A Maze Without Escape: Navigating the Bail Reform Act and the Immigration and Nationality Act

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INTRODUCTION

A basic and fundamental misunderstanding of the Bail Reform Act (BRA) and its application to immigration (ICE) detainers has caused numerous breaches of legal norms and substantial litigation. The misapplication of the BRA challenges due process, erodes the separation of powers and continues to put the liberty interests of criminal defendants in jeopardy. Although the inability to apply basic provisions of the BRA is serious and concerning, a proper adjudication of the BRA and its interplay with the Immigration and Nationality Act (INA) is very challenging. Many of the issues in this inquiry are fact intensive and delve into the nuances of immigration law. It is no wonder then that there has been substantial litigation over these issues with varying outcomes. This article will address the significant issues related to the BRA-INA interplay, how courts have addressed these issues and what outcome determinative issues are yet to be resolved.

I. THE BAIL REFORM ACT AND DEFENDANTS WITH ICE DETAINERS GENERALLY

The BRA is the starting point for the abundance of issues surrounding bail and ICE detainers. When a criminal defendant arrives in court for his detention hearing, the criteria of the BRA guides the judge's decision in whether or not to grant bond.[2] In general, pre-trial release depends on whether "the Government has made the necessary showing of dangerousness or risk of flight."[3] This does not change even if the defendant is subject to an ICE detainer, which serves as notice to the United States Marshals Service that ICE seeks custody of the alien for arresting and deporting him.[4] Though alienage and the presence of ICE detainers are not a bar to obtaining bond under the BRA, immigration status does play a role in the process.[5]

In fact, Congress addressed immigration directly in subsection (d) of the BRA. Subsection (d) allows for *temporary* detention of non-citizens without legal permanent status and certain other individuals.[6] If a defendant falls into this category, then subsection (d) requires the judicial officer to "order the detention of such person, for a period of not more than ten days . . . , and direct the attorney for the Government to notify

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[2] 18 U.S.C. § 3142 (a)–(b).

[3] United States v. Montalvo-Murillo, 495 U.S. 711, 717 (1990) (citing 18 U.S.C. §§ 3142(e), (f)).

[4] 8 C.F.R. § 287.7(a).

[5] *See* 18 U.S.C. § 3142 (c).

[6] *Id.* § 3142 (d)(1)(B).

the appropriate [authorities] . . . ."[7] In the case of a non-citizen, that authority would be ICE.[8] After ten days, "[i]f the official fails or declines to take such person into custody during that period, the person shall be treated in accordance with the other provisions of this section . . . ."[9] In simpler terms, non-citizen defendants are treated just like everyone else after the temporary detention period of subsection (d) expires.

In terms of the role immigration status plays in bond decisions, the plain language of the statute makes several points clear. First, the interests of immigration authorities are noticeably protected by the temporary detention period of subsection (d).[10] ICE is free to act on its immigration interests and take custody of a defendant during the ten-day detention period.[11] Second, the statutory protections for immigration interests dissipate after ten days.[12] If ICE does not act within ten days, then immigration issues, such as an ICE detainer, cannot compel the detention of a defendant.[13] In fact, the BRA mandates that a detention decision should be made "notwithstanding the applicability of . . . deportation or exclusion proceedings."[14]

Despite clear direction from the BRA, some courts categorically deny bail when a defendant is subject to an ICE detainer.[15] The superficial argument often provided is that the defendant is a flight risk because ICE may detain the defendant after posting bond.[16] Practical in concern, but legally meritless, this policy misconstrues the BRA and raises constitutional concerns, namely, the separation of powers and due process.

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[7] *Id.* § 3142 (d)(2).

[8] *See id.*

[9] *Id.*

[10] *See id.* § 3142 (d).

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *Id.* § 3142 (d)(2).

[15] *See, e.g.*, United States v. Lozano, 1:09-CR-158-WKW, 2009 WL 3834081, at *6 (M.D. Ala. Nov. 16, 2009).

[16] As stated above, the BRA mandates that judicial officers not consider removal and exclusion proceedings when making a bond determination. Therefore, courts are construing detention for these proceedings as unavailability for future court appearances and thus a risk of flight.

II. CONSTITUTIONAL CONCERNS IN THE BRA – INA INTERPLAY

A. The Separation of Powers is violated when magistrates order detention strictly on the basis of a pending ICE detainer

The failure of the judiciary to properly apply the BRA has allowed the executive branch to impermissibly encroach upon the judiciary. The common dilemma facing many judges is whether an otherwise eligible defendant should be granted bond if ICE detention seems inevitable upon release. Some courts have determined that potential ICE detention automatically disqualifies a defendant from bond because they are a flight risk.[17]

In the simplest sense, this policy is erroneous because the risk of flight assessment under the BRA turns on whether there is a risk of *voluntary* flight.[18] Indeed, it would be nonsensical to assume that travel compelled and paid for by a federal agency was the sort of flight risk Congress had in mind when enacting the BRA.[19] Moreover, the BRA provides an affirmative defense to prosecution for failure to appear if "uncontrollable circumstances prevented the person from appearing or surrendering, and . . . the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender."[20] This section implies that the BRA is concerned with "the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions and will."[21]

Notwithstanding these authorities, some courts still equate ICE detainers to automatic flight risk. This is not just a case of poor or selective statutory interpretation, but, more worrisomely, a separation of powers problem.

While there is a degree of overlap among the coordinate branches of government, the three branches of government must remain "entirely free from the control of coercive influence, direct or indirect, of either

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[17] *See, e.g.*, Lozano, 2009 WL 3834081 at *20-21; United States v. Ong, 762 F. Supp.2d 1353 (N.D. Ga. 2010); United States v. Pantaleon-Paez, No. 07-CR-292, 2008 WL 313785, at *4 (D. Idaho Feb. 1, 2008) (unpublished).

[18] *See, e.g.*, United States v. Ailon-Ailon, 875 F.3d 1334, 1337 (10th Cir. 2017); United States v. Santos-Flores, 794 F.3d 1088, 1091–92 (9th Cir. 2015) (citing 18 U.S.C. §§ 3142(e), (g)).

[19] United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (explaining congressional intent regarding risk of flight).

[20] 18 U.S.C. § 3146(c).

[21] United States v. Montoya-Vasquez, No. 4:08-CR-3174, 2009 WL 103596, at *5 (D. Neb. Jan. 13, 2009).

of the others."[22] But as Justice Gorsuch has noted, the separation of executive and judicial powers has recently come under strain.[23] Too often, Article III powers are gravitating to the "politically accountable and energetic executive" at the expense of the judiciary, which "was designed to be insulated from political pressures so that people could be confident that their cases and controversies over the meaning of existing laws and past facts would be resolved neutrally."[24] In the BRA-INA interplay, this power grab is exemplified by the perceived role executive action plays in some judges' bond decisions.

The cases of *Lozano*, *Ong*, and *Panaleon-Paez* are illustrative of this point.[25] There, the courts held that, because the defendants would be detained by ICE upon release, their appearance at trial could not be assured.[26] As the *Lozano* court put it, ordering Lozano's pre-trial detention under the BRA was "in no way restricting the defendant's liberty" because he would ultimately be detained by ICE anyway.[27] However practical these holdings may be, the logic nullifies the separation of powers.

Specifically, courts are disregarding their obligations under the BRA and premising bail determination on executive action. Because the immigration arm of the executive branch is likely to detain the defendant, the judiciary feels compelled to compromise its responsibilities and fall in line with the will of the executive. As a result, the criminal defendant is detained not on the criteria laid out in the BRA, but instead, upon the threat of executive action in a distinct matter, i.e., immigration. Unfortunately, the problems do not stop here.

A more direct separation of powers infringement arises in this context when the court overtly shifts judicial power to the executive branch. This occurs when an otherwise eligible defendant has his bond conditioned upon lobbying ICE to lift his detainer.[28] How a defendant can accomplish this task is not exactly clear. Regardless, this requirement shifts the judicial power of the BRA to the executive branch because executive action is outcome determinative. In doing so, the court is imposing an extra-judicial obligation that not only violates the BRA but also leads to a meaningful constitutional infringement.[29]

Such judicial relinquishment impermissibly allows executive power to encroach on the judiciary and blurs the safeguards of the separation of powers doctrine. Though issues inherent to the executive action factor

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[22] Mistretta v. United States, 488 U.S. 361, 380–81 (1989) (citation and internal quotation marks omitted).

[23] NEIL GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 65 (Random House Publishing, 2019).

[24] *Id.*

[25] *See* Lozano, 2009 WL 3834081; Ong, 762 F. Supp.2d 1353; Pantaleon-Paez, WL 313785, at *4.

[26] Ong, 762 F. Supp.2d at 1363; Lozano, 2009 WL 3834081 at *21; Pantaleon-Paez, 2008 WL 313785 at *4.

[27] Lozano, 2009 WL 3834081 at *21.

[28] There is no significant case law on this issue, but the author has observed this obligation being imposed on defendants during detention hearings.

[29] Credit for this argument goes to Assistant Federal Public Defender Lance O. Aduba.

into bond determinations, they cannot control the result. The judiciary must jealously guard its duties and not allow executive action to unduly influence judicial outcomes. When ICE detainers are involved in bond determinations, this seems all too common.

B. Due process is violated when an ICE detainer signifies a categorical denial of bond

In addition to separation of powers concerns, automatic detention of defendants with ICE detainers raises due process concerns. The Due Process Clause of the Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[30] "In our society liberty is the norm," and detention under the BRA is a "carefully limited exception."[31] The due process afforded under the BRA is an individualized assessment of a defendant's danger to the community and risk of flight.[32] This is a fact-based inquiry because no two defendants or class members "are likely to have the same pedigree or to occupy the same position."[33]

When ICE detainers mean automatic detention, due process is violated because a categorical denial of bail is substituted for the individualized evaluation required by the BRA.[34] A compelling case can also be made that this policy violates the Equal Protection Clause because nationality is made a suspect class.[35] Regardless of the manner of violation, individuals are deprived of a presumptive liberty interest by indirect executive branch influence over the judiciary.

C. Concluding Remarks on the Misapplication of the BRA

In sum, the misapplication of the BRA's basic statutory mandates raises significant constitutional concerns. When courts premise detention on an ICE detainer, the BRA is nullified, the separation of powers is distorted, and due process rights are jeopardized. A proper adherence to the BRA avoids these pitfalls and assures criminal defendants constitutional protection.

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[30] U.S. CONST. amend. V.

[31] United States v. Salerno, 481 U.S. 739, 755 (1987).

[32] United States v. Tortora, 922 F.2d 880, 888 (1st Cir. 1990).

[33] *Id.*

[34] Santos-Flores, 794 F.3d at 1091–92; *see also* United States v. Lizardi-Maldonado, 275 F. Supp. 3d 1284, 1297 (D. Utah 2017) (holding that denial of release under the BRA based on the existence of a removal order "violates the due process requirement for individualized consideration in every pretrial detention hearing").

[35] Montoya-Vasquez, 2009 WL 103596 at *5.

Nevertheless, granting bond to qualified aliens subject to an ICE detainer raises a plethora of other issues, the outcome of which hinge on the application of sometimes intricate immigration laws. Understandably, court rulings have varied, but certain principles are becoming clear.

III. TWO PERSPECTIVES ON THE ROLE OF IMMIGRATION LAWS AND DETENTION POWERS POST-RELEASE

If a court is willing to grant bond to a defendant with a pending ICE detainer, several issues are likely to arise. Some of these issues center on ICE's authority to intervene in what is presumptively a pending criminal matter. For instance, what authority does ICE have over a defendant who has been granted bond by an Article III court? Can ICE proceed with deportation proceedings or must ICE wait for the criminal prosecution to be concluded? Is it possible for both the criminal and removal proceedings to occur simultaneously? What about the rights of the defendant?

For many years these questions had no definite answer. In many instances, there is still no answer. The court in *Trujillo-Alvarez* summed it up best when it stated, "[t]he interplay between the BRA and the INA has caused both confusion and tension."[36] This is an understatement to say the least. But for criminal practitioners, understanding how to navigate the sometimes-competing interests of executive branch actors is essential for advising a client or educating the court when the BRA and INA intersect.

Unfortunately, navigating this legal world is difficult. The development of case law in this area has been erratic. There is no pattern that fits onto when, where, or how the law has progressed. However, two essentially distinct perspectives on statutory and regulatory interpretation have emerged. For lack of a better term, the "early line" of cases found a conflict between the BRA and INA.[37] They also determined that ICE's regulations require criminal and immigration cases to proceed sequentially.[38] In the "recent line" of cases, five appellate courts[39] determined that there was no conflict between the BRA and the INA, and, therefore,

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[36] United States v. Trujillo-Alvarez, 900 F. Supp. 2d 1167, 1176 (D. Or. 2012).

[37] *See generally* United States v. Boutin, 269 F. Supp. 3d 24, 26 (E.D.N.Y. 2017) (stressing the importance of the conflict between the BRA and INA); United States v. Resendiz-Guevara, 145 F. Supp. 3d 1128, 1133 (M.D. Fla. 2015) ("The most common issue arising out of this conflict in the context of criminal cases has been pretrial detention in cases with an existing ICE detainer"); United States v. Blas, No. 13-0178-WS-C, 2013 WL 5317228, *23-24 (S.D. Ala. Sep. 20, 2013) (highlighting the tension between the INA and BRA); Trujillo-Alvarez, 900 F. Supp. 2d 1167(discussing the interplay between the BRA and INA); Montoya-Vasquez, 2009 WL 103596, *13-14 (D. Neb. Jan. 13, 2009) (explaining the impact of risk of removal under the INA on the BRA). Some of these case holdings have been overturned by subsequent appellate court decisions.

[38] *See* Boutin, 269 F. Supp. 3d at 27; Resendiz-Guevara, 145 F. Supp. 3d 1128, 1137; Blas, 2013 WL 5317228 at *32-33;Trujillo-Alvarez, 900 F. Supp. 2d 1167.

[39] At the time of writing, the Fifth Circuit's decision in United States v. Baltazar-Sebastian, 20-60067, remained pending.

these courts allowed for concurrent criminal and immigration proceedings.[40] I will address each line of cases in turn.

A. The Early Line of Cases

1. The BRA, INA, and immigration regulations mandate sequential proceedings

Can a defendant be held by ICE while his prosecution is pending? "Central to that question is an apparent conflict between the Bail Reform Act, which governs the pretrial detention of most individuals charged with federal criminal offenses, and the Immigration and Nationality Act, which governs the detention of individuals who enter or remain in the United States unlawfully."[41] The case law attempting to resolve this clash has been anything but clear.

Starting with the seminal case of *Trujillo-Alvarez*, the early line of cases determined that the BRA and INA were at odds, or at a minimum, they could not co-exist in harmony.[42] In general, these cases determined that BRA controlled over the INA.[43] Namely, the provisions of 18 U.S.C. § 3142(d) provided an avenue for immigration authorities to act on their interests.[44] If they chose not to do so, the BRA would be the sole means for determining a defendant's detention.[45] If the defendant was neither a flight risk nor a danger, then they would be bonded out and freed from the threat of ICE detention.[46] Essentially, detention under the INA would be trumped by the liberty protections of the BRA.

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[40] *See generally* United States v. Pacheco-Poo, 952 F.3d 950 (8th Cir. 2020) (finding that the BRA and INA coexist rather than conflict); United States v. Veloz-Alonso, 910 F.3d 266, 270 (6th Cir. 2018) ("To the extent that ICE may fulfill its statutory mandates without impairing that purpose of the BRA, there is no statutory conflict."); United States v. Vasquez-Benitez, 919 F.3d 546, 553 (D.C. Cir. 2019) ("[T]he supposed conflict between the BRA and the INA simply does not exist in this case."); United States v. Nunez, 928 F.3d 240 (3d Cir. 2019) (explaining that detention for removal purposes under the INA does not conflict with the BRA), *cert. denied*, 205 L. Ed. 2d 347 (Nov. 18, 2019); United States v. Lett, 944 F.3d 467, 469 (2d Cir. 2019) ("We conclude that there is no conflict between the detention-and-release provisions of the two statutes.").

[41] Boutin, 269 F. Supp. 3d at 26 (internal citations omitted).

[42] *See generally* Boutin, 269 F. Supp. 3d at 26 (discussing the conflict between the BRA and the INA); Resendiz-Guevara, 145 F. Supp. 3d 1128 (same); Blas, 2013 WL 5317228 at *23-24 (same); Trujillo-Alvarez, 900 F. Supp. 2d 1167 (same); Montoya-Vasquez, 2009 WL 103596 (same).

[43] *See* Boutin, 269 F. Supp. 3d at 26 ("[O] once a criminal prosecution is initiated and the Government has invoked the jurisdiction of a federal district court, the Bail Reform Act is controlling."); Resendiz-Guevara, 145 F. Supp. 3d at 1134 (explaining that risk of removal under the INA does not create an exception to the BRA); Blas, 2013 WL 5317228 at *23 (same); Trujillo-Alvarez, 900 F. Supp. 2d at 1177 (same) ;Montoya-Vasquez, 2009 WL 103596 (same).

[44] Trujillo-Alvarez, 900 F. Supp. 2d at 1179.

[45] *Id.*

[46] *Id.*

A similar theme was put forward by other courts. In *Blas*, for example, the court determined that once the government "invokes the jurisdiction of [the district court], [the district court] has priority or first standing and administrative deportation proceedings must take a backseat to court proceedings until the criminal prosecution comes to an end."[47] Piggybacking off of the *Blas* holding, the Court in *Boutin* determined that once "the Government has invoked the jurisdiction of a federal district court, the Bail Reform Act is controlling. [Hence], [w]hen an Article III court has ordered a defendant released, the retention of a defendant in ICE custody contravenes a determination made pursuant to the Bail Reform Act."[48] In other words, the district court has primary jurisdiction and the BRA therefore controls detention. ICE must wait its turn.

To bolster this position, the courts then turned to the INA and ICE's own internal regulations. Standing on its own, the INA did not appear to support or reject the proposition that criminal prosecutions should be prioritized over immigration proceedings. The INA conveyed certain powers to immigration authorities, including detention, but gave no direct guidance on whether these powers would be abated pending the resolution of a criminal prosecution.[49] To find an answer to this question, the courts turned to ICE's internal regulations.

Specifically, the courts looked to 8 C.F.R. § 215.3 which states in relevant part: "[t]he departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States. . . . Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court. . . ."[50]

Viewing this regulation in isolation appears to support the notion that the executive branch prioritized criminal prosecutions over immigration proceedings. Accordingly, several courts determined that per ICE's own regulations, immigration proceedings did not become ripe until after the prosecution was complete.

2. Concluding Remarks on Early Line of Cases

The upshot of these holdings was a significant win for defendants

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[47] Blas, 2013 WL 5317228 at *3.

[48] Boutin, 269 F. Supp. 3d 24, 26.

[49] In fact, the courts realized that they had little power to interfere with ICE's detention and removal powers, despite the fact they had jurisdiction over the defendant. *See* Trujillo-Alvarez, 900 F. Supp. 2d at 1179. Nonetheless, it is undisputable that ICE cannot hold someone for purposes of securing his appearance at trial. Only the BRA had this power. *See* Vasquez-Benitez, 919 F.3d at 552; United States v. Vazquez, 2018 WL 3599593, at *2 (W.D. Tex. July 27, 2018) (internal citations omitted).

[50] 8 C.F.R. § 215.3 (2020).

and a burden for the executive branch. By mandating sequential proceedings, defendants released under the BRA, in theory, were immune from intervening ICE custody. Moreover, ICE custody could not be used as a pretext for defying the Bail Reform Act and detaining a defendant for purposes of securing his appearance at trial.[51] With immigration proceedings forced to take a backseat, detention for removal purposes was postponed. For the duration of the prosecution at least, defendants could enjoy their liberty.

The executive branch fared differently. Many courts opined that the executive branch's failure to coordinate its respective efforts resulted in much of the BRA-INA tension. The competing interests of the Department of Justice and ICE were essentially irreconcilable. In short, many courts concluded that the executive branch could not have it both ways. Either "proceed administratively with deportation, or defer removal for the alien to face criminal prosecution."[52] And once the executive branch opts for prosecution over deportation, the criminal proceedings take precedent over those of immigration.[53] This position seems especially strong when a non-citizen is paroled into the country for the purpose of prosecution.[54] The Board of Immigration Appeals has determined that "the purposes of parole for prosecution are not served until the criminal charges are resolved."[55] Thus, immigration authorities could not and should not interfere during the pendency of the prosecution. If immigration did intervene, the consequences could be significant.

For example, in *Resendiz*, ICE elected to take custody of an alien after he was released under the BRA.[56] The court there found that by allowing ICE to detain the defendant, the executive branch had effectively abandoned its prosecution.[57] The executive branch could not elect to prosecute a defendant and then put him in ICE custody because they did not like the fact that the defendant was free. In such instances where the executive branch reversed course and elected to move forward with the removal, dismissal of the indictment was the proper remedy.[58]

Though factual circumstances varied and courts' reasonings differed, the litigation in the early line of cases developed important themes and principles. Despite some later disagreements by the appellate courts, these holdings framed complex issues in a coherent fashion and took the first step in clarifying the muddied world of the BRA-INA interplay. More importantly, some of the issues addressed in the recent line of cases could preempt the recent holdings of several appellate courts.

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[51] Boutin, 269 F. Supp. 3d at 27.

[52] Resendiz-Guevara, 145 F. Supp. 3d at 1136.

[53] *See id.* at 1137; Blas, 2013 WL 5317228 at *3.

[54] 8 U.S.C. § 1182(d)(5)(A) (2020).

[55] Matter of Valenzuela-Felix, 26 I. & N. Dec. 53, 65 n.5 (BIA 2012).

[56] Resendiz-Guevara, 145 F. Supp. 3d at 1132.

[57] *Id.* at 1133.

[58] *But see* United States v. Villatoro-Ventura, 330 F. Supp. 3d 1118, 1139–40 (N.D. Iowa 2018).

B. Recent Line of Cases - Appellate Courts

1. The BRA and the INA Do Not Conflict

After making the rounds through several district courts and two border appellate circuits, the BRA-INA interplay was recently addressed by five non-border appellate courts in quick succession. Though affirming aspects of the district courts' holdings, the appellate courts have departed from the district courts on various issues. One crucial issue in particular—statutory interpretation.

The originating "recent" case was *Veloz-Alonso*.[59] *Veloz-Alonso* was an illegal alien charged with illegal reentry and subject to a final deportation order.[60] After pleading guilty, the district court released him on bail pending sentencing.[61] The district court also issued an order preventing ICE from detaining *Veloz-Alonso*.[62] The government appealed and the Sixth Circuit reversed.[63]

The primary issue raised on appeal was whether the district court's "order of release under the BRA superseded the statutory mandate of the INA."[64] In arriving at its decision, the Sixth Circuit noted that the district court was correct in holding that an alien is "not per se ineligible for bail," but erred in its statutory interpretation.[65] In particular, the court held that "[r]eading the BRA's permissive use of release to supersede the INA's mandatory detention does not follow logically nor would doing so be congruent with our canons of statutory interpretation."[66] To that end, as long as ICE "fulfill[ed] its statutory mandates without impairing that purpose of the BRA, there is no statutory conflict . . . ."[67]

Following the Sixth Circuit's lead, the D.C. Circuit and the Second Circuit handed down similar decisions months later.[68] Both Circuits endorsed *Veloz-Alonso*'s holding and found no statutory conflict between the BRA and the INA.[69] As the D.C. Circuit succinctly put it, "[A] criminal defendant is detained under the BRA to ensure his presence at his criminal trial and the safety of the community. An illegal alien is detained

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[59] Veloz-Alonso, 910 F.3d 266.
[60] *Id.* at 267.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 270.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Vasquez-Benitez, 919 F.3d 546; Lett, 944 F.3d 467.
[69] Vasquez-Benitez, 919 F.3d at 552-53; Lett, 944 F.3d at 471.

under the INA to facilitate his removal from the country."[70]

More recently, in *Pacheco-Poo* and *Nunez*, the Eight and Third Circuits respectively found no conflict between the BRA and the INA.[71] *Nunez* affirmed the holdings of both *Veloz-Alonso* and *Vasquez-Benitez*, while also putting forward four reasons as to why there was no statutory conflict.[72] First, the BRA explicitly applies only to federal criminal proceedings, not state or immigration proceedings.[73] Second, the BRA and INA operate under distinct statutory frameworks and are subject to separate jurisdictions.[74] Third, the statutes serve different purposes and do not infringe upon one another.[75] And lastly, statutes do not compel a choice by the executive branch.[76] The prosecution and removal process can proceed simultaneously.[77]

2. *Criticism of these Decisions*

Needless to say, legal minds may differ with this analysis.[78] On a purely practical level, the third reason is unconvincing. The tension between the BRA and INA has been boiling for years and the boundaries of the competing detention powers remains hotly disputed. But, the important takeaway from these recent appellate decisions is that the BRA and INA do not conflict. Thus, concurrent prosecutions and removal proceedings are permissible in these jurisdictions.[79]

For instance, the law in many circuits permits ICE to detain a defendant on bond and deport him. This allows ICE to complete its statutory mandate, but at the same time deprives the DOJ of a prosecution.[80] ICE's independent statutory actions therefore infringe upon the BRA and compel a de facto choice by the executive branch—deportation over criminal prosecution. Thus, the non-infringement and choice rationales put forward by *Soriano Nunez* are effectively obliterated.

In addition to this practical conflict, the legal consequence of these decisions is that subsection (d) of the BRA is now rendered meaningless. Subsection (d) provides a specific window for immigration authorities to

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[70] Vasquez-Benitez, 919 F.3d at 553 (internal citations omitted).

[71] Pacheco-Poo, 952 F.3d at 953; Nunez, 928 F.3d at 245-46.

[72] Nunez, 928 F.3d at 246.

[73] *Id.*

[74] *Id.* at 246.

[75] *Id.*

[76] *Id.* at 247.

[77] *Id.* at 246-47.

[78] *Cf.* United States v. Baltazar-Sebastian, 429 F. Supp. 3d 293 (S.D. Miss. 2019).

[79] The Fifth Circuit has also recognized that immigration and criminal matters can proceed in parallel. *See* Witter v. INS, 113 F.3d 549, 555 (5th Cir. 1997) (discussing a petitioner's Fifth Amendment privilege in the context of parallel immigration and criminal proceedings).

[80] Resendiz-Guevara is just one example of this scenario. *See* Resendiz-Guevara, 145 F. Supp. 3d at 1136-37.

act on their interest and take custody of a federal defendant. But by focusing solely on ICE's detention power under the INA, the appellate courts have essentially repealed subsection (d) by judicial fiat. ICE must no longer comply with subsection (d), but instead, can ignore that provision, as well as orders from Article III judges, and detain individuals almost at will.

With a singular emphasis on the distinct statutory objectives of the BRA and INA, the appellate courts failed to address the real conflict between the statutes. Namely, the concurrent and competing custodial powers over a defendant subject to a release order by an Article III court. This tension also leads to an inevitable separation of powers clash. Only a sounder judicial analysis can resolve this disarray. That analysis starts with recognizing the interplay between the statutes and how they can be harmonized.

When analyzing the detention provisions of the BRA and INA, a court "should not confine itself to examining [the] particular statutory provision[s] in isolation."[81] And when confronted with statutes addressing the same subject matter, the judiciary is not at "liberty to pick and choose among congressional enactments," but instead it must strive "to give effect to both."[82]

The recent appellate court decisions viewed the BRA and INA in isolation and largely ignored the statutes' common subject matter—detention of non-citizen. By doing so, subsection (d) of the BRA became meaningless. This outcome is ironic because a proper application of subsection (d) gives both statutes effect and harmonizes the competing detention provisions.[83]

One of the purposes of subsection (d) is to account for the various detention interests of federal and state actors. In many cases, these authorities, such as ICE here, have an independent and concurrent authority to detain a non-citizen defendant. The BRA, however, provides a legal framework for these interests to be exercised via subsection (d). Subsection (d) gives these actors the ability to move on their interest while not infringing on the authority of the court. Once actors, such as immigration, are given license to act outside this framework, subsection (d) is essentially nullified.

In short, subsection (d) of the BRA provides the legal framework

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[81] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

[82] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[83] Admittedly, there is some ambiguity to subsection (d). Temporary detention appears to be authorized if a defendant is subject to detention by another authority *and* is also flight risk or danger. The proviso of subsection (d)(2) seems unnecessary because if the defendant is a flight risk or danger, then he would be subject to standard pre-trial detention, not just temporary detention. More importantly, if a defendant identified in subsection (d) can be immediately release because they are not a danger or flight risk, then the harmonizing aspect of subsection (d) is questionable. The harmony of the competing detention interests exists under subsection (d) only if other authorities actually have the opportunity to act. Without temporary detention, the framework of the BRA does not outright harmonize the competing detention interests. Nevertheless, when temporary detention is utilized, the framework of the BRA harmonizes the various detention interests.

for ICE to lawfully act on its interests, while respecting the authority of Article III courts.

Another concern with the current state of law is the separation of powers. Again, Justice Gorsuch's warning about Article III powers gravitating towards the executive branch is evident. Executive branch actors now have judicial mandate to summarily dismiss Article III directives and impose their will by detaining defendants subject to a bond. Granted, ICE is carrying out its statutory duty and doing so in accordance with existing case law. Nevertheless, the subordination of judicial power at the expense of the executive is a concerning trend. A proper application of the BRA balances these interests and is the only means to ensure justice and constitutional integrity.

Despite what criticism may be levelled, the important takeaway from the recent appellate decisions is that the BRA and INA do not conflict. Thus, concurrent prosecutions and removal proceedings are permissible in these jurisdictions.[84]

3. *A Contrary View of ICE Regulations*

By finding no statutory conflict and endorsing concurrent proceedings, most of the recent appellate court decisions did not need to address ICE regulations in any depth, if at all. The Second and Eighth Circuits, however, did address these regulations and arrived at an interpretation contrary to that put forward in *Trujillo-Alvarez*. This conclusion was not novel, but very important.

More than ten years ago, in *New Jersey v. Fajardo-Santos*, the New Jersey Supreme Court set out on a comprehensive review of 8 C.F.R. § 215.3 and the broader statutory framework it operated under.[85] Ultimately, the court determined that section 215.3 was inapplicable in the context of deportation and removal cases.[86]

The court first noted that 8 C.F.R. § 215.3 was contained in the legislative authority of 8 U.S.C. § 1185(a) ("Travel control of citizens and aliens").[87] This statute regulated how aliens could depart or enter the country as opposed to cases where an alien was ordered removed.[88]

Similarly, the regulation focused on the voluntariness of the departing alien.[89] For instance, the regulation provided that an alien could be prevented from leaving the country "where doubt exists whether such

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[84] The Fifth Circuit has also recognized that immigration and criminal matters can proceed in parallel. *See Cf.* Witter v. INS, 113 F.3d 549, 555 (5th Cir. 1997) (discussing a petitioner's Fifth Amendment privilege in the context of parallel immigration and criminal proceedings).

[85] *See* State v. Fajardo-Santos, 199 N.J. 520 (2009).

[86] *See id.* at 529-30.

[87] *See id.* at 528.

[88] *See id.* at 528-29 (contrasting 8 USC § 1185(a) with 8 U.S.C. § 1231).

[89] *See id.* at 529.

alien is departing or seeking to depart from the United States voluntarily."[90]

Lastly, the regulation provided departure-control officers with a mechanism to temporarily halt an alien's departure.[91] This procedure is separate from and inconsistent with the removal process.[92]

With this understanding, the court concluded that section 215.3 did not apply to criminal defendants facing removal.[93]

This contrary interpretation of ICE regulations is a pertinent example of how nuances of immigration law stymied the courts application of the BRA. Initially, courts relied on ICE regulations to conclude that immigration proceedings must be deferred until the criminal prosecution was resolved.[94] In *Fajardo-Santos*, however, the New Jersey Supreme Court arrived at an entirely different conclusion and determined that ICE regulations did not mandate sequential proceedings.

After lying dormant for years, the *Fajardo-Santos* interpretation was invigorated by the *Lett* and *Pacheco-Poo* decisions. The *Fajardo-Santos* holding had existed for years, but as a state court decision, it had little influence in federal courts. *Lett* and *Pacheco-Poo* changed that. Though not citing *Fajardo-Santos,* these courts arrived at the same outcome and provided the *Fajardo-Santos* analysis with federal precedential value.[95]

4. Concluding Remarks on the Recent Line of Cases

The recent appellate court decisions and *Fajardo-Santos* regulatory analysis present a clear setback for non-citizens. Though not as significant, these holdings also pose some hurdles for prosecutors if a non-citizen is granted bond. For example, managing the logistics of the defendant's custody between the marshals and ICE is no doubt a nuisance. Furthermore, the timing of the proceedings is unlikely to run in parallel and may interfere with the smooth administration of justice.

For defendants, the result of these holdings is detrimental because they are now exposed to detention by ICE despite receiving bond from an Article III court. Nevertheless, there are slight legal positives. The first is that the recent appellate court decisions have at least tacitly affirmed that non-citizens are eligible for bond under the BRA. And, apart from the temporary detention provision, ICE detainers themselves do not

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[90] *See id.*; 8 C.F.R. § 215.3(j).

[91] *See* Fajardo-Santos, 199 N.J. at 529; 8 C.F.R. § 215.2(a).

[92] *See* Fajardo-Santos, 199 N.J. at 529.

[93] *See id.* at 529-30.

[94] *See* United States v. Rangel, 318 F. Supp.3d 1212, 1217 (E.D. Wash. 2018); Trujillo-Alvarez, 900 F. Supp.2d at 1179.

[95] *See* Pacheco-Poo, 952 F.3d at 953 (explaining that 8 C.F.R. § 215.2(a) governs the actions of the alien and not those of the Executive Branch); Lett, 944 F.3d at 472-73 (same).

strip away this right.

More important for defendants, is what the recent decisions have left unresolved. Specifically, the courts did not address the definition and scope of custody under the INA. In the BRA-INA context, how custody is defined can have significant ramifications.

IV. THE DEFINITION AND SIGNIFICANCE OF CUSTODY UNDER THE INA

The recent appellate court decisions have seemingly negated the possibility of pre-trial liberty for defendants subject to ICE detainers. With no statutory conflict between the BRA and INA, criminal and immigration cases can proceed concurrently. This means ICE can detain its subject despite receiving a pre-trial bond. Likewise, the adoption of the *Fajardo-Santos* regulatory analysis precludes the argument that ICE regulations require sequential criminal and immigration proceedings. Thus, ICE is free to detain defendants despite the ongoing prosecution. In short, detention seems inevitable.

Notwithstanding these rulings, a significant legal point remains unresolved. Namely, does ICE have the statutory power to detain an individual released on bond?[96]

ICE's statutory authority to detain an alien does not start until the removal period begins.[97] The removal period begins when an "alien is released from detention or confinement."[98] Notably, "the statutory phrase 'released from detention or confinement' is not defined" in the statute.[99] However, specific instances of when ICE can detain an individual are provided in the statute. These examples include when an alien is on supervised release and serving parole or probation.[100] The power to detain defendants on bond is conspicuously omitted.[101] Absent statutory authority, it is unclear what mandate ICE has to detain individuals released under the BRA.

Unfortunately, the courts have not provided a clear definition either. In the habeas context, the Supreme Court has held that defendants are in custody while subject to terms of a pre-trial release order.[102] How or if this principle applies in the context of the INA is unclear. Only the

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[96] The Ninth Circuit and D.C. Circuit both declined to address this issue. *See* Vasquez-Benitez, 919 F.3d at 549 n. 2; Santos-Flores, 794 F.3d at 1092 n. 6.

[97] *See* 8 U.S.C. § 1231(a)(2).

[98] *See* 8 U.S.C. § 1231(a)(1)(B)(iii).

[99] Trujillo-Alvarez, 900 F. Supp. 2d at 1174.

[100] *See* 8 U.S.C. § 1231(a)(4)(A).

[101] *See id.* § 1231(a).

[102] Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., California, 411 U.S. 345 (1973).

Ninth Circuit has extended this definition of custody to the BRA.[103] More recently however, both the Ninth Circuit and D.C. Circuit declined to address whether ICE could lawfully detain a defendant released pursuant to the BRA.[104] In short, there is no clear-cut answer.

It goes without saying then that how custody is eventually defined under the INA will have a substantial impact on the BRA-INA interplay.

For instance, if defendants released under the BRA remain in custody of the court then, ICE's statutory power to detain has not yet manifested. With the defendant still in custody, the removal period has not yet begun and therefore, neither has ICE's power to detain.[105] Thus, there is no conflict between the BRA and INA because immigration authorities cannot detain the defendant. Similarly, the regulations are moot. There is no need to ascertain if ICE's regulations contemplate sequential proceedings because the INA would mandate such. ICE's power to detain for immigration purposes would only manifest after the criminal proceedings have concluded.

Moreover, the superficial argument that defendants subject to a detainer cannot receive a bond would also be nullified. With ICE lacking the power to detain a defendant on bond, there is no longer a risk of involuntary flight.

Thus, through one definition, all problems in the BRA-INA interplay are resolved. There would no longer be any doubt that defendants subject to a detainer are eligible for bond, and ICE's power to detain these individuals would not mature until after the prosecution concluded. It all seems pretty simple. But of course, it is not.

With no statutory definition and undeveloped case law, there is no predicting how courts would decide the issue. Indeed, it may be argued that some courts have already indirectly ruled on the scope of custody. Though not specifically addressing the issue, recent appellate courts have ultimately held that ICE can detain defendants released on bond.[106] Similarly, some jurists have previously argued that the definition of custody needs to be limited.[107] Addressing the scope of custody in the context of the BRA-INA struggle may be the perfect time to provide this limitation.

Nonetheless, the issue of custody provides an avenue for defense attorneys to undercut recent appellate court holdings and maybe, secure (a restricted) liberty for their clients.

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[103] United States v. Castro-Inzunza, 2012 WL 6622075 (9th Cir. July 23, 2012).

[104] *See* United States v. Diaz-Hernandez, 943 F.3d 1196, 1197 (9th Cir. 2019); Vasquez-Benitez, 919 F.3d at 554.

[105] *See* United States v. Lutz, 2019 WL 5892827, at *4 (D. Ariz. Nov. 12, 2019); Trujillo-Alvarez, 900 F. Supp. 2d at 1175.

[106] *See* Pacheco-Poo, 952 F.3d at 953; Nunez, 928 F.3d at 247; Lett, 944 F.3d at 470; Veloz-Alonso, 910 F.3d at 270.

[107] *See* Lawrence v. 48th Dist. Court, 560 F.3d 475, 485 (6th Cir. 2009) (Judge Thapar concurring).

FINAL THOUGHTS

At the time this article was composed, the circuits and district courts were split on how to interpret the competing statutory powers of the BRA and the INA, as well as how to interpret the corresponding regulations. And despite the refinement of the jurisprudence in this area, the rather significant issue of custody remains unresolved. The tension identified by *Trujillo-Alvarez* remains alive and well.

Similarly, the legislature has shown no signs of stepping in and alleviating this tension. Arguably, the 35-year-old BRA needs to be updated, especially in the context of immigration, which has transformed society and the criminal justice system in recent years. The same can also be said for the INA. Defining "custody" to include or exclude federal bond could streamline a resolution to the various issues this article addresses.

In short, it is unlikely these issues will be clarified in the near future. Criminal practitioners need to be armed with all of the information possible when navigating the maze of the BRA-INA interplay.