Setting Bail in Deportation Cases: The Role of Immigration Judges

JANET A. GILBOY*

Regulations provide that the Immigration and Naturalization Service (INS) may determine whether to detain or release an arrested alien and the amount of bail to require. Any time before an order of deportation becomes final, however, the alien may apply to an immigration judge for a redetermination of this decision. This Article describes the administrative review process through a case study of bond redetermination applications to immigration judges in Chicago and examines some preliminary data on the consequences of bail decisions for aliens' failure to appear in court and failure to depart the country after being granted voluntary departure. The study's empirical data suggest the difficulties of both immigration judges and the INS in adequately distinguishing among aliens deserving or undeserving of stronger controls. The study's data are used to evaluate several proposals for immigration bail reform, including proposals to limit or eliminate immigration judge bail review authority.


Funding for the research reported here was generously provided by The Ford Foundation and the American Bar Foundation. The author would like to thank the Office of the Chief Immigration Judge of the Executive Office for Immigration Review and the Chicago District Office of the Immigration and Naturalization Service (INS) for the special opportunity to use their case files to compile the statistical data in this study. The author wishes to thank the individual immigration judges, court personnel, and INS administrators, supervisors and other employees whose cooperation made this study possible. This Article is a revised portion of a larger manuscript on immigration bail administration. The author would like to thank T. Alexander Aleinikoff, Deborah Anker, Michael J. Churgin, Donna Price Cofer, Terence C. Halliday, Stephen H. Legomsky, John R. Schmidt, Peter H. Schuck, Rayman L. Solomon, Daniel J. Steinbock, and Anne Tatalovich for their valuable comments on the original manuscript.
INTRODUCTION

Concerns about the administration of bail in the immigration area have been widely expressed. Reports of widespread absconding by aliens awaiting deportation hearings frequently appear in the popular media. Immigration judges are portrayed as having “unmanageable” caseloads and backlogs so extensive that endless delays occur before cases receive a final disposition. This situation is thought to contribute to the problem of absconding. From a different perspective, Immigration and Naturalization Service (INS) bail decisions

1. *Illegal Aliens Gush from 'Pipeline,'* Chicago Tribune, Dec. 13, 1984, at 42, col. 5 (“An Immigration Service survey showed that about three out of four illegal aliens failed to appear after they were released in Miami on bond to await deportation or exclusion hearings and those from the Indian subcontinent had even worse records.”). *The Gatekeepers: Immigration Service has Mammoth Job, Minimal Resources,* Wall St. J., May 9, 1985, at 16, col. 1 (“In McAllen, Texas, officers are sometimes forced to release 20 to 30 illegal immigrants from Central America a day on their own recognizance because there isn’t room to detain them in INS facilities or money to house them in the county jail; almost all of the illegal immigrants released without bond are never seen again.”).

2. *Heavy Caseload Strains Immigration Office,* The Washington Post, Jan. 9, 1984, at D7, col. 6 (quoting Judge John F. Gossart, of the Washington Office of the Executive Office for Immigration Review, as saying, “We are a force of 52 immigration judges with a caseload that is not manageable, and under the present system probably never would be manageable . . . ”).

3. *Id.* at col. 2 (suggesting that administrative and judicial appeals “can take months or years to exhaust when the kind of backlog exists as does in the Washington immigration court”). *Idealism of '60s Reborn in Pleas for Immigrants,* L.A. Times, June 1, 1986, at pt. 2, 6, col. 6 (reporting that “INS Attorneys said that the Los Angeles Immigration Court is so backlogged that a person making a first appearance in an asylum case this week will not have a second hearing on his application for two to 2 ½ years. Every month, about 1000 new cases are filed. Seven immigration judges are attempting to handle 20,000 cases.”).

4. Generally, delay is considered a breeding ground for absconding. It is clear from research conducted in the criminal justice area that court disposition time is an important factor relating to nonappearance in court. In 1976, the Institute of Government at the University of North Carolina at Chapel Hill reported the findings of their study examining the relative importance of various factors in determining the likelihood that a defendant would fail to appear in court (as well as be rearrested). The study examined a random sample of 756 defendants released on bail in Charlotte, North Carolina in 1973. The study concluded that court disposition time was the most important factor relating to nonappearance:

Court disposition time, defined here as the amount of time elapsing from the defendant’s release until the disposition of his case by the court (or until he fails to appear or is rearrested, if either of those events occurs before disposition) must be considered the variable of greatest importance. Among the defendants studied, the likelihood of “survival” — avoidance of nonappearance and rearrest — dropped an average of five percentage points for each two weeks their cases remained open. This suggests that reducing court delay should be high on the agenda of those who would reform the bail system.

The North Carolina study also indicated that defendants’ sex, race, income, age and employment status either had no significant effect on nonappearance or a reverse effect than the one expected. S. Clarke, J. Freeman & G. Koch, The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail, 21, 34 (Institute of Government, Chapel Hill, N.C., Jan. 1976) (unpublished study).

5. The Immigration and Nationality Act of 1952 authorizes the Attorney Gen-
have been publicly criticized by the United States Commission on Civil Rights as “fail[ing] to adhere to acceptable standards of due process.”

Procedural protection through review of INS bail decisional to make custody and bond determinations:

Any . . . alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.

Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a) (1982) [hereinafter INA]. This authority is delegated by regulation to the INS by the Attorney General. 8 C.F.R. § 242.2(a) (1986). The determination may be made by the district director; acting district director; deputy district director; assistant district director for investigations; assistant district director for examinations; assistant district director for anti-smuggling; officer in charge; chief patrol agent or his deputy, associate or chief patrol agents. Id. Revised by 51 Fed. Reg. 34,082 (1986). On the INS authority to detain aliens pending deportation (and exclusion) proceedings, see generally Bell, Detention and Parole of Aliens in Exclusion and Deportation, 3 IMMIG. L. REP. 17 (1984).

6. In its findings the United States Commission on Civil Rights came to the following conclusions:

Current INS policies and practices in setting bail fail to adhere to acceptable standards of due process for the following reasons:

* Bail is set for purposes other than to assure the appearance of the arrested alien at the subsequent hearing.
* There is a lack of consistency and comparability in the setting of bond.
* There are few written guidelines for measuring whether the bail recommended is appropriate.
* There is a lack of sufficient documentation in case files to justify either the bond recommended or the amount of bond set at the hearing.
* Few statistics are available which might indicate what are successful (and therefore appropriate) bond amounts in a particular case.


Allegations have also been made by the American Immigration Lawyers Association that the lack of adequate guidelines for bail decisions “has resulted in the unnecessary and costly detention of aliens not likely to abscond.” INS Oversight and Budget Authorization—Fiscal Year 1985: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 333 (1984) (statement of Seymour Rosenberg, President, American Immigration Lawyers Association) [hereinafter House Subcomm. Budget Hearings — FY1985].

Moreover, controversy has surrounded various INS bond practices. For instance, the National Center for Immigrants’ Rights brought a lawsuit challenging the INS’s attempt to bar the unauthorized employment of aliens released on bond. The litigation arose when the INS adopted a policy of requiring that a “no work” rider be included in all appearance and delivery bonds issued in connection with deportation or exclusion proceedings. Recently, the Court of Appeals for the Ninth Circuit affirmed the decision of the district court, that imposition of a no-employment condition in every delivery bond exceeded the Attorney General’s authority under the INA. National Center for Immigrants’ Rights, Inc. v. INS, 791 F.2d 1351 (9th Cir. 1986), petition for cert. filed, No.
sions by immigration judges, however, has generated further criticism; for example, the time taken by immigration judges to review INS bail decisions was recently criticized by the General Counsel of the INS as an "outrageous waste of their time," time presumably better spent on conducting deportation hearings to reduce court delays and absconding. Disagreement with immigration judge bail decisions has provoked the INS, in the past, to recommend limiting or eliminating immigration judge bail review authority.

Despite dissatisfaction with the current situation and the existence of several proposals that would significantly alter the bail review authority of immigration judges, and despite the fact that over 70,000 aliens annually are placed under deportation proceedings, very little is actually known about the functioning of immigration judges in bail administration.

86-1207 (Jan. 20, 1987).

7. Although the INS may initially set the amount of the bond, immigration judges have authority to redetermine the custody or bond decision. Immigration judges' authority to continue to detain an alien in custody or to release him and to set bond is delegated by regulation to them by the Attorney General.

authority of immigration judge; appeals. After an initial determination pursuant to paragraph (a) of this section, and at any time before a deportation order becomes administratively final, upon application by the respondent for release from custody or for amelioration of the conditions under which he may be released, an immigration judge may exercise the authority contained in section 242 of the Act to continue or detain a respondent in, or release him from custody, and to determine whether a respondent shall be released under bond, and the amount thereof, if any.

8 C.F.R. § 242.2(b) (1986).

8. Speech by Maurice C. Inman, Jr., General Counsel, INS, 1985 American Immigration Lawyers Association Annual Conference, Boston, Massachusetts (June 4-9, 1985), Recent Developments at the Justice Department, (cassette #10) (tape available from Convention Seminar Cassettes, 2307 Royal Avenue, Simi Valley, Cal.) ("We think with a finite number of judges, 60, it is an outrageous waste of their time to spend days, literally days, on bond redetermination hearings.").

9. See infra text accompanying notes 93, 96-100.

10. See infra text accompanying notes 93, 96-100.


12. This study examines immigration judges' bail review role in the deportation process — the process to determine whether an alien considered to have "entered" the United States may remain in the country. A relatively limited body of literature exists about immigration bail administration in deportation cases. The common focus of much of this literature is the INS, not immigration judges. For the most part, this literature is not based on empirical research, but rather is comprised of legal commentaries about
Regulations provide that the INS may initially determine whether to detain or release an arrested alien and the amount of bail to require. Any time before an order of deportation becomes final, however, the alien may apply to an immigration judge for a redetermination of this INS decision. If either the alien or the government is displeased with the judge's decision, they may appeal to the Board of Immigration Appeals (BIA). Although, immigration judges clearly


One notable exception is an unpublished 1978 INS-commissioned study which examines the bail setting practices of the INS in 10 jurisdictions. Immigration and Naturalization Service, A Comparison of the Bond-Setting Practices of the Immigration and Naturalization Service with that of the Criminal Courts (Bruce D. Beaudin, consultant) (July 26, 1978) (unpublished study) [hereinafter Beaudin]. This study focuses largely on INS bail decisionmaking. It provides only limited insights into the frequency of immigration judge bond redetermination hearings and the implications of this administrative review for immigration bail administration.

This study does not examine custody proceedings in exclusion cases, that is, proceedings to determine whether an alien may enter the country for the first time or reenter the country after a significant period of absence. See INA § 236, 8 U.S.C. § 1226. An alien awaiting an exclusion hearing may be detained or released on parole by the INS pending a final decision in his case. For discussions of (and cases relating to) detention in exclusion cases, see T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 293-314 (1985); Helton, The Legality of Detaining Refugees in The United States, 14 N.Y.U. REV. OF L. & SOC. CHANGE 353 (1986); and Levy, Detention in the Asylum Context, 44 U. PITT. L. REV. 297 (1983). For a general discussion of the procedural features of INS custody determinations in exclusion cases, see Verkuil, A Study of Immigration Procedures, 31 UCLA L. REV. 1141, 1175-78 (1984).


14. Regarding the authority of the INS and immigration judges to set bonds, see supra notes 5 & 7.

15. 8 C.F.R. § 242.2(b) (1986). For a recent description of the Board of Immigration Appeals (BIA) and a critical examination of the allocation of cases for administrative review between the BIA and the Administrative Appeals Unit (a body within the INS), see Legomsky, Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process, 71 IOWA L. REV. 1297 (1986).

After all administrative review is exhausted, that is, a decision has been made by the BIA, a habeas corpus action may be brought in federal district court. INA § 242(a), 8 U.S.C. § 1252(a). Regarding this review, the INA provides:

Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

INA § 242(a), 8 U.S.C. § 1252(a). Under this standard, it has been held that a determination regarding bail will “be overturned only on a showing of clear abuse.” Carlson v.
occupy a potentially important position in bail administration, no in-depth examination of their role in the bail process exists.

No empirical data are available on such basic questions as: How frequently does the commencement of deportation proceedings involve INS arrest of aliens and imposition of a money bond? To what extent does the INS bail decision trigger a demand by aliens for a bond redetermination hearing? How often do immigration judges raise, lower or leave unchanged the bond imposed by the INS? What are the consequences of immigration judges' decisions for aliens' continued detention or release? And what are the consequences of bail decisions for rates of failure to appear in court for a deportation hearing and rates of failure to depart the country voluntarily? This study is an effort to begin to answer these questions based on data from one jurisdiction: Chicago. Those empirical data are then used


16. Until recently, immigration judges were part of the Department of Justice's INS, the body charged with the enforcement of immigration laws. This organizational arrangement provoked a great deal of criticism. Serious concerns existed about the independence of immigration judges subject to the budgetary and administrative control of District Directors responsible for the investigation and prosecution of cases that immigration judges later were called upon to adjudicate. Levinson, A Specialized Court for Immigration Hearings and Appeals, 53 Notre Dame Law. 644, 645-47 (1981); Roberts, Proposed: A Specialized Statutory Immigration Court, 18 San Diego L. Rev. 1, 7-11 (1980). In early 1983, responsibility for immigration judges was removed from the INS, and shifted to a newly created body within the Department of Justice called the Executive Office for Immigration Review (EOIR). 8 C.F.R. § 3.0 (1986). This new entity is the parent organization of both the Office of the Chief Immigration Judge, which is responsible for the general supervision of immigration judges, as well as the BIA, a five-member administrative appellate review body. 8 C.F.R. § 3.0, 3.1 (1986). The EOIR operates under the supervision of the Deputy Attorney General. The United States Government Manual 1984/85 357 (Office of the Federal Register, National Archives and Records Service, General Services Administration). Immediate supervision of both the Office of the Chief Immigration Judge and the BIA is by the Director of EOIR, 8 C.F.R. § 3.0 (1986), who is currently also the Chairman of the BIA.

17. The Chicago Office of the EOIR, see supra note 16, is among the largest and busiest offices in the country. At the time of the study, the office was the third largest court with 6 of the nation's 57 immigration judges located in the base city of Chicago. (The Chicago Office now has 7 immigration judges and nationwide there are 60 judges.) Of the 64 cities and facilities served by immigration judges, the Chicago Office ranks eighth in the number of new deportation cases received annually, making it one of the larger offices in the country for processing aliens. In 1985 it received about 2600 new deportation cases — 4% of all new cases received nationwide by EOIR (figures calculated from data contained in a letter to the author from the Chief Immigration Judge, see supra note 11). In addition to hearing cases in Chicago, the immigration judges are detailed on a regular basis to hear cases in Cincinnati, Kansas City, Milwaukee, Omaha, St. Louis, and St. Paul.

The immigration judges studied were located in Chicago, a large urban community in the interior of the United States. Immigration law enforcement in the interior of the country is quite different than along its borders, particularly in its methods of enforcement and level of apprehensions. Border enforcement by Border Patrol Agents typically involves borderline watch activities and traffic observation, while interior enforcement by investigators involves area control surveys of businesses, identification of fraudulent efforts to obtain benefits, and investigations of smuggling, counterfeiting and marriage fraud rings. The level of apprehensions produced by these enforcement activities is quite
to evaluate various proposals which have been made for reform in this area.

**DATA ON IMMIGRATION SERVICE BAIL DECISIONS AND REDETERMINATIONS BY IMMIGRATION JUDGES**

*Immigration Bail Administration in Perspective*

Before turning to a discussion of the study and its findings, it is useful to briefly describe the overall processing of suspected deportable aliens, the place of bonds in deportation proceedings, and the existing standards for bail decisionmaking.

Immigration law enforcement frequently involves INS arrest without a warrant of suspected deportable aliens. In the Chicago jurisdiction, for instance, most aliens are arrested without a warrant by the INS at their place of employment. Although the methods by
which the INS makes these apprehensions are beyond the scope of the study, it is worth noting that these arrests are a result of systematic INS operations, or surveys as they are sometimes called.19

Following the arrest of a suspected deportable alien, the alien is transported to an INS facility for processing. Normally only two choices are available to the alien: to immediately voluntarily return to their country,20 or to request a deportation hearing.21

If an alien chooses to have a deportation hearing — and in the jurisdiction studied it seems increasingly aliens are exercising their

---

19. These operations involve the identification of a company as hiring illegal aliens, a visit by the INS to obtain the cooperation of the company, a subsequent raid of the workplace by investigators (with or without a warrant depending on whether the company’s cooperation was obtained), the questioning of workers and the arrest of suspected deportable aliens who are then taken into INS custody for processing.

Alternatively, some cases come to the attention of the INS for processing after appearing on their own (walk-ins or call-ins) to request a deportation hearing. For instance, some aliens who have resided in the country for seven or more years approach the INS and request to be placed under deportation proceedings in order to apply for suspension of deportation. See INA § 244, 8 U.S.C. § 1254. In other cases, aliens request a deportation hearing after the District Director has denied their petition requesting, for instance, adjustment of status. See INA § 245, 8 U.S.C. § 1255. Commonly in these cases the INS does not arrest the alien and take them into custody for processing. The fact that the alien came to the INS requesting relief, a benefit or review generally suggests to the INS that they are less likely to flee. Instead of being arrested and a bond imposed, these aliens are interviewed by an INS employee and told that deportation proceedings will be initiated by an order to show cause that will be mailed to them (a mail OSC).

20. Procedures for the removal of aliens without issuance of a warrant of arrest and a finding of deportability are provided by INA § 242(b), 8 U.S.C. § 1252(b). Removals prior to the commencement of deportation proceedings are sometimes referred to by INS employees and others as “voluntary returns.” I have used this terminology to distinguish these cases from cases in which after commencement of deportation proceedings, an alien is found deportable but permitted by the immigration judge to depart the country voluntarily. These latter cases are called “voluntary departure” cases.

Nationwide the number of individuals agreeing to accept voluntary return has declined. Senate Subcomm. Budget and Oversight Hearing — FY1986, supra note 11, at 18. In Chicago, INS data indicate a sharp decline in recent years in the number of voluntary returns in apprehended cases. For a discussion of the sources of data for the table below and Table 1 in the text, see infra note 39.
### Rate of Pre-Court Voluntary Returns Versus Initiation of Immigration Court Proceedings — Chicago District (Apprehended Cases Only—Excludes Walkins/Mail Order to Show Causes)

<table>
<thead>
<tr>
<th></th>
<th>(a) Court Proceedings Initiated (Order to Show Cause Issued)</th>
<th>(b) Voluntary Return Under Safeguards (Effective Voluntary Departure Immediately I-274's)</th>
<th>(c) Extended Voluntary Departure (I-210's)</th>
<th>(d) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>October-December 1981</td>
<td>730</td>
<td>46.0</td>
<td>825</td>
<td>52.0</td>
</tr>
<tr>
<td>January-March 1982</td>
<td>602</td>
<td>35.7</td>
<td>1071</td>
<td>63.5</td>
</tr>
<tr>
<td>April-June 1982</td>
<td>1043</td>
<td>42.2</td>
<td>1410</td>
<td>57.1</td>
</tr>
<tr>
<td>July-September 1982</td>
<td>520</td>
<td>32.0</td>
<td>1093</td>
<td>67.2</td>
</tr>
<tr>
<td>October-December 1982</td>
<td>490</td>
<td>38.4</td>
<td>784</td>
<td>61.6</td>
</tr>
<tr>
<td>January-March 1983</td>
<td>698</td>
<td>45.7</td>
<td>822</td>
<td>53.9</td>
</tr>
<tr>
<td>April-June 1983</td>
<td>964</td>
<td>46.6</td>
<td>1090</td>
<td>53.4</td>
</tr>
<tr>
<td>July-September 1983</td>
<td>706</td>
<td>35.1</td>
<td>1272</td>
<td>64.9</td>
</tr>
<tr>
<td>October-December 1983</td>
<td>355</td>
<td>54.5</td>
<td>277</td>
<td>45.5</td>
</tr>
<tr>
<td>January-March 1984</td>
<td>433</td>
<td>70.6</td>
<td>141</td>
<td>29.4</td>
</tr>
<tr>
<td>April-June 1984</td>
<td>580</td>
<td>71.5</td>
<td>179</td>
<td>28.5</td>
</tr>
<tr>
<td>July-September 1984</td>
<td>559</td>
<td>72.6</td>
<td>167</td>
<td>27.4</td>
</tr>
<tr>
<td>October-December 1984</td>
<td>331</td>
<td>64.0</td>
<td>137</td>
<td>36.0</td>
</tr>
</tbody>
</table>

**SOURCES:** Data for 1981, 1982 and January-June 1983 calculated from INS Chicago District Report of Field Operations, G23.20 forms. Data for July 1983-December 1984 calculated from INS Chicago District Investigation Division: (a) Logs of Anti-smuggling Unit and Criminal Investigation’s Unit III, (b) I-213 forms (“Record of Deportable Alien” Forms) of Criminal Investigation’s Unit I and, (c) Supervisory estimates of Criminal Investigation’s Unit II (1-2 orders to show cause monthly).

As indicated in the above table, approximately 27% of the apprehended aliens returned voluntarily in the last quarter of 1984. This is in sharp contrast to the substantially higher proportion of voluntary returns in the last quarter of 1981 and 1982, 52% and 61%, respectively.

One reason for the recent decline in the proportion of aliens returning voluntarily may be various legislation that has been proposed over the last few years, for example, the Simpson-Mazzoli Immigration Reform and Control Act debated in the 98th Congress. An alien voluntarily leaving the country would not be eligible for the amnesty provisions of various proposed bills, assuming he had not otherwise recently entered the country. Other reasons for the decline in voluntary returns may be the increased role of community groups, lawyers, and legal service organizations in informing aliens of their rights.

The current decline in voluntary returns may also reflect changes in the composition of apprehended aliens. In July 1983, new investigative priorities in interior enforcement were introduced throughout the INS through a case management system. The effects of the INS shift from “quantity to quality” investigative activity can be seen beginning with the last quarter of 1983. The general result in the change in law enforcement has been a significant decline in the numbers of apprehended aliens. However, another result in the shift in law enforcement may be the apprehension of proportionately more aliens with greater equities — that is, aliens more likely to benefit from a deportation hearing. It is
right to a hearing rather than voluntarily returning home\textsuperscript{22} — the INS commences deportation proceedings by issuing an order to show cause why the alien should not be deported.\textsuperscript{23} In conjunction with the order to show cause, a warrant of arrest\textsuperscript{24} is issued by the INS and a decision made as to whether detention or release is indicated.\textsuperscript{25} In Chicago, at the time of the study, ordinarily the custody and bail decision was made by the Assistant District Director for Investigations.\textsuperscript{26} Typically, a money bond is set or the alien released on a

possible that operations against businesses employing aliens, particularly businesses employing aliens at higher pay levels, on the whole result in the apprehension of aliens who have been in the country longer (and have more equities) than, for instance, a group of aliens apprehended as a result of street questioning. The latter group may be a somewhat different population of aliens containing, for instance, proportionately more recent arrivals to the United States. Second, another explanation for the decline in voluntary returns may be an increase in INS apprehension of aliens other than Mexicans. These aliens are generally thought less likely than Mexicans to agree to voluntarily return to their country, and more likely to demand a deportation hearing.

21. INA § 242(b), 8 U.S.C. § 1252. See Verkuil, \textit{supra} note 12, at 1168-69 for a discussion of the fundamental procedural features of deportation proceedings. A third alternative, extended voluntary departure, or the withholding of enforced departure for a limited period of time, is currently available to only a few nationalities, including persons from Afgan, Uganda, Ethiopia, and Poland. Grants of extended voluntary departure to a nationality are made by the Attorney General usually with the advice of the Secretary of State. \textit{Immigration and Naturalization Service Budget Authorization — Fiscal Year 1986: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 142} (1985) (INS response to supplemental questions submitted by the Subcommittee) [hereinafter \textit{House Subcomm. Budget Hearings — FY1986}].

24. INA § 242(a), 8 U.S.C. § 1252(a); 8 C.F.R. § 242.2(a) (1986).
25. 8 C.F.R. § 242.2(a) (1986).
26. \textit{See supra} note 5 for a discussion of the delegation of the Attorney General’s authority to delegate custody and bond determinations to various INS officials.

The discretion delegated to INS officials is broad. The development of guidelines or standards for bail decisions has been largely left to each local INS district. These local guidelines or standards are not published, or generally made available. Little in the way of additional formal INS guidelines exist to constrain custody and bail decisionmaking discretion.

Considerable differences in local INS district average bonds are reported to exist. See E. HARWOOD, IN \textit{LIBERTY’S SHADOW} 120-21 (1986) (reporting that “there can be considerable variations in the average bond from district to district because of the service’s need to keep resources in equilibrium with caseloads”). In Bruce Beaudin’s INS-commissioned study of bail administration, he concluded that there was no servicewide pattern to the setting of bonds and that each District seemed to have its own standards. Beaudin, \textit{supra} note 12, at 16, 20-22. Although indicating that the lack of uniformity among Districts may be good for some reasons (presumably to fit the particular needs of a jurisdiction), Beaudin suggested that currently there are no statistical data to justify the various different bond amounts customarily set by different Districts. As Beaudin observed:

In some places, once a decision has been reached that a bond should be requested there is an “assumption" that it should begin at $2000. In others $500 or $1000 marks the norm. Factors are then weighed as negatives or positives against the norm. The real flaw in the process is that no one is able to explain why $500, $1000, $2000 or even $5000 should be the norm. Thus, depending on the prior experiences of District Directors, Assistant District Directors, and others permitted to set bond, and depending upon the types of respondents,
recognizance bond rather than the alien being detained in custody without bond during the pendency of his deportation proceedings. These immigration bonds serve a dual purpose: they ensure that an alien will appear in court during the pendency of his deportation proceedings, and that he will surrender himself for deportation, if that is ordered.

To safeguard an alien against any unnecessary or arbitrary confinement by the INS, a two-tiered administrative review procedure exists. Specifically, regulations provide that while the INS may initially determine whether to detain or release an alien and the amount of bail to set, any time before an order of deportation becomes final, the alien may apply to an immigration judge for a redetermination of this decision. The determination of the immigration judge as to custody status or conditions of the bond “may be based upon any information which is available to the judge or which is presented to him by the alien or the Service.” At the conclusion of the bond redetermination hearing, if either the alien or the government is dissatisfied with the judge’s decision, they may appeal to the BIA. In addition, the exercise of discretion is also subject to lim-

bonds can be set at any amount. Two people with virtually identical circumstances may have Own Recognizance or $2000 depending upon the place of apprehension . . . . There are few statistics—present or past—that demonstrate, even on a “hunch” basis, that one amount is more or less successful than another . . . . Unfortunately, the data that might best assist in developing a rationale for bond recommendations has not been systematically analyzed. Id. at 21-22 (emphasis added). Beaudin concluded that the real concern was not that there were no written standards, for indeed there were many, but rather that there was no servicewide “consistent policy represented by a single written standard or set of standards.” Id. at 26. Several examples of District bond criteria and guidelines appear in Appendix E of his report.

27. See supra note 17 and text accompanying Table 2 for a discussion of the Chicago District Office’s custody and bond determinations. See 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure, § 5.4a (1985) (suggesting that generally those arrested are seldom denied bail). The authors also briefly describe the standards for denial of bail. Id. § 8.16.

28. In re Kwun, 13 I. & N. Dec. 457, 460 (BIA 1969) (the INS’s power “was designed for use, where needed, to make the alien available for hearing and, if ordered, for deportation”). In re L—, 3 I. & N. Dec. 862, 863 (Comm. 1950) (“Delivery bonds are exacted to insure that aliens will be produced when required by this Service for hearings or deportation.”). In re Arbelaez-Naranjo, Interim Dec. No. 2942 (Reg. Comm. 1983) (same); see 2 C. Gordon & H. Rosenfield, supra note 27, § 10.8a(13) app. (reproducing the immigration bond form).

29. See supra note 7.

30. 8 C.F.R. 242.2(b) (1986).

31. Id.
To protect aliens against unnecessary confinement, broad standards for bail decisionmaking have been articulated by the BIA. These standards are binding on both the INS and immigration judges. Generally, in determining the necessity for, and the amount of bail to require, several factors are considered relevant. These include: employment history; length of residence in the community; existence of family ties; record of nonappearance at court proceedings; and a history of criminal and immigration law violations.

One of the more significant cases articulating standards for immigration bail administration in deportation cases is In re Patel, decided by the BIA a decade ago. The most important feature of Patel is the basic premise that release without conditions of bond should be the normal method of release rather than the exceptional procedure. The case states: "[a]n alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk . . . ." Because few cases involve national security issues, the determination in most cases focuses on whether an alien is a "poor bail risk."

**Frequency of Arrest and Imposition of Bond**

To determine the characteristics of bail administration in the jurisdiction studied, a sample of 31% of the aliens arrested and placed under deportation proceedings during April-May, 1983 was identified. Contrary to some published reports, the importance of arrest

---

32. *See supra* note 15.
33. *Decisions of the Board as precedents.* Except as they may be modified or overruled by the Board or the Attorney General, decisions of the Board shall be binding on all officers and employees of the Service or Special Inquiry Officers in the administration of the Act, and selected decisions designated by the Board shall serve as precedents in all proceedings involving the same issue or issues.
8 C.F.R. § 3.1(g) (1986).
36. *Id.* at 666.
37. A sample from the months of April and May, 1983, was used because the cases were relatively recent when the study began in early 1984. Nevertheless, the cases had been in the court system long enough to receive some initial processing such as a bond redetermination hearing and initial court appearance. I also wanted a sample of cases initiated after the EOIR was created in February, 1983. Examination of INS official statistics for fiscal year 1983 (INS Chicago District Report of Field Operations, G23.20 forms) indicated these two months were not unusual, in the sense that the INS hadn't initiated a massive apprehension program in the period (as it had in April 1982), which might have affected the processing of cases.

It should be noted that the overall number of cases in the study, including both this sample of cases and others described in this Article, were an outgrowth of discussions at the inception of the project with the Chief Immigration Judge of the EOIR. It was
and custody determinations in deportation proceedings is not limited

greed that the study would involve use of approximately 500 case files. Given that this is
a study of a single jurisdiction using a small sample size, the study's conclusions must be
regarded as tentative.

In order to identify a sample of cases placed under deportation proceedings, I used the
I-213 “Record of Deportable Alien” forms of the INS Chicago District Office’s Criminal
Investigation’s Units I and III. At the time of the research, the Chicago Office of EOIR
had no way to determine readily which cases entered the court system in a given month.
Copies of the I-213 forms were kept by the INS units in folders or notebooks. The I-
213’s were organized by the month in which the order to show cause and the I-213 for
the alien were prepared. The sample of cases does not include data from INS Criminal
Investigations Unit II which investigated major fraud cases and at the most only issued
one or two order to show causes a month. The sample also does not include antismug-
gling cases where a full set of I-213’s for the period studied were not located. Because of
the exclusion of antismuggling cases from the sample, I believe Table 2 in the text
slightly underestimates the number of recognizance bonds issued by the INS. Generally
in antismuggling cases, the INS uses recognizance bonds when an alien is expected to be
a U.S. government witness in federal prosecution of a smuggler. It may be noted that
several researchers have utilized I-213 forms in other research including Jones, Changing
Patterns of Undocumented Mexican Migration to South Texas, 65 Soc. Sci. Q. 465, 468

The I-213 “Record of Deportable Alien” form is a one page form filled out by an INS
investigator for each alien placed under deportation proceedings. This one-page form
contains various information including the time, place and manner of the alien’s entry
into the United States and date of apprehension. The form also contains a narrative
space in which the investigator gives any further details about the circumstances under
which the alien was located or apprehended and elements of the case that establish ad-
ministrative or criminal violations. In the Chicago District Office this space also was used
by the investigator to record his bond recommendation (a practice discontinued by the
office in 1984).

Using the INS official statistics (G23.20 forms) for fiscal year 1983, I was able to
locate about 68% of the I-213’s (377 forms) for aliens arrested and placed under depor-
tation proceedings in April (193 cases) and May (359 cases). No information is available
as to why some I-213 forms were missing — they may have been lost or placed in the
INS individual file for the alien. The missing I-213’s may have introduced some degree
of sampling error into the study. From the I-213’s I prepared a list of all aliens having an
order to show cause-warrent of arrest issued and the bond recommended by the investi-
gator. To conserve research resources, I chose every other case on the list, stratified by
the bond recommended by the investigator (for example, every other case receiving a
$2,000 bond, or recognizance bond, etc.). While not a truly random sample, the lack of
an arranged order to the I-213 forms in the April and May folders when the list of aliens
was prepared should have eliminated any potential source of sampling bias. The selection
of cases stratified on the basis of the investigator's recommended bond, however, intro-
duced some degree of sampling error into the study. It was only later when I examined
the order to show cause (OSC) in the immigration court’s files that I learned that investi-
gators’ recommended bonds were on the whole lower than those eventually given by the
Assistant District Director for Investigations. In most cases the bond set was about $500-
$1,000 higher than the investigator’s recommended bond. The distribution of cases rela-
tive to each other, however, was about the same. In only a few cases was there a dra-
matic change such as a recognizance bond given when a money bond had been

Finally, although a sample from the I-213’s of cases was drawn sufficient to equal one-
third of all aliens arrested and placed under deportation proceedings in April and May

359
to a small number of cases.\textsuperscript{88} The data for Chicago reported in Table 1\textsuperscript{39} indicate that two-thirds or more of the aliens involved in deportation proceedings in recent years were arrested\textsuperscript{40} and had either a money or recognizance bond imposed by the INS.\textsuperscript{41}

1983, some of these cases were later identified as involving aliens who “voluntarily returned” in lieu of a hearing, or who received a “mail OSC” rather than were arrested, or who were in exclusion rather than deportation proceedings. This resulted in the odd sample size of 31%.

To determine the characteristics of bail administration in the jurisdiction studied I examined immigration court files called “Records of Proceeding.” From this source I recorded information on the INS bond from the OSC contained in the files. To determine whether a bond redetermination hearing had been held, I examined the entire contents of each court file. If a bond hearing had been conducted, the file typically contained a one-page court form entitled “Order of the Immigration Judge with Respect to Custody.” On this form was recorded information about the immigration judge’s custody decision. Where the court’s file was missing or contained incomplete information, the INS file was utilized. Although the sample of cases initially consisted of 170 cases, for 13 cases (8% of the sample) no files from either source could be located or were immediately available. These missing cases were excluded from the analyses in this study.

38. IA C. GORDON & H. ROSENFIELD, supra note 27, § 5.4a (noting that the “importance of arrest in deportation proceedings has diminished” and that “[a]rrest is ordered in comparatively few of the deportation cases now being brought”).

39. In order to provide a picture of the proportion of deportation proceedings in the jurisdiction involving arrested aliens with a bond imposed (Table 1) it was necessary to use several sources of data including: official INS statistics, INS investigation unit logs, INS investigator “Record of Deportable Alien” forms, and INS supervisory estimates.

For 1981, 1982 and the first half of 1983, data for Table I were obtained from official INS statistics (Form G23.20). In late 1983 the INS changed their recordkeeping system. Because it was no longer possible to track the data using official statistics, I turned to the primary sources of the INS official statistics — the logs of the various investigation units (Anti-Smuggling Unit and Criminal Investigation’s Unit III). Where these logs were not maintained by a unit, I used their “Record of Deportable Alien” I-213 forms (Criminal Investigation’s Unit I) or supervisory estimates (Criminal Investigation’s Unit II).

When information from these sources indicated an order to show cause and warrant of arrest had been issued, the alien was classified as arrested. Where the information showed the alien was mailed an order to show cause (a mail OSC) or came into the INS on his own (a walk-in), the case was classified as not arrested. A very small number of the cases in the “not arrested” category are criminal cases where the alien was already in jail or prison when they received their order to show cause by mail. The INS places detainers on these cases and, ultimately, when the alien is released from the criminal system, the alien is taken into custody by the INS and a bond is set. Table 1 thus slightly understates the proportion of deportation hearings involving arrested aliens with a bond imposed. For a discussion of immigration detainers and their adverse effects on the treatment of alien inmates see, M. McShane, Immigration and the Alien Inmate: A Sociological Analysis (Apr. 11, 1985) (unpublished paper presented at the Annual Meeting of the Midwestern Sociological Association).

40. Regarding INS arrests with or without a warrant, see supra note 18.

41. Beginning in late 1983, Table 1 shows a marked decline in the proportion of deportation proceedings involving arrested aliens. I do not believe this reflects a shift in INS handling of apprehended aliens. In the jurisdiction studied, it has been a consistent policy of the INS that if an apprehended alien does not voluntarily return to his country, deportation proceedings are commenced with the issuance of an order to show cause and a warrant of arrest. I believe the decline in recent years in the proportion of deportation proceedings involving arrested aliens is largely an artifact of the overall decline in apprehensions by the INS. Beginning with the last quarter of 1983, the INS shifted from apprehensions derived largely from the street questioning of persons looking foreign or
TABLE 1

Proportion of Deportation Proceedings Involving Arrested Aliens and Imposition of a Money or Recognizance Bond

<table>
<thead>
<tr>
<th></th>
<th>Arrested(^a)</th>
<th>Not Arrested(^b)</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
<td>No.</td>
</tr>
<tr>
<td>October-December 1981</td>
<td>730</td>
<td>87.5</td>
<td>104</td>
</tr>
<tr>
<td>January-March 1982</td>
<td>602</td>
<td>83.4</td>
<td>120</td>
</tr>
<tr>
<td>April-June 1982</td>
<td>1043</td>
<td>87.5</td>
<td>149</td>
</tr>
<tr>
<td>July-September 1982</td>
<td>520</td>
<td>68.0</td>
<td>245</td>
</tr>
<tr>
<td>October-December 1982</td>
<td>490</td>
<td>87.7</td>
<td>69</td>
</tr>
<tr>
<td>January-March 1983</td>
<td>698</td>
<td>99.1</td>
<td>6</td>
</tr>
<tr>
<td>April-June 1983</td>
<td>964</td>
<td>89.0</td>
<td>119</td>
</tr>
<tr>
<td>July-September 1983</td>
<td>706</td>
<td>75.4</td>
<td>230</td>
</tr>
<tr>
<td>October-December 1983</td>
<td>355</td>
<td>63.4</td>
<td>205</td>
</tr>
<tr>
<td>January-March 1984</td>
<td>433</td>
<td>69.2</td>
<td>193</td>
</tr>
<tr>
<td>April-June 1984</td>
<td>580</td>
<td>70.6</td>
<td>241</td>
</tr>
<tr>
<td>July-September 1984</td>
<td>559</td>
<td>72.0</td>
<td>217</td>
</tr>
<tr>
<td>October-December 1984</td>
<td>331</td>
<td>65.5</td>
<td>174</td>
</tr>
</tbody>
</table>


a. Cases were classified as arrested if an order to show cause/warrant of arrest (OSC/WA) was issued in the case.

b. Cases were classified as not arrested if data indicated they had either come to the INS office on their own (a "Walk-in") or had been sent by mail an order to show cause (Mail OSC).

The extensive use of money bonds by the INS is reflected in Table 2 below. Data from the study indicate that 87% of the aliens arrested were required by the INS to post a money bond. In the remaining 13% of the cases, the aliens were released on their own recognizance. In no deportation case in the sample did the INS detain the alien without setting bond.

---

hispanic, to apprehensions stemming from operations directed against businesses thought to employ illegal aliens. The general result in the change in law enforcement has been a significant decline in the numbers apprehended. See generally table discussed supra note 20 (compare, for instance, total apprehensions for the last quarter of each year). It is this significant decline in numbers apprehended, I believe, that has led to the decline in the proportion of deportation proceedings involving arrested aliens.
TABLE 2
Bonds Set by the Immigration and Naturalization Service, April-May 1983, Chicago District Office

<table>
<thead>
<tr>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recognizance Bond</td>
<td>20 12.7</td>
</tr>
<tr>
<td>500 - 1,500</td>
<td>1 0.6</td>
</tr>
<tr>
<td>2,000 - 3,000</td>
<td>77 49.0</td>
</tr>
<tr>
<td>3,500 - 4,500</td>
<td>29 18.5</td>
</tr>
<tr>
<td>5,000 - 6,000</td>
<td>15 9.6</td>
</tr>
<tr>
<td>6,500 - 7,500</td>
<td>2 1.3</td>
</tr>
<tr>
<td>8,000 - 9,000</td>
<td>0 0.0</td>
</tr>
<tr>
<td>9,500 - 10,500</td>
<td>10 6.4</td>
</tr>
<tr>
<td>11,000 - 12,000</td>
<td>0 0.0</td>
</tr>
<tr>
<td>12,500 - 13,500</td>
<td>0 0.0</td>
</tr>
<tr>
<td>14,000 - 15,000</td>
<td>0 0.0</td>
</tr>
<tr>
<td>Over 15,000</td>
<td>3 1.9</td>
</tr>
<tr>
<td>TOTAL</td>
<td>157 100.0</td>
</tr>
</tbody>
</table>

SOURCE: Examination of the orders to show cause/warrants of arrest (OSC/WA) in the Executive Office for Immigration Review, Chicago Office's Records of Proceeding for 170 cases, a sample of 31% of the cases in which an OSC/WA was issued by INS area control, fraud and criminal investigation's units during April-May, 1983. For 13 cases no files were located.

The data in Table 2 also show the level of money bonds set by the INS. Fewer than 1% of all arrested aliens received bonds of $1500 or less. In 68% of the cases, bonds were set in the $2000 to $4500 range, and in 19% of the cases, bonds of $5000 or over were set. The median bail amount was $3000. In evaluating these figures, it is important to realize that the alien is required to furnish the full amount of the money bond; few commercial bail bonds are written in the jurisdiction. These money bonds and the median bail amount are therefore relatively high by criminal justice system standards.42

42. One source of comparison is Fleming's 1972 data on pretrial release for Detroit and Baltimore. R. FLEMING, PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE OF FELONY BAIL PROCESSES (1982). The study contains data on the disposition of approximately 1500 felony cases in each city. The data for Detroit show that 49% of the felony defendants were released on their own recognizance and the median cash bail was $2000. In Baltimore, 12% of the felony defendants received recognizance release and the median cash bail was $4650. Id. at 9, table 1.2. In comparison to the situation of most aliens in Chicago, in both Baltimore and Detroit (although to a declining extent) defendants were able to use the intercessions of bondsmen to obtain their release.
Frequency of Bond Redetermination Hearings

Immigration judges are frequently called upon by detained aliens to review INS bail decisions. As indicated by Figure 1, in those cases in which the INS set a money bond, 92% of the aliens were unable or unwilling to provide the determined bail amount. Only 8% posted bail and were released. Of those 126 aliens who remained in custody, 88% demanded a bond redetermination hearing. In the remaining 12% of the cases, the detained aliens simply decided to go ahead immediately with their deportation hearing without a bond redetermination. Overall, 71% of all arrested aliens had a bond redetermination hearing.

43. It is worth noting that of the 15 aliens who decided to forego a bond redetermination hearing, only 2, or 13%, were represented by counsel at the time of their decision. In comparison, of those aliens who requested a bond redetermination hearing, 79% were represented by a lawyer when the demand was made. See Table 6 infra p. 371 (84 of 107 aliens having a bond redetermination hearing were represented). There is another way to look at these data. That is to ask, what proportion of all unrepresented aliens versus represented aliens waive their right to a bond hearing? Thirty-six percent of the unrepresented aliens (13 of 36 unrepresented aliens) as compared to only 2% of the represented aliens (2 of 86 represented aliens) waived their right to a bond hearing. These statistics in themselves tell us nothing, but suggest the need for further research about the circumstances in which aliens forego a bond hearing. My observations of bond hearings, see infra text following note 52, revealed that some aliens who went immediately to a deportation hearing without a bond hearing were recently released from prison after serving time for a criminal conviction. These aliens may have concluded it was unlikely a judge would reduce their bond because of concerns about their fleeing where their deportation seemed inevitable because of their criminal conviction. However, my observations indicated that not all detained aliens who went immediately to a deportation hearing without a bond redetermination hearing had just been released from prison. In these cases, what difference, if any, would the presence of an attorney have made at the time of the decision to waive the hearing? Generally, how informed were these aliens of the purpose and nature of the proceeding? These questions need to be systematically examined in future research.

44. Out of a total of 157 arrested aliens, 111 had a bond redetermination hearing.
Figure 1. Bond and Disposition History of Arrested Aliens Placed under Deportation Proceedings during April-May, 1983

Source: Examination of the Records of Proceeding of the Chicago Office of the EOIR for 170 cases, a sample of 31% of the cases in which an order to show cause/warrant of arrest was issued during April-May, 1983. For 13 cases no files were located. Research conducted August, 1984.
Unfortunately, no data comparable to Figure 1 exist for other jurisdictions in the country. Some national data, however, were provided by the Executive Office for Immigration Review (EOIR)\textsuperscript{46} on the number of "new deportation receipts" and "bond receipts" received by immigration judges in various cities throughout the country.\textsuperscript{49} These data are useful in calculating the percentage of all new deportation cases entering various court systems that had a bond redetermination hearing.\textsuperscript{47} Table 3 displays a portion of the data, although grouped somewhat differently from the tables provided by EOIR.\textsuperscript{48}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
City & New Deportation Receipts & Bond Receipts & Bond Redetermination Hearings \\
\hline
Los Angeles & 500 & 200 & 100 \\
San Diego & 300 & 150 & 75 \\
New York & 200 & 100 & 50 \\
San Francisco & 100 & 50 & 25 \\
\hline
\end{tabular}
\caption{Data on deportation and bond receipts for various cities.}
\end{table}

\textsuperscript{45} See supra note 16.
\textsuperscript{46} See supra note 11.
\textsuperscript{47} These aggregate data, however, do not give us very refined information. For instance, they do not tell us in what proportion of new deportation cases the INS imposed a money bond, or how many aliens were detained after imposition of a money bond, or how frequently the INS money bonds were challenged by aliens.
\textsuperscript{48} The tables provided by the Chief Immigration Judge contained data on "new deportation receipts" and "bond receipts" for every base city, detail city and sub-office of the Office of the Chief Immigration Judge for fiscal years 1983, 1984, and 1985.

The data in Table 3 are largely base city data. When there was a sub-office that was a detention facility serving the catchment area of the base city (for example, the New York detention facility was the holding facility for aliens in custody from the New York City area), I grouped the sub-office and base city statistics together so that the statistics on the proportion of new deportation cases receiving a bond hearing reflected all cases in a jurisdiction.

Los Angeles and San Diego were grouped together since some cases counted as new receipts in Los Angeles initially received a bond hearing in San Diego and were counted in that city as bond receipts.

Laredo and San Antonio statistics were also grouped together. Laredo's new deportation receipts apparently pertained only to aliens receiving a deportation hearing while serving time for criminal offenses in county jail in Laredo. Statistics for all other new deportation receipts coming out of Laredo were merged by EOIR with San Antonio statistics. Some cases counted as new deportation receipts in San Antonio, however, initially received a bond hearing in Laredo and were counted as bond receipts in Laredo's statistics. As a result of the way statistics were kept by EOIR, for fiscal year 1985, Laredo showed twice as many bond hearings as new deportation receipts. Merging the Laredo and San Antonio statistics, however, tended to systematically deflate the combined rate of bond hearings in new deportation cases for these two cities, since aliens serving time for criminal offenses in county jail in Laredo, normally only receive a deportation hearing and not a bond hearing during their incarceration. For the interested reader, Laredo's new deportation receipts (that is, deportation hearings in incarcerated cases) for each fiscal year were as follows: FY1983 — 217 cases; FY1984 — 491 cases; FY1985 — 243 cases.

Washington and Norfolk data were merged for 1983 and 1984, since this was done by EOIR for 1985.
TABLE 3
Proportion of New Deportation Cases Receiving a Bond Hearing (National Data: Fiscal Years 1983-1985)

<table>
<thead>
<tr>
<th>Base City (and related suboffices)</th>
<th>FY 1983 ( ^a )</th>
<th>FY 1984</th>
<th>FY 1985</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta</td>
<td>75</td>
<td>6</td>
<td>8.0</td>
</tr>
<tr>
<td>Baltimore</td>
<td>345</td>
<td>49</td>
<td>14.2</td>
</tr>
<tr>
<td>Boston</td>
<td>918</td>
<td>67</td>
<td>7.3</td>
</tr>
<tr>
<td>Buffalo</td>
<td>305</td>
<td>42</td>
<td>13.8</td>
</tr>
<tr>
<td>Chicago</td>
<td>2841</td>
<td>1379</td>
<td>48.5</td>
</tr>
<tr>
<td>Dallas</td>
<td>1264</td>
<td>56</td>
<td>4.4</td>
</tr>
<tr>
<td>Denver</td>
<td>511</td>
<td>70</td>
<td>13.7</td>
</tr>
<tr>
<td>El Paso &amp; El Paso Camp</td>
<td>4479</td>
<td>1143</td>
<td>25.5</td>
</tr>
<tr>
<td>Harlingen (TX) &amp; Los Fresnos Facility</td>
<td>2251</td>
<td>1038</td>
<td>46.1</td>
</tr>
<tr>
<td>Houston &amp; Houston Center</td>
<td>879(^b)</td>
<td>35</td>
<td>4.0</td>
</tr>
<tr>
<td>Los Angeles &amp; San Diego &amp; El Centro Facility</td>
<td>7410</td>
<td>4123</td>
<td>55.6</td>
</tr>
<tr>
<td>Base City (and related suboffices)</td>
<td>FY 1983a</td>
<td>FY 1984</td>
<td>FY 1985</td>
</tr>
<tr>
<td>----------------------------------</td>
<td>---------</td>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td></td>
<td>No. New</td>
<td>No. Bond</td>
<td>%</td>
</tr>
<tr>
<td>Miami &amp; Krome Facility</td>
<td>1741</td>
<td>509</td>
<td>29.2</td>
</tr>
<tr>
<td>New York &amp; N.Y. Facility</td>
<td>2391</td>
<td>689</td>
<td>28.8</td>
</tr>
<tr>
<td>Newark</td>
<td>1066</td>
<td>232</td>
<td>21.8</td>
</tr>
<tr>
<td>Phoenix &amp; Florence Facility</td>
<td>1181e</td>
<td>187</td>
<td>15.8</td>
</tr>
<tr>
<td>Laredo &amp; San Antonio</td>
<td>1013</td>
<td>121</td>
<td>11.9</td>
</tr>
<tr>
<td>San Francisco</td>
<td>2998</td>
<td>1309</td>
<td>43.7</td>
</tr>
<tr>
<td>Seattle</td>
<td>718</td>
<td>112</td>
<td>15.6</td>
</tr>
<tr>
<td>TOTAL</td>
<td>32,766</td>
<td>11,266</td>
<td>34.4</td>
</tr>
</tbody>
</table>

**SOURCE:** Executive Office for Immigration Review, Office of the Chief Immigration Judge.

a. 7 month figure because the Executive Office for Immigration Review was not created until February, 1983.

b. Figure includes only Houston data, Houston Center detention facility not in existence.

c. Figure includes only Phoenix data, Florence detention facility not in existence.
The data for fiscal year 1985 indicate substantial differences among jurisdictions — ranging from bond redetermination hearings occurring in 2% of all deportation cases (in Harlingen, Texas) to 58% of the cases (in Chicago). Although the overall rate of bond hearings ranges widely across the country, with Chicago having the highest rate, there are several cities that also had a high proportion of bond hearings in fiscal year 1985 including Boston (39%); Houston and Houston Center combined (34%); Los Angeles and San Diego combined (46%); and Laredo and San Antonio combined (46%).

49. The high proportion of bond hearings in these jurisdictions, even when all deportation cases including those in which the INS never set a bond are grouped together, suggests the possibility that something similar to the situation in Chicago (the high rate of immigration judge review of INS money bonds) may exist elsewhere. This possibility is suggested even more strongly by portions of the data provided by EOIR. For several areas of the country EOIR keeps statistics separately for bond receipts received by a city's base office and those received by a related sub-office, that is, detention facility in the area. This is true for the following areas: El Paso, Harlingen, Houston, Los Angeles, and San Diego, Miami, New York, and Phoenix. The table below shows the statistics separately for each base office and related sub-office.

<table>
<thead>
<tr>
<th>FY 1985</th>
<th>No. New Deportation Receipts</th>
<th>No. Bond Receipts</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>El Paso</td>
<td>2720</td>
<td>82</td>
<td>3.0</td>
</tr>
<tr>
<td>El Paso Camp</td>
<td>5075</td>
<td>1823</td>
<td>35.9</td>
</tr>
<tr>
<td>Harlingen (TX)</td>
<td>1668</td>
<td>2</td>
<td>0.1</td>
</tr>
<tr>
<td>Los Fresnos Facility</td>
<td>6980</td>
<td>126</td>
<td>1.8</td>
</tr>
<tr>
<td>Houston</td>
<td>1143</td>
<td>18</td>
<td>1.6</td>
</tr>
<tr>
<td>Houston Center</td>
<td>2029</td>
<td>1084</td>
<td>53.4</td>
</tr>
<tr>
<td>Los Angeles &amp; San Diego</td>
<td>7568</td>
<td>3887</td>
<td>51.4</td>
</tr>
<tr>
<td>El Centro Facility</td>
<td>9767</td>
<td>4163</td>
<td>42.6</td>
</tr>
<tr>
<td>Miami</td>
<td>1619</td>
<td>19</td>
<td>1.2</td>
</tr>
<tr>
<td>Krome Facility</td>
<td>1867</td>
<td>773</td>
<td>41.4</td>
</tr>
<tr>
<td>New York</td>
<td>2710</td>
<td>43</td>
<td>1.6</td>
</tr>
<tr>
<td>New York Facility</td>
<td>1306</td>
<td>811</td>
<td>62.1</td>
</tr>
<tr>
<td>Phoenix</td>
<td>1063</td>
<td>394</td>
<td>37.1</td>
</tr>
<tr>
<td>Florence Facility</td>
<td>1810</td>
<td>319</td>
<td>17.6</td>
</tr>
</tbody>
</table>

The statistics suggest, for instance, striking similarities between Houston and Chicago — that is, frequent use of money bonds and high rates of bond redetermination hearings are common to both cities. More specifically, in the Houston area, there were 3172 new deportation receipts in fiscal year 1985. Sixty-four percent of the deportation receipts were received by the Houston detention facility — presumably receipts for aliens in custody. This suggests that about two-thirds of the aliens placed under deportation proceedings in Houston were arrested by the INS and had a money bond imposed. Bond hearings occurred in over half (53%) of the new deportation cases received by the detention facility. These statistical data simply suggest the situation that may exist in the jurisdiction. Obviously, further research is needed in order to understand how various jurisdictions may be similar to or different from Chicago.
Frequency, Direction, Size, and Consequences of Bail Modifications

Immigration judges play an extremely active role in reviewing INS bail decisions as shown in Table 4.

Table 4

<table>
<thead>
<tr>
<th>Requests for a Hearing as a Percent of Detainees (N=126)</th>
<th>Modifications as a Percent of Hearings Held (N=111)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No request for bond hearing</td>
<td>11.9</td>
</tr>
<tr>
<td>Request for bond hearing</td>
<td>88.1</td>
</tr>
<tr>
<td>No modification</td>
<td>5.4</td>
</tr>
<tr>
<td>Bond increased</td>
<td>0.0</td>
</tr>
<tr>
<td>Bond decreased</td>
<td>94.6</td>
</tr>
</tbody>
</table>

TOTAL 100.0  100.0

SOURCE: See Figure 1.

Twelve percent of the aliens who failed to post bail to cover the bail amount set by the INS decided not to request a bond redetermination hearing. Of the 88% who did ask for a hearing, virtually all received a decrease in the bail amount required — only 5% left the hearing with no bail reduction. There was no case in the sample where the bail amount was increased by an immigration judge, although discussions with judges indicate that this occasionally occurs.

One way to compare immigration judges' bonds to those of the INS is to examine the frequency of recognizance bonds and the overall levels of money bonds after bond redetermination hearings. It must be noted, however, that immigration judges are reviewing the cases of aliens not already released on a recognizance or money bond by the INS.
Table 5

Bonds Set by Immigration Judges after a Bond Redetermination Hearing, April-May 1983, Executive Office for Immigration Review, Chicago Office

<table>
<thead>
<tr>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recognizance Bond</td>
<td>18</td>
</tr>
<tr>
<td>500-1,500</td>
<td>60</td>
</tr>
<tr>
<td>2,000-3,000</td>
<td>27</td>
</tr>
<tr>
<td>3,500-4,500</td>
<td>4</td>
</tr>
<tr>
<td>5,000-6,000</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>111</td>
</tr>
</tbody>
</table>

SOURCE: See Figure 1.

As Table 5 indicates, 84% of the aliens having a bond redetermination hearing were required to post a money bond while 16% were released on their own recognizance. Basically, immigration judges about doubled the number of aliens released on recognizance bonds. After the INS released 20 aliens on their own recognizance, immigration judges released 18 more individuals. Immigration judges’ money bonds were also considerably lower than INS bonds. For instance, 54% of the aliens were given bonds of $1500 or less by immigration judges, as compared to fewer than 1% of the aliens whose cases were considered by the INS (see Table 2). Looking at the other end of the bond range, in only about 2% of the cases they heard did immigration judges set bonds of $5000 or higher, as compared to 19% of the cases considered by the INS. The median bail amount for bonds set by immigration judges was $1000 — this amount is $2000 lower than the median bail amount set by the INS.

Another way to look at immigration judges’ bonds is to examine the overall extent to which INS bail amounts were reduced by immigration judges. An examination of all cases in which there was a bond redetermination hearing indicates that the hearing results in an average reduction of over two-thirds (68%) of the original INS bond. Table 6 gives the detailed picture of the overall percent reduction by immigration judges for the various bonds initially set by

50. Nineteen aliens received a $500 bond; 26 received a $1000 bond; 15 received a $1500 bond; 12 received a $2000 bond; 12 received a $2500 bond; 3 received a $3000 bond; 1 received a $3500 bond; 3 received a $4000 bond and 2 received a $5000 bond.

51. A recent publication of the National Lawyers Guild reports a similar large reduction of INS bonds by immigration judges. Based on their information, they suggest that immigration judges generally reduce bonds by an average of 50% in nonaggravated cases. NATIONAL LAWYERS GUILD, BOND PRACTICE MANUAL 16 (National Immigration Law Project 1986).
the INS.

Table 6
Average Size of Immigration Judge Reduction of INS Bonds in All Represented and Unrepresented Cases

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Represented</th>
<th>Unrepresented</th>
<th>Total Cases*</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percent Reduction</td>
<td>Percent Reduction</td>
<td>Percent Reduction</td>
</tr>
<tr>
<td>500 - 1,500</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2,000 - 3,000</td>
<td>49</td>
<td>12</td>
<td>61</td>
</tr>
<tr>
<td>3,500 - 4,500</td>
<td>17</td>
<td>6</td>
<td>23</td>
</tr>
<tr>
<td>5,000 - 6,000</td>
<td>9</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>6,500 - 7,500</td>
<td>0</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>8,000 - 9,000</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>9,500 - 10,500</td>
<td>7</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Over 15,000</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

SOURCE: See Figure 1.

*Excludes 4 cases with no information on type of representation.

Average reduction in represented cases ...................... 70.4%
Average reduction in unrepresented cases .................... 57.1%
Average reduction all cases ................................ 67.6%

Note: In this analysis, the calculation of the average size of immigration judges’ bail reductions includes all cases having a bond hearing—$0 values were assigned to cases where bonds were not modified by immigration judges.

Immigration judges’ frequent and substantial modification of INS bonds is particularly notable given that the cases reviewed by immigration judges were not a set of “borderline” cases. The INS imposes a money bond in the vast majority of arrest cases, and 81% of these aliens demand a bond redetermination hearing. Given the large proportion of aliens demanding a hearing, the substantial disparity between immigration judge and INS decisions is not plausibly explained as due to differences of judgment (or differences in subjective interpretation of the evidence) in a small set of “close” cases.52

An important fact about bond redetermination hearings is that the

---

52. A discussion of the possible factors creating this decisional disparity between immigration judges and the INS will appear in a future article by the author.
disposition pattern suggested by the data in this study — frequent and substantial reduction of INS bonds — is a continuing one. The data in Table 6 are for cases entering the system in mid-1983. Observations of 183 bond redetermination hearings during the period from October 1983 through November 1984 indicated fairly similar bond levels set by the INS and a similar disposition pattern by immigration judges. Viewed a little differently, this pattern suggests that while immigration judges’ bail decisions alter the bonds in the individual cases decided, their decisions appear to have little influence on INS bail decisions in subsequent cases.

Concerning the consequences of bond redetermination hearings, as shown in Figure 1, immigration judges released 90% of the aliens in custody who requested a bond redetermination hearing or 100 of the 111 aliens. In fact, over three times more aliens were released by immigration judges than by the INS. More specifically, 100 aliens were released after a bond redetermination hearing as compared to the initial 31 aliens released — 20 recognizance and 11 money bonds — after the INS set bond.

Finally, the INS has a theoretical right to appeal these bond redeterminations by immigration judges to the BIA. However, the BIA’s role in review of custody and bond determinations, and presumably any subsequent judicial review by the federal courts as well, appears to be extremely limited. Although in 7% of the cases in the case file study the government reserved appeal at the close of the bond redetermination hearing, in no case was an appeal actually taken.

53. In the jurisdiction studied, the termination of most bond disputes at the immigration judge level diminishes any prospect (however useful) that immigration law’s administrative and judicial review structure might be an avenue for intervention in this area. Given the low rate of appeal from immigration judges’ orders, such review forums have had little opportunity to recognize or to address the present situation. No data are available on the rate of appeal of bond cases for other jurisdictions than the one studied. However, it may be noted that nationwide bond cases account for a very small percentage of the BIA’s caseload — only 6% of all appeals (185 cases) for fiscal year 1984. Legomsky, supra note 15, at 1401 app.

Of course, there is no guarantee that this bail administration problem would be addressed through more frequent appeals to the BIA, or federal courts for that matter. One difficulty is recognition by these bodies that the relatively few cases appealed represent more than simply isolated problems. Another difficulty, though, is the sometime reluctance of such institutions to deal with patterns, even when clearly recognizable. See generally Allen, A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review, 70 IOWA L. REV. 311, 333-36 (1985) (notes a pattern of prosecutorial excesses and a reluctance of reviewing courts to deal with serious intentional prosecutorial misconduct by reversing the conviction). In general, infrequent appeal in bail cases has made the legal, administrative, and policy implications of custody determinations by the INS and immigration judges difficult to discern and oversee.

54. In 8% of the cases in the case file study the alien reserved appeal and in one case an appeal was filed. Legomsky, supra note 15, at 1401 app.

372
THE CONSEQUENCES OF BAIL DECISIONS: THE RATE OF FAILURE TO APPEAR AND FAILURE TO DEPART

The pattern of immigration bail administration that emerges from the foregoing data is striking — imposition of money bonds by the INS at levels which result in continued detention of aliens in most cases; frequent demands by aliens for bond redetermination hearings; and numerous and substantial reductions of INS bonds by immigration judges. Clearly, there exists a fundamental difference over the use and appropriate level of bail in immigration cases. At stake in this conflict are some basic values and objectives of the law enforcement process.55

On the one hand, immigration judges' frequent and substantial reduction of INS bonds potentially undermines a critical tool of immigration law enforcement. Without bonds set at appropriate levels, aliens may avoid deportation by fleeing and evading their deportation hearing, or by failing to leave the country after agreeing to voluntarily do so. By requiring investigative efforts to locate abscondees, these consequences tax the limited resources of the INS and further add to its existing administrative overload. In addition, when INS impotence in enforcing immigration laws becomes apparent to aliens, it can result in a loss of enforcement credibility that can fuel widespread noncompliance.

On the other hand, if bonds are set at unnecessarily high levels — that is, the alien could be safely released on a lower money or a recognizance bond — the liberty of individuals is abrogated by inappropriate detention. Further, a practice of requiring aliens to post high money bonds can impose a tremendous financial burden on the public which must bear the cost of the detention of aliens.56 In addition, the current bonds set by the INS, resulting in a large number of redetermination hearings, precipitate a substantial use of immigration judges' limited resources.57

Obvious questions arise: Are the INS bonds necessary to run an effective enforcement program? Do immigration judges play an im-

55. In a future article, I shall explore the differing institutional cultures of the INS and the court that shape the decision disparity described in this Article. For a general discussion of the competing value systems found in the operation of the criminal justice process (which are quite similar to the conflicting claims found in immigration bail administration), see H. Packer, THE LIMITS OF THE CRIMINAL SANCTION 149-73 (1968).
56. See infra notes 117-19 and accompanying text.
57. These administrative costs are compounded by the costs of providing custodians, government attorneys, and court interpreters at these proceedings.
important review function by reducing or removing money bonds in the cases of aliens who could have been safely released by the INS on recognizance or lower financial bonds? Are substantial money bonds actually necessary to maintain the integrity of the deportation hearing process and the enforcement of voluntary departure orders under current conditions?

To begin to answer these questions we must look at the rates of noncompliance resulting from the decisions currently being made. Noncompliance resulting in bond forfeiture may occur at one of two points in the deportation process. First, an alien may fail to appear in court during the pendency of his deportation proceedings. Second, if the alien is found deportable at his deportation hearing, but is granted the discretionary relief of voluntary departure, the alien may fail to leave the country on his own within the prescribed period of time, as well as fail to appear for his deportation upon demand by the INS that he surrender for INS removal. 58

Failure to Appear at Deportation Hearings

The “failure to appear” rate is the percentage of cases in which aliens failed to show up for an immigration court appearance. It is difficult to calculate the failure to appear rate in the immigration area because of the large proportion of pending cases. 59

Based on

58. See supra note 28 and accompanying text.
59. Measuring the rate at which aliens fail to appear before immigration judges is difficult. On the difficulty of calculating failure to appear rates, see generally M. Kirby, Failure-to-Appear: What Does it Mean? How Can it be Measured? (Pretrial Services Resource Center, Wash, D.C.) (June 1979). Normally, we might proceed by examining all cases closed in a given period and from this, calculate the proportion closed because of aliens’ failure to appear in court. This would be a valid, although by no means optimal, measurement approach if immigration judges kept up with the incoming caseload. In Chicago, however, this is not the case (although immigration judges are now wrestling with the problem). A fairly large proportion of incoming cases are added each year which creates an ever increasing case backlog. This feature of court processing creates a serious measurement problem. We are likely to overestimate substantially the rate of failure to appear with this measurement approach because failure to appear cases are the most likely to be rapidly identified and closed — it takes only one court date to identify a failure to appear case while other cases may be continued on the court’s calendar for long periods without disposition.

There is another way to calculate the failure to appear rate. This approach is to take a sample of cases as they come into the court system and follow them through to disposition. This method also has serious shortcomings due to the same feature of court case processing just discussed — the large proportion of the cases entering the court system that linger for years undisposed. How do you calculate a failure to appear rate with all these pending cases? Until recently, many of the cases were not even calendared and given a tentative hearing date by an immigration judge. Instead, they were “inactive” or uncalendared cases, that is, files were left for extensive periods of time in the “to be set” court file drawers, to be calendared if there was room on the court’s call. Under current court practices, all cases entering the court system are given an initial court date, and all cases are continued with a specific court date — that is, no cases are allowed to be inactive or off the court’s calendar.

The measurement problems are perhaps no less severe with this method than the first,
data collected for a sample of 177 arrested aliens entering the immigration court system in 1982, the failure to appear rate is no lower than about 18%. As Figure 2 shows, there were 31 failure to ap-

but the approach has the advantage of allowing us to see more clearly what the flaws in the data are, because we know something about the disposition status of all the cases entering the system in a given period. Additionally, this allows us to calculate a lower end estimate of the rate of failure to appear (rather than an inflated estimate), which we may be more willing to accept, and from this speculate about how much higher the rate may be.

In this study, the “failure to appear” rate refers to all cases where aliens missed a scheduled court appearance, the immigration judge sent the case to the INS to locate the alien, and the alien never returned to court or was returned to court only after his apprehension. Excluded from the “failure to appear” figure were a couple of cases in which the court or INS file noted a failure to appear, but each appeared to be a “technical” missed court date since the files showed the alien in court shortly after the missed date and there was no evidence of INS apprehension of the alien.

60. The 177 cases were part of a larger sample of 342 cases, or one-half of all cases entering the immigration court system in May, June, and July, 1982. Excluded from the original sample of 342 cases were: 33 cases where either no court or INS files could be located or the files were missing disposition information; 111 mail OSC cases where the aliens were never arrested and a custody determination was never made; and 21 cases where the arrested aliens were in custody at the time of their disposition and therefore a “failure to appear” was not a possibility in their cases.

In order to develop the original sample of 342 cases entering the immigration court, I used INS investigations apprehension logs for May, June and July, 1982. This period of time was selected for several reasons. The files of the court and the INS were still available in Chicago for the year 1982. Selection of this year also meant that the cases had been in the system about three years by the time of my file research. The period of May through June was selected because the INS had a fairly complete set of apprehension logs for this period from which a sample of aliens entering the system could be selected. Also, INS official statistics showed that apprehensions for these three months were typical and not the result of some large special INS operation. For a discussion of some of the limitations of these 1982 data, see infra note 62.

The apprehension logs of INS area control and antismuggling units were used to develop this sample of cases. Every second case listed on the logs was included in the study's sample. No logs or I-213 “Record of Deportable Alien” forms were available for fraud and criminal cases. However, in working with the area control logs, it appeared that the cases of some aliens convicted of criminal charges and later transferred to INS custody were listed on the area control's logs. Generally, criminal and fraud cases make up a very small percentage of the cases entering the court system. The rate of failure to appear for these more serious cases, however, may be different than for the cases studied. On the other hand, many criminal and fraud cases have such high bonds set by the INS and by immigration judges that they are never released and would not have been included in this study of failure to appear cases.

61. The research was conducted during March, April, and May, 1985. Around this time, immigration judges began a push to recalendar cases that were “inactive,” that is, cases that had been given a “to be set” date and then had been left in the court's file drawers until the court had some time to schedule the case for a hearing. See supra note 59. Many of these cases had had their last court date one or more years ago. Had I conducted my study at a later period than March-May 1985, the failure to appear rate could have been higher since some of the old “pending inactive” cases in Figure 2 may have by then received a court date and the aliens may have failed to appear.
pear cases at the time of the research — about 36 months after the
177 cases entered the court system. This sample of 177 cases in-
cludes both arrested aliens who were released from custody on a re-
cognizance or money bond set by the INS as well as aliens who were
released after an immigration judge bond redetermination hearing.62

62. The data in Figure 2 show the following: 28 failure to appear cases that were
never located; 3 failure to appear cases in which the aliens were subsequently apprehended; 2 pending cases that were being continued on the court's calendar and had never
had a failure to appear; 95 cases that were disposed of without a failure to appear; 37
cases that were pending but were awaiting a date to be set on the court's calendar; and
12 cases in which either the INS requested termination of proceedings before the immi-
gration judge (I-471 cases), or the proceedings were in effect terminated because the
aliens left the country (frequently with INS approval) before their cases could be given
hearings by immigration judges.

I have not refined my analysis for these 1982 data to show the failure to appear rate
for just cases receiving a bond redetermination hearing since the data are already dated
in several respects and I believe it would be of limited utility to further refine these data
(for the failure to appear rate for a sample of 1983 cases that received a bond redetermi-
nation hearing, see infra text following notes 70-72). Collecting data for 1982 cases
meant that cases had been in the system for about three years by the time of my file
research and therefore, theoretically, many if not most of them should have been dis-
posed or recorded as failure to appear cases. In fact, many were still pending at the time
of the research. Further, the bonds set in 1982 were set by a different district director
than in 1983 and are lower than bonds set since 1983. This in turn affects the rate of
release by the INS, the rate of bond redetermination hearings and the extent of partici-
pation of immigration judges in the bail review process. Moreover, there were major
changes in immigration court practices after the research began — currently cases never
get off the court's calendar, see supra note 59, and are never left in the court's file
drawers "to be set" at some later date, and the court is attempting to dispose of cases
more quickly. All of this suggests that further refined analyses of the 1982 data would be
of limited value for understanding the current situation. It should be noted that this
sample of 177 cases includes both arrested aliens who were released from custody on a
recognizance or money bond set by the INS as well as aliens who were released after an
immigration judge bond redetermination hearing.
Figure 2. Disposition Status of the Cases of Arrested Aliens Placed under Deportation Proceedings during May-June-July, 1982.

SOURCE: Examination of the case files of the Chicago Office of the Executive Office for Immigration Review, and of the Immigration and Naturalization Service (Chicago District) for 177 cases, a 50 percent sample of all arrested cases in which an order to show cause was issued during May-June-July, 1982. Research conducted March-May, 1985.

The failure to appear rate is 18% if we choose to believe that no other aliens will fail to appear in the remaining 39 pending cases. Of these pending cases, 37 were inactive at the time of the study.63 Re-

63. It should be noted that immigration judges no longer permit cases to be inactive, that is, continued without a specific court date. See supra note 59.
alistically, by the time some of these inactive pending cases are calendared by immigration judges for a hearing, a half decade will have elapsed. Lack of interest in pursuing the case, address changes, and other factors, may increase the failure to appear rate higher than the current rate for disposed cases. Thus, the 18% figure is clearly a low estimate of the failure to appear rate.

The rate can also be calculated as a percentage of all 95 cases disposed of to date, plus those that are probably likely to be seen through to disposition, specifically, the two pending active cases where aliens are now appearing in court. Calculated this way, the rate of failure to appear is 24% of the disposed cases. However, this is likely to be a higher figure than the actual failure to appear rate since failure to appear cases may be identified and closed more quickly than other cases. It is plausible that those with the fewest equities fled early on, leaving those with more substantial claims to see their cases through to conclusion.

Given the difficulties of calculating a precise failure to appear rate, the best conclusion that can be reached using the 1982 data is that, conservatively estimated, 18% of the aliens for whom deportation proceedings are initiated will fail to appear for their court hearing. The 18% failure to appear rate is somewhat higher than that reported in criminal court systems. Nationwide EOIR efforts to deal more efficiently with its caseload, however, may in the future lower this failure to appear rate in Chicago. This would be consistent with criminal justice research which indicates that failure to appear

64. The 95 disposed of cases, plus 2 pending active cases, plus 31 failure to appear cases, equals 128 cases. The 31 failure to appear cases equal 24% of the total 128 cases.
65. See supra note 59.
66. Id.
67. For example, a study of the feasibility of a guidelines approach to bail setting in the Philadelphia Municipal Court reported as part of its findings that the failure to appear rate was 13% for defendants in the experimental bail guidelines group and 12% for defendants in the control or nonguidelines group. J. Goldkamp & M. Gottfredson, Judicial Decision Guidelines for Bail: The Philadelphia Experiment 81 (U.S. Dept. of Justice, National Institute of Justice, July 1984) (Unpublished study).

In another study, of 756 defendants (charged with misdemeanor and felony offenses) released on bail in Charlotte, North Carolina, a 9.3% failure to appear rate was reported. In order to interpret this failure to appear rate it should be noted that about 12% of the total sample of 861 cases were not released at all before court disposition of their charges. Also the average amount of time elapsing between successive court appearances was 23 days for those charged with felonies and 25 days for those charged with misdemeanors. S. Clarke, J. Freeman & G. Koch, supra note 4, at 7, 8, 18 n.20.
68. These efforts include: a uniform docketing system; improvement of support to judges, including law clerks; a caseload distribution assessment; preparation of court procedural rules; training of new judges; and an automated case system. Speech by William R. Robie, Chief Immigration Judge, EOIR, 1985 American Immigration Lawyers Association Annual Conference, Boston, Massachusetts (June 4-9, 1985), Recent Developments at the Justice Department (cassette #10) (tape available from Convention Seminar Cassettes, 2307 Royal Avenue, Simi Valley, Cal.).
rates are closely related to court disposition time, that is, the amount of time between a person's arrest and court disposition. 69

More recent failure to appear data are also available for Chicago from the 1983 sample of arrested aliens, which shows the disposition status of a sample of 131 cases about 15 months after they entered the court system. 70 Based on these data, the failure to appear rate at the time of the research was about 3% of all released aliens. 71 Thirty-seven percent of the cases, however, were still pending at the time of the research — and some had never had a court date scheduled. Finally, it should be noted that of those arrested aliens released on a money bond or on their own recognizance after a bond redetermination hearing, only 2 of 100 or 2% failed to appear at their first court date usually scheduled anywhere from two weeks to a month from the date of their release. For half of the aliens, this first court date was also their last because they agreed to voluntarily depart the country; the rest had their cases continued to the court’s regular call for a deportation hearing in the future. This very low rate of failure to appear for a court date set shortly after an alien’s release suggests the possibility that if court disposition time could be trimmed for even cases continued to the regular call, the failure to appear rate might be kept fairly low. 73

Failure to Depart on a Voluntary Departure Order

The bond set in deportation cases serves a function beyond ensuring the appearance of the alien in immigration court. The purpose of the bond is also to ensure that the alien appears for his deportation, when and if that is ordered. 74 If the alien fails to appear for his

---

69. C. Clarke, J. Freeman & G. Koch, supra note 4, at 34; see also W. Thomas, Bail Reform in America 106-07, table 37 (1976).

70. See Figure 1 in text. The 131 cases are the 157 minus the 26 that never left custody.

71. As Figure 1 indicates, two aliens failed to appear at their first court date after being released by the INS on a recognizance bond, and two aliens failed to appear at their first court date after being released on bail after an immigration judge bond redetermination hearing. These four aliens equal 3% of the total 131 aliens released after their arrest.

72. Figure 1 shows that the following cases were pending: the cases of 3 aliens released by the INS on a recognizance bond; the cases of 5 aliens released by the INS on a money bond; and the cases of 40 aliens released after an immigration judge bond redetermination hearing. These 48 cases comprise 37% of the 131 cases of aliens released after their arrest.

73. On the relationship between court disposition time and failure to appear, see generally S. Clarke, J. Freeman & G. Koch, supra note 4.

74. See supra note 28 and accompanying text.
deportation, the bond is forfeited. If, however, the alien complies, the bond can be recovered through application at the American Embassy in the country to which the alien departs.\footnote{75}

Ensuring the appearance of aliens for their deportation arises most often in the context of grants of voluntary departure. Few aliens today are ordered deported by immigration judges. For humane, as well as administrative reasons, the vast majority of aliens found deportable are granted the discretionary relief of voluntary departure. That is, when individuals are found deportable, the entry of a final order of deportation is withheld and they are allowed to leave the country \textit{on their own} within a period of time specified by the judge.\footnote{76}

If they fail to leave within the time allotted, an alternate order of deportation is automatically activated. The bond in the voluntary departure cases is to ensure that the aliens appear for their deportation, upon their failure to voluntarily depart on their own, and upon demand by the INS that they now surrender for INS removal.

In voluntary departure cases, if a substantial proportion of aliens fail to voluntarily depart on their own and then fail to surrender for deportation when ordered, an effective enforcement program is potentially jeopardized because of the substantial resources needed to pursue absconders and because realistically many aliens will never be located. Widespread awareness of this administrative incapacity by those who are expected to comply could lead to the collapse of a credible enforcement posture and the further undermining of the system's capacity to encourage self-enforcement of voluntary departure orders.

To develop a picture of the frequency with which aliens fail to depart the country after being given voluntary departure, an examination was made of all cases disposed during April and May, 1983 that received a voluntary departure order.\footnote{77} INS case files were then utilized to determine exactly what had transpired since the voluntary departure order two years previously. That information for arrested

\footnote{75. See infra note 80.}

\footnote{76. Voluntary departure is established by statute as a form of discretionary relief available to aliens under deportation proceedings. INA § 244(e), 8 U.S.C. § 1254(c). For a discussion of voluntary departure, see 2 C. GORDON & H. ROSENFIELD, supra note 27, § 7.2.}

\footnote{77. Included in this sample were some cases that were disposed in April or May 1983, but which did not receive a voluntary departure order until a later date. Typically in these cases there had been a full formal deportation hearing, the judge had completed the case and some months later had issued his written decision, finding the alien deportable and granting the alien voluntary departure.}
aliens is presented in Table 7.

78. In the course of doing the research, I also collected data for voluntary departure cases in which the alien was never arrested (that is, mail OSC cases) and, therefore, a custody decision was never made by the INS. See supra note 19. Data on the disposition of these cases is presented in the table below. The data show a very high rate of "unverified departure" cases — 40% of the enforceable order cases.

Disposition of Cases of Non Arrested Aliens (Mail OSC Cases) Given Voluntary Departure during April-May, 1983

<table>
<thead>
<tr>
<th>No.</th>
<th>% of all cases</th>
<th>% of enforceable order cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>24.2</td>
</tr>
<tr>
<td>1.</td>
<td>Enforceable orders</td>
<td></td>
</tr>
<tr>
<td>a) Voluntary departure of alien</td>
<td>8</td>
<td>24.2</td>
</tr>
<tr>
<td>b) Failure to depart</td>
<td></td>
<td>9.1</td>
</tr>
<tr>
<td>Alien apprehended and deported</td>
<td>3</td>
<td>9.1</td>
</tr>
<tr>
<td>Alien appeared for voluntary departure</td>
<td>1</td>
<td>3.0</td>
</tr>
<tr>
<td>extension—taken into custody for fraud</td>
<td></td>
<td>3.0</td>
</tr>
<tr>
<td>c) Unverified departure</td>
<td>8</td>
<td>24.2</td>
</tr>
<tr>
<td>Total</td>
<td>20</td>
<td>60.5</td>
</tr>
</tbody>
</table>

2. Unenforced orders

| a) Intervening relief—visa issued            | 6              | 18.2                        |
| b) Extension of voluntary departure         | 2              | 6.1                         |
| c) Case pending on appeal                   | 4              | 12.1                        |
| d) Case appealed—visa obtained during pendency | 1          | 3.0                         |
| Total                                       | 13             | 39.4                        |
| Grand total                                 | 33             | 99.9                        |
Table 7

Disposition of Cases of Arrested Aliens Given Voluntary Departure during April-May, 1983

<table>
<thead>
<tr>
<th>No.</th>
<th>% of all cases</th>
<th>% of enforceable order cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Enforceable orders</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Voluntary departure of alien</td>
<td>75</td>
<td>48.4</td>
</tr>
<tr>
<td>b) Failure to depart</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alien apprehended and deported</td>
<td>17</td>
<td>11.0</td>
</tr>
<tr>
<td>Alien responded to “Bag &amp; Baggage” letter’s appearance date</td>
<td>10</td>
<td>6.5</td>
</tr>
<tr>
<td>Alien turned self in after “Bag &amp; Baggage” letter’s appearance date</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>Alien departed on own but after warrant of deportation issued</td>
<td>2</td>
<td>1.3</td>
</tr>
<tr>
<td>Alien appeared for voluntary departure extension—taken into custody for fraud</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>Alien unlocated but presence in country verified</td>
<td>4</td>
<td>2.6</td>
</tr>
<tr>
<td>c) Unverified departure</td>
<td>23</td>
<td>14.8</td>
</tr>
<tr>
<td>TOTAL</td>
<td>133</td>
<td>85.8</td>
</tr>
<tr>
<td>2. Unenforced orders</td>
<td></td>
<td></td>
</tr>
<tr>
<td>a) Intervening relief—visa issued</td>
<td>15</td>
<td>9.7</td>
</tr>
<tr>
<td>b) Extension of voluntary departure</td>
<td>3</td>
<td>1.9</td>
</tr>
<tr>
<td>e) Motion to reopen—relief granted</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>d) Case pending on appeal</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>e) Case appealed—visa obtained during pendency</td>
<td>2</td>
<td>1.3</td>
</tr>
<tr>
<td>TOTAL</td>
<td>22</td>
<td>14.1</td>
</tr>
<tr>
<td>GRAND TOTAL</td>
<td>155</td>
<td>99.9</td>
</tr>
</tbody>
</table>

SOURCE: Examination of Immigration and Naturalization Service case files, Chicago District Office, for 210 cases—all cases closed during April-May 1983, that received a voluntary departure order from an immigration judge. The table excludes: 33 mail order to show cause cases; 9 cases in which the case files were missing; 7 cases in which the files had been transferred to other cities; and 6 cases in which the case file number for the aliens receiving voluntary departure was incorrect. Research conducted June and October, 1985.

The difficulties of classifying cases can engender sharp differences of opinion as to the level of noncompliance which these data indicate. The data, however, allow with some confidence a calculation...
of the rate of noncompliance within a range.

There are at least three ways to calculate the level of noncompliance depending upon the question being asked. First, it can be asked, what percentage of the aliens failed to depart the country after being granted a voluntary departure order and ordered to depart? A con-
cated INS believed the alien had departed on his own. Typically, an I-392 was the basis for INS verification of voluntary departure. It may be noted that not all these cases, however, were strictly "voluntary" departures. In a number of cases the INS used the warrant of deportation as a tool to encourage the alien's voluntary departure. For in-
stance, after an alien was denied an extension of his voluntary departure he may have been told that a warrant of deportation would be placed in the file. If the INS heard from him in a given period, the warrant would be cancelled (and his departure treated as voluntary); if not, the warrant would be exercised.

Thirty-five of the remaining 58 enforceable order cases are classified as "failure to depart" cases (Table 7 lb). In these cases, after the INS received no notification of an alien's departure, typically a warrant of deportation and "bag and baggage" letter, see infra note 80, were issued. Depending on the case, investigators may or may not have been sent out to locate the alien. It is interesting to note that, of these 35 aliens who we know failed to depart within the period given them by the court, less than half (17 aliens) were apprehended by the INS and deported. This figure may be higher today. Since April and May 1983, the period covered by this study, the Chicago District Office has attempted to move more quickly to apprehend aliens they believe have failed to de-
part. If some of the "unverified departure" cases in Table 7 are abscondees, rather than aliens who left the country but failed to report their departure, then the INS may be in a better position today with its earlier enforcement to apprehend these aliens. In 10 other cases, the aliens came into the INS for their deportation in response to the "bag and baggage" letter. In another case, the alien came into the INS six months after the appearance date given in the "bag and baggage" letter. In two other cases as well, the INS did not apprehend the deportable aliens. Instead the two aliens left the country on their own, but the INS verified that they had left after the voluntary departure period expired and the warrant of deportation issued. In one other case, the alien appeared at the INS to request an extension of his voluntary departure date and was taken into custody for marriage fraud and deported. Finally, in four cases, the INS was unable to locate the aliens but a close examination of the INS file indicated that the INS had obtained information that the alien was present in the country after the issuance of the warrant of deportation. In three cases employers verified for the INS that the aliens had been present working at their workplace after the voluntary departure order expired. And in one case, a motion to reopen was filed in immigration court by the alien after the voluntary departure order expired.

This assortment of "failure to depart" cases is interesting because it suggests the lack of homogeneity of what might otherwise be called abscondees. There clearly are different levels of noncompliance (just as there were different levels of compliance) requiring more or less use of INS resources to locate aliens or even to remove them. Noncompliance spans the range from "fugitives or abscondees" to "delayed compliance," to possibly even "technical noncompliance," that is, failure to leave for possibly nonwillful, nondeliberate reasons (for example confusion, sickness, error in attorney informing no extensions will be given, etc.).

The remaining 23 cases (Table 7 lc) are classified as "unverified departure" cases since empirically, it remains unclear whether the alien's voluntary departure was simply unverified or whether the alien failed to leave the country. See infra note 80. An exami-
nation of the alien's bail status at the time of the voluntary departure order may be useful in speculating about what happened.
servative estimate from the data suggests a figure of 26% who failed to depart the country within the time limit prescribed by their voluntary departure order and any extensions (35 of 133 enforceable order cases). Included in this figure are all the cases in which the alien was apprehended, taken into custody, or self-deported after a warrant was issued (31 cases); and the additional cases in which INS information indicated the aliens stayed in the country past their prescribed voluntary departure date, although the aliens were never located (4 cases). It should be noted that this noncompliance figure developed from Table 7 includes not only aliens released after a bond redetermination hearing, but also aliens released on their own recognizance or on monetary bonds set by the INS.

This 26% noncompliance figure is a rock bottom estimate. The frequency of the failure of aliens to depart is no doubt higher. The number of aliens whose departure was not verified (Table 7 1c) realistically includes aliens who have successfully concealed themselves from immigration enforcement. If all the unverified departure

<table>
<thead>
<tr>
<th>Bail Status of &quot;Unverified Departure&quot; Cases</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recognizance bond</td>
<td>5</td>
<td>21.7</td>
</tr>
<tr>
<td>500-1,500 bond</td>
<td>12</td>
<td>52.2</td>
</tr>
<tr>
<td>2,000-3,000 bond</td>
<td>6</td>
<td>26.1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>23</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

The above shows that 22% of the unverified departure cases were cases where the alien was released on a recognizance bond. In 52% of the unverified departure cases the alien had been released on a $500 to $1500 bond. And in 26% of the cases the aliens had been released on a $2000 to $3000 bond. The recognizance bond cases may be the most likely not to be verified because there are no monetary incentives for the aliens to participate in documentation of their departure. Of course, it may be argued that they also may be the most likely to have absconded because of no monetary loss. On the other hand, the abandonment of a bond might suggest more the possibility that the alien absconded — although even here a variety of other plausible explanations exist (the alien's or obligor's death, ignorance of procedure, loss of document verification, etc.).

A central fact about verification of the voluntary departure of aliens is that the onus is on the alien to let the INS know he has left the country. This creates a serious problem of verification of departure in cases where aliens have little immediate incentive to inform the INS, such as cases where there is no bail money to be returned after their departure. Even in other cases, it is not clear that the alien has simply absconded and abandoned the bond since many other plausible explanations exist.

Currently, the system of verification relies on the alien to come into the INS on his own initiative to obtain documents that will help verify his departure from the country. Currently, immigration judges do not require aliens receiving voluntary departure orders to appear before the INS within a specified period of time with evidence of their intent to depart. Many times aliens do come into the INS on their own, typically for other reasons, such as to inquire how to get the bail money back, or to request that their voluntary departure date be extended. In these situations, the deportation officer will inquire about the alien's travel arrangements. If none have been made, the alien is typically asked to return within a short period with his tickets.

After review of an alien's travel arrangements, the deportation officer usually will give the alien two forms to verify his departure. First, aliens are given Form I 94, an entry and departure document, which they are supposed to surrender when they leave the
cases were treated as failure to depart cases, the rate of failure to
depart would be 44%. Realistically, the range of noncompliance is probably somewhere between 26% and 44% of all the cases in which the voluntary departure order was enforceable (Table 7 lb, c). Viewed a little differently, of course, somewhere between 56% and 74% of the aliens whose voluntary departure order was enforceable did comply — that is, voluntarily departed (Table 7 la, c).

There is a second way, however, to calculate compliance and noncompliance rates. The compliance rate could be calculated by answering the question, what proportion of the aliens departed the country on their own or came in on their own for deportation after receiving a surrender “bag and baggage” notice from the INS? Compliance figures would include the 75 aliens who we know voluntarily departed, as well as the 10 who responded to the “bag and baggage” notice. If this figure is used, the known compliance rate would be 64%. If all the unverified departure cases were treated as cases that departed, the rate of compliance could be 81%. That is, somewhere between 64% and 81% of the aliens departed the country prior to the expiration of their voluntary departure order or came into the INS for removal after receiving a surrender notice. 81

was seldom issued immediately. Warrants of deportation and “bag and baggage” letters were typically issued one or two months after the expiration of the period within which the alien was to voluntarily depart. More recently, however, the INS has attempted to issue warrants and letters much earlier, and deportation officers make an effort to go out more quickly to apprehend aliens. Again, if the alien fails to come into the INS in response to the “bag and baggage” notice, the INS employee is to go out and try to locate the alien and bring him in for deportation.

This current process of verification of departure leads to a fairly large number of cases in which it is impossible to determine if the alien has failed to depart, or has departed, but simply failed to inform the INS of his departure. If an alien cannot be located, there is no way of knowing which of these two situations exists. Although this problem will always exist to some extent, verification of departure (and possibly departure itself) is less likely to occur in a situation where aliens are not systematically informed of the need to appear at the INS for departure documents prior to leaving the country. Aliens who have no cash bonds held by the INS (those aliens released OR, or sent a mail OSC) may be the most unlikely to assist in verifying their departure without more official advice and pressure than now exists.

81. The 64% compliance rate is derived by adding the 75 voluntary departure cases to the 10 cases where the aliens responded to the “bag and baggage” notice. These 85 cases comprise 64% of the total 133 cases. The 81% compliance rate is calculated by treating the 23 “unverified departure” cases as cases that departed and by adding these to the above 85 cases. These 108 cases comprise 81% of the total 133 cases. Technically, it is not precisely accurate to reverse the figures to say that somewhere between 19% and 36% of the aliens failed to depart the country prior to the expiration of their voluntary departure order and failed to come into the INS for removal after receiving a surrender notice. For instance, in one case in Table 7, the alien came into the INS for an extension of his voluntary departure and was taken into custody for fraud. In this case, the surrender notice had not been issued yet.

For purposes of this study, I have not defined compliance or noncompliance to mean simply whether an alien did or did not surrender as ordered after issuance of a warrant of deportation and “bag and baggage” (I 166) notice. To comply with the terms of a bond, an alien may either voluntarily depart the country and present documentation of his departure, or, upon failure to voluntarily depart, surrender for INS removal when
Third, it is very important to remember that the above two ways of calculating the voluntary departure compliance rate use "enforceable order cases" as the base figure with which to calculate the rate of compliance and noncompliance, rather than the number of all voluntary departure orders issued by judges. For some policy pur-
poses, such as consideration of the advisability of continued use of voluntary departure grants, it may be more useful to think in terms of the latter base figure. Thus, recalculating the rate of noncompliance using all cases of arrested aliens given voluntary departure, including those where the order was never enforced, somewhere between 23% and 37% of all aliens given voluntary departure failed to comply with the terms of the order by not departing. Treating those who appeared in response to a “bag and baggage” letter as having complied, or at least not as having created a significant enforcement problem for the INS, then somewhere between 16% and 31% of all aliens given voluntary departure failed to comply with the order by not departing or by not appearing for their deportation when ordered.

of deportation was also denied by the District Director of the INS. After the case was reopened in immigration court, the immigration judge adjusted the alien's status to that of alien lawfully admitted for permanent residence. The government reserved but did not pursue an appeal.

D. In one of the unenforced order cases an appeal was taken from the immigration judge's decision, which automatically stayed the alien's deportation because the judge's order in such a situation is not final. In the case, a grant of suspension of deportation had been denied by the immigration judge, at which time voluntary departure was granted and the judge's order appealed by the alien.

E. In two cases, visas were obtained by aliens during the pendency of proceedings stemming from appeals in their cases. In one case, the alien's appeal to the BIA from the immigration judge's denial of suspension of deportation was pending at the time a visa was issued to him. In the second case, the visa was issued after the alien appealed the immigration judge's denial of a motion to reopen the case. The case involved an alien who accepted voluntary departure after an uncontested deportation hearing. Although the alien had been in the country for over seven years and was eligible to apply for the discretionary relief of suspension of deportation, this relief was not pursued since the alien believed he had a 5th preference visa number available to him as a brother of a United States citizen. After accepting voluntary departure, 5th preference visas became unavailable that year due to the fact that the maximum number of visas (20,000) available at any single foreign state in any fiscal year, had already been made available to Mexico. The alien's motion to reopen his deportation proceedings in order to pursue the discretionary relief of suspension of deportation was denied by the immigration judge. Upon appeal, the BIA disagreed with the judge's decision not to reopen the case and sent the case back for a hearing. Before the judge could act, the visa was issued based upon the availability of new visa numbers the next year.

83. For instance, it may be asked, what percentage of all arrested aliens granted voluntary departure create an enforcement problem for the INS by not departing when ordered to do so?

84. The 23% noncompliance rate is derived from 35 “failure to depart” cases out of 155 total cases. The 37% noncompliance rate is derived from 35 “failure to depart” cases plus 23 “unverified departure cases” treated as failure to depart cases, out of the total 155 cases. If all cases receiving a voluntary departure were included, that is, mail OSC cases as well, the rate of noncompliance would be 20% to 38%. Regarding the disposition of mail OSC cases, see supra note 78.

85. The 16% noncompliance figure is derived from 35 “failure to depart” cases minus the 10 cases where the alien responded to the “bag and baggage” letter, out of the 155 total cases (that is, 25 of 155 cases). The 31% noncompliance rate is derived from the 35 “failure to depart cases” minus the 10 cases responding to the “bag and baggage” letter plus the 23 “unverified departure cases” treated as failure to depart cases, out of the total 155 cases. For a discussion of why these noncompliance figures are not precisely
For purposes of discussing how successful the voluntary departure order’s “self-enforcement” by aliens is, however, the use of enforceable order cases as the base figure is a valid measurement method since there is no issue of whether the alien actually will depart voluntarily in cases where the alien receives relief and the departure order is never enforced. As for the remaining unenforced order cases, those still on appeal or where voluntary departure extensions are being granted, there is no basis to determine their future disposition. It appears unlikely, however, that these cases will have a significant effect on the first two rates of compliance estimated above. There are simply not that many cases, and at least some in this group eventually will be diverted from enforcement by the eventual grant of an immigrant visa or suspension of deportation on appeal.

In assessing the impact of immigration judge redeterminations of INS bonds, a further question may be significant: What is the rate of noncompliance with voluntary departure orders by aliens released after a bond redetermination hearing? The above estimates of noncompliance included both the cases of aliens released after a bond redetermination hearing as well as the cases of aliens released after the initial custody decision of the INS.

As indicated previously, the rate can be calculated in different ways. First, what percentage of the aliens failed to depart the country after being given a voluntary departure order and ordered to depart? The rate of noncompliance for aliens receiving a bond redetermination hearing is not very different from the noncompliance rate for all enforceable order cases (Table 7). As Table 8 shows, 57% left the country voluntarily, 27% failed to depart, and in 16% of the cases it is unclear whether they complied with the order. If all the “unverified departures” were actually “failures to depart” the country, the rate of noncompliance with voluntary departure orders for cases receiving a bond redetermination hearing would be around 43%. Realistically, the level of failure to depart, for cases in which the alien had a bond hearing and the voluntary departure order was enforceable, probably falls somewhere in the range of 27% to 43%.

Reaction to these data, however, will depend very much on whether one sees a glass as half empty or half full. Although, as stated, the level of noncompliance is somewhere in the range of 27% to 43%, turning the data around, this means that the rate of compliance with voluntary departure orders for cases receiving a bond hearing is

accurate, see supra note 81.

86. See supra notes 80-81 and accompanying text.
somewhere between 57% and 73%.

Table 8
Rate of Noncompliance for Cases Released after a Bond Redetermination Hearing

<table>
<thead>
<tr>
<th>Voluntary Departure</th>
<th>Failure to Depart</th>
<th>Unverified Departure</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>No.</td>
<td>%</td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>---------</td>
<td>-------</td>
<td>---------</td>
<td>-------</td>
</tr>
<tr>
<td>Recognizance bond</td>
<td>1</td>
<td>50.0</td>
<td>0</td>
</tr>
<tr>
<td>$500-1,000</td>
<td>30</td>
<td>55.6</td>
<td>18</td>
</tr>
<tr>
<td>$1,500-2,500</td>
<td>20</td>
<td>55.6</td>
<td>7</td>
</tr>
<tr>
<td>$3,000-4,000</td>
<td>4</td>
<td>80.0</td>
<td>1</td>
</tr>
<tr>
<td>$7,000-8,000</td>
<td>1</td>
<td>100.0</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>56</td>
<td>57.1</td>
<td>26</td>
</tr>
</tbody>
</table>

We can calculate the compliance and noncompliance rates somewhat differently by asking the question: What proportion of the aliens receiving a bond hearing departed the country on their own or came in on their own for deportation after receiving a "bag and baggage" surrender notice? Compliance figures would include the 57 aliens who we know voluntarily departed as well as 6 others — in the failure to depart group — who responded to the surrender notice. If this figure is used, the known compliance rate is 63%. If all the unverified departure cases were treated as cases that departed, the rate of compliance would be 80%. That is, somewhere between 63% and 80% of the aliens who had a bond redetermination hearing departed the country prior to the expiration of their voluntary departure order or came into the INS for removal after receiving a surrender notice.\(^8\)

Obviously, there is considerable room for debate over whether the levels of noncompliance in cases where bonds were reduced by immigration judges are cases where even INS bond levels would have failed to prevent absconding. It may be that there exists a core of cases where any bond set at any level, high or low, will not deter the alien from absconding. The issue in these cases may not be the size of the bond, but rather the issue of detention versus bail. This is a valid point in evaluating to what extent judges' actions, in and of themselves, contribute to noncompliance. Nonetheless, the data indicate that after immigration judges' bond redetermination decisions,

---

8. The 63% compliance rate is derived by adding the 56 voluntary departure cases to the 6 cases where the aliens responded to the "bag and baggage" notice. These 62 cases comprise 63% of the total 98 cases. The 80% compliance rate is calculated by treating the 16 "unverified departure" cases as cases that departed and by adding these to the above 62 cases. These 78 cases comprise 80% of the total 98 cases.
and after the release of aliens, a fairly sizeable proportion of the aliens do fail to depart the country voluntarily or surrender for removal.

Finally, in addition to calculating compliance rates, the data in the study also allow us to examine what happened at the bond hearing. For instance, in how many of the "failure to depart" cases in Table 8 did immigration judges actually reduce the INS bond and by how much? Data from the study indicate that in 25 of the 26 cases in the "failure to depart" category in Table 8, immigration judges reduced the bond. In these 25 cases, bonds were reduced an average of 61%. On the other hand, in 53 of the 56 cases in the "voluntary departure" category, immigration judges also reduced the bond or modified it to a recognizance bond. The overall average bond reduction in these 53 cases where the alien did depart was 62%. Bonds were originally set by the INS at anywhere from $2000 to $15,000.

The data in the study indicate that although problems of enforcement may exist after immigration judges' reduction of INS bonds, the bond redetermination hearing provides a very important procedural protection to many aliens. As suggested by the study, many aliens will continue to be involved in the processing of their cases under considerably less stringent bail conditions than originally set by the INS. Specifically, as shown in Table 8, we know that at least 56 of the 98 aliens did voluntarily depart the country after a bond redetermination hearing. In all but 3 of these 56 cases immigration judges substantially reduced the bond.88

The bond redetermination hearing also provides an important procedural protection in other cases as well. Immigration judges also reviewed INS bonds in several cases in which the voluntary departure orders were never enforced. For instance, bond hearings were conducted in 10 of the 15 cases in which aliens ultimately obtained visas and reentered the country legally (Table 7 2(a)). In each of these 10 cases, the bond amount was reduced. The overall average bond reduction by immigration judges was 70% of the original bond set by the INS.

*An Overview of the Quality of Bail Decisions*

The data on rates of failure to appear and to depart suggest some tentative conclusions about the quality of bail decisionmaking by the INS and by immigration judges described earlier in this Article. If

88. The bond was cut by over three-fifths (62%).
the findings of this study are correct, noncompliance poses a serious problem for immigration law enforcement. The reality of the situation is that although only a relatively small proportion of aliens fail to appear for their deportation hearing, conservatively estimated about 18% from the 1982 sample or about 3% from the 1983 sample, the vast majority of these aliens are then given voluntary departure orders and a substantial percentage fail to depart the country voluntarily on their own. However, neither the decisions of the INS, to set high bonds, nor the decisions of immigration judges, to reduce the bonds, receive much support from these data.

On the one hand, the levels of noncompliance following immigration judge bond redeterminations suggest problems in the quality of immigration judge bail decisionmaking. After immigration judges reduce the bonds initially set by the INS, a substantial group of aliens fail to comply with the terms of their release. However, in light of the fact that no data exist to show that higher bonds produce greater compliance, it is impossible to simply conclude that absconding would have been avoided without the bond modifications in these cases.

On the other hand, the data suggest that INS bond setting practices fail to distinguish adequately among those deserving and undeserving of stronger controls. In many cases in which immigration judges drastically reduce INS money bonds or release aliens on their own recognizance, the aliens comply with the terms of their release by appearing for their deportation hearing and by departing the country voluntarily if ordered to do so.

Thus, a disturbing situation exists in immigration bail administration. The successive actions of immigration judges and the INS have in many cases failed to guarantee the appearance of aliens for their deportation hearing and their voluntary departure, while in other cases aliens have suffered unnecessary detention and its attendant costs. This situation in immigration bail administration is reminiscent of the problems that have over time plagued bail administration in the criminal justice area. As noted criminologist Arthur L. Beeley stated over a half century ago in a classic study of the criminal justice bail system in Chicago: "[T]he present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. The system is lax with those with whom it

89. The overall rate of noncompliance cannot be readily calculated from the data in this study. Adding together the failure to appear rate and the failure to depart rate does not equal the rate of noncompliance in the jurisdiction studied. Certainly the greatest problem in developing an accurate estimate of the rate of noncompliance is the large number of cases pending for years in the immigration court system. This makes it virtually impossible to follow a sample of relatively current cases (as they enter the court system) through to disposition in order to determine how many failed to appear for their court hearing or failed to comply with their voluntary departure order.
should be stringent and stringent with those with whom it could safely be less severe. 90

REFORM POSSIBILITIES

This study has described the bail administration process in one INS district, involving one immigration court, in a metropolitan city located in the interior of the United States. Because of the limited focus of the study and the absence of other comparable empirical research, the general applicability of the study's findings is not known. 91 Nevertheless, because no other empirical data concerning immigration bail administration exist and because the situation described in the study may be considered an example of the serious problems that can emerge in immigration bail administration, it is useful to draw out some of the study's findings and their implications for reform.

Different interpretations of the situation might be drawn from the data depending on one's perspective. On the one hand, given the magnitude of noncompliance by aliens, immigration judge review of INS bonds might be described as plagued by excessive concern with the amount of the bonds, and by an inability to set bonds at levels adequate to ensure aliens' subsequent appearance in court and voluntary departure. Such a view might decry the granting of bail review authority to judges and the using of limited immigration judge resources for bond redetermination hearings that result in inappropriate conditions of release.

On the other hand, the functioning of immigration judges might be characterized as the embodiment of legitimate administrative action. Frequent and active immigration judge intervention may be viewed as reducing unnecessarily high INS bonds, thereby avoiding continued detention of aliens who subsequently will appear in court and will comply with voluntarily departure orders. This might be said to indicate the system's capacity to respond in an effective, fair way to a set of justified demands. Any adverse effects of immigration judge decisions on law enforcement — failures to appear and to voluntarily depart — might be seen as the cost of vigorously enforcing individual rights.

These differing, perhaps polar, perspectives are illustrative of the

91. For discussions of the generalizability of the study's findings and the tentative nature of the study's conclusions based on the study's small sample sizes, see supra notes 17 & 37, respectively.
interpretations that might be placed on the study’s findings. Neither of these ways of viewing the situation, however, fully characterizes the current problem in immigration bail administration — an inability of both immigration judges and INS employees to predict non-compliance — nor suggests the types of reforms necessary to strengthen immigration bail administration.

**Current Proposals to Eliminate or Reduce Immigration Judge Bail Review and Voluntary Departure Authority**

This study has described the conflict between immigration judges and the INS at the local level. The contours of the struggle between institutions can also be seen at the national level in official and “unofficial” projected rulemaking by the INS. This projected rulemaking would limit, or eliminate, immigration judge and BIA authority to review INS bail decisions, and place restrictions on, or eliminate, immigration judge and BIA use of voluntary departure orders.

In April 1983, a regulatory agenda stating various projected rules for the INS was published by the Department of Justice.92 One projected rule proposed that a minimum $1000 bond be imposed in all cases of apprehended aliens and eliminated immigration judges’ authority to reduce bonds to less than $1000 or to release aliens on recognizance bonds.93

A second projected rule in the 1983 Agenda also sought to limit immigration judges’ authority by proposing that they would be limited to granting no more than thirty days to an alien given voluntary departure.94 The rule reflected an INS desire to increase control over aliens given the option of voluntary departure. It also, apparently, was the expression of an INS view that decisions regarding the length of time within which aliens were to depart the country were inappropriate decisions for immigration judges. Rather, it appears the INS viewed these as questions relating to their enforcement powers.95

93. 48 Fed. Reg. 18,162 (1983). The projected rule apparently addressed what the INS saw as an undesirable practice by judges of reducing INS bonds to minimum or recognizance bonds. There was a general feeling in the INS that release on a minimum bond of $500, while perhaps appropriate in 1952 when the INA was enacted, was today insufficient to keep aliens accessible until a final order had been entered in their cases. Telephone conversation with Paul W. Schmidt, Deputy General Counsel for the INS (May 24, 1985).
95. The projected rule reflected a view that the proper role of immigration judges was to sit and hear legal and factual issues surrounding deportation. Grants of voluntary departure in excess of 30 days were viewed as more in the nature of prosecutorial discretion — decisions that should be left to the absolute discretion of enforcement officials, since judges were not in the best position to make these law enforcement related determinations. Telephone conversation with Paul W. Schmidt, supra note 93.
These two projected rules were never actually published as rules for public comment. Since the rules would have had an impact on the newly created EOIR, they were subject to promulgation by the Attorney General rather than by the INS Commissioner. Given the substantial restrictions on the authority of immigration judges contemplated by the rules, it is not surprising that concurrence of the Attorney General, EOIR, and the INS has not been rapidly forthcoming.

Although these two projected rules never were published, the concerns behind them have never faded from INS sight. In speaking before the AILA Annual Conference held in June 1985, INS General Counsel, Maurice Inman, revealed his “personal” agenda, which expressed an even more extreme position with respect to limiting immigration judge and BIA authority. In his presentation, he proposed eliminating all immigration judge and BIA authority to review INS bail decisions. Bond redeterminations would be exclusively committed to the authority of District Directors. In addition, he indicated that an attempt would be made to eliminate use of voluntary departure orders. If this mode of disposition survived at all, he indicated, immigration judges and the BIA would no longer have authority to grant voluntary departure — it would be exclusively within the decisionmaking domain of the District Director.

Five months later, in October 1985, a new projected rule regarding bail decisionmaking authority was published in the Federal Register as part of the Department of Justice’s Semiannual Regulatory Agenda. The new projected rule proposed that release without bond would be only authorized by a District Director. Immigration judges and the BIA would not have authority to release an alien without bond. No such rule was published for public comment. Instead, six months later, in April 1986, the Department of Justice’s Semiannual Regulatory Agenda indicated that a rule to impose a minimum bond as a condition of release was “not presently being considered.”

96. Speech by Maurice C. Inman, Jr., General Counsel, supra note 8.
97. Id.
99. Id.
Proposals to eliminate or reduce immigration judge bail review authority are difficult to support based on the Chicago data in this study. Obviously, some aliens are currently released by immigration judges without sufficient surety to prevent absconding. The problem, however, is not simply that immigration judges release some aliens without sufficient surety to ensure their return to court or compliance with voluntary departure orders. In a large proportion of cases, judges drastically reduce or eliminate INS bonds and these aliens subsequently comply with the terms of their release. This feature of the current bail system suggests that individuals are committed to custody by the INS on bonds unnecessary to ensure their court presence or voluntary departure. In other words, control of aliens is pursued by the INS more vigorously and results in greater use of restraint and bail than necessary in some cases.

One alternative to immigration judge and BIA bail review that seems to be desired by the INS is that the District Director have sole authority to review INS employee custody and bond decisions. No independent process to ensure the enforcement of individual rights over agency requirements would then exist. Not only would this "internal review only" proposal place the INS in the position of being a self-regulatory agency, it may potentially undermine the INS commitment to enforcement. Both of these potential adverse effects of internal review have been suggested by Skolnick in his discussion of police supervisors' review of warrants and probable cause decisions:


Concerns exist not only about proposals to eliminate immigration judge review power, but also about proposals to reduce their review authority. As noted above, one previous projected INS rule proposed allowing the INS to impose a minimum $1000 bond in every case where an alien had been apprehended for an immigration law violation. As it was proposed, neither immigration judges nor the BIA would have authority to reduce any bond to less than $1000 or to
release an alien without a money bond. A more recent proposal simply would deny to immigration judges and the BIA authority to release any alien without bond.\textsuperscript{103} In other words, an alien could not be released by immigration judges or the BIA on anything less than a $500 bond.

These proposals seem likely to result in arbitrary and capricious imposition of money bonds when none may be necessary to ensure compliance. There is no evidence that the individuals likely to be affected by these proposals are persons requiring any bond whatsoever to ensure their compliance. The proposals may merely result in tougher responses to all aliens — and significant costs of detention which must be paid for by the public — without any increase in effective law enforcement.

Across-the-Board Retreat from Use of Voluntary Departure

Proposals to limit or to eliminate immigration judge and BIA voluntary departure authority also seem to be questionable reforms for dealing with the present situation in immigration administration.

One older proposal, to curtail immigration judge and BIA authority to granting no more than 30 days to aliens given voluntary departure, seems precipitous based on current information, or more appropriately lack of information. Presumably not permitting an alien more than 30 days within which to depart (unless an extension is granted by the INS) is designed to reduce the likelihood of absconding and the difficulty of locating an alien who fails to depart. In light of the fact that no data exist to show that any particular length of time in which to voluntarily depart the country increases or decreases the likelihood of an alien's voluntary departure, it is difficult to imagine how any voluntary departure time period can be granted with anything approaching accuracy as to what will happen.

Proposals that entirely eliminate the use of voluntary departure (or its use by judges or the BIA), fail to take into account the relatively large proportion of aliens who after being granted voluntary departure by immigration judges do depart the country on their own at their own expense without INS enforcement. As indicated by the study, somewhere between 56\% and 74\% of the arrested aliens, whose voluntary departures were enforceable, did depart the country prior to the expiration of the period given them to depart by immigration judges. In fact, if we combine the cases of aliens who de-

\textsuperscript{103} See \textit{supra} note 98.
parted prior to the expiration of their voluntary departure order with those who came into the INS on their own after receiving a surrender notice—that is, all aliens whose departure required no INS apprehension efforts—the rate of compliance would range anywhere from 64% to 81%, depending on whether we count "unverified departures" as failures to depart or not. The relatively large proportion complying at little or no cost to the public would suggest a course of action less radical than elimination of voluntary departure grants as a mode of disposition available to immigration judges and the BIA.

**Limiting INS Authority to Set Bonds**

One potential way to strengthen immigration bail administration might be to limit the bail setting authority of the INS. For instance, the INS might be empowered only to set recognizance bonds and money bonds up to $1500 or $2000. In cases believed by the INS to require higher bonds, immigration judges would make the initial bond determination. In general, the authority of immigration officials to set bail is an anomaly in law enforcement—the police, for instance, seldom are empowered to set bail.

There are two potential advantages of limiting INS bail setting powers. First, limiting INS power to only setting recognizance or lower money bonds might better protect the integrity of the deportation process by immunizing it to some extent from the possibility that bail could be used for coercive purposes. Concerns have been raised in other jurisdictions regarding INS officials' use of the threat of detention to obtain the consent of aliens to voluntarily return to their country. Similarly, a policy or practice of setting bonds be-

---

104. See supra text accompanying note 81.

105. See W. THOMAS, supra note 69, at 206-07 (indicating that in only a few states do the police have extensive powers in the pretrial release area—for example, in Connecticut the police can release misdemeanor and felony defendants on their own recognizance and set bail amounts in cases not granted a nonfinancial release).

106. INS officials' use of the threat of detention to obtain consent to voluntary departure was noted, for instance, in Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982). The court indicated that evidence presented to it was replete with descriptions by aliens of being threatened with incarceration if they did not accept voluntary return. Id. at 360. The court opinion contained, for instance, the following firsthand account of one plaintiff: The INS official told me that I could not get political asylum in the United States, and that I would have to remain in jail for a long period of time. Moreover, he told me that I would be placed in a cell with men, leaving me with the impression that I would be sexually molested. He did not mention to me that I had a right to place a bond to get out of custody, that I had the right to call a lawyer, or that I had the right to go before an immigration judge to try to ask for release on my own recognizance or have bail lowered. Id. at 360.

In the context of the interrogative setting in which aliens are questioned by the INS (a context of fear and confusion of aliens), INS descriptions to aliens of what might in fact...
Beyond the reach of the vast majority of aliens may lead aliens to abandon their request for a deportation hearing and generally may have a dampening effect on other aliens' pursuit of a hearing. In short, limiting INS authority to set higher bonds may reduce the possibility that the INS bond and threat of detention might function as a coercive tool to induce the voluntary return of aliens and their abandonment of a deportation hearing.

Another potential advantage of limiting INS bail setting authority happen in a case without any offsetting notice of rights constitutes coercion. As the court stated in its opinion:

According to defendants, INS agents who inform Salvadorans that they will not be released on bail pending deportation hearings or adjudication of their asylum applications, who suggest that their applications for political asylum will be denied anyway, and who note that families may be separated during the hearing process, are simply giving "accurate descriptions" of what may in fact occur. In the context already described, however, and without any offsetting notice of rights, such "accurate descriptions" are improper. Counsel for the INS argued that it is only fair to give these people the "down" side of their situation; yet to give only this perspective and, as seen in the declarations, to deny any knowledge of an "up" side, i.e., of possible alternatives to voluntary departure, constitutes coercion.

Id. at 373.

The court in Orantes-Hernandez appears to have considered INS officials' threat of detention a substantial enough problem to warrant notice to aliens of their possible release on bail pending a deportation hearing. More specifically, in addition to enjoining the INS from using coercion to obtain signatures on voluntary departure forms, the court also required the INS, prior to informing aliens of the availability of voluntary departure, to provide aliens with a copy of a written notice of rights. Id. at 386. Among the rights listed on the notice was the "Right to a Deportation Hearing" which contained a notice to aliens regarding possible eligibility for release on bail:

You have the right to a deportation hearing to determine whether you are illegally in the United States before you can be deported. If you request a deportation hearing, you may be represented at the hearing by an attorney at your own expense. You may be eligible to be released on bail until the time of the deportation hearing.

Id. at 387.

107. Aliens are not required to be advised of their right to a bond redetermination hearing prior to their request for a deportation hearing, nor are they required to be informed of the likely results of a bond hearing. But see discussion of Orantes-Hernandez, supra note 106. Although some aliens faced with the decision as to whether to voluntarily return may be familiar with deportation procedures, others will be uneducated about the deportation process and the rights and procedures established regarding bail and its review. In such a situation where an individual is not aware of his rights, the perceived threat of detention or an INS employee's actual threat of detention as reported elsewhere, see supra note 106, may effectively discourage an alien from requesting a deportation hearing and induce him to sign a voluntary return agreement. Even when a deportation hearing has been requested, the actual INS money bond set in individual cases may lead aliens to abandon their right to a hearing and to request a voluntary return. For a description of aliens shifting from requests for a hearing to requests for voluntary return after imposition of the INS bond in their case, see Harwood, supra note 18, at 318-19.
is that it would deal with the serious problem observed by Beaudin in his INS-commissioned study of ten other jurisdictions — the problem of a "by-play" over bonds between immigration judges and law enforcement officials. In his study, Beaudin observed that the INS set excessive bonds anticipating immigration judge reduction. Accordingly, immigration judges reduced the bonds "not so much on the individual merits of a particular case but because they 'knew' the law enforcement side of the service asks for high bonds anticipating they will reduce it." It may be far better for immigration judges to make a genuinely fresh determination. The government attorney presumably would make a case before an immigration judge regarding why generally a "high bond" should be set, the alien's attorney would respond. Such a procedure might be more likely to produce distinctions among cases based upon their individual merits. If the problem reported by Beaudin is to be taken seriously, it is an additional important reason to consider limiting INS authority to set bail.

Given the above concerns, why not eliminate all INS bail setting authority? One answer is that permitting the INS to continue to set recognizance and lower money bonds prevents the unnecessary detention of aliens for whom release on such bonds is appropriate. It is unrealistic to expect that immigration judges in the near future will conduct bond hearings on the day of an alien's arrest. Therefore, the INS must be relied upon for immediate release of those eligible for lower bonds or release on their own recognizance. Permitting the INS to set these bonds also protects the workload of immigration judges by reducing the number of aliens requiring bond hearings.

An important question about any proposal to limit INS bail authority is the extent to which such a system would interfere with the early release, that is, the same day as arrest, of aliens who under the present system are able and willing to post an INS bond at levels higher than $2000. Any loss of liberty involved with such a proposal is probably largely illusory. Data from the study indicate that the rate of posting bail for INS bonds set above $2000 is very low — only 7% (9 of 126 aliens) posted bail at the higher levels set by the INS. Although the study did not examine exactly when these 9 aliens were released, it seems unlikely they were all released on the day of their arrest. Some were probably held overnight pending financial arrangements to release them. In other words, even had the INS not been permitted to set bail at over $2000, some of these aliens in any event would have spent an additional night in custody.

109. Legally, in cases where an alien is arrested without a warrant, the INS has 24 hours within which to determine whether to detain the alien or to release him on his own recognizance or on bond. 8 C.F.R. § 287.3 (1986).
Should there be a Two-Stage Bail Decisionmaking Process and Different Standards at Each Stage?

One strategy that might be proposed for enhancing the likelihood of voluntary departure of aliens would be to have a second bond redetermination hearing at the time voluntary departure is granted to an alien. If the problem is that the risk of absconding is greater after a voluntary departure disposition, then perhaps the bond should be reviewed at the time of the order.

If immigration judges tend to make an overall assessment of both the likelihood of appearing in court and of voluntarily departing — as seemed to be suggested by the judges interviewed\(^{110}\) — then it seems unlikely that a second stage of decisionmaking after the disposition of a case will play much of a role in the bail decision process. Better information about the levels of noncompliance after a voluntary departure order may be needed by judges in their decisionmaking,\(^{111}\) but an automatic review of the bond does not make sense in light of current decisionmaking practices. For instance, one judge, questioned about whether a dual bond review should be used, suggested that review after a voluntary departure order was unnecessary.

I don’t think so. Not for philosophical reasons. It’s just not necessary. When you set a bond you should set it by looking at the whole picture, whether a person will appear and whether they’ll come back when requested [for deportation]. Nine times out of ten you’re going to be able to see the final picture, whether the case will result in voluntary departure. For example, the lady today had a pretty good suspension case. She was a native of Korea, a citizen of Paraguay. The kid is older. That all makes her a better than average suspension case. I set the bond at $500. If there were no questions whether she would come back I would have released her on OR. [The woman had failed to appear for her deportation hearing but claimed that

\(^{110}\) Three of the six judges in the Chicago office of the EOIR at the time of the research were formally interviewed. Interviews indicated that the judges considered that the bond was to ensure both an alien’s appearance in court as well as departure from the country after a final order. Judges were asked how likely it was that aliens would abscond after being given voluntary departure. Each judge expressed reluctance to give a figure, indicating that they just didn’t know. Interviews with immigration judges, Chicago Office of the EOIR, in Chicago (Nov. 1984). This response suggests an important feature of immigration judges’ situation in bail decisionmaking. Judges are called upon to set an appropriate bond based on their estimates of the likelihood of two different events. Realistically viewed, in the absence of other information, judgments regarding the proper bond to be set understandably will be based upon a judge’s experience. Immigration judges have direct experience with the frequency with which aliens fail to appear before them, but do not have the same personal experience from which to estimate the rate of voluntary departure absconding. Whether an alien eventually leaves the country is typically known only by the INS.

\(^{111}\) See supra note 110.
she had never been notified.] Administratively, I see a problem. Two separate bonds is pretty unwieldy . . . . The complications in enforcement outweigh the benefits. It's extremely complicated to enforce, to administer. Also I do not think it is necessary.112

A second decision might be important in a few cases in which the record of behavior pending disposition makes it hard to justify continuation of the bond, and changing the bond might enhance the enforcement of the voluntary departure order. Such a review of the bond, however, can be achieved by the INS113 without immigration judges automatically reviewing bonds in every case receiving voluntary departure. Overall, it seems unlikely that such a two-stage bond process would result in more than a minimal number of bond modifications.

Talking about two-stage review, however, raises a related issue: the standard to be used in bail decisionmaking. Presently there appears to be one bail standard perhaps best articulated in the Patel case — “an alien generally is not and should not be detained or required to post bond except on a finding that he is a threat to national security . . . or that he is a poor bail risk.”114 The presumption is one of release, and in fact release without the condition of bail if possible. Although BIA decisions applying Patel usually interject the phrase that an alien not be required to post bond “pending a determination of deportability,” there appears to be no different articulated bail standard once there is a finding of deportability. Certainly in current practice, immigration judges treat an alien who has been found deportable and granted voluntary departure according to the same release standards of an alien awaiting a deportation hearing.

No doubt release standards at these two stages could be distin-

---

112. Interview with Immigration Judge, Chicago Office of the EOIR, note 110.
113. Legally, the INS may revoke the bond of an arrested alien at any time. 8 C.F.R. § 242.2(c) (1986). In the event of such revocation, the alien has a right to administrative review by an immigration judge. Id. One situation in which revocation of bond may occur is at the conclusion of a deportation proceeding. Where a finding of deportability is made, the INS may elect to revoke the alien's release and reset bond based upon a conclusion that the likelihood of the alien absconding is now greater than prior to the deportation order. See, e.g., In re Sugay, 17 Interim Dec. 637 (BIA 1981). The BIA upheld the District Director's authority to revoke the bond and to set a higher bond based upon "a change of circumstances" in the case. Id. at 640. The change of circumstances in the case included newly developed evidence brought out at the deportation hearing and the fact that was ordered deported and his applications for suspension of deportation and withholding of deportation were denied. For a discussion of the case by Sugay's attorney on appeal, see Chow, supra note 12, at 4-5.

Alternatively, rather than revoking the bond (followed by reincarceration, a new higher bond or detention, and a bond redetermination hearing) the INS may move to reopen the proceedings under 8 C.F.R. § 242.22 (1986). The BIA has indicated that it considers such a procedural avenue as appropriate for bringing to an immigration judge's attention additional evidence material to the bond decision. See In re Figueroa A 23 686 528 (BIA 1983) (unpublished decision) reproduced in NATIONAL LAWYERS GUILD, PRACTICE MANUAL SUPPLEMENT 32, 33 (National Immigration Law Project 1986).

Setting Bail in Deportation Cases

SAN DIEGO LAW REVIEW

guished and a proposal made that once a person has been found deportable, the presumption in favor of release no longer is justified. Such a tougher standard was adopted, for instance, for bail on appeal in criminal cases in the 1984 Crime Control Act. As applied to the immigration context, an alien found deportable would not be released unless an immigration judge found “clear and convincing evidence that the alien is not likely to flee.” The burden would rest with the alien to overcome the presumption of detention upon a finding of deportability.

Such a change, however, might have a profound effect on the disposition of cases. The threshold for release would be so high that detention might be justified in many cases. As a result, the use of voluntary departure would be diminished — those that did not meet the standard for release presumably would be deported in lieu of voluntary departure. In turn, deportation rather than voluntary departure orders might provoke substantial numbers of aliens to file appeals to the BIA — challenging the immigration judge’s custody decision or finding of deportability. Finally, a tougher standard for release at the time of a finding of deportability may fail altogether to achieve its purpose of enhancing law enforcement. The problem of absconding may be pushed back to an earlier stage — aliens expecting a finding of deportability may simply fail to appear for their deportation hearings.

Recognizing the effect of a standard modeled after the 1984 Crime Control Act raises the question of whether the system merits such a measure of enforcement control. In the criminal justice area, a defendant found guilty of a crime who absconds after conviction pending appeal poses a real threat to society. His guilt of an antisocial act has been established beyond a reasonable doubt, and his release into the community poses a real continuing danger to the community. In comparison, an alien found deportable who is granted voluntary departure but fails to depart may work illegally, but his presence in the community will not pose a danger or physical harm to any individual in the community.

A premise of such a tougher standard is that judges can predict with some acceptable degree of accuracy which aliens are likely to flee and which will not. Information about what factors predict noncompliance, however, is virtually nonexistent in the immigration

Thus, currently it cannot be assumed that an acceptable level of accuracy exists to make predictions under such a standard.

Ultimately, such decisions require basic social and political choices about the values to be incorporated in our immigration system. The study provides sufficient data to suggest that an easy retreat to modification of bail standards to deal with voluntary departure noncompliance too easily ignores the interests of many aliens complying under current immigration bail standards.

**Improving the Quality of Decisionmaking**

One important task for strengthening immigration bail administration is the development of information for decisionmaking. Information needs to be routinely and systematically collected to answer two basic questions: (1) What are the rates of failure to appear in court and failure to voluntarily depart the country? (2) What factors predict aliens’ failure to appear in court and noncompliance with voluntary departure orders?

It is simply not possible to make well-informed decisions without answers to these questions. Until attention and resources are directed toward generating information necessary for intelligent bail decisionmaking, immigration bail administration will be vulnerable to attack because of reservations as to its administrative and moral legitimacy.

Further, the lack of information can result in great expense to taxpayers in a period of limited fiscal resources. For instance, extensive

116. Clearly, in addition, the sound exercise of discretion at the administrative level requires the development of clear policy statements as a guide to action and the definition of the elements to be weighed in decisionmaking. See Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 164-65 (1975). In the bail area, however, it may be argued that the BIA already has developed a clear policy and already has articulated a list of factors considered relevant to bail inquiry. See supra text accompanying notes 34-36.

This, however, is not enough for the sound exercise of discretion. Data are needed to transform broad policy statements and undifferentiated lists of “relevant” factors into specific adjudicative guidelines. What is currently missing is systematic information about bail administration — regular feedback to INS employees and immigration judges as to the level of noncompliance, and thorough data about the factors most likely to predict noncompliance. The latter would assist decisionmakers in the difficult task of determining how much weight to assign to various factors considered relevant to the bail inquiry, and what types of programmatic charges are necessary to ensure compliance. See infra text preceding and following note 129. As has been pointed out by Yale Kamisar in another context (the test for application of the exclusionary rule in search and seizure cases), where one has many variables relevant to the inquiry, “[a]lmost everything [is] relevant, but almost nothing [is] decisive.” Decisionmakers end up doing as they darn well please and subjective preferences prevail. In addition, the situation undermines the precedential value of cases as well as discourages active appellate review. Kamisar, *Gates, “Probable Cause,” “Good Faith,” and Beyond*, 69 IOWA L. REV. 551, 570-71 (1984). Of course, even with data on the factors most likely to predict noncompliance in the immigration area, decisionmakers must still determine what bail amount to set. For a discussion of the need for objective systems for bail decisionmaking, see infra text accompanying notes 125-28.
use of arrest and imposition of bonds by the INS can quickly lead to overcrowded detention facilities and high costs to taxpayers faced with the bill to house detainees and with proposals to build more detention space. Currently, the costs of detention nationwide appear to be substantial. For instance, for fiscal year 1984, the INS reported 1,236,926 detention days, and has estimated for 1986 a 25% increase in the number of detention days over 1984 figures. Even, if only one-half of the daily federal prison costs were spent by the INS to house detained aliens in 1984, the cost, conservatively estimated, would reach 25 million dollars annually. Moreover, data exist suggesting that an increasing proportion of the apprehended aliens are demanding a deportation hearing (that is, declining to voluntarily return home immediately under safeguards). These data underscore the importance of developing the best means possible to allocate detention space among aliens under deportation proceedings. Generally, the INS Management Team is attempting to develop more economical methods of managing resources. The effect of improved bail decisionmaking in reducing costs could result in tremendous savings to the public.

117. The 1984 figures are contained in House Subcommittee Budget Hearings — FY1986, supra note 21, at 211. This figure no doubt includes detention days of not only deportable aliens (the subject of this study) but also excludable aliens. Figures for fiscal years 1984, 1985 and 1986 appear in a Department of Justice Budget submitted to Congress for approval in 1985. Department of Justice, Detailed Budget Estimates, Fiscal Year 1986, Immigration and Naturalization Service 2 (showing an estimate for 1986 of 1,549,000 detention days).

118. The daily federal prison costs are $35-38 a day. These are Bureau of Prisons estimated costs per day per prisoner. House Subcommittee Budget Hearings — FY1986, supra note 21, at 211. Although Cubans under exclusion proceedings may be detained in the Federal Prison System, deportable aliens are generally detained at INS processing centers and contract facilities. The daily cost to hold an alien at these facilities is not known. However, estimating the cost at $20 per day, as I have, is probably an extremely conservative estimate. An average detention cost of $50 per day per alien was recently noted in a memorandum sent by a Department of Justice employee to the Department of Justice in response to a proposed rule. If $50 a day is the average detention cost, the total cost to the INS (the public) of housing detained aliens in 1984 would have been more like 62 million dollars. (The information on detention costs appeared in a comment dated February 6, 1986, sent to the Department in response to the proposed rule in 51 Fed. Reg. 3471 (1986)).

119. The 25 million dollar figure represents about 4.4% of the expected $585,031,000 INS budget appropriation for fiscal year 1985. The budget figure was reported in the Senate's fiscal year 1986 congressional budget, Department of Justice, Immigration and Naturalization Service Estimates for Fiscal Year 1986 12. For a discussion of why this is probably a very low estimate of annual detention costs, see supra note 118.

120. See supra note 20.

121. Senate Subcommittee Budget Hearings — FY1986, supra note 11, at 3.
Refinement in decisionmaking may also reduce the amount of immigration judge and INS resources now being consumed by the bond redetermination hearing process. The disagreement between immigration judges and the INS over the use and amount of bail can fuel requests for bond redetermination hearings. In other words, the more bond hearings heard and INS bail decisions that are modified by immigration judges, the greater the incentives for aliens to demand a hearing.

Identification of factors that predict noncompliance is an undertaking which should appeal to both sides of the current debate over the appropriate use and level of bail in immigration cases. For those advocating a tougher policy, the criteria would afford an opportunity to identify those aliens for whom restrictive measures are necessary to ensure their subsequent appearance or deportation. Conversely, such a study would also identify those aliens being unnecessarily detained by identifying those aliens for whom arrest is not necessary to ensure their subsequent compliance as well as aliens who could be safely released on a recognizance or minimum bond without decreasing society's ability to enforce its immigration laws.

Data collection to predict noncompliance, however, can be difficult. The problem in distinguishing "safe risks" from "likely absconders" is perhaps most apparent in the failure to appear cases. Developing predictors may be particularly difficult since most aliens do return for their hearing. As has been observed in other research, developing factors discriminating between success and failure is very difficult where failures are a relatively infrequent event.\textsuperscript{122} Since \textit{without any information} one could predict that every alien would appear and this would be correct for a large proportion of cases, refined analysis of failure to appear cases is unlikely to significantly enhance the predictive ability of decisionmakers. Moreover, some research in the criminal justice area suggests that the most important factor relating to failure to appear may be court disposition time, not factors such as an individual's employment status, age, etc.\textsuperscript{123}

Although it appears that it might be difficult to determine the characteristics distinguishing those who are likely to appear in court from those who are not, it might still be possible to enhance bail decisionmaking by determining the characteristics of those who will abscond after being given a voluntary departure order. The relatively high rate of noncompliance makes it possible to isolate the factors distinguishing the compliers from the noncompliers. The specific question addressed in such a study would be: What factors explain

\textsuperscript{122} J. Austin, B. Krisberg & P. Litsky, Evaluation of the Field Test of Supervised Pretrial Release 104 (U.S. Department of Justice, National Institute of Justice, June 1, 1984) (unpublished study).

\textsuperscript{123} S. Clarke, J. Freeman & G. Koch, \textit{supra} note 4, at 34.
most of the variation in the risk of failure to depart?

How this information will be used is another question. Of course, information on characteristics distinguishing noncompliers from compliers might be used informally by the INS and immigration judges in their decisionmaking. The data, however, could be used more systematically to develop an objective system for determining appropriate release conditions for aliens. Such a recommendation was proposed back in 1978 by Beaudin at the conclusion of his study of INS bail setting practices.124

Innovations in bail administration in the criminal justice area have involved the development of objective point scales125 and bail guidelines matrices126 for determining the appropriate conditions for release of defendants. Point systems, for instance, have been based on the background characteristics of an individual (such as community ties) as well as criminal justice characteristics, that is, criminal record.127 The point systems have been most widely used to determine appropriateness for release on recognizance, but can also be developed to determine appropriateness for release on certain levels of money bond. Ideally, any objective system should be based on research that identifies particular factors as related to the performance of individuals such as their departure from the country, or surrender for removal, if granted voluntary departure. The development of an objective system to bail decisionmaking offers the potential for making decisions more visible, rational, equitable, and effective.128 Examination of the strengths and weaknesses of objective bail decisionmaking systems in the immigration area is an important future direction for research.

Just as certain characteristics of aliens or their cases may affect the likelihood of compliance with voluntary departure orders so may various programmatic factors. For example, how does the information available to an alien as to the consequences of his failure to depart affect compliance? Would increased information from immigration judges as to the adverse consequences of an order of deportation on an alien’s future reentry to the country affect compliance? Would compliance be affected if immigration judges required aliens receiving voluntary departure to appear within a specified period of

126. See, e.g., J. Goldkamp & M. Gottfredson, supra note 66.
127. M. Kirby, supra note 125, at 1.
time before the INS with evidence of their intent to depart — for instance, bus or plane tickets, or date and port of departure by automobile? Does the amount of time within which an alien must depart the country after a voluntary departure order affect compliance? To what extent would compliance be affected by the INS “supervision” of certain aliens prior to their departure? An important way to enhance the quality of bail administration would be to further develop and clarify the effect of each of these factors on the rate of failure to depart.

Finally, it is worthwhile noting here that improving the quality of information is unlikely to entirely eliminate the decisionmaking disparity and tensions between the INS and immigration court. Antagonisms and decisional differences are perhaps inevitable given their differing interests and responsibilities — the INS as responsible for maintenance of social order, and the court as expressive of broader community concerns and values. Depending on the constraints and demands that arise from the institutional environments in which each institution performs, differing weight will be given to the competing interests of efficiency (rapid removal of deportable aliens and the prevention of absconding which interferes with this goal) and due process (insistence on accuracy of decisionmaking and on the substantial probability of noncompliance before loss of liberty or unnecessary restraint is imposed). In turn, bail decisionmaking will probably continue to reflect the particular balancing of these two interests from each institution’s perspective. Despite the apparent value disensus at the heart of the current conflict between the court and INS, better information may help narrow the gap between institutions in bail and policy decisionmaking.

CONCLUSION

Each of these proposals is illustrative of various possible strategies for reform. Such proposals indicate something of the extraordinarily demanding task which must be faced ultimately if immigration administration is to have an effective and fair bail system.

The critical point in approaching reform in immigration bail administration is that a narrow focus on the noncompliance rate for aliens released after immigration judge bond redetermination hearings is inadequate for dealing with the problems of immigration bail administration suggested by this study. A problem of greater magnitude exists. The research indicates a bail system in which immigra-

129. Presently, aliens are expected to appear at the INS with travel documents, but are not officially informed systematically of this. Instead, typically aliens come into the INS seeking return of their bond or an extension of their voluntary departure date, and are then routinely informed of the need to return with travel documents.

130. See supra note 55.
tion judge release of aliens without sufficient surety to ensure their appearance in court, or compliance with voluntary departure orders, exists simultaneously in a system where there is substantial compliance (many aliens appear for their deportation hearing and leave the country voluntarily) after large reductions of INS bonds by immigration judges. This combination of features of the bail system indicates an inability of immigration judges, as well as the INS, to adequately recognize and deal with "safe risks" and "likely abscondees." Proposals for reform that ignore either of these features of bail administration are inadequate.

As in any bail system, the general problem is to devise a variety of means by which the conflicting claims of law enforcement and individual rights can be better balanced. This task is by no means novel. Over a half century ago, in the context of criminal justice bail administration, Arthur Beeley observed that there is a need to ensure the presence of individuals at their trials "by a method which, in a given case, will (a) guarantee a maximum of certainty to society and (b) impose a minimum of hardship upon the defendant."  

Balancing the interests of efficiency and due process in the immigration area will always be difficult. The complexity of the balancing task is enhanced by the fact that immigration law enforcement — unlike most criminal law processes — entails objectives to which widely differing weight is given at different times and by different segments of the public. Currently, however, due to concerns about the credibility of immigration law enforcement, strong pressures exist to devise stringent measures to ensure aliens' presence for a deportation hearing and departure. This environment may make realization of the multiple values of effective law enforcement and concern for individual liberty quite difficult. Of all of the reform possibilities, the effort to obtain more information — to find out what factors may lead to noncompliance and thereby to enhance rational decisionmaking in individual cases — seems the most promising.

131. A. BEELEY, supra note 90, at 1.
132. Although limiting INS authority to set bonds, see supra text accompanying notes 105-09, may be an important way to strengthen bail administration, a central problem is that neither INS employees nor immigration judges have sufficient information about rates of absconding and factors relating to noncompliance to adequately inform their decisions.