20180216.html](http://www.philly.com/philly/news/new_jersey/new-jersey-cash-bail-risk-assessment-20180216.html).

Countywide there were some disparities in the results. For example, Essex County released only 1.6% of defendants on their own recognizance, plus an additional 76% with conditions of various levels, and detained 20%.<sup>45</sup> Hudson County, on the other hand, released 10.3% of defendants on their own recognizance, plus an additional 67% with conditions, and detained 11.4%.<sup>46</sup> There is no apparent explanation for these disparities in such similar counties, with the busiest prosecutor's offices in the state, but as a whole, the state has clearly seen improvements in the number of people who are detained while awaiting the disposition of their criminal cases.

### III. Immigration Detainers and the Removal Process

This section addresses some of the complicated laws and processes of how undocumented immigrants are deported from the United States, which will later tie into the bail reform discussion. The process of deportation, also known as removal, of an undocumented immigrant in the United States typically begins with an arrest.<sup>47</sup> People may be arrested either by Border Patrol at the border or an airport, by local police, or by Immigration and Customs Enforcement (“ICE”) officers,<sup>48</sup> the latter of which will be relevant in this discussion. There are two stages of the removal process.<sup>49</sup> In the first stage, the Department of Homeland Security (“DHS”) files a notice for the undocumented individual to appear, which must state a “valid ground for removal” for a judge to sustain.<sup>50</sup> The second stage begins once someone is declared removable.<sup>51</sup> At this point, the undocumented

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<sup>45</sup> Chart A, *supra* note 43.

<sup>46</sup> *Id.*

<sup>47</sup> Sarah Wise & George Petras, *The Process of Deportation*, USA TODAY (June 25, 2018), <https://www.usatoday.com/pages/interactives/graphics/deportation-explainer/>.

<sup>48</sup> *Id.*

<sup>49</sup> INGRID EAGLY, ESQ. & STEVEN SHAFER, ESQ., ACCESS TO COUNSEL IN IMMIGRATION COURT 15 (Am. Immigration Council ed., 2016).

<sup>50</sup> *Id.* The notice to appear is filed pursuant to 8 U.S.C. § 1229(a)(1) (2016). Grounds for inadmissibility and removal are found in §§ 1182, 1227. They include those who entered the country illegally. § 1182(a)(6)(A)(i); § 1227(a)(1). They also include those who have been convicted of certain crimes. §§ 1182(a)(2)(A), (B). However, in *Sessions v. Dimaya*, No. 15-1498, slip op. at 1 (U.S. Apr. 17, 2018), the Supreme Court held that the statute defining some of these criminal offenses is unconstitutionally vague. There will be more on *Dimaya* and its implications later in this note.

<sup>51</sup> EAGLY & SHAFER, *supra* note 49.



immigrant will be removed unless they successfully file an application for relief.<sup>52</sup> Grounds for relief may include asylum due to persecution or cancellation of removal based on multiple factors, including the length of time they have been in the country.<sup>53</sup>

DHS issues immigration detainers, also known as “ICE Holds.”<sup>54</sup> These “ICE Holds” were created by statute in 1986 and allow ICE to bring non-citizens directly into custody after they have been convicted of a crime and served their sentences, or after they have been arrested for a crime locally and have been brought into custody, even for a brief time.<sup>55</sup> ICE may request for local law enforcement officials to hold the person for 48 hours so ICE can transfer the person into their custody and begin removal proceedings.<sup>56</sup> Though ICE claims to prioritize those who have been arrested for or convicted of serious and dangerous crimes,<sup>57</sup> in reality, ICE “predominantly issues detainers for low-level offenders with no criminal history.”<sup>58</sup> Once in ICE custody, a person may be detained or released pending removal proceedings in immigration court, in a process similar to the criminal justice system.<sup>59</sup>

When a detainer is issued on an individual, the I-247(A) form is issued and filled out by both the local law enforcement agency and the immigration officials.<sup>60</sup> As of March 2017, the form states

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Alia Al-Khatib, Comment, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 AM. U. L. REV. 109, 115 (2014).

<sup>55</sup> *Id.* Detainers are authorized by the Immigration and Nationality Act (“INA”) and regulated under 8 C.F.R. § 287.7 (2017). Immigration officials have the power to arrest “any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.” 8 U.S.C. § 1357(a)(2).

<sup>56</sup> Al-Khatib, *supra* note 54, at 111. The 48-hour period allows time for the transfer of custody from a local jail or prison to ICE custody but holding anyone beyond this time raises constitutional concerns. See *ICE Detainers: Frequently Asked Questions*, U.S. IMMIGRATION & CUSTOMS ENF’T, <https://www.ice.gov/ice-detainers-frequently-asked-questions> (last updated December 28, 2011).

<sup>57</sup> Al-Khatib, *supra* note 54, at 113.

<sup>58</sup> *Id.* at 116 (referencing studies from parts of Washington, Maryland, New York, and Texas finding “that ICE issued the majority of detainers for low-level offenders.”).

<sup>59</sup> See *id.* at 138-40.

<sup>60</sup> DEP’T OF HOMELAND SEC., IMMIGRATION DETAINER – NOTICE OF ACTION, DHS Form I-247(A) (2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> [hereinafter DHS Form I-247(A)].

in the “Notice to the Detainee” section that “DHS intends to assume custody of you (after you otherwise would be released from custody) because there is probable cause that you are subject to removal from the United States under federal immigration law.”<sup>61</sup> Transfer to ICE custody is not possible while the defendant is still in local custody.<sup>62</sup> Before New Jersey’s bail reform, an immigrant defendant who could not post bail would not be processed for removal until after a final disposition on their case, i.e. upon the end of their sentence.<sup>63</sup> A supervised release in particular “is not a reason to defer removal.”<sup>64</sup>

State and county law enforcement agencies, however, are not legally obligated to honor ICE detainers.<sup>65</sup> Cooperating with ICE would certainly make the jobs of federal officials easier, considering that transferring an individual directly into ICE custody within the 48-hour period allows ICE to initiate deportation proceedings more easily.<sup>66</sup> Because the ICE detainers are merely requests and not commands, certain jurisdictions within New Jersey typically choose not to honor them, including Camden, Union, Burlington, Ocean, and Middlesex Counties.<sup>67</sup> If ICE officials cannot take custody of people subject to removal directly from local jails, they still have the ability to track down the

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There is one section on the request form for the local law enforcement agency to fill out and other sections should be read to or by the person the detainer is issued against. *Id.*

<sup>61</sup> *Id.* at 2. Probable cause is based on one of four categories: a final order of removal exists against the individual, there is an ongoing removal proceeding against the individual, there is confirmation of the individual’s identity and that he or she is not in the United States lawfully, and this confirmation may come from voluntary statements made by the individual that indicate the person is not in the country lawfully. U.S. IMMIGRATION AND CUSTOMS ENFT, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS 4 (Mar. 24, 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.

<sup>62</sup> *How Immigrants Are Detained, Deported*, VOA NEWS (Mar. 4, 2017), <https://www.voanews.com/a/how-immigrants-are-detained-deported/3750166.html>.

<sup>63</sup> See 8 U.S.C. § 1231(a)(4)(A) (2016).

<sup>64</sup> *Id.* Insufficient reasons also include parole, probation, or the possibility of further imprisonment or arrest. *Id.*

<sup>65</sup> *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d. Cir. 2014) (holding that the language and use of the word “request” found in 8 C.F.R. § 287.7(a) means that local state law enforcement agencies do not have to honor detainers, and recognizing that no provision of the INA commands state or local agencies to do so).

<sup>66</sup> Thomas Zambito, *N.J. County Jails Setting Free Alleged Criminals Facing Deportation, Feds Say*, NJ.COM (updated Nov. 17, 2014), [http://www.nj.com/news/index.ssf/2014/11/immigration\\_debate\\_hits\\_county\\_jails\\_feds\\_say\\_criminals\\_facing\\_deportation\\_are\\_being\\_set\\_free.html](http://www.nj.com/news/index.ssf/2014/11/immigration_debate_hits_county_jails_feds_say_criminals_facing_deportation_are_being_set_free.html).

<sup>67</sup> See *id.*; see also Press Release, U.S. Immigration and Customs Enft, ICE Newark Arrests 2 Aliens After New Jersey County Declines Detainers (June 19, 2017), <https://www.ice.gov/news/releases/ice-newark-arrests-2-aliens-after-new-jersey-county-declines-detainers#wcm-survey-target-id>.

individuals themselves, as they have in some New Jersey cases,<sup>68</sup> and take them into custody where they may be detained or released pending removal proceedings.

When an undocumented immigrant is arrested by ICE and ICE pursues removal for that individual, they may be either detained or released on bond.<sup>69</sup> If detained, ICE will “assess the security and safety risk of individuals to decide whether bond should be granted or if they may be released on their own recognizance.”<sup>70</sup> A judge will decide “whether to grant bond based on criteria such as an individual’s local family ties, ability to post the bond, time in the U.S., criminal record and how they entered the country.”<sup>71</sup> If an individual is granted bond and can pay, he or she will be released.<sup>72</sup> If bond is denied or set too high, the individual may appeal the immigration judge’s decision.<sup>73</sup> ICE, meanwhile, may agree that an undocumented immigrant in any given case is eligible for bond, or may argue to detain the individual because he or she is a “flight risk or a danger to the community.”<sup>74</sup> An individual not granted bond or unable to pay bond will remain in custody throughout the proceedings unless appeals are granted in their favor.<sup>75</sup>

There will then be initial hearings where “charges are listed and individuals admit or deny each one.”<sup>76</sup> At this point, undocumented immigrants may request continuances but no legal claims are addressed, except the judge may decide when the next hearing will be and what defenses against deportation an individual may next assert.<sup>77</sup> Next come the merit hearings at which people will argue

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<sup>68</sup> U.S. Immigration And Customs Enf’t, *supra* note 67.

<sup>69</sup> Wise & Petras, *supra* note 47.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

their reasons for staying in the country.<sup>78</sup> The judge will then decide whether the individual will be deported,<sup>79</sup> and both ICE and the undocumented immigrant may appeal the judge’s decision within thirty days.<sup>80</sup> If filing an appeal, an individual may move for a stay of deportation during the process, because individuals eligible for bond may still be detained during the appeals process.<sup>81</sup> Eventually, if appeals are lost, undocumented immigrants are deported directly back to their home countries.<sup>82</sup>

#### **IV. The President’s Role in the Immigration Process**

Each president and his administration “must decide who it considers a priority for deportation,”<sup>83</sup> or who ICE may target to issue detainers for or otherwise arrest. This section compares the immigration policies under President Obama with those under President Trump highlighting the noticeable differences and outcomes between the two administrations that are important to note for the purposes of this discussion.

##### **A. President Barack Obama**

President Obama initially prioritized for removal undocumented immigrants who were convicted of minor crimes, like shoplifting, in addition to those who committed more serious offenses,

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<sup>78</sup> *Id.* In removal proceedings, undocumented immigrants have the right to examine evidence against them, present their own evidence, and cross-examine government witnesses. 8 U.S.C. § 1229a(b)(4)(B) (2016). The burden is on the undocumented immigrant to show that he or she is “clearly and beyond doubt entitled to be admitted and is not inadmissible” under § 1182. § 1229a(c)(2)(A). He or she also has the burden to show by clear and convincing evidence that he or she is lawfully present in the country. § 1229a(c)(2)(B). The undocumented immigrant may also show in these proceedings that he or she is entitled to relief or protection from removal, including that he or she is eligible to stay in the country. § 1229a(c)(4)(A). ICE, meanwhile, has to show by clear and convincing evidence that the individual is deportable “based on reasonable, substantial, and probative evidence.” § 1229a(c)(3)(A).

<sup>79</sup> The judge should make this decision “based only on evidence produced at the hearing.” § 1229a(c)(1)(A).

<sup>80</sup> Wise & Petras, *supra* note 47. An undocumented immigrant who was ordered to be removed by a judge may file a motion to reconsider pursuant to § 1229a(c)(6) or a motion to reopen the proceedings pursuant to § 1229a(c)(7). Once found to be removable, the undocumented immigrant is to be removed from the country within 90 days without a stay of deportation and if they file no appeals, and must be detained while they await deportation. §§ 1231(a)(1)(A), 1231(a)(2).

<sup>81</sup> Wise & Petras, *supra* note 47. This process can last months.

<sup>82</sup> *Id.*

<sup>83</sup> Jennifer Medina, *Trump’s Immigration Order Expands the Definition of ‘Criminal’*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/trump-immigration-deportation.html>; *see also* U.S. CONST. art. II, § 3; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511 (2009) (“In general, Congress specifies in great detail the criteria for admission and removal . . . and delegated broad authority to the executive branch to set standards.”).

but then changed his policy to target “primarily those who had been convicted of serious crimes, were considered national security threats, or were recent arrivals.”<sup>84</sup> From 2011 to 2013, statistics show that detainees were often issued for those with no criminal record or those only convicted of minor offenses, matching Obama’s initial policy.<sup>85</sup> However, by his second term, his policies had changed. Deportations peaked in 2012 and declined dramatically through the end of his presidency.<sup>86</sup> Specifically, deportations from the interior of the United States, typically of immigrants who were not new arrivals but rather than those found near the border, actually peaked in 2009 and declined steadily to the end of his presidency.<sup>87</sup>

By January 2015, DHS guidelines included three priority levels for deportation.<sup>88</sup> Level one, reflecting individuals who were the highest priority to be deported, was for those who committed felonies, were in gangs, or were suspected terrorists.<sup>89</sup> Level two included those convicted of three or more misdemeanors other than minor traffic violations and those convicted of significant misdemeanors like domestic violence charges or unlawful possession charges.<sup>90</sup> Level three, the lowest priority, included those who had been issued a final order of removal over the past year, from January 1, 2014, yet still remained in the country.<sup>91</sup> Claiming it did not have the resources to deport millions of people merely because they had entered the country illegally, the Obama administration primarily

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<sup>84</sup> Medina, *supra* note 83.

<sup>85</sup> See *Few ICE Detainers Target Serious Criminals*, TRAC IMMIGRATION (Sept. 17, 2013), <http://trac.syr.edu/immigration/reports/330/>.

<sup>86</sup> Scott Horsley, *5 Things To Know About Obama’s Enforcement Of Immigration Laws*, NPR (Aug. 31, 2016), <https://www.npr.org/2016/08/31/491965912/5-things-to-know-about-obamas-enforcement-of-immigration-laws>.

<sup>87</sup> *Id.*

<sup>88</sup> See Memorandum from the Sec’y of Dep’t of Homeland Sec. on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion%281%29.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf) [hereinafter Memorandum from the Sec’y of Dep’t of Homeland Sec. 2014]. The memo makes it clear that although any undocumented person may be issued a detainer for removal, resources should primarily be dedicated to the priority levels outlined, and “commensurate with the level of prioritization outlined.” *Id.* at 5.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> *Id.* at 3-4.

<sup>91</sup> *Id.* at 4.

targeted those caught near the border, those who had committed crimes, and those who had arrived in the country in 2014 or later.<sup>92</sup>

These policies show that by the end of President Obama's time in office, those convicted of serious offenses were the highest priorities for removal.<sup>93</sup> In fact, by that time "around 90 percent of the country's 11 million undocumented immigrants were not considered a priority for deportation."<sup>94</sup> In 2016, Obama's last full year in office, ICE removed 65,332 people who "were apprehended in the interior of the United States, and the vast majority were convicted criminals."<sup>95</sup>

## **B. President Donald Trump**

Throughout his campaign, President Trump made it clear that he intended to enact strict and harsh immigration policies for removing undocumented immigrants from the country.<sup>96</sup> He called for the number of ICE officers to triple, "the mandatory return of all criminal aliens,"<sup>97</sup> and the "enforce[ment] [of] the laws of the land" by mass deportations.<sup>98</sup> He believes that "anyone who has entered the United States illegally is subject to deportation," merely based on their status.<sup>99</sup>

On January 25, 2017, days after his inauguration, President Trump issued Executive Order 13767, titled "Border Security and Immigration Enforcement Improvements," which called to

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<sup>92</sup> Horsley, *supra* note 86.

<sup>93</sup> See generally Memorandum from the Sec'y of Dep't of Homeland Sec. on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, *supra* note 88.

<sup>94</sup> Medina, *supra* note 83.

<sup>95</sup> U.S. Immigration and Customs EnF't, *supra* note 67.

<sup>96</sup> See Tessa Berenson & Zeke J. Miller, *Donald Trump Pivots Back to Hard-Line Immigration Stance*, TIME (Sept. 1, 2016), <http://time.com/4475417/donald-trump-immigration-policy-mexico-deportation/>.

<sup>97</sup> Nick Gass, *Trump's Immigration Plan: Mass Deportation*, POLITICO (Aug. 17, 2015), <https://www.politico.com/story/2015/08/donald-trump-immigration-plan-121420>.

<sup>98</sup> Donald J. Trump (@realDonaldTrump), TWITTER (June 25, 2016, 7:39 PM), <https://twitter.com/realdonaldtrump/status/746895602798178304> (noting that he does not like the term "mass deportations.").

<sup>99</sup> Alan Neuhauser, *Fearing an Unknown Fate: President Donald Trump's Directives to Step Up Immigration Enforcement Have Fueled Concerns That a Wider Deportation Net Looms.*, U.S. NEWS & WORLD REPORT (Feb. 17, 2017), <http://www.usnews.com/news/the-report/articles/2017-02-17/after-trumps-executive-orders-on-the-border-immigrants-fear-deportation>.

“repatriate illegal aliens swiftly, consistently, and humanely.”<sup>100</sup> Executive Order 13768, issued that same day and titled “Enhancing Public Safety in the Interior of the United States,”<sup>101</sup> was more specific. It stated that “many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety,”<sup>102</sup> highlighting his view that the mere status of being an undocumented immigrant in the United States makes one at risk of deportation. He added, “this is particularly so for aliens who engage in criminal conduct in the United States.”<sup>103</sup> Therefore, he prioritizes for removal those who “have been charged with any criminal offense, where such charge has not been resolved . . . [and] in the judgment of an immigration officer, otherwise pose a risk to public safety or national security,” giving a wide range of people who may be targeted by immigration officials for removal.<sup>104</sup>

The order introduces a sweeping policy.<sup>105</sup> It “focuses on anyone who has been charged with a criminal offense, even if it has not led to a conviction” or “anyone who has ‘committed acts that constitute a chargeable criminal offense,’ meaning anyone the authorities believe has broken any type of law — regardless of whether that person has been charged with a crime.”<sup>106</sup> Immigration officers now have broad authority in deciding who to arrest and for what reasons, as they are no longer required to consult with supervisors prior to targeting individuals, giving them even more deference.<sup>107</sup> Executive Order 13768 goes further than the policies of previous administrations and could be “the largest expansion of any president in terms of who is a priority for removal.”<sup>108</sup>

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<sup>100</sup> Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>101</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 8800.

<sup>105</sup> *See* Medina, *supra* note 83.

<sup>106</sup> *Id.*

<sup>107</sup> *See id.* (stating that the executive order “gives immigration officers the broad authority they have been pressing for, and no longer requires them to receive a review from a supervisor before targeting individuals.”).

<sup>108</sup> *See id.* (explaining Trump’s policy for deportation simply means that “[i]f someone is here illegally they are targets for removal”).

In a memo, DHS announced its new policy to prioritize those who “have been charged with any criminal offense that has not been resolved” and “have committed acts which constitute a chargeable criminal offense,”<sup>109</sup> which will directly impact those in New Jersey who have been released under the new bail reform law. The order also aimed to hire 10,000 new ICE agents to effectuate Trump’s policies.<sup>110</sup>

Additionally, President Trump revived a program ended by the Obama administration, called “Secure Communities,”<sup>111</sup> which allows “federal officials [to] use digital fingerprints shared by local law enforcement departments to find and deport immigrants who commit crimes.”<sup>112</sup> It is an “immigration law enforcement practice” to allow federal and local officials to jointly identify people subject to removal.<sup>113</sup> When an arrestee’s fingerprints are entered into the local booking system, “ICE has access to that person’s name, address, date of birth and, depending on the state, country of birth.”<sup>114</sup> This helps ICE officials know who to target for removal and allows the agency to prioritize more categories of people to begin the process of deportation.<sup>115</sup>

## **V. The Convergence of Bail Reform and Trump’s Policies on Undocumented Immigrants**

### **A. Background**

The problem with Trump’s immigration policies and bail reform in New Jersey is that people who are released under the reformed bail system, including those who have allegedly committed minor

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<sup>109</sup> Memorandum from the Sec’y of Dep’t of Homeland Sec. on Enf’t of the Immigration Laws to Serve the Nat’l Interest (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to Be Built and Plans to Block Syrian Refugees*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html>.

<sup>113</sup> Milena A. Wilson, *Will Bail Reform in NJ Have Positive Impact on Immigrant Community*, 222 N.J. L.J. 3855, 27 (2016).

<sup>114</sup> Gustavo Solis, *ICE Targets Jails to Find Undocumented Immigrants, Even if They Haven’t Been Convicted of Anything*, DESERT SUN (May 3, 2017), <https://www.desertsun.com/story/news/2017/05/03/ice-targets-jails-find-undocumented-immigrants-even-if-they-havent-been-convicted-anything/99185770/>.

<sup>115</sup> Davis, *supra* note 112.



crimes, may be deported before their criminal cases can even be resolved.<sup>116</sup> Under the old system, individuals unable to pay bail would have just been detained pretrial.<sup>117</sup> But ICE officials are now more likely to detain people involved in the criminal justice system earlier in the process.<sup>118</sup> It was always possible for immigration officials to arrest people in or outside the courtroom, but it has become more prevalent with President Trump's immigration initiatives.<sup>119</sup> Undocumented immigrants who are released from custody with pending criminal charges are arrested by ICE for showing up to court for other matters because they are now on ICE's radar.<sup>120</sup> Justice Rabner even asked federal officials to stop arresting undocumented immigrants at courthouses after two people were detained after arriving for other court appearances.<sup>121</sup>

Recently, “[e]ven while charges are pending in criminal court, people have been going into ICE detention as they get out of criminal detention.”<sup>122</sup> They are “not even given an opportunity to fix their criminal issues.”<sup>123</sup> Over half of the undocumented immigrants deported between 2007 and 2012 were never released from custody during their immigration proceedings, meaning a large number of undocumented immigrants are held pending possible deportation, which results in being unable to resolve criminal charges against them.<sup>124</sup>

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<sup>116</sup> Nicholas Pugliese, *Immigration Arrests at N.J. Courthouses Having a ‘Chilling Effect,’ Attorneys Say*, NORTHJERSEY.COM (June 5, 2017), <https://www.northjersey.com/story/news/new-jersey/2017/06/05/immigration-arrests-continue-n-j-courthouses/370974001/>.

<sup>117</sup> See *supra* section II.B.

<sup>118</sup> See Pugliese, *supra* note 116.

<sup>119</sup> See *id.*

<sup>120</sup> Monsy Alvarado & Hannan Adely, *N.J. Chief Justice Asks Feds Not to Arrest Immigrants at Courthouses*, NORTHJERSEY.COM (Apr. 19, 2017), <https://www.northjersey.com/story/news/politics/2017/04/19/nj-supreme-court-chief-justice-asks-ice-dhs-not-arrest-undocumented-immigrants-court/100663528/>.

<sup>121</sup> Letter from Stuart Rabner, New Jersey Supreme Court Chief Justice, to John F. Kelly, Sec’y of Homeland Sec. (Apr. 19, 2017) (on file with National Center for State Courts). Rabner requested that courthouses be deemed “sensitive locations” like schools and hospitals, where undocumented immigrants are left alone despite their status. *Id.* California Chief Justice Tani G. Cantil-Sakauye also asked immigration officials to stop making arrests at courthouses. Letter from Tani G. Cantil-Sakauye, California Supreme Court Chief Justice, to Jeff Sessions, U.S. Att’y Gen., and John F. Kelly, Sec’y of Homeland Sec. (Mar. 16, 2017) (on file with California Courts).

<sup>122</sup> Solis, *supra* note 114 (quoting California based immigration lawyer, Nina Bonyak).

<sup>123</sup> *Id.*

<sup>124</sup> EAGLY & SHAFER, *supra* note 49, at 21-22.

## B. Effects on the Criminal Justice System

Between January and October 2017, about 30% of national ICE arrests were for individuals not yet convicted of a crime, about 70% of which included those who were charged with a crime.<sup>125</sup> This directly impacts undocumented immigrants in New Jersey who are arrested for a crime then released under bail reform, because previously many of them likely would have been detained solely because they could not afford bail. There have been no reports released yet specifying the demographics of those who have been released or detained under bail reform, so it is difficult, if not impossible, to discuss how many undocumented immigrants may be impacted by both bail reform and the president's immigration policies at this time.<sup>126</sup> However, given the high number of undocumented immigrants in New Jersey and comments on the subject from experts in immigration law,<sup>127</sup> there is reason for concern.

Even before bail reform went into effect and before Trump was sworn in, there was concern about the possible effect bail reform policies could have on undocumented immigrants.<sup>128</sup> Milena Wilson, a solo practitioner and Rutgers University professor, raised the possibility that the speedy trial provision in the legislation, which applies only to those who have been detained, allows prosecutors to use their discretion to shift cases with undocumented defendants over to DHS to lessen their

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<sup>125</sup> U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, *ICE Removes Mexican Man Following Sentence for Death of North Carolina Man* (Oct. 16, 2017), <https://www.ice.gov/news/releases/ice-removes-mexican-man-following-sentence-death-north-carolina-man>.

<sup>126</sup> Hanna, *supra* note 44. However, the NAACP in New Jersey praised bail reform's risk-based assessment tool for benefitting "disadvantaged" minorities. See Anders Hagstrom, *New Jersey Cut Its Jail Population By 20 Percent With One Move*, THE DAILY CALLER (July 17, 2017, 11:29 AM), <http://dailycaller.com/2017/07/17/new-jersey-cut-its-jail-population-by-20-percent-with-one-move/>.

<sup>127</sup> Michael Noriega is the chairman-elect of the immigration law section of the New Jersey State Bar Association. Pugliese, *supra* note 116. He said that because of the number of people released under bail reform and the president's policies, "now we have the possibility of somebody being deported while their [criminal] case is pending." *Id.*

<sup>128</sup> Wilson, *supra* note 113.

caseloads.<sup>129</sup> Wilson was concerned that new local versions of “Secure Communities” would therefore be created.<sup>130</sup> With President Trump in office, these concerns may actually be realized.

The I-247(A) form informs law enforcement officials that, “if . . . you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center,” and provides a phone number.<sup>131</sup> This shows that ICE may be willing to work with police and prosecutors to allow the undocumented immigrant, still in local custody at the time the detainer form is issued and filled out, to be prosecuted for their crimes. But prosecutorial discretion comes into play, which includes Wilson’s point about prosecutors wanting to lessen their caseload.<sup>132</sup> It is possible that prosecutors in New Jersey may let the immigration process take hold rather than focus on the criminal case against the undocumented defendant. Prosecutors in King County, Washington reported that the existence of detainers on defendants did not impact their charging or dismissal decisions, especially in cases with victims.<sup>133</sup> They are not likely to dismiss charges just because someone is likely to be deported after serving their sentence.<sup>134</sup>

However, unlike New Jersey, Washington continues to rely on a cash bail system and experiences the same issues that New Jersey faced prior to bail reform.<sup>135</sup> King County prosecutors said they were likely to ask for bail in cases of undocumented immigrant defendants to ensure “they’re not going anywhere,” specifically to the federal detention center where they are “not going to be able

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* Wilson’s take on Secure Communities is that it is “meant to serve as an immigration law enforcement practice wherein, by use of integrated technology, varied local, county, and, state enforcement agencies became partners with immigration enforcement agencies for the purpose of identifying prospective immigrants that may be subject to removal from the United States.” *Id.*

<sup>131</sup> DEP’T OF HOMELAND SEC., *supra* note 60.

<sup>132</sup> *See* Wilson, *supra* note 113.

<sup>133</sup> Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. AND SOC’Y REV. 241, 259-60 (2015).

<sup>134</sup> *Id.* at 259.

<sup>135</sup> *See Washington Joins Nationwide Campaign for Pretrial Reform*, ACLU WASH. (June 22, 2017), <https://www.aclu-wa.org/news/washington-joins-nationwide-campaign-pretrial-reform>.

to get them back” to face their criminal charges.<sup>136</sup> Prosecutors did not want “defendants with ICE detainees [to be] released from jail prior to adjudication, because a transfer to ICE would disrupt the criminal process . . . .”<sup>137</sup> Prosecutors did not want to have to explain to a victim that “some federal authority took this person and we can’t pursue the case because of it.”<sup>138</sup> This shows that in jurisdictions that have not undergone bail reform, the existence of bail is an easy tool to keep undocumented immigrants in jail so ICE cannot touch them until they are convicted and serve their sentences. For jurisdictions with bail reform like New Jersey, prosecutors no longer have this tool to ensure defendants will remain in local custody throughout their criminal cases because ICE is under no apparent obligation to return criminal defendants.<sup>139</sup>

### **C. Effects on the Immigration Court System**

Immigration courts ordered deportations faster in the first half of 2017 than previously, “issuing nearly 50,000 removal orders from February through July – up 28 percent compared with the same period last year under President Obama.”<sup>140</sup> While deportations themselves were down nationally at that time, arrests by ICE and orders of removal were up.<sup>141</sup> As of April 2017, daily ICE arrests increased by 38% from the previous year.<sup>142</sup>

On July 31, 2017, the Justice Department issued a memo to immigration judges directing them to grant fewer continuances “to ensure that adjudicatory inefficiencies do not exacerbate the current

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<sup>136</sup> Beckett & Evans, *supra* note 133, at 260.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See id.*

<sup>140</sup> Stephen Dinan & Andrea Noble, *Illegal Immigration Statistics Show Trump’s Resolve to Keep Campaign Promise*, WASH. TIMES (Aug. 8, 2017), <https://www.washingtontimes.com/news/2017/aug/8/donald-trumps-illegal-immigration-numbers-show-maj/>.

<sup>141</sup> *Id.*

<sup>142</sup> Pugliese, *supra* note 116. At the time, the number was about 400 arrests a day. *Id.* As of the end of September 2017, ICE arrests were still up by around 40%. Monsy Alvarado, *Immigration Arrests and Deportations Climb in New Jersey*, NORTHJERSEY.COM (Dec. 13, 2017), <https://www.northjersey.com/story/news/new-jersey/2017/12/12/immigration-arrests-and-deportations-climb-new-jersey/942630001/>.

backlog of pending cases nor contribute to the denial of justice for respondent and the public.”<sup>143</sup> The memo calls for continuances to be used “appropriately and only where warranted for good cause or by authority established by case law.”<sup>144</sup> Granting fewer continuances may lead to undocumented immigrants having less time to prepare their cases, which could lead to more deportations happening on a more efficient basis.<sup>145</sup>

One aspect of the immigration court system is that indigent defendants do not have a right to appointed counsel.<sup>146</sup> Indigent defendants must hire a lawyer if they can, more likely find one who will take on their cases pro bono, or they may represent themselves at hearings.<sup>147</sup> At the national level, only 37% of undocumented immigrants were represented by a lawyer in their removal cases.<sup>148</sup> Only 14% of undocumented immigrants detained by ICE were represented by counsel, while about two-thirds of non-detained undocumented immigrants were represented by counsel.<sup>149</sup> Undocumented immigrants from Mexico, who made up the vast majority of ICE arrests in 2015,<sup>150</sup> “were the least likely of any nationality group to be represented by counsel in their removal proceedings,” with only 21% retaining counsel, and also had the highest detention rate, at 78%.<sup>151</sup> Other groups with

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<sup>143</sup> Memorandum from the U.S. Dep’t of Justice on Operating Policies and Procedures: Continuances 1 (2017). As of the time the memo was issued, there were 600,000 pending immigration cases in the country. *Id.* at 2. Over half of the cases surveyed by the Inspector General of the Department of Justice in 2012 “had one or more continuances, with an average in those cases of four continuances and 368 days of continuance, per case.” *Id.* Between 2006 and 2015, the use of continuances in these cases increased by 23%. *Id.* Continuances are sometimes used by defendants in immigration proceedings solely to delay deportation. *Id.* at 3.

<sup>144</sup> *Id.* at 2.

<sup>145</sup> Tessa Berenson, *Undocumented Immigrants May Get Less Time to Make Their Case*, TIME (Aug. 16, 2017), <http://time.com/4902820/immigration-lawyers-judges-courts-continuance/>. The average immigration case is resolved in about two and a half years. Amanda Sakuma & Hannah Rappleye, *Donald Trump’s Deportation Plan Must Still Overcome These Roadblocks*, NBC NEWS (Nov. 16, 2016), <https://www.nbcnews.com/politics/immigration/donald-trump-s-deportation-plan-must-still-overcome-these-roadblocks-n683976>.

<sup>146</sup> See EAGLY & SHAFER, *supra* note 49, at 24. There is only a right to be represented by an attorney of their choice, but “at no expense to the Government.” 8 U.S.C. § 1229a(a)(4)(A) (2016).

<sup>147</sup> Solis, *supra* note 114.

<sup>148</sup> EAGLY & SHAFER, *supra* note 49. The data comes from 1.2 million deportation cases from 2007-2012. *Id.* at 2.

<sup>149</sup> *Id.* at 5.

<sup>150</sup> Wise & Petras, *supra* note 47.

<sup>151</sup> EAGLY & SHAFER, *supra* note 49, at 2.

representation rates under 50% include those from Honduras, Guatemala, Nicaragua, El Salvador, Cuba, and the Dominican Republic.<sup>152</sup>

Immigrants in smaller cities were less likely to obtain counsel than those in large cities.<sup>153</sup> The rate of undocumented immigrants who obtained counsel in medium cities was 15% for those detained and 60% for those not detained.<sup>154</sup> Newark, New Jersey is considered a medium city and performed better than the national average, with 74% of non-detained undocumented immigrants obtaining counsel for their proceedings.<sup>155</sup> Undocumented “[i]mmigrants with attorneys fare better at every stage of the court process.”<sup>156</sup> When in detention, immigrants were four times more likely to be released after a custody hearing when they had a lawyer and were also “much more likely to apply for relief from deportation” and “were more likely to obtain the immigration relief they sought.”<sup>157</sup>

This data allows for the inference that once an individual is released from county jail after an arrest and is charged with a crime, most indigent undocumented immigrants fare worse in their removal proceedings and are more likely to be deported than those represented by counsel. These same individuals would probably have been unable to post bail or bond after being arrested for a crime under New Jersey’s old system but under the new system are more likely to be released. As the Trump administration works to make the removal process more efficient, deportations may occur at a faster rate. With there being less time between an arrest by ICE and a deportation coupled with criminal cases of non-detained defendants not being affected by the speedy trial provision of bail reform,

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<sup>152</sup> *Id.* at 13. In the order the countries are listed, the exact percentages were 23%, 30%, 35%, 40%, 44%, and 47%. *Id.* These nationalities also represent those with the “greatest number of removal cases decided.” *Id.*

<sup>153</sup> *Id.* at 11. A small city was defined as having a population less than 50,000 people compared to a large city with a population over 600,000. *Id.*

<sup>154</sup> *Id.* A medium city is defined as having a population between 50,000 and 600,000 people. *Id.*

<sup>155</sup> *Id.* at 8 (The percentage of detained defendants in New Jersey who are represented by counsel is not included in the data).

<sup>156</sup> *Id.* at 2.

<sup>157</sup> *Id.* at 2-3.

deportations of some undocumented immigrant criminal defendants may occur while their criminal cases are still pending.

Although unrelated to the president's policies, an additional relevant issue for undocumented immigrants is the recently decided case of *Jennings v. Rodriguez*. The Immigration and Nationality Act (INA) states that undocumented immigrants “may” be detained, and “may” be released on bond pending disposition of their immigration cases, with exceptions.<sup>158</sup> The Court of Appeals for the Ninth Circuit held that undocumented immigrants detained without bond pending removal had a right “to periodic bond hearings.”<sup>159</sup> The Supreme Court reversed this interpretation of the statute,<sup>160</sup> essentially holding that undocumented immigrants may be detained indefinitely while their cases are decided and throughout the appeals process.<sup>161</sup> This leads to the possibility that those detained by the federal government after being charged with a crime in New Jersey could be detained indefinitely by ICE pending removal proceedings. Indefinite detentions may keep them from returning to criminal court for disposition of their criminal cases, especially if they have a prior conviction that makes them deportable under the INA alone.

#### **D. Local Examples**

In particular, New Jersey has a high number of undocumented immigrants and is only one of five states to have over 450,000.<sup>162</sup> It is also a top ten state for deportation, with over 25,000 deported from the state since 2003.<sup>163</sup> Deportations have increased by 30% in the state and the arrests of undocumented immigrants by 20% under Trump's presidency, but there is some disagreement as to

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<sup>158</sup> 8 U.S.C. § 1226(a) (2016).

<sup>159</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

<sup>160</sup> *Id.*

<sup>161</sup> Richard Wolf, *Supreme Court Allows Indefinite Immigrant Detentions*, USA TODAY (Feb. 27, 2018), <https://www.usatoday.com/story/news/politics/2018/02/27/supreme-court-allows-indefinite-immigrant-detentions/841184001/>.

<sup>162</sup> Wise & Petras, *supra* note 47.

<sup>163</sup> Ted Sherman, *Numbers Paint a Surprising Portrait of Deportation in N.J.*, NJ.COM (Apr. 8, 2017, 7:00 AM), [http://www.nj.com/news/index.ssf/2017/04/bad\\_hombres\\_whos\\_really\\_getting\\_deported\\_from\\_nj.html](http://www.nj.com/news/index.ssf/2017/04/bad_hombres_whos_really_getting_deported_from_nj.html).

why.<sup>164</sup> John Tsoukaris, the field office director for ICE in Newark, believes that the president's policies are not the sole reason for the increase in the arrests and deportations of undocumented immigrants in New Jersey, claiming that deportations and arrests had been on the rise in New Jersey before Trump took office.<sup>165</sup> He believes that having additional immigration judges assigned to the Newark Immigration Court is also a reason, and he claims that officers in the state are still prioritizing for arrest and removal those who have committed crimes or who are a threat to public safety.<sup>166</sup> However, others disagree and have noted changes in how ICE conducts its operations in the state since the start of Trump's presidency.<sup>167</sup> Those who work closely with undocumented immigrants have reported that people with no criminal backgrounds are being arrested for removal, and that it seems that more people are being detained by the federal government than had been previously while they await disposition of their immigration cases.<sup>168</sup>

There were two cases that were highlighted by ICE in Middlesex County, New Jersey in 2017 when bail reform was in effect involving undocumented immigrants: one of a Mexican citizen and the other of an Indian citizen who were both arrested locally and had detainers issued upon them.<sup>169</sup> Middlesex County failed to honor both detainers, so both men were released; however ICE then tracked them down and picked them up.<sup>170</sup> One faced pending charges in the county and the other faced state charges, but ICE stated that "both [would] remain in ICE custody pending removal

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<sup>164</sup> See Monsy Alvarado, *Undocumented Immigrant Arrests up 20 Percent in NJ; Deportations up 30 Percent*, NORTHJERSEY.COM (May 21, 2017), <https://www.northjersey.com/story/news/new-jersey/2017/05/21/undocumented-immigrant-arrests-up-20-percent-nj-deportations-up-30-percent/325391001/>.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *See id.*

<sup>168</sup> *See id.* Specifically, the article quotes staff of Faith in New Jersey and First Friends of New Jersey & New York, two organizations that work with undocumented immigrants. *Id.* Those from First Friends do not have numbers to back up their assertions, but they do a lot of work with people who have been detained, so based on their personal experience and stories they hear, they allege that more people are in custody and that deportations are occurring much more swiftly as well. *Id.*

<sup>169</sup> *See* U.S. Immigration and Customs EnFt, *supra* note 67.

<sup>170</sup> *Id.*



proceedings,”<sup>171</sup> so both presumably would not face their criminal charges. Also in Middlesex County, in April 2017, the county jail released yet another Mexican citizen who was facing state criminal charges despite ICE issuing a detainer on him.<sup>172</sup> He was also picked up by ICE but no more information was released on either his criminal or immigration cases.<sup>173</sup>

These examples show that even if counties refuse to honor detainers, often known as sanctuary counties, ICE under Trump may still track down those they intend to bring removal proceedings against. The aforementioned ICE detainments show that people who are released under bail reform may be picked up by ICE and detained even though they have outstanding criminal charges. These charges are unlikely to be resolved if the undocumented immigrants do not get bond or cannot afford to pay bond in their immigration proceedings because they may be deported without ever being released from federal custody.

### **E. Further Impacts**

The convergence of bail reform in New Jersey and President Trump’s strict policies against undocumented immigrants can leave some criminal cases unresolved, leaving victims of crimes committed by undocumented immigrants without resolution. This is likely an unintended consequence of Trump’s policies in states like New Jersey that have bail reform policies implemented. DHS, at the direction of President Trump,<sup>174</sup> created the Victims of Immigration Crime Engagement office, or VOICE, to help families who have been victims of crimes committed by undocumented immigrants.<sup>175</sup> Then Secretary of Homeland Security John F. Kelly stated that VOICE would offer a

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<sup>171</sup> *Id.*

<sup>172</sup> Craig McCarthy, *ICE Arrests 2 Undocumented Immigrants Released From N.J. Jail*, NJ.COM (June 1, 2017), [http://www.nj.com/middlesex/index.ssf/2017/06/ice\\_says\\_middlesex\\_jail\\_released\\_2\\_immigrants\\_with.html](http://www.nj.com/middlesex/index.ssf/2017/06/ice_says_middlesex_jail_released_2_immigrants_with.html).

<sup>173</sup> *See id.*

<sup>174</sup> *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

<sup>175</sup> Ron Nixon & Liz Robbins, *Office to Aid Crime Victims Is Latest Step in Crackdown on Immigrants*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/us/politics/trump-voice-immigrants-crime.html>. Throughout his campaign, President Trump expressed views that undocumented immigrants are often responsible for committing crimes in the United States, calling them “bad hombres” and promising to deport them, so he wanted to create a special

“voice for victims” of “crimes that should never have taken place because the people who victimized them oftentimes should not have been in the country in the first place.”<sup>176</sup> The program seeks to provide victims with information on the “alleged criminal’s progress through the immigration system” through a hotline service operated by victim advocates.<sup>177</sup> Trump clearly has prioritized the victims of crimes committed by undocumented immigrants, yet at the same time his administration’s policies may harm some victims in a state like New Jersey with bail reform because, again, their cases may go unresolved.

VOICE would be most effective if it (1) ensured undocumented immigrants who have committed crimes served their sentences as intended as part of our justice system, and (2) are ultimately deported in states which still have a cash bail system and as a result of the bail system, have more people detained as part of the criminal process. Otherwise, VOICE’s purpose in a state like New Jersey seems frustrated given it would be informing some victims that their offenders may be released pretrial, and then later informing them about the removal process once ICE picks them up and begins removal proceedings.<sup>178</sup> Of course there are victims of violent crimes who are able to see justice properly served with a conviction and sentence, given defendants accused of violent crimes are more likely to be detained pretrial based on bail reform’s policies, and then see the offender be deported. But with less violent crimes and other cases where defendants are not detained in the county jail, the only justice witnessed by victims is deportation, which may not be enough for them, especially considering the next point.

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office for victims of crime committed by illegal immigrants. Maya Rhodan, *Donald Trump Raises Eyebrows With ‘Bad Hombres’ Line*, TIME (Oct. 20, 2016), <http://time.com/4537847/donald-trump-bad-hombres/>.

<sup>176</sup> Nixon & Robbins, *supra* note 175.

<sup>177</sup> *Id.*

<sup>178</sup> See Press Release, Dep’t of Homeland Sec., DHS Announces Launch of New Office for Victims of Illegal Immigrant Crime (Apr. 26, 2017), <https://www.dhs.gov/news/2017/04/26/dhs-announces-launch-new-office-victims-illegal-immigrant-crime>.

In addition to the impact these policies may have on victims of crimes committed by undocumented immigrants, the undocumented immigrants themselves are essentially getting away with crimes given the way the deportation system may now operate in certain cases. While American citizens would have to face their criminal charges after release under bail reform, undocumented immigrants may be deported before they even face their charges. While deportation is undoubtedly unfortunate, it is arguably better than jail, prison, or other criminal punishments, and should not be a surprising consequence to those who know they are in the country illegally and know the risks. Since many deported individuals illegally return to the United States,<sup>179</sup> there are people who may get away without a trial since they are deported rather than prosecuted, but who then return to the country, having never faced the criminal justice system for previous crimes.

This is unlike the experience of American citizens who have no choice but to face the charges against them. It is possible that now, some undocumented immigrants who have committed crimes may be deported prior to prosecution, only to illegally return to the country at a later date. It seems possible that someone may get away without serving time after committing crimes in New Jersey, be deported instead of prosecuted, and then come back as if they never left, still never having been prosecuted. Arguably, the people who may get away with this have an advantage over American citizens who have committed crimes.

#### **F. The Court's 2018 Decision in *Sessions v. Dimaya***

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<sup>179</sup> About 42% of those deported from the United States in 2016 (total of 340,056 removed) had reinstatements of final removal orders, meaning they had been deported previously and illegally reentered the United States. BRYAN BAKER, IMMIGRATION ENFORCEMENT ACTIONS: 2016 3, 8 (U.S. Department of Homeland Security Office of Immigration Statistics, 2017). DHS deported 135,570 criminal aliens in 2016, and 35% of these individuals committed immigration offenses, including reentry after a previous deportation. *Id.* at 10. Additionally, John Tsoukaris, head of ICE enforcement in Newark, stated, "We have been encountering a lot of other people that sometimes they have been deported before . . . and came back illegally." Alvarado, *supra* note 164.

On April 17, 2018, the Supreme Court issued its decision in *Sessions v. Dimaya*. The issue in *Dimaya* was whether the definition of a “crime of violence” found in 18 U.S.C. § 16(b) is impermissibly vague, and the Court held that it is.<sup>180</sup> In the INA, one ground for deportation from the United States is a conviction for an “aggravated felony.”<sup>181</sup> Aggravated felony is defined in 8 U.S.C. § 1101(a)(43), and includes “a crime of violence,” as defined in 18 U.S.C. § 16(b), “for which the term of imprisonment [is] at least one year.”<sup>182</sup> Part (a) of the definition is known as the “elements clause,”<sup>183</sup> and defines “crime of violence” as “an offense that has an element [of] use, attempted use, or threatened use of physical force against the person or property of another.”<sup>184</sup> Part (b) of 18 U.S.C. § 16, known as the “residual clause” and the section of the statute at issue in *Dimaya*,<sup>185</sup> also defines “crime of violence” as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”<sup>186</sup>

The Court held the language in § 16(b) unconstitutional under the void-for-vagueness doctrine, which “guarantees that ordinary people have ‘fair notice’ of the conduct a statute proscribes” and guards against arbitrary law enforcement.<sup>187</sup> As was the problem with similar statutory language in the precedent case *Johnson v. United States*, 135 S. Ct. 2551 (2015), the language in § 16(b) is not useful in helping a court determine what felony has a substantial risk that force against another may be used

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<sup>180</sup> *Sessions v. Dimaya*, No. 15-1498, slip op. at 1 (U.S. Apr. 17, 2018).

<sup>181</sup> 8 U.S.C. § 1227(a)(2)(A)(iii) (2016).

<sup>182</sup> *Id.* § 1101(a)(43)(F) (2016).

<sup>183</sup> *Dimaya*, slip op. at 1.

<sup>184</sup> 18 U.S.C. § 16(a) (2016).

<sup>185</sup> *Dimaya*, slip op. at 2.

<sup>186</sup> 18 U.S.C. § 16(b).

<sup>187</sup> *Dimaya*, slip op. at 4-5 (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)).

when committing that offense.<sup>188</sup> Thus, the Court said, § 16(b) does not guide a court enough in determining what offense applies to the definition, and it may lead to arbitrary results.<sup>189</sup>

However, this case does not affect the analysis in this note much, if at all. The existence of a prior conviction(s) is just one ground for removal under 8 U.S.C. § 1227, and *Dimaya* in particular is only relevant to one of many parts of the INA which defines which crimes and convictions constitute removability. As detailed in this note, President Trump has ordered ICE to prioritize for removal those who have been arrested for crimes and those whose mere status makes them deportable. Undocumented individuals released under bail reform may have criminal records including prior convictions for aggravated felonies, which may fit the now-rendered vague definition of “crimes of violence,” but their release from local custody combined with their immigration status alone makes them targets for removal under the current administration. The recently decided *Dimaya* case, therefore, does not have significant impacts on the arguments made and points raised in this note.

## **VI. Conclusion**

Bail reform went into effect in New Jersey on January 1, 2017, changing the system from one relying on cash bail to a risk-based assessment, with a goal to get indigent defendants out of pretrial detention. That same month, Donald Trump became president and signed an executive order, expanding which people are a priority for removal from the country. Bail reform has worked – but so have the president’s strict policies against undocumented immigrants. New Jersey’s law and the president’s policy have led to the possibility that some indigent undocumented immigrant defendants may be released from local detention pending disposition of their criminal cases, only to be arrested by immigration officials and have removal proceedings commenced against them. With an additional goal to make processing removals in immigration court more efficient, people may be deported before

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<sup>188</sup> *Id.* at 10-11.

<sup>189</sup> *See id.* at 7, 9.

their criminal cases in New Jersey can be resolved. This has likely unintentional and disparate impacts on victims of crimes committed by undocumented immigrants and on American citizens, who have no choice but to face charges against them. As time goes on and more information regarding how effective bail reform is and how effective the president's policies are moving forward, we will be able to see the full impact of these two areas of law converging.