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Breaking Bond: How ICE Uses Bond Money to Fund Detention Centers

The number of noncitizens arriving at the border has skyrocketed as socioeconomic conditions in South and Central America—like the Haitian political crisis, and violence in the Northern triangle—have added to this wave of people arriving at the U.S. border.[1] The rate of detention during encounters at the southwestern U.S. border has increased by more than five times between July 2020 and July 2021.[2] Between Biden’s inauguration day on January 21, 2021 and October 1, 2021, the number of noncitizens detained by ICE or CPB has increased 56% from around 14,000 to over 22,000.[3]

This increase in detention is at odds with the Biden Administration’s stated goal of reducing the average detained population capacity by 1,500 beds to 30,000, with a parallel budget reduction of \$78 million.[4] The majority of these 30,000 beds—about 92%—will be funded by discretionary distributions totaling \$1.44 billion when using ICE’s estimated cost of \$52,000 per year per bed.[5] The remaining 8% will be funded by mandatory fees totaling \$124.8 million in FY 2022.[6] Through these “mandatory fees” ICE funds its own systems of detention. Normally this could be cured by reducing the number of people in detention and reducing the number of fees paid in turn. But there is a loophole. Even if the agency successfully eschews detention for nonimmigrants in removal proceedings, ICE can take money from those on bond. This is done through the Breached Bond Detention Fund.[7] Given that non-detention alternatives are a priority for the Biden administration,[8] this channel is primed to funnel more money into ICE’s coffers in the coming years. Let’s look at this loophole and understand how it fits into the noncitizen removal process.

When an ICE officer commences removal proceedings against a noncitizen, arguing for their deportation, she may set a bond of at least \$1,500.[9] This permits a noncitizen’s release in exchange for posting collateral, which, in the overwhelming majority of cases, takes the form of a cash bond.[10] However, more than half (59%) of the 433,162 immigration bonds set between the years 2001 and 2021 were over \$5,000, with a quarter (25%) set at amounts over \$10,000.[11] As of 2018, over \$1.5 billion of noncitizens’ money in total was held as collateral for immigration bonds,[12] and ICE can divert that money to fund its operations with a breach determination.

Currently the Breached Bond Detention Fund provides ICE resources to the tune of \$55 million a year.[13] The agency’s *2014 Bond Management Handbook* acknowledges that the money forfeited to these accounts directly pays for detention bed space.[14] In the first ten months of Fiscal Year 2018, ICE collected \$39.4 million from an average 656 breaches per month, averaging about \$6,000 per breach.[15] This is concerning when we consider the ease with which ICE can determine a bond was breached.

Federal Regulations instruct that an immigration bond is breached when there has been a “substantial violation of the bonds terms.” For I-352 bonds, a single failure to show up to a court date is sufficient to find a “substantial violation of the bond’s terms,” because delivery is the bond’s primary condition.[16] A court’s review of ICE’s breach determination is also limited to determinations that were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”[17] This gives “great deference to the interpretation given to an administrative regulation by the officers or agency charged with its administration.” [18]

Perhaps this deferential approach explains why, in a year where there were roughly 7,872 bond breach determinations,[19] only 70 appeals were adjudicated on the merits by the Administrative Appeals Office (AAO) related to immigration bonds (I-352).[20] Fifty-five of these claims were dismissed.[21] With such bleak odds of success, many may find that a breach determination is not worth appealing. These circumstances are magnified by the \$640 charge to file an appeal,[22] the general lack of legal representation in immigration court,[23] and a noncitizens’ reluctance to draw the increased attention of the legal system.[24] These headwinds stack the deck in favor of ICE which has a large amount of power to make and uphold breach determinations, and in turn divert millions of dollars to fund its operations. If alternatives to detention programs increase in adoption and the practice of issuing immigration bonds grows, the amount of money ICE is poised to gain could also increase. Further, if ICE finds itself low on funding, it may decide to use this lever to keep its operations afloat. We must stay aware of these outcomes. We do not want to perpetuate a system of detention and should investigate ICE’s funding more completely. There are more questions to answer about the connection between ICE bond breaches and funding its internal operations. The better we understand these, the better we can reform the broken system we find ourselves in.

[1] Eileen Sullivan & Miriam Jordan, *Illegal Border Crossings, Driven by Pandemic and Natural Disasters, Soar to Record High*, N.Y. Times, Oct. 22, 2021, <https://www.nytimes.com/2021/10/22/us/politics/border-crossings-immigration-record-high.html?searchResultPosition=1>.

[2] John Gramich, *Migrant Encounters at U.S.-Mexico Border Are At a 21-Year High*, Pew Research, Aug. 13, 2021, <https://www.pewresearch.org/fact-tank/2021/08/13/migrant-encounters-at-u-s-mexico-border-are-at-a-21-year-high/>.

[3] TRAC Syracuse University, ICE Detainees, (2021) (https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html).

[4] Dep’t of Homeland Security, FY 2022 Budget in Brief 35 (2021) [hereinafter DHS 2022 Budget Brief] (https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf).

[5] Dividing the \$78M saved by cutting 1,500 beds gives an average cost per bed of \$52,000. The report also specifies how many of the beds will be funded by discretionary spending. *Id.* at 35.

[6] *Id.* at 35.

[7] *Id.* at 32. See also Stanford Law Immigrants’ Rights Clinic & U.C. Davis School of Law Immigration Law Clinic, *Following the Money: New Information about the Federal Government’s Billion Dollar Immigration Detention and Bond Operations*, 7 (2018) [hereinafter *Following the Money*]

(<https://stanford.app.box.com/s/s17s3sdk2af3bcqy3r1z1o5zhmojix54>).

[8] DHS 2022 Budget Brief, *supra* note 4 at 3 (DHS dedicate \$440 million to expand alternatives to detention program).

[9] 8 C.F.R. § 1226 (a)(2)(A).

[10] *Following the Money*, *supra* note 7 at 2 (over 90% of bonds are cash bonds).

[11] TRAC Syracuse University, Immigration Court Bond Hearings and Related Case Decisions, (2021) (<https://trac.syr.edu/phptools/immigration/bond/>).

[12] *Following the Money*, *supra* note 7 at 3.

[13] DHS 2022 Budget Brief, *supra* note 4 at 32.

[14] DHS, 2014 Bond Management Handbook 2 (2014) (<https://www.aila.org/File/Related/1605173of.pdf>).

[15] *Following the Money*, *supra* note 7.

[16] *See, e.g., Matter of D-k-*, 2017 WL 6946195 (DHS 2017).

[17] 5 U.S.C. § 552 f(i).

[18] *Bahramizadeh v. U.S. I.N.S.*, 717 F.2d 1170, 1173 (7th Cir. 1983) (citing *Udall v. Tallman*, 380 U.S. 1, 16, (1965)).

[19] This is the 656 monthly number for FY 2018 multiplied by 12. *Following the Money*, *supra* note 7.

[20] See AAO Appeal Adjudications Data for FY 2018 for I-352 appeals. AAO, AAO Appeals Adjudications (2018) (https://www.uscis.gov/sites/default/files/document/data/AAO_Data_for_Publishing_Thru_FY19.pdf)

[21] *Id.*

[22] DHS, Instructions for Notice to Appeal or Motion 6 (Dec. 2, 2019)

(<https://www.uscis.gov/sites/default/files/document/forms/i-290binstr.pdf>).

[23] TRAC Syracuse University, Immigration Court Quick Facts, (2021)

(<https://trac.syr.edu/immigration/quickfacts/?category=eoir/>).

[24] Especially when a breach determination would often be made with a formal order of removal.