MISGUIDED GOOD INTENTIONS: HOW BLUE STATES' OPPOSITION TO ICE CONTRACTS HURTS THE UNDOCUMENTED

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I. INTRODUCTION

"The history of liberty has largely been the history of the observance of procedural safeguards."[1]

Traditionally, the U.S. Immigration and Customs Enforcement agency ("ICE") and its predecessor, the Immigration and Naturalization Service ("INS"), have held contracts with local county jails to house detainees prior to their deportation proceedings. Compared to prior administrations, the Trump Administration made a concerted effort to detain more people prior

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1 McNabb v. United States, 318 U.S. 332, 347 (1943).

to their removal hearings.[2] This highly publicized and harsh enforcement of immigration policy has caused progressive communities and state leaders to end or forbid ICE contracts to house detainees in county jails while respondents await their hearings. Contrary to the goal of protecting vulnerable immigrant communities, this policy may be assisting the Trump Administration by detaining immigrants far from their homes and resources. Detentions that place respondents away from their homes makes it more difficult for these individuals to obtain legal representation, collect evidence to support their cases in pending deportation proceedings, and force them away from their families and support networks. An immediate solution to this problem would be for local counties to keep their contracts with ICE, and use a portion of proceeds from these contracts to fund social services or pro-bono attorneys for detainees and their families to help them remain in the United States. While statutory changes to immigration law like allowing 1404(a) federal civil procedure type transfer motions would aid in correcting structural inequality these individuals face when their cases are filed in an unwarranted venue.

This Note will argue how distinctions between federal civil and criminal venue procedures show a lack in the interest of justice for deportation respondents and how well-intentioned policies on the part of local governments have unintended consequences that allow more individuals to be deported. The organization of the Note will be as follows: Part II will explain the current legal procedures ICE must follow to start deportation proceedings and their choice of venue. Part III will explore why venue is essential to the outcome of a case. Parts IV and V will contrast the rules of deportation proceedings with that of federal civil and criminal venue procedures, Part VI will examine disparities in the due process rights of those who face deportation, Part VII will explore what steps local communities are taking to protect their immigrant residents, Part VIII will explore the unintended consequences of these policies, and Part IX will conclude the argument by proposing factors local communities should weigh before terminating contracts with ICE and structural changes to immigration law that would result in a more equitable venue for deportation proceedings.

[2] Jason Lemon, *Are Migrant Detention Centers Worse Under Donald Trump than Under Barack Obama?*, NEWSWEEK (July 2, 2019, 1:41 PM), https://www.newsweek.com/migrant-detention-centers-trump-obama-1447160.

II. THE CRITICAL IMPORTANCE OF VENUE IN DEPORTATION PROCEEDINGS

Respondents seeking to avoid removal from the United States face significantly different outcomes based on whether their hearing occurs in a "red" or "blue" state.[3] Hearings in California and Hawaii result in deportation twenty percentage points under the national average, while North Carolina and Kentucky order deportation twenty percentage points more than the national average.[4] Respondents held in "blue" states may find courts that are more sympathetic, and are generally connected to pro bono support services.[5] While there is not a direct explanation as to why respondents have more success in "blue" states, there is statistical data showing immigrants in deportation proceedings face a greater risk of removal if they are not represented by counsel.[6] States with the highest percentage of deportation orders generally also have the lowest levels of attorney representation.[7] Respondents with access to legal representation have a better chance of a success at their deportation hearing.[8] This information is especially relevant to venue challenges because change of venue motions will only be considered for a short window of time, so any delay in proper representation may cause the initial venue to stand.

It is difficult to determine if ICE is purposely filing NTAs away from respondents' place of residence because there is no centralized system providing information on where these individuals live. However, analysis of the number and location of charging documents filed under both the Trump and Obama administrations reflect an increased and aggressive enforcement by President Trump. There is no question ICE actions seeking

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[3] For the purposes of this piece "red" and "blue" states are generally defined by which political party won the popular vote in the 2016 presidential election (red for republican, blue for democrat). Pennsylvania, Ohio, New Hampshire, and Wisconsin are not defined by either connotation; however, their overall number of deportations and charging documents are included in gross calculations for the sake of complete analysis. Florida is categorized as a "red" state despite its swing state record due to the historical republican control of its state government and high percentages of deportation orders.

[4] *Outcomes of Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION (Jan. 20, 2021), https://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php [hereinafter TRAC, *Outcomes*]. This information was compiled by reviewing the 2019 immigration outcomes from each of the above states. This data can be accessed following the link and then changing "ordered deported" to percent, and type to immigration. From there one can view the percent for each state by clicking on the box in the lower left corner.

[5] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGRATION COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[6] Darla Cameron, *Immigrants In Texas Are Among The Least Likely To Have A Lawyer, Most Likely To Get Deported*, KUT 90.5 (Apr. 12, 2018, 4:16 PM), https://www.kut.org/post/immigrants-texas-are-among-least-likely-have-lawyer-most-likely-get-deported.

[7] *Id.*

[8] Eagly & Shafer, *supra* note 5.

deportation increased under the Trump administration.[9] The second term of the Obama administration, ranging from 2013 through 2016, ICE filed approximately 800,000 new deportation proceedings.[10] From only 2017 through 2020 ICE filed nearly 1.4 million new deportation proceedings.[11]Using the same time period, Texas, California, New York, and Florida were the states with the highest number of new filings under both administrations.[12] Under Trump, ICE increased their filings approximately 60% in Texas, California, and New York; while Florida saw a 150% increase.[13] This information alone is not enough to suggest manipulation of Notice to Appear ("NTA") filings, but examination of new filings in other states show a concerning trend. States like North Carolina and Louisiana who exhibit a high percentage of deportation orders[14] and were less popular under the Obama administration for new filings, saw the number of charging documents filed shoot up dramatically since 2017.[15] Louisiana has seen new NTAs increase over 70%, while North Carolina saw over a 150% increase.[16] Media and advocate groups should use this information to press the Trump administration to determine if these localities are targeted because respondents are more likely to be deported if their cases are heard there.

III. VENUE RULES

After examining how venue in certain "red" and "blue" states can affect the outcome of deportation proceedings, it is now important to understand the legal procedures necessary to establish proper venue. To

[9] *New Deportation Proceedings Filed in Immigration Court*, TRAC IMMIGRATION (Jan. 20, 2021), https://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php [hereinafter TRAC, *New Deportation Proceedings*]. This information was compiled by comparing the numbers of new filings of deportation proceedings for the second Obama administration and the Trump administration. This data can be accessed following the link and then changing "type of charge" to immigration, clicking "entire US", changing "fiscal year" to 2013, 2014, 2015, 2016 then adding these numbers. Then changing "fiscal year" to 2017, 2018, 2019, 2020 then adding these numbers.

[10] *Id.*

[11] *Id.*

[12] *Id*. This data was compiled by using the same method as cite 9 but instead of selecting "entire US", California, New York, Texas, and Florida were selected individually and new deportation proceeding numbers were added for the 2013-2016 and 2017-2020 time periods. Once the totals of each state are known for both administrations one can calculate the percent increase for each state.

[13] *Id.*

[14] TRAC, *Outcomes*, *supra* note 4.

[15] TRAC, *New Deportation Proceedings*, *supra* note 9. This data was compiled by using the same method as cite 9 but instead of selecting "entire US", Louisiana and North Carolina were selected individually and new deportation proceeding numbers were added for the 2013-2016 and 2017-2020 time periods. Once the totals of each state are known for both administrations one can calculate the percent increase for each state.

[16] *Id.*

commence a deportation or "removal" proceeding of an individual already in the United States,[17] ICE serves Form I-862 (an NTA).[18] Venue initially begins where the NTA is filed.[19] Once the NTA is filed, the individual facing deportation becomes known to the court as the "respondent."[20] The Immigration Court Rules of Procedure provide that venue "shall lie at the Office of the Immigration Judge where the charging document is filed."[21] Because ICE is not bound by the venue where respondent resides or is "found," the agency has the ability to file a case in place where they are most likely to receive an outcome in their favor. Such a power cannot be understated when individuals face deportation.

The statutes that deal with removal proceedings are written to give broad discretion to ICE throughout the life of the deportation proceeding. The Immigration and Nationality Act ("INA") is silent as to the proper venue for removal proceedings, "but the regulations promulgated under the Act provide that venue is proper wherever federal immigration authorities choose to file the charging instrument."[22] This creates a system where ICE has the power to file an NTA in states or counties the respondent has never visited or resided. While a procedural system exists for respondents to request a change in venue, such a request comes with a high burden for approval and the empirical data shows that the state where the removal proceedings are heard have a huge impact on the outcome of the case.[23] ICE can, for instance, file charging documents in a state with a high likelihood of deportation despite the respondent having possibly zero connection to that state or jurisdiction.[24]

The venue where the proceeding will be tried is determined by where ICE files the NTA.[25] Respondents have the opportunity to move for a change of venue that would be more convenient, but this ability to rebut venue is limited by a series of factors.[26] The motion for change of venue can only be filed after ICE files their initial NTA, and the respondent must make the motion before a judge can consider questions of venue.[27]

[17] 8 C.F.R. § 1003.13-14(a) (Mar. 6, 1967).

[18] 8 C.F.R. § 208.2(b) (Apr. 6, 1982).

[19] ALEXANDRA PEREDO CARROLL & ASHLEY M. BARKOUDAH, IMMIGRATION PRACTICE MANUAL: RELIEF FROM REMOVAL AND IMMIGRATION COURT PROCEDURES § 20 (2019).

[20] *Id*.

[21] PLACE OF HEARING, 1 IMMIGR. L. AND DEF. § 7:29 (2020).

[22] Peter L. Markowitz & Lindsay C. Nash, Constitutional Venue, 66 FLA. L. REV. 1153, 1201 (2014).

[23] TRAC, *Outcomes*, *supra* note 4.

[24] Markowitz & Nash, *supra* note 22, at 1202-03.

[25] *Id*. at 1201.

[26] *Id*. at 1202.

[27] *Id*.

Respondents may be unaware the onus is on them to take this action. This is further compounded by lack of legal representation and a possible language barrier. Additionally, these motions must be submitted as soon into the proceedings as possible because, "motions for change of venue after a merits hearing has begun are strongly disfavored."[28] Before a change of venue motion can be granted the opposing party must be given notice and opportunity to respond.[29] Additionally, the respondent must provide a "fixed street address, including city, state and ZIP code, where the respondent/applicant may be reached for further hearing notification."[30] This requirement is important because it allows the state to contact or find respondent if they do not appear at their hearing.

Once the change of venue motion is submitted, the decision is at the sole discretion of the immigration judge ("IJ") and can be "reviewed for abuse of discretion only."[31] In granting the motion, judges must review factors related to "good cause."[32] Good cause is a standard which measures "relevant factors, including administrative convenience, expeditious treatment of the case, location of witnesses, cost of transporting witnesses or evidence to a new location, and factors commonly associated with the alien's place of residence."[33] Even if the respondent does reside elsewhere they must show "significant factors associated with" their residence *outweigh* ICE's opposition to the change of venue.[34]

This threshold may be difficult to overcome because a showing of "inconvenient" venue is not sufficient to move ICE's case.[35] Strong factors in respondent's favor include a prior attorney-client relationship in the venue they are requesting.[36] Courts have ruled other factors such as previously being granted a change of venue or residing in the undesirable venue a few days a month may show a lack of good cause.[37]

If respondent's motion is denied they may appeal the decision to the Board of Immigration Appeals ("BIA"). As stated above, the BIA only overturns the lower court's decision upon a finding of abuse of discretion. Examples of abuse of discretion may include denying respondent's motion

[28] EXCLUSIVE PROCEDURES—VENUE, 3 IMMIGR. L. SERV. § 13:159 (2d ed. 2020).

[29] 8 C.F.R. § 1003.20(b).

[30] 8 C.F.R. § 1003.20(c).

[31] Ballesteros v. Ashcroft, 452 F.3d 1153, 1160 (10th Cir. 2006).

[32] *Id.*

[33] In re Rahman, 20 I & N Dec. 480 (BIA 1992).

[34] *Id*.

[35] *See* Meng Fei Ye v. Holder, 491 F. App'x 479, 480 (5th Cir. 2012) (Respondent was denied change of venue to their place of residence because defendant could not show how witnesses residing in NY could have provided testimony.).

[36] Guzman v. Reno, 65 F. Supp. 2d 1077, 1092 (N.D. Cal. 1999).

[37] Zheng v. Holder, 498 F. App'x 55, 57 (2d Cir. 2012).

based on arbitrary assumptions like a "real funny feeling" by an immigration judge,[38] or denying respondent's request one day after it was filed.[39] Courts have also stated where respondent "did not deliberately wait until the last minute to make their request," their motion should be considered.[40]

However, even if respondent is successful in proving abuse of discretion by the lower court, this alone does not guarantee their change of venue will be granted.[41] Further frustrating respondents' attempts to have venue in a favorable location, even if the denied motion is brought for review, the BIA is under no obligation to provide written reasoning when affirming the lower court's decision.[42] ICE's extensive power in this arena seems more overwhelming when considering Trump's chief immigration judge issued a memo to immigration judges discouraging changes of venue motions.[43] The same document instructs when respondent is detained outside the venue reviewing their proceedings, this does not mean respondent's venue has been changed even if bail hearings are conducted in the foreign venue.[44]

IV. VENUE IN FEDERAL CRIMINAL CASES

This section will argue defendants in federal criminal cases are afforded substantially more opportunity to change an inequitable venue than their counterparts in deportation proceedings. To understand this comparison we must first examine how venue is chosen in federal criminal cases and what constitutional protections criminal defendants are entitled to.

Criminal proceedings attempt to deprive defendants of their liberty, so prosecutors must act as to not disturb the due process rights of defendants.[45] When a prosecutor charges a defendant in criminal court, they are bound by Rule 18 of the Federal Rules of Criminal Procedure. This rule is the product of two constitutional safeguards: Article III, section 2, clause 3 of the United States Constitution and the Sixth Amendment. Article III states, "Trial of all Crimes . . . shall be held in the State where the said Crimes

[38] Monter v. Gonzales, 430 F.3d 546, 560 (2d Cir. 2005).

[39] *Reno*, 65 F. Supp at 1091–92

[40] Baires v. I.N.S., 856 F.2d 89, 92 (9th Cir. 1988).

[41] Lovell v. I.N.S., 52 F.3d 458, 460–61 (2d Cir. 1995).

[42] Carriche v. Ashcroft, 350 F.3d 845, 851 (9th Cir. 2003).

[43] MaryBeth Keller, Chief Immigr. J., Just. Dep't, to All Immigr. J., et al., Operating Policies and Procedures Proc. Memorandum 18-01: Change of Venue (Jan. 17, 2018), https://www.aila.org/infonet/eoir-releases-oppm-on-change-of-venue-requests.

[44] *Id.*

[45] David Spears, *Venue in Federal Criminal Cases: A Strange Duck*, 43 CHAMPION 24 (2019).

shall have been committed" and the Sixth Amendment mandates a criminal trial be "by an impartial jury of the State and district wherein the crime shall have been committed."[46] A crime is held to be committed where "any of its 'conduct' elements are committed."[47]

Where criminal conduct is committed in multiple districts or jurisdictions, statutory provisions or other judicial rules provide where the case may be tried.[48] In *United States v. Rodriguez-Moreno*, the Supreme Court ruled that New Jersey was the proper venue for a kidnapping and firearm case where the victim was taken from Texas to New Jersey, New York, and Maryland, despite the firearm only being carried in Maryland.[49] The Court found that the crime had been committed in all of those places, so venue was appropriate in any them.[50] Other multi-district crimes such as tax fraud or mail offenses have statutory rules for where such cases can be tried.[51] For the crime of being "found in" the United States following deportation, venue is proper wherever the previously deported and reentered defendant is "found."[52]

Regardless of what venue is chosen, the prosecutor bears the burden of showing their choice in venue was proper.[53] The prosecution must prove "that the trial is in the same district as the crime's commission."[54] This burden is not governed by the reasonable doubt standard, but rather needs to be established by a preponderance of the evidence.[55]

Compare these procedures with the standards for choosing venue in deportation proceedings. While the prosecuting office in both situations may decide the initial venue, the government in criminal cases bears the burden of proving their venue choice was proper, whereas respondents in deportation cases must show their interest in being tried in a different venue outweighs ICE's opposition to such a change.[56] The preponderance of the

[46] PETER J. HENNING, § 302 DISTRICT IN WHICH OFFENSE COMMITTED, 2 FED. PRAC. & PROC. CRIM. § 302 (4th ed. 2019).

[47] CHARLES DOYLE, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED, CONG. RES. SERV., RL33223, https://fas.org/sgp/crs/misc/RL33223.pdf.

[48] *Id.*

[49] United States v. Rodriguez-Moreno, 526 U.S. 275, 278 (1999); *see also* United States v. Cabrales, 524 U.S. 1, 2 (1998) ("Locus delicti of crime must be determined, for venue purposes, from the nature of the crime alleged and location of act or acts constituting it.").

[50] United States v. Lombardo, 241 U.S. 73, 77 (1916) ("Where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.").

[51] CONG. RES. SERV., RL33223.

[52] PETER J. HENNING, *supra* note 466, at 3.

[53] *Id.*

[54] United States v. Winship, 724 F.2d 1116, 1124 (5th Cir. 1984).

[55] PETER J. HENNING, *supra* note 466, at 10.

[56] *Id.*

evidence standard prosecutors are subject to for criminal proceedings is not the most stringent legal bar, but it does require the government to show a relation between the venue and the crime that is not necessary in deportation proceedings.[57] ICE is under no obligation to show it made the correct choice of venue, yet detainees must prove the inequity of the situation if they hope to move the proceedings to a more just location. [58]

Rule 21(b) is more analogous to the "good cause" standard we are familiar with from immigration court. The section provides,

> Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.[59]

This is known as the transfer for convenience provision.[60] Prior to the 1966 amendment this section allowed for transfers "in the interest of justice."[61] The convenience language did not fundamentally change the analysis for transfer of venue, but it did allow for a larger number of transfers to take place.[62] For example*, United States v. Ringer* allowed for a transfer in a criminal securities fraud case, where prosecutors initially choose Illinois as the venue, but a majority of the criminal actions took place or were directed at New York.[63] The interests of justice required the transfer because all defense witnesses, some prosecution witnesses were located in New York, and defendant's business would fail if the trial were to proceed in Illinois.[64] *Platt v. Minnesota Mining & Manufacturing Company* was decided before the 1966 amendment[65] but gives us a list of ten factors that are still used today to weigh defendant requests for change of venue.[66] While none of these factors are binding on a judge's decision of change of venue, they lay out the holistic picture the judge should consider before ruling on the motion.

As in deportation proceedings, judge discretion is paramount in change of venue motions.[67] The two cases are also similar in that if the

[57] *Id.*

[58] *Id.*

[59] FED. R. CRIM. P. 21.

[60] Platt v. Minn. Min. & Mfg. Co., 376 U.S. 240, 243-44 (1964); *see also* TRANSFER IN THE INTEREST OF JUSTICE—STANDARD FOR TRANSFER, 2 FED. PRAC. & PROC. CRIM. § 345 (4th ed. 2020).

[61] *Id*.

[62] *Id.*

[63] United States v. Ringer, 651 F Supp. 636, 638 (N.D. Ill. 1986).

[64] *Id*.

[65] *What is the Judicial District "in Which the Claim Arose" for Venue Purposes Under 28 U.S.C.A. § 1391(a) and (b)*, 59 A.L.R. FED. 320, 334 (1982) [hereinafter, *What is the Judicial District*].

[66] TRANSFER IN THE INTEREST OF JUSTICE—STANDARD FOR TRANSFER, *supra* note 60.

[67] *Id.*

respondent or defendant do not motion for change of venue in a timely fashion they may risk waiving the opportunity to have their case heard in the proper venue.[68] Motions in both cases are not proper when the defending party believes the judge to be biased.[69]

Despite these similarities, the biggest difference between the deportation and criminal venue decision is the framers of the criminal system understood unchecked venue would be ripe for abuse.[70] It was recognized that defendants had to be protected from sophisticated prosecutors who could "cherry-pick" a forum where a particular circuit may have a law that is favorable to the State, or to prevent prosecutors from centralizing certain kinds of crimes to certain districts.[71] Compare these fears of legal manipulation with current ICE applications of their venue powers. Much of what accused criminals are being protected against, non-criminal detainees could be subjected to.[72] Proceedings in venues such as Kentucky or North Carolina are much more likely to result in removal orders.[73] NTAs can be filed in districts that favor deportation, regardless of respondents' contacts to that area.[74] The government is stacking the deck in their favor from the inception of the case. This combination of choice of initial venue, onus on respondent to have an unfair venue changed, weak appeal system, and detainment away from family and resources to build a defense for trial leave respondents in a much weaker position than their criminally accused counterparts.

V. VENUE IN FEDERAL CIVIL CASES

As with our analysis of venue in federal criminal cases, we must first understand how plaintiffs may choose venue in federal civil suits and what safeguards defendants possess to change venue if necessary. Once this legal structure is understood the dipartites between deportation respondents and civil litigants become apparent.

The initial choosing of venue in civil cases falls under the authority of 28 U.S.C. § 1391.[75] The relevant text of 28 U.S.C. § 1391 is:

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[68] CHARLES DOYLE, *supra* note 47.

[69] TRANSFER FOR PREJUDICE, 2 FED. PRAC. & PROC. CRIM. § 343 (4th ed. 2020).

[70] Spears, *supra* note 45.

[71] *Id*.

[72] Alan Gomez, *ICE sets record for arrests of undocumented immigrants with no criminal record*, USA TODAY (Mar. 21, 2019, 4:03 PM), https://www.usatoday.com/story/news/politics/2019/03/21/ice-sets-record-arrests-undocumented-immigrants-no-criminal-record/3232476002.

[73] TRAC *Outcomes*, *supra* note 4.

[74] Markowitz & Nash, *supra* note 22, at 1197.

[75] 28 U.S.C. § 1391.

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.[76]
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.[77]

Other sections of the statute describe appropriate venue in the case of corporations as a defendant, foreign residents, and officers or employees of the United States.[78] For the purposes of our analysis only sections 1391(a)-(b) are pertinent.

Changes to federal civil law over the past decades has given more flexibility to the venue where a proceeding can occur.[79] "[V]enue is primarily a matter of convenience of litigants and witnesses."[80] Prior to 1966, venue questions depended upon the residence of the parties; not until the 1966 amendment could venue be based on where the litigated event or incident occurred.[81] Congress considered this change to be in the interest of justice because while it is possible for no parties to reside where a claim arose, witnesses and evidence may be more readily available.[82] Amendments to federal immigration law that mirror § 1391(a)-(b) would lessen ICE's absolute venue powers and would provide a more equitable result for respondents. In a case where more than one venue may be acceptable the court must weigh factors such as the availability of witnesses, the accessibility of relevant evidence, and convenience of the defendant when assigning the "locus of the claim."[83] Federal civil cases provide some deference to plaintiff's choice of forum,[84] but the defendant is provided some protections, like Rule 12(b)(3) that enables a party to move to dismiss if venue is inappropriate.[85] These baseline protections allow defendants in federal civil cases to have their cases heard in an arena that is relevant to what they are accused of.

One particular aspect of federal civil suits that would be valuable to the interest in justice of deportation respondents is the ability to transfer a

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[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *What is the Judicial District, supra* note 65.
[80] Denver & R. G. W. R. Co. v. Brotherhood of R. R. Trainmen, 387 U.S. 556, 560 (1967).
[81] *What is the Judicial District, supra* note 65.
[82] *Id*.
[83] *Id*.
[84] VENUE DISTINGUISHED FROM JURISDICTION, 14D FED. PRAC. & PROC. JURIS. § 3801 (4th ed. 2020).
[85] FED. R. CIV. P. 12(b)(3).

case under 28 U.S.C. § 1404(a). Under this provision, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."[86] This statute is similar to current immigration proceedings, where judges have discretion to approve the transfer,[87] and there is a strong preference for plaintiff's choice of forum.[88] Courts consider private and public factors when deciding 1404(a) transfers.[89] These list of factors can be considered analogous to the "good cause" standard for current deportation change of venue motions made by respondents.

However, defendants do not waive their right to a § 1404(a) transfer if they fail to assert improper venue in the initial answer to the complaint.[90] This contrasts with immigration respondents' being compelled to move for change of venue early in the proceedings, or else risk waiving the right to a proper venue. Another important protection for transfer motions under § 1404(a) is courts must explain their ruling on the transfer motion.[91] Under the current immigration system, however, the BIA is under no obligation to give written reasoning to support their decision.[92]

The Supreme Court has stated that § 1404(a) was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" and the discretion allowed to courts is considered "broader."[93] While IJs are afforded a large amount of discretion in change of venue motions, their decisions are affected by respondents' arguments for venue having to *outweigh* ICE's opposition to the transfer.[94] Implementing a § 1404(a)-type statute for venue changes in deportation proceedings would allow judges to focus on the three main concerns in civil transfers ("convenience of parties, convenience of witnesses, and the interest of justice"),[95] rather than being forced to put ICE's interests first.

Other protections by law, such as, a court having discretion to dismiss a case of improper venue is also pertinent to our discussion. 28 U.S.C. §

[86] 28 U.S.C. § 1404(a).

[87] Daniel A. Edelson, *Civil Procedure: Venue*, USLAWESSENTIALS, https://uslawessentials.atavist.com/civil-procedure-venue (last visited Dec. 20, 2019).

[88] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981).

[89] Edelson, *supra* note 877.

[90] WAIVER, CIVIL PRACTICE IN THE SOUTHERN DISTRICT OF NEW YORK § 10:27 (2d ed. 2020).

[91] STANDARD IN CONSIDERING TRANSFER—IN GENERAL, 15 FED. PRAC. & PROC. JURIS. § 3847 (4th ed. 2020).

[92] Carriche, *supra* note 42.

[93] Norwood v. Kirkpatrick, 349 U.S. 29, 30–31 (1955).

[94] Rahman, *supra* note 33.

[95] STANDARD IN CONSIDERING TRANSFER—IN GENERAL, *supra* note 91.

1406(a) allows the court to transfer or dismiss a case if the chosen venue is improper,[96] perhaps a similar method of dismissal in the face of improper filing would be beneficial to ensuring uniform fairness in immigration enforcement.

Updating the current rules regarding choice of venue for deportation proceedings to include a § 1404(a) type motion for transfer would shift ICE's almost complete power to decide venue, and would allow respondents the opportunity to challenge venue even if they are late to obtain legal representation. Our legal system places importance on the "interests of justice" for federal civil matters, and since immigration court is considered a civil court,[97] the same such protections should be given to respondents there.

VI. WHY DUE PROCESS MATTERS IN IMMIGRATION PROCEEDINGS

While it is settled law that immigration actions are considered civil proceedings,[98] there is a stark difference between individuals in immigration court and defendants in more traditional civil lawsuits. The Supreme Court has allowed the executive branch to act as both arresting officer and judge to respondents facing deportation,[99] and this dual role highlights the vulnerability individuals face in immigration courts against a system that affords them fewer procedural protections.

In 1993, Justice Scalia wrote, "it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[100] Though conservative justices agree respondents should be awarded these protections, application is another matter. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[101] Due process claims are often associated with fairness.[102]

The founders of the United States understood that a strong central government would need the power to deprive some of their liberty.[103] The Fifth Amendment provides that "[n]o person shall be . . . deprived

96 28 U.S.C. § 1406(a) (1996).

97 *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), https://immigrationforum.org/article/fact-sheet-immigration-courts.

98 *Id*.

99 Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35, 36 (2017).

100 Reno v. Flores, 507 U.S. 292, 306 (1993).

101 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

102 State v. LaPlaca, 27 A.3d 719, 723–24 (N.H. 2011) ("Fundamental fairness requires that government conduct conform to the community's sense of justice, decency and fair play." (citation omitted)).

103 Enriquez, *supra* note 99 at 39.

of . . . liberty . . . without due process of law."[104] A functioning government of the people needs to balance these two interests; a regime that is empowered enough to protect its citizens from wrongdoers and individual protections for its citizens so its government cannot become tyrannical.[105] As immigrants are often viewed as a group the government needs to protect its people from, rather than someone needing its protection.[106] This "due process light" approach leads to a system where fundamental safeguards are denied to people seeking refuge in the United States.

Protection reaches its minimum under the expedited removal process, where undocumented immigrants who have been in the country less than two years and are arrested less than one hundred miles from the border may be deported almost instantly, with no hearing.[107] Asylum seekers are exempted from this process.[108] This Note has previously described how ICE is granted an enormous litigation advantage by being given the choice of where to file, but other measures, such as hearsay, are allowed in immigration court while being disavowed in most other American courts.[109] States like New York are taking historic steps to provide all immigration detainees with legal representation.[110] However, most immigrants are not represented by an attorney unless they can afford one.[111] This matter is further compounded by current administration policies of pursuing those who cross the border illegally with criminal charges as well as deportation.[112] Such a charge is currently a misdemeanor under United States law.[113] These challenges show the disparities undocumented immigrants face when fighting deportation.

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

[105] *Id*.

[106] Brenna Williams, *Trump's Immigration Policy (or What We Know About it) in 13 Illuminating Tweets*, CNN (Aug. 26, 2016, 7:18 PM), https://www.cnn.com/2016/08/26/politics/donald-trump-immigration-tweets/index.html; *see also* Anthony Rivas, *Trump's Language About Mexican Immigrants Under Scrutiny in Wake of El Paso Shooting*, ABC NEWS (Aug. 4, 2019, 3:05 PM), https://abcnews.go.com/US/trumps-language-mexican-immigrants-scrutiny-wake-el-paso/story?id=64768566.

[107] Gretchen Frazee, *What Constitutional Rights do Undocumented Immigrants Have?*, PBS (Jun. 25,2018), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have.

[108] *Id*.

[109] *Id*.

[110] *New York State Becomes First in the Nation to Provide Lawyers for All Immigrants Detained and Facing Deportation*, VERA INSTITUTE OF JUSTICE (Apr. 7, 2017), https://www.vera.org/newsroom/new-york-state-becomes-first-in-the-nation-to-provide-lawyers-for-all-immigrants-detained-and-facing-deportation.

[111] *Id*.

[112] *Id*.

[113] *Id*.

Due process challenges often arise from objections to the government's implementation of its authority in seeking to deprive persons of their liberty, rather than an individual exercising a specific behavior.[114] Even if law enforcement is justified in their removal of someone from society, native or otherwise, the method for conviction and punishment must be within these bounds, equitable proceedings are key. Indeed, procedural safeguards that Americans expect in criminal court—such as a right to a speedy trial—are absent in the immigration system.[115] Further, civil defendants do not face the risk of detention prior to their case being adjudicated.[116] Even IJs themselves do not have the level of independence we expect from the judiciary.[117] IJs are administrative judges appointed by the Attorney General, and are thus employees of the Department of Justice ("DOJ"), rather than the judicial branch.[118] This smaller degree of structural independence faces further erosion, as the Trump Administration attempts to decertify the union that represents the over 400 IJs who currently preside over these cases.[119] The DOJ has exerted even more authority over IJs by tying numeric quotas for completed cases to performance reviews of IJs.[120] These quotas result in IJs needing to complete (roughly) three cases a day; this speed of adjudication that would be unheard of in other federal courts.[121]

Other protections one may rely on for fair adjudication, such as interpreters, are not guaranteed to be as skilled as one may expect. Currently, the Executive Office of Immigration Review ("EOIR"), provide interpreters at Government expense, but if a respondent only speaks a regional dialect, a translator may be difficult to produce, and the onus is on the respondent to make a motion for the correct interpreter *prior* to their merits hearing.[122] EOIR interpreters are vetted internally or by private

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[114] Enriquez, *supra* note 9999 at 42.

[115] *Id.* Individuals may be detained for months before ICE is obligated to file a charging document.

[116] *Id.* at 36.

[117] Dana Leigh Marks, *Opinion: I'm an Immigration Judge. Here's How we Can Fix our Courts*, WASH. POST (Apr. 12, 2019, 3:31 PM), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html.

[118] *Id*.

[119] Richard Gonzales, *Trump Administration Seeks Decertification Of Immigration Judges' Union*, NPR (Aug. 12, 2019, 9:17 PM), https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union.

[120] Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges.

[121] *Id.*

[122] Grace Benton, *"Speak Anglish:" Language Access and Due Process in Asylum Proceedings*, 34 GEO. IMMIGR. L.J. 453, 458 (2019).

contractors working for the department; this differs from interpreters in federal district courts who must be certified by the Administrative Office of the U.S. Courts.[123] Cases involving disputes about interpreters have led courts to raise due process concerns, but courts have been unwilling to definitively state "language access is a constitutional due process right."[124]

This Section has attempted to explain how respondents in immigration courts hold fewer procedural protections than their counterparts in civil lawsuits. Additional statutory protections could be established by Congress, but until such a time that immigration reform legislation passes there is little state and local governments can do to ensure procedural protections for these individuals. With the courts consistently ruling that immigration authorities—and by extension the executive branch—need not award respondents the procedural protections (specifically venue selection rules) granted to criminal and civil litigates; it is imperative that concerned local governments, as a matter of fairness and sound public policy, assist respondents in meaningful ways so they can be best prepared to enter this imbalanced system.

VII. WHAT LOCAL COMMUNITIES ARE DOING TO FIGHT BACK AND HOW THEY CAN DO BETTER

As more immigrants faced detention and deportation under the Trump administration (and perhaps a future administration with similar values), more state and local governments are taking steps to fight back. Discussions of place of detainment are especially timely because more respondents are being held prior to their hearings than under previous administrations.[125] The DHS (and ICE by extension) face an enormous backlog, with some estimates of one million pending cases.[126] Respondents also face longer detentions as immigration courts' backlogs have increased since 2017.[127] Detentions from May to July of 2019 range from twenty-eight to forty-six days.[128] It is important to take note of how holding

[123] *Id.* at 463.

[124] *Id.* at 467.

[125] Lemon, *supra* note 2.

[126] Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, WALL ST. J. (Sept. 18, 2019, 9:22 PM), https://www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885.

[127] *Immigration Court Backlog Tool*, TRAC (Sept. 11, 2019), https://trac.syr.edu/phptools/immigration/court_backlog. This information was compiled by reviewing the 2017 through 2020 immigration backlogs. This data can be accessed following the link and then changing "what to graph" to pending cases, changing "charge type" to immigration, changing "what to tabulate" to pending cases, and clicking "entire US." Viewing this data one can witness the increase in pending immigration cases from 2017 to present.

[128] Isabela Dias, *ICE is Detaining More People than Ever-And for Longer*, PAC. STANDARD (Aug. 1, 2019), https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer.

detainees' far from home effects their mental health.[129] Lack of access to legal services may affect morale, but most will also be cut off from visits from friends and family. Over four million U.S. citizen children under the age of eighteen live with at least one parent who is undocumented.[130] Many of these children have grown up with their undocumented parents at home and face educational and economic uncertainty after a parental separation.[131] In light of this imbalance of preference, immigrant-friendly jurisdictions should do everything in their power to keep respondents in their districts to give respondents the best possible chance of a positive outcome.

Local governments in Santa Ana, Albany,[132] and Atlanta have responded to the increase in enforcement by ending their contracts with ICE.[133] Five of the seven California counties who previously contracted with ICE have prohibited county jails from contracting with ICE to hold detainees prior to deportation proceedings. California specifically is trying to limit the amount of detentions by reviewing legislation that outlaws private prisons (including those that contract with ICE).[134] Two California counties who have held the most detainees over the last twenty years are closing their doors to ICE.[135] Lawmakers in New Jersey have also introduced legislation to end state and county contracts.[136]

Communities' strong reactions to these detentions are understandable, as in recent years more than half of ICE detainees had no previous criminal

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[129] Renuka Rayasam, *Migrant Mental Health Crisis Spirals in ICE Detention Facilities*, POLITICO (July 21, 2019, 6:54 AM), https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114.

[130] U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT, AM. IMMIGR. COUNS. (Nov. 22, 2019), https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement.

[131] *Id*.

[132] Mallory Moench, *No More Immigrant Detainees in Albany County Jail*, TIMES UNION (Jul. 28, 2019, 9:39 PM), https://www.timesunion.com/news/article/No-more-immigrant-detainees-in-Albany-County-Jail-14134105.php.

[133] Matt Katz, *County Officials Shutting ICE Out of Local Jails*, NPR (Oct. 14, 2018, 8:00 AM), https://www.npr.org/2018/10/14/657238852/jails-nationwide-end-contracts-with-immigration-and-customs-enforcement.

[134] Chantal De Silva, *California to Ban ICE Detention Centers Housing Thousands of Immigrants After New Bill Clamps-Down on Private Prisons*, NEWSWEEK (Sept. 13, 2019, 5:58 AM), https://www.newsweek.com/california-prison-prisons-ban-ice-detention-centers-1459094.

[135] *Where Are Immigrants with Immigration Court Cases Being Detained?*, TRAC IMMIGRATION (Mar. 29, 2018), https://trac.syr.edu/immigration/reports/504 (Source shows two California counties holding the number 1 and number 5 spots. Cite 133 shows these sites closing.).

[136] Monsy Alvarado, *Bergen lawmaker's bill would bar new immigrant detention contracts with ICE*, NORTHJERSEY (Jan. 7, 2021), https://www.northjersey.com/story/news/new-jersey/2021/01/07/bergen-county-lawmaker-would-ban-nj-counties-ice-detention-contracts/4139920001/.

record.[137] County jails have far from a pristine record, with food and safety violations that can seem horrifying in some cases.[138] Contra Costa County in California ended its detainee holding contract with ICE after alleged abuses against female inmates were uncovered.[139] Localities do not want to be paid participants in a detention policy they view as cruel, ineffective, and racially motivated.[140]

Communities see the terrible price immigrant families pay for these federal policies and want to do their part to protect their neighbors, but private prison companies see these closings and are eager to pursue the new revenue stream. Detainees were moved to private facilities after counties in Michigan, Georgia, and Texas terminated their contracts with ICE.[141] Despite the local community disagreeing with the detainments, state governments are allowed oversight in the conditions in county jails, a protection unlikely to be available if operated by a private company.[142] These counties' moral decisions may be good for private prisons' bottom line, as two major companies who contract with ICE saw their revenue increase $85 and $121 million over the same time period.[143] Activists protest these detentions because they believe they should not occur at all, their goal is not to cause people to be shipped farther away from the people who care about them. As the number of detentions continues to increase[144] the issue of where these detainments occur becomes more important. Local

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[137] *Profiling Who ICE Detains - Few Committed Any Crime*, TRAC IMMIGRATION (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530.

[138] Joe Davidson, *Inspection finds ICE Jail's Conditions Endanger Detainees' Health, Safety*, THE WASHINGTON POST (Mar. 1, 2019, 7:00 AM), https://www.washingtonpost.com/politics/2019/03/01/inspection-finds-ice-detainee-conditions-endanger-health-safety.

[139] Lauren Hernández, *ICE Removes All its Immigrant Detainees from Contra Costa County's Jail*, S.F. CHRONICLE (Aug. 23, 2018, 8:18 PM), https://www.sfchronicle.com/bayarea/article/ICE-removes-all-its-immigrant-detainees-from-13178495.php.

[140] *Id*.

[141] Justin Rohrlich, *As US Communities Resist ICE, Private Prison Companies are Cashing In*, QUARTZ (Apr. 9, 2019), https://qz.com/1586161/private-prisons-make-big-profits-from-ice.

[142] Sophie Murguia, *California Cities are Ending ICE Detention Contracts, but Immigrants Might Not Go Free,* PAC. STANDARD (May 29, 2019), https://psmag.com/social-justice/california-cities-are-ending-ice-detention-contracts-but-immigrants-might-not-go-free.

[143] Rohrlich, *supra* note 141.

[144] This information can be witnessed by reviewing the increase in the number of immigration detainees across the United States. This data can be accessed following the link and then changing "measure" to current status, changing "graph time scale" to by month and year, changing "time series" to number, changing first drop down menu to "immigration state court," changing second drop down menu to "custody," changing third drop down menu to "represented." Once these selections are complete click all on "Immigration Court State," click detained on "custody", and click all on "represented." This graph should show an increase in detainees from 2017 through the start of the pandemic. *Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION (Sept. 2019), https://trac.syr.edu/phptools/immigration/nta.

governments across the country do not wish to be unconcerned in the wrongful detention of immigrants. In this desire to do right by their communities, we must be sure that our solutions are treating the disease and not the symptom.

ICE seems determined to go around local governments by holding an increased number of people far away, in rural prisons.[145] If the end goal is to lower the amount of detentions and increase the number of people allowed to stay in the country, leaders on the left must acknowledge what tactics the federal government is using to detain the residents of their districts. Large liberal cities may be eager to end these contracts, but rural communities see them as job creators.[146] Private prisons operate heavily in these areas, and local sheriffs prefer ICE detainees to state criminal prisoners as the federal government pays a much higher rate per inmate.[147] Democrat governors have had some success in blocking the growth of private prisons, but this discretion is limited to denying the company the ability to use or buy state property.[148] As stated in Part II, not enough information exists to determine if NTAs are being filed away from respondent's place of residence. However, current deportation filings suggest besides an overall increase in the number of filings,[149] the Trump administration is increasing efforts in "red" states where respondents are more likely to be deported and less likely to be represented by an attorney.

It is important to note that even politically conservative policies toward immigration do not require mass detention to be successful. More than three-quarters of immigrants who face removal proceedings attend all of their court hearings.[150] This high retention rate can be credited to the penalty imposed for those who do not appear in court.[151] If a defendant in criminal court fails to appear they risk a bench warrant being issued for their arrest, but respondents in immigration court face the much harsher penalty of facing an immediate deportation order, despite being tried in absentia.[152] This penalty allows immigration officers to immediately deport

[145] Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar*, NPR (Aug. 15, 2019, 7:13 AM), https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks.

[146] *Id*.

[147] *Id*.

[148] Paul Egan, *Whitmer Nixes Private Immigrant Detention Center Proposed in Ionia*, DETROIT FREE PRESS, https://www.freep.com/story/news/local/michigan/2019/02/17/gretchen-whitmer-private-immigration-prison-ionia/2898680002 (last updated Feb. 17, 2019).

[149] TRAC, *Outcomes*, *supra* note 4.

[150] IMMIGRANTS AND FAMILIES APPEAR IN COURT, AM. IMMIGRATION COUNCIL (July 30, 2019), https://www.americanimmigrationcouncil.org/research/immigrants-and-families-appear-court.

[151] *Id*.

[152] IMMIGRANTS AND FAMILIES APPEAR IN COURT, *supra* note 150150.

the absent party, and forfeits their ability to applying for asylum.[153] Once such an order is issued it is difficult to reverse—often respondents must prove the government either failed to notify them of their hearing or provided respondent with the incorrect date and time.[154]

The Trump Administration decried so-called "catch-and-release" policies claiming more than ninety percent of respondents did not appear in court.[155] This wide differential in appearance statistics can be accredited to the administration's "completion-based" method, where only completed cases are valued into a given year's tally, ignoring the countless respondents who appear as their cases progress, sometimes through a multi-year process.[156] As pending cases continue to increase "completion-based" assessments discount the large majority of respondents who acquiesce with court orders to appear in the hopes of obtaining legal status through the courts. Almost all respondents with legal representation come to their court dates.[157] As such, administrations who want to encourage appearance of respondents, should perhaps invest in pro-bono services as their rate of appearance is overwhelming.[158]

Other fears, like immigrants affecting the crime rate, are not a statistical fact.[159] By the nature of being undocumented this group is difficult to conduct statistical analysis on.[160] However, one study showed that over the past twenty-five years overall crime has decreased in the United States, and neighborhoods with higher undocumented populations saw a decrease in crime at similar rates.[161] While many activists for the undocumented would agree the Trump administration's policy of mass detention and deportation is wrong, these individuals have little power to force a change in federal policy. Until statutory protections can be passed the most effective thing immigrant-supporting communities can do help respondents acquire legal representation. "Blue" states may oppose detention in their county jails, but if these results ensure counsel for

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[153] Lee Davidson, *Most Migrants Show Up for Utah Immigration Court Dates — Contrary to Trump Administration Claims*, SALT LAKE TRIB. (Sep. 3, 2019, 9:36 AM), https://www.sltrib.com/news/politics/2019/09/03/most-migrants-show-up.

[154] IMMIGRANTS AND FAMILIES APPEAR IN COURT, *supra* note 150150.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] IMMIGRANTS AND FAMILIES APPEAR IN COURT, *supra* note 150150150 (97% of respondents appear in court when represented by counsel).

[159] Robert Farley, *Is Illegal Immigration Linked to More or Less Crime?*, FACTCHECK.ORG (June 27, 2018), https://www.factcheck.org/2018/06/is-illegal-immigration-linked-to-more-or-less-crime.

[160] Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html.

[161] *Id*.

respondents, individuals have the best chance of successful proceedings regardless of presidential administration.

VIII. PROPOSAL AND UNINTENDED CONSEQUENCES

In response to these hardline immigration policies "blue" states and local governments are ending or forbidding contracts with ICE to house detainees in county jails, while respondents await their hearings. Failure to renew these contracts cannot be merely a symbolic gesture. Localities wishing to help vulnerable immigrant communities cannot simply wash their hands of federal policy they disagree with. In light of these factors, immigrant friendly municipalities must do a better job of tracking if detainees are released following these contract terminations or if they are detained elsewhere. This is especially important since private prisons and local facilities in red states are stepped in to fill the Trump Administration's need for detention spaces.[162] This fact in conjunction with the enormous power ICE has to set venue can allow for more and more detainees to be held and prosecuted in places that are unfavorable to them, regardless if this is the intention of "blue" states.

The above mentioned Contra Costa County jail closing resulted in over two-hundred immigrant detainees being transferred to holdings in Washington state and Colorado.[163] This development means places of detention play a much larger role in respondent's ability to prepare for trial and retain pro bono services in order to have successful outcomes in their proceedings. Respondents who have legal representation throughout their removal process are much more likely to remain in the country and avoid long-term detention.[164] To prevent against this worst case scenario, localities should not terminate their contracts with ICE until more evidence is gathered to support the proposition that terminating these contracts results in *fewer* detentions of their residents. The end goal of state and local governments wishing to help immigrant communities should be to assist them in obtaining legal residence in the United States. While ending local jail contracts with ICE may temporarily reduce the amount of immigrants in detention, states do not yet know if this will result in more people being held hundreds of miles away from their legal and familial support systems.

Any presidential administration, present or future, will retain the ability to institute harsh immigration policy, unless Congress passes legislation limiting this ability. Statutory changes would allow for

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[162] Noguchi, *supra* note 145.

[163] Hernández, *supra* note 139.

[164] Karen Berberich et al., *The Case for Universal Representation*, VERA INST. OF JUST. (Dec. 2018), https://www.vera.org/advancing-universal-representation-toolkit/the-case-for-universal-representation-1.

continuity between administrations and would prevent against upheaval every four or eight years. The history of the Deferred Action for Childhood Arrivals ("DACA") under both the Trump and Obama administrations provide a good example of how executive action alone is not enough to ensure long-term protections. In 2012 President Obama instituted DACA via executive order to provide undocumented immigrants who came to the United States as children protection from deportation and authorization to work.[165] This action was taken after Congress failed to pass similar legislation known as the DREAM Act.[166] In 2017 the Trump administration announced plans to end the program, which would leave over 800,000 individuals eligible for deportation.[167] In June of 2020 the Supreme Court struck down this attempt citing violations of the Administrative Procedure Act, but recognized the DOJ has the authority to end the program if guidelines laid out in the Administrative Procedure Act are followed.[168] This example illustrates how statutory protections are the long-term solution to meaningful protections for undocumented persons.

Joseph Biden won the 2020 U.S. presidential election[169] and he plans to follow President Obama in his support of DREAMers.[170] However, much like problems with venue, this uncertain future based on inconsistent enforcement leaves many in peril, especially when an anti-immigration candidate seeks a path to the White House in future election years.

Introducing legislation that would allow respondents to make change of venue motions that mirror 28 U.S.C. § 1404(a) in federal civil proceedings would force ICE to file the charging document in a court that is relevant to respondents proceeding. Such a statute would have this outcome because a 1404(a) motion would force IJs to consider factors such as availability of evidence and municipalities' interest in having the case adjudicated in their locale.[171] Additionally, this measure would extend the window for respondents to request a changes of venue and would be

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[165] THE DREAM ACT, DACA, AND OTHER POLICIES DESIGNED TO PROTECT DREAMERS, AM. IMMIGRATION COUNCIL (Aug. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_dream_act_daca_and_other_policies_designed_to_protect_dreamers.pdf.

[166] *What is DACA and Who Are the DREAMers?*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/education/resources/tools-and-strategies/table-talk/what-is-daca-and-who-are-the-dreamers (last visited Aug. 20, 2020).

[167] *Id.*

[168] THE DREAM ACT*, supra* note 16565.

[169] Christina A. Cassidy & Anthony Izaguirre, *EXPLAINER: Election claims, and Why it's Clear Biden Won*, A.P. (Jan. 19, 2021), https://apnews.com/article/election-claims-biden-won-explained-bd53b14ce871412b462cb3fe2c563f18.

[170] Mimi Dwyer, *Factbox: U.S. president-elect Biden pledged to change immigration. Here's how*, REUTERS (Jan. 15, 2021), https://www.reuters.com/article/us-usa-biden-immigration-promises-factbo/factbox-u-s-president-elect-biden-pledged-to-change-immigration-heres-how-idUSKBN29K1X1.

[171] Edelson, *supra* note 8787.

particularly valuable if respondent lacked legal representation early in their proceedings.[172] Bare minimum protections for due process would be added, as BIA officers would be obligated to give written decisions when respondents appeals are denied, this basis requirement may also be useful to immigration attorneys as they can change litigation strategy once they are aware of the reason for denial.[173] Most importantly, any request by respondent for a change of venue would no longer need to outweigh ICE's interest, however ICE will not be subject to a respondent's whim for a particular venue as plaintiffs in federal civil proceedings maintain a high deference in their choice of venue.[174] This proposed change would not solve all the due process disparities that face immigrants in removal proceedings. Nevertheless, clear legislative agendas give advocates clear goals to push in enacting lasting change for vulnerable populations. Policies can change with time and administrations, but statutory protections are more difficult to erode when political tides change. A combination of both defensive and offense strategies are needed to ensure immigrants have a fair trial and opportunity to stay in the United States.

IX. CONCLUSION

The mass exodus of ICE contracts with county jails is resulting in aftershocks that allow more detainees to be held in private prisons and in states where they are more likely to lose their ability to remain in the United States. States need to be more aware of the long term consequences of contract termination, and more accounting needs to be done to ensure NTAs are being filed in respondent's place of residence. State governments should create legislation to give local governments the *option* of contracting with ICE and if they decide to do so, a portion of proceeds from the contracts should be allocated to social services or pro-bono attorneys for detainees and their families. Immigrants with legal representation are much more likely to have a positive outcome than those without.[175] If a percentage of the funds from ICE contracts are used by counties to pay immigration attorneys, the federal government will essentially be paying towards their own opposition. The pro bono networks in place in many of these liberal cities are unparalleled.[176] Structural changes like 1404(a)-type motions being allowed by respondents, like those discussed in Part VIII may create procedural protections for immigrants and asylum seekers to aid

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[172] WAIVER, *supra* note 90.

[173] STANDARD IN CONSIDERING TRANSFER—IN GENERAL, *supra* note 91.

[174] *In re Rahman*, 20 I & N at 33.

[175] Karen Berberich et al., *supra* note 164.

[176] Murguia, *supra* note 142 ("In the Bay Area especially, detainees had access to one of the nation's most robust networks of pro bono immigration lawyers . . . .").

these groups in receiving a fair trial, regardless of which administration is in power. Those wishing to fight current immigration policy must not only tackle the ills of today, but also consider how the desire to protect people now can be used by their opponents in the future.