



Policy Brief: Reforming Bond Policies for Indigent Noncitizens in Immigration Detention

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I. Introduction

Under current immigration laws, noncitizens in removal proceedings have limited opportunities to challenge the necessity of their detention. One way in which noncitizens can seek release from immigration detention is through the payment of a bond. However, current bond policies have a punitive effect on indigent noncitizens, who cannot afford to pay for their release. This policy brief provides an overview of immigration bond and provides recommendations to improve current policies for indigent noncitizens in immigration detention.

II. Who is eligible for immigration bond?

The Immigration and Nationality Act (INA) lays out provisions for the detention and release of noncitizens in federal immigration custody. [Under the INA](#), noncitizens who pose no flight risk or danger to public safety may be released either on parole or on bond of no less than \$1,500.

Pursuant to [INA § 236\(c\)](#), some noncitizens, such as those who commit certain criminal offenses, are subject to mandatory detention and are ineligible for release on bond. In some cases, mandatorily detained noncitizens may request what is often referred to as a “[Joseph Hearing](#)” before an immigration judge to challenge whether the mandatory detention provision applies for their case. If the immigration judge determines that

INA § 236(c) does not apply, then the detained noncitizen may request a bond hearing.

III. Who sets immigration bond?

Immigration bond is first set by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) agency. If a detainee wishes to challenge the bond amount set by ICE, he or she may request a [custody redetermination hearing](#) before an immigration judge. The immigration judge has broad discretion to change the ICE bond amount or to release the detainee on his or her own recognizance. In their review, immigration judges consider [relevant factors](#) such as the noncitizen's:

- Length of residency in the United States.
- Family and community ties in the United States.
- Length of employment in the United States.
- Criminal background.
- Failure to appear for prior immigration proceedings.

IV. How much is immigration bond?

Immigration bond amounts are determined on a case-by-case basis by ICE officers and immigration judges. As such, bond amounts can [vary widely](#), ranging from the statutory minimum of \$1,500 to over \$25,000 in some cases. According to recently released [data](#) by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the median immigration bond amount for Fiscal Year (FY) 2015 was approximately \$6,500.

V. How do current immigration bond policies affect indigent noncitizens in immigration detention?

Under current immigration laws, neither ICE officers nor immigration judges are required to consider a noncitizen's financial ability to pay when setting their bond amount. This means that noncitizens may be determined to be eligible for bond, but nevertheless prevented from release because they cannot afford to pay the bond amount. As a result, noncitizens who cannot afford to pay must remain in immigration detention until their cases are fully processed through the federal immigration court system. Due to

[growing backlogs](#), this can mean that indigent noncitizens are detained anywhere from a few months to [several years](#) until they receive a final order from an immigration judge.

VI. Prolonged detention of indigent noncitizens burdens U.S. taxpayers

With [more than 40,000 noncitizens](#) in immigration detention as of October 2016 (an unprecedented number) operating costs continue to [increase each year](#). When immigration bond is set too high, noncitizens who are eligible for release must remain in detention. This results in more noncitizens held in our expensive federal immigration detention system and more U.S. taxpayer dollars going towards detention costs.

As detailed in the National Immigration Forum's paper [The Math of Immigration Detention](#), the federal government spends millions of dollars each year keeping thousands of noncitizens in immigration detention. In FY 2014, the federal government spent approximately [\\$5.46 million per day](#) on detention costs. This amounts to approximately \$161 per day spent for each detained noncitizen. Family detention, which has been growing in recent years, is even more expensive at an average of [\\$298 per person per day](#).

VII. Current bond policies possibly violate 14th amendment

In the domestic criminal context, the U.S. Department of Justice (DOJ) [recently argued](#) before the 11th Circuit Court of Appeals in the case of [Walker v. City of Calhoun](#) that bail and bond policies that do not consider an indigent defendant's ability to pay violate the 14th Amendment. In an [amicus brief](#), the Department of Justice wrote, "In addition to violating the Fourteenth Amendment, such bail systems result in the unnecessary incarceration of people and impede the fair administration of justice for indigent arrestees...they are not only unconstitutional, but they also constitute bad public policy."

There is a compelling argument that DOJ's views of criminal justice reform should also apply in the federal immigration context for several reasons. First, immigration cases fall under DOJ's purview in the Executive Office of Immigration Review (EOIR). Second, the governmental interest of

immigration detention is to detain noncitizens who pose a danger to the community and to ensure that those who pose a flight risk appear for their subsequent court hearings. Detention is not intended to serve a punitive purpose, particularly for noncitizens who are eligible for release. As the DOJ argued in *Walker*, “fixed bail schedules that allow for the pretrial release of only those who can pay, without accounting for ability to pay and alternative methods of assuring future appearance...unlawfully discriminate based on indigence.” In line with DOJ’s reasoning, indigent noncitizens determined to be eligible for bond should not be unjustly held in prolonged immigration detention simply because they are unable to pay. Thus, DOJ’s position that ability to pay be considered when setting bond for criminal defendants should be reasonably extended in the civil immigration context.

VIII. Recommendations

Indigent noncitizens should not be required to remain in prolonged detention simply because they cannot afford to pay for their release. [Sensible reforms](#) are needed to ensure that immigration bond policies do not unjustly keep indigent noncitizens detained simply because they cannot afford to pay for their release. Changes to current bond policies would also help alleviate the federal government’s over-reliance on immigration detention, which imposes unnecessary costs upon U.S. taxpayers.

- 1. Congress should eliminate the \$1,500 statutory minimum for immigration bond currently in the Immigration and Nationality Act (INA).**
- 2. ICE officers and immigration judges should be required to consider an individual’s ability to pay when determining bond amounts for noncitizens who pose no danger to public safety or flight risk.** If a noncitizen cannot afford to pay for bond, ICE officers and immigration judges should consider alternatives to detention (ATD) programs which can help to ensure that released noncitizens appear for their subsequent court hearings. Lower amounts of bond for indigent people provide the same incentive to

appear in court as higher amounts for those who have the financial means to pay.

- 3. ICE officers and immigration judges should expand the use of ATD programs.** ATD programs utilize community-based and electronic monitoring devices to monitor released noncitizens. These programs have proven to be effective —with [more than 90% of noncitizens](#) who participate in ATD programs showing up to their court appearances. Expansion of such programs would also save taxpayer money. In May 2014, the *Los Angeles Times* reported that requiring detainees to wear tracking devices and report twice a week to parole officers cost roughly [\\$8 per person per day](#). Expanding the use of ATDs for individuals who cannot afford bond would help lessen the federal government’s reliance on immigration detention and reduce government spending on detention.

VIII. Conclusion

Reforming current immigration bond policies would help promote more humane immigration practices towards indigent noncitizens in our federal immigration system. Reforms would also help lessen the federal government’s over-reliance on immigration detention and reduce federal spending on detention. Small improvements will not only help the federal government better allocate limited resources on detaining only those who pose a real threat to public safety, but will help move our nation forward towards repairing our broken immigration system.