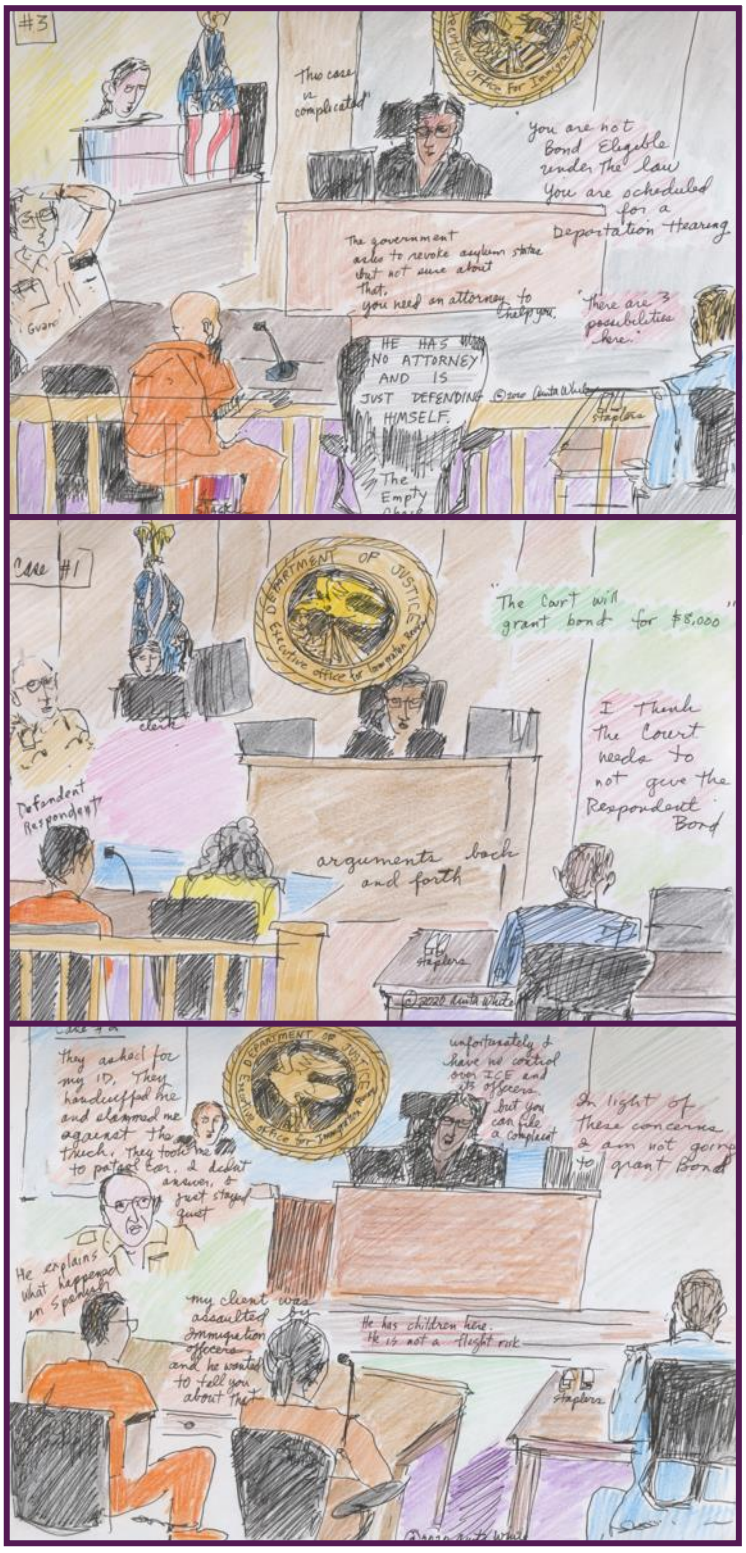
Seeking Release from Immigration Custody

Bond Hearings at the Fort Snelling Immigration Court



Stakeholder Report from the Immigration Court Observation Project

2022

The Advocates FOR HUMAN RIGHTS

ABOUT THE IMMIGRATION COURT OBSERVATION PROJECT

The Immigration Court Observation Project sends volunteers into the Fort Snelling Immigration Court to observe bond and removal cases for people facing deportation. The project is a collaboration between The Advocates for Human Rights, the University of Minnesota Law School's James H. Binger Center for New Americans, and Robins Kaplan LLP. The project began in 2017 as a result of the surge of protests following the first announced Muslim ban. The focus of the project has been to monitor for due process and human rights concerns in immigration court, especially for people being held in ICE custody. The volunteer observers are lay members of the public, most with no legal training or background, who bring fresh eyes to the court. Since its inception, more than 750 volunteer observers have attended 4,000-plus shifts documenting more than 10,000 removal and bond hearings at the Fort Snelling Immigration Court.

An established human rights practice, trial monitoring serves to bring transparency and accountability to judicial proceedings and assure that human rights activists are not targeted by state actors. The Minnesota Immigration Court Observation Project upholds the same principles of transparency, accountability, and the fair application of the law.

ABOUT THIS REPORT

This report presents data from observed bond hearings at the Fort Snelling Immigration Court between March 1, 2020, and September 30, 2021. Some comparison data from prior stakeholder reports are also included. This document is not intended to be a comprehensive report about bond, its legal basis, and legal challenges, nor a comparison among courts. Instead, this report is a window into bond hearings at this court during a time when we experienced both a pandemic and a change of administration in the White House. The pandemic saw a shift from in-person to remote hearings, a decrease in ICE arrests, and an increase in humanitarian parole in an effort to address COVID risks in detention. Upon taking office in 2021, the Biden administration enacted new ICE enforcement guidelines that prioritized removal of noncitizens who were deemed to pose a national security risk or a danger to public safety, or who had recently entered the United States.

These shifts in ICE enforcement were evidenced in bond hearings. A far greater proportion of respondents (noncitizens in removal proceedings) had criminal records or pending charges; indeed, noncitizens without criminal records were far less likely to be detained than they had been in the few years prior to the pandemic. We observed fewer bond hearings in general over this period of time, likely a reflection of decreased detention numbers and fewer of the respondents in detention being bond-eligible.

This report examines multiple issues pertaining to bond hearings, including the impact of legal representation and criminal history on bond outcomes, rates of appeal, variations among judges, and the increase of bond amounts over time. This report will be of particular interest to observers, advocates, and immigration attorneys who provide detained removal defense.

KEY FINDINGS

Bond decisions have real impact on people's ability to defend against deportation. Observers documented cases like one pro se respondent who specifically requested the statutory minimum of $1,500 but was granted a $5,000 bond, which he could not afford. He requested deportation, despite having lived in the United States for 15 years, because he could not afford the bond and tolerate prolonged detention. This is the human cost of a system that does not require consideration of ability to pay.

Legal representation matters. Observers documented significantly better outcomes for people seeking bond when they were represented by an attorney than when they appeared without representation. People with representation were four times more likely to have their bond request granted by a judge than people who spoke for themselves.

BRIEF OVERVIEW OF THE BOND PROCESS

Immigration and Customs Enforcement (ICE) can initiate removal proceedings against anyone whom they believe to be a noncitizen in violation of U.S. immigration laws. ICE has the authority to detain the noncitizens it has charged as being removable, and most people whom ICE arrests are detained for at least some period of time. The Immigration and Nationality Act (INA) specifies certain people as subject to mandatory detention, meaning they cannot be released while their case moves through immigration court. Some grounds for ineligibility for bond are people considered "arriving aliens," those with a removal order (deportation order), and those who have been convicted of certain criminal offenses deemed "aggravated felonies," "crimes involving moral turpitude," or "controlled substance offenses" under immigration law.

If the noncitizen is not subject to mandatory detention, ICE can choose to release the noncitizen on their own recognizance, which may or may not include other stipulations, such as ankle monitoring or regular ICE check-ins. If ICE does not choose to release someone on their own recognizance, the officer then makes an initial custody determination, which can include setting a bond amount or denying bond and holding the noncitizen in detention.

After ICE has made its initial custody determination, noncitizens can request a custody redetermination hearing before an immigration judge ("IJ"). A custody redetermination hearing is what we refer to as a bond hearing.

In a bond hearing the judge must decide three things:

- Whether the respondent is statutorily eligible for a bond, or whether they are subject to mandatory detention.
- Whether the respondent poses a danger to people or property. In their assessments, judges will consider both conviction records and police reports for pending cases. Letters of support and proof of rehabilitation can be considered as mitigating factors.
- Whether the respondent is a flight risk—that, is, whether the respondent will reliably return to court for all hearings and meet all stipulations that ICE and the court sets. In weighing flight risk, a judge may consider factors such as employment history, family with legal status,

length of time in the United States, ownership of property, and appearances at past court hearings.

Bond may not be used to mitigate any danger; the judge will either find that the respondent is a danger, in which case bond is denied, or not a danger, in which case the judge turns to evaluating flight risk. The judge, if granting a bond, will set a bond amount to mitigate any flight risk. By statute the minimum bond an IJ may set is $1,500, but bonds often far exceed that amount.

Bond hearings in immigration court differ from bail hearings in criminal court in several critical ways:

- A detained noncitizen must affirmatively request a bond hearing. It is not an automatic procedure.
- Persons in removal proceedings have the right to an attorney, but they must find and pay for one themselves. There is no public defender system for immigration court, as these are civil rather than criminal proceedings.
- Noncitizens, not the government, bear the burden of proof that they are bond eligible. They must provide the evidence that they are not a danger to society and are not a flight risk. The evidentiary burden may not be clear to most respondents until it is too late, if ever. This may be especially confusing to respondents with experience with the criminal justice system. Unlike immigration court, criminal defendants are entitled to a presumption of release, and the state must show by clear and convincing evidence that no combination of conditions and bail will ensure that the defendant will return to court and remain law-abiding.
- Respondents get only one bond hearing. They may have a new bond hearing only if they can demonstrate that there has been a material change in circumstance since their bond hearing. This standard of material change is not well delineated.
- In setting a bond, a judge is not required to consider a person's ability to pay, that is, their financial circumstances.
- There are no standards or guidance for the bond amount. Thus, similarly situated respondents may receive wildly different bonds. In the criminal courts, a worksheet and formula are normally used to determine whether the defendant should be released with or without bail and what bail amount should be set.
- Noncitizens face significant barriers into obtaining evidence. The vast majority of respondents are non-English speaking but must submit all documents and evidence in English. Their family members, if any face, similar barriers in trying to assist them. The government provides no translation assistance. Timeframes are quick in immigration proceedings, making it difficult to get necessary documentation without the assistance of an attorney.

After the IJ makes a bond determination, both sides have a right to appeal. If bond is denied and respondents wish to appeal, they will remain detained throughout the appeal process. Their removal case will continue to move forward during this time. If bond is granted and the government appeals, in most cases the respondent will be able to post bond; if the government's appeal is successful, the

respondent will be re-detained. However, in some situations, ICE may be able to keep the respondent detained while its appeal is considered.

If bond is granted, the amount must be paid in full to the Department of Homeland Security. The bond amount will be returned only at the conclusion of the removal case and all pending appeals, and only if the respondent complies with all conditions and attends all hearings. If a noncitizen is released on bond, the case continues on the non-detained immigration court docket.

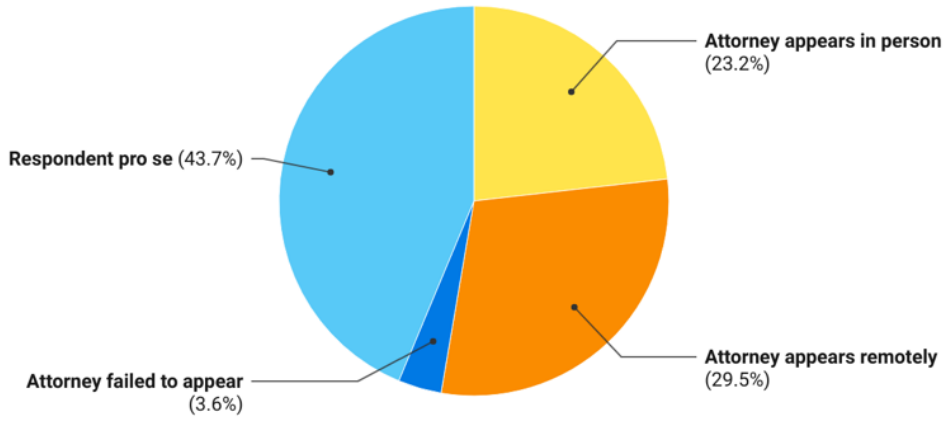
Of note, occasionally a respondent will have a bond hearing that follows a different set of rules and procedures. This typically occurs because the respondent has been detained longer than six months and has filed a lawsuit, called a *petition for writ of habeas corpus*, against the government in federal district court alleging that their detention has become unconstitutional. The district court orders the government to conduct a bond hearing even if the respondent is not otherwise eligible for bond and may attach other requirements, such as the government bearing the burden to prove dangerousness and flight risk.

BOND DATA

Unless otherwise specified, all graphs, charts, and data pertain to observed hearings between March 11, 2020, and September 30, 2021.

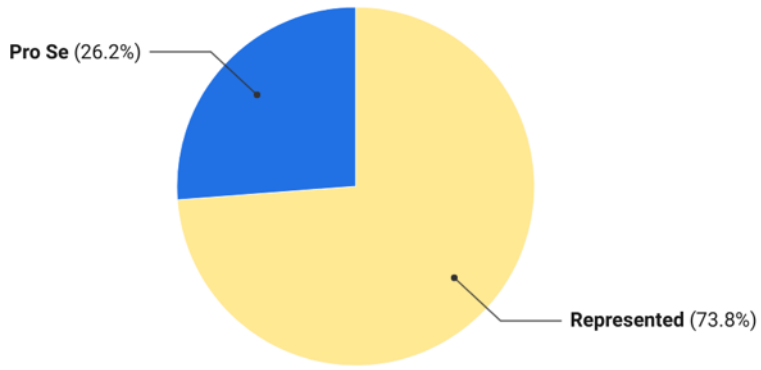
Representation for detained hearings at the Fort Snelling Court

Court observers documented 1,443 unique bond and master removal hearings. Overall, in 52.7% of all observed hearings, the respondent was represented, and in 47.3% of the hearings the respondent appeared pro se, i.e., without an attorney representing them.



In the 3.6% of cases, the attorney failed to appear. The many stated and implied reasons why this occurred included instances of an attorney only recently filing as representative and not being aware of the hearing, and instances where it was unclear whether the respondent or their family had definitively hired an attorney. Sometimes the respondent was confused about whether a nonprofit legal services organization had actually agreed to take their case or had just screened them.

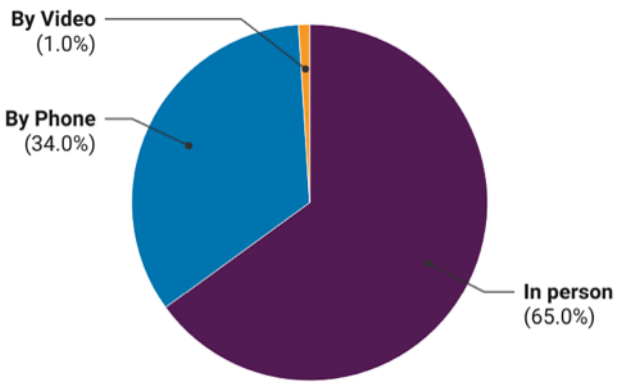
Representation for bond hearings



Of the 1,443 detained hearings observed, 443 were bond hearings. Nearly 74% of respondents had an attorney for their actual bond hearing. This excludes hearings where the bond request was withdrawn or a continuance to seek legal counsel was requested.

Respondents' attorneys' appearance in person or remote

The Covid-19 pandemic precipitated the adoption of remote appearance options for counsel. More than one third of respondents' attorneys appeared remotely for bond hearings during this time period. Video appearances have become more prevalent since these data were collected.

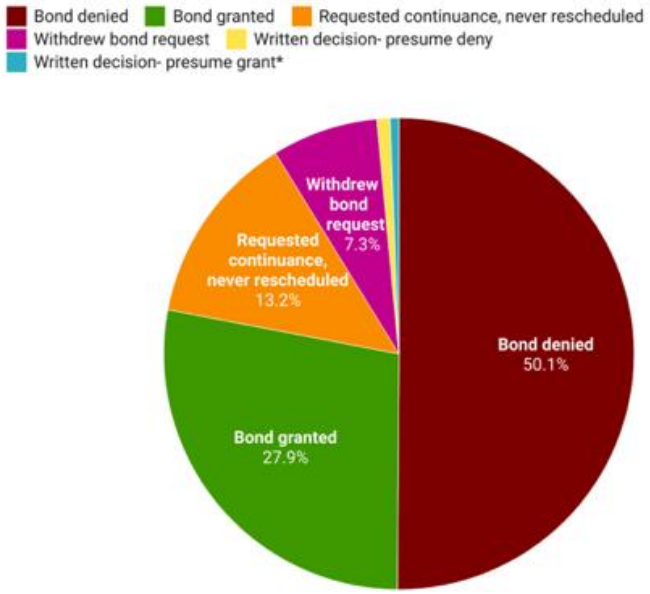


Not all bond hearings yield a bond decision

Not everyone who initially requested a bond ultimately went through with a bond hearing. Some people requested continuances in order to consult with an attorney but never requested a subsequent bond hearing, and some withdrew their bond requests. The immigration judges are inconsistent in their uses of the term "case continued" or "case withdrawn" when a respondent wishes to delay a bond hearing in order to consult an attorney or gather evidence. For the purposes of this report, and the following charts, "Requested continuance" indicates an intention to refile a bond request after obtaining evidence or legal representation. "Withdrew bond request" indicates a respondent's stated intention to not renew a request for bond.

Outcome of last bond hearing documented

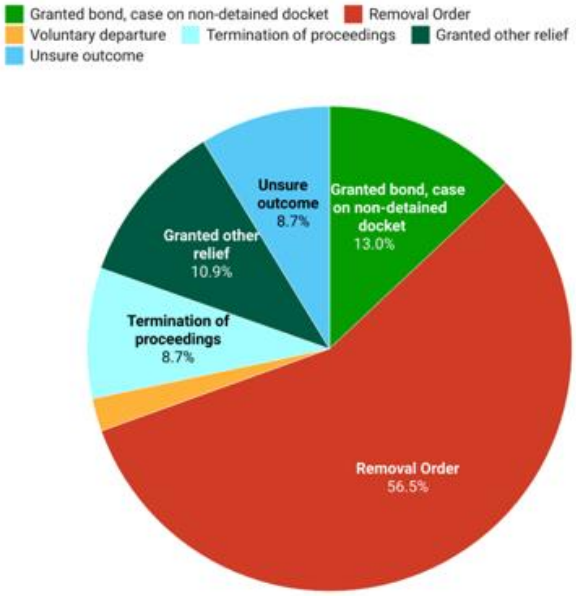
The chart below demonstrates the outcome of the last documented bond hearing for all respondents requesting bond during this reporting period. A bond decision was made in just over three quarters of final bond hearings. In more than 20% of bond hearings, the respondent withdrew the request for bond or asked for a continuance but never rescheduled a bond hearing.



Observers were not scheduled for every hearing during the first three months of the pandemic. When shelter-in-place was in effect, observers attended detained court for only one hour per day. For cases in the first few months of the pandemic, we looked through data from subsequent removal hearings to determine what happened in those cases where a bond continuance was requested but no observation data were recorded about a subsequent bond hearing.

Final case outcome after continuance in bond case

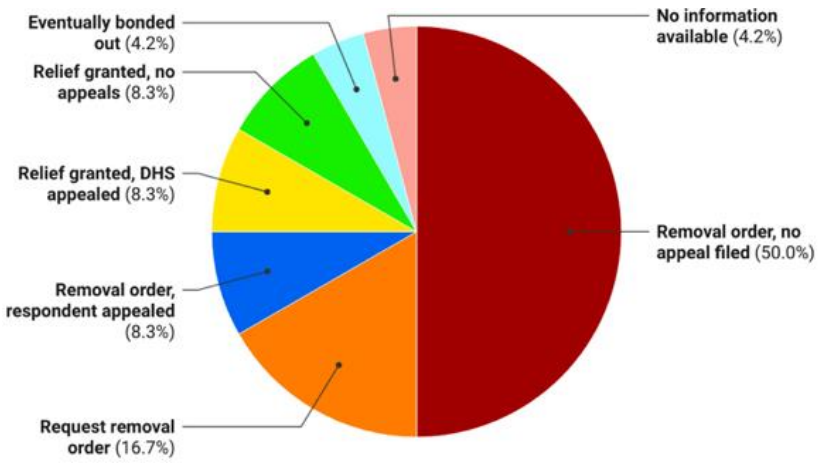
Some respondents asked for bond continuances in order to obtain representation and did eventually get attorney representation but ultimately did not pursue bond. Presumably, they were counseled on the merits of their bond application. Some respondents apparently did reschedule bond hearings and were successful: A total of 13% were released, either on bond or humanitarian parole, and had their cases moved to the non-detained docket. The majority, 56.5%, received removal orders at subsequent master calendar or merits hearings. Of those who remained detained after asking for a continuance, 10.9% eventually were granted relief, and 8.7% were released after proceedings were terminated. These outcomes are indicated in the chart to the right.



Final case outcome after bond request withdrawn

Those who asked to withdraw their bond request either decided to pursue relief while detained, presumably upon learning they were subject to mandatory detention, or stated their intention to ask for

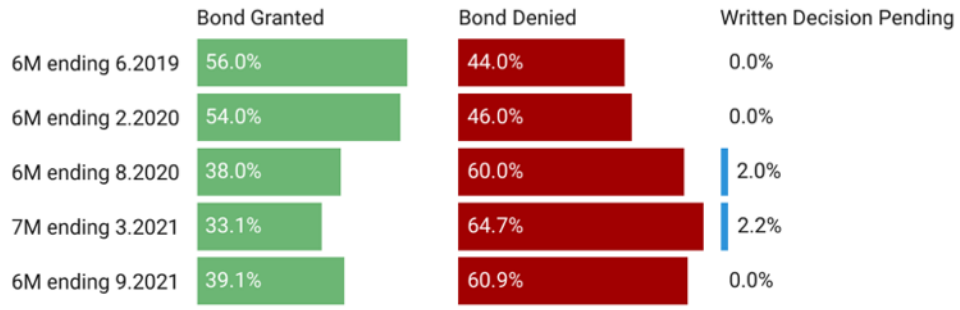
a removal order at their next removal hearing. This motion to withdraw the bond request was sometimes made by the respondent's attorney.



A total of 75% the respondents who withdrew their bond requests received removal orders; 16.7% requested a removal order at a subsequent hearing. One of these individuals had been granted a bond by ICE but was unable to pay the high amount imposed and requested a deportation order. More than 58% received a removal order at a subsequent master calendar or bond hearing. Most did not appeal the removal order. Of those cases where the respondent was granted relief, half of the decisions were appealed by DHS and half were not. Though explicitly stated only a few times, this suggests that people who withdrew their bond requests may be aware they would not be successful.

The high number of continuances and withdrawals on bond motions demonstrate the inefficiency of not having appointed counsel or, in the absence of that, adequate resources in detention for respondents to understand the bond process before they get to court. These barriers, as we have witnessed since the beginning of the project, lead many respondents to give up and ask to be deported, including presumably many who have viable cases for relief but feel they are languishing in detention.

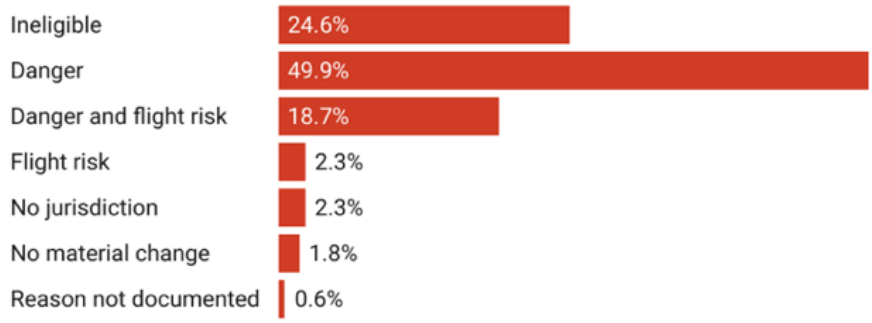
Bond grant rates have been decreasing over time



The chart to the left shows bond grant rates for several of the project's 6-7 month (M) reporting cycles. Bond grant rates decreased significantly since the start of the COVID pandemic. The most plausible explanation is that, because of the changes in ICE priorities, far fewer people without criminal histories were being detained. A far greater proportion of respondents requesting bond were found to be ineligible or were denied on the basis of their convictions or arrest histories. The impact of criminal history and bond is explored in more detail later in this report. The difficulty acquiring counsel may be another factor in the lower bond rates noted since March 2020. Early in the pandemic it is was

much harder for respondents to seek and connect with legal counsel. Frequent quarantines limited phone access, and all in-person visits including legal screenings were halted.

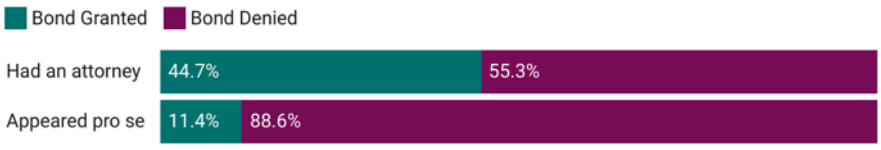
Reason for denial of bond



Of the completed bond cases between March 1, 2020, and September 30, 2021, we looked at the reason given when the judge denied bond. Nearly 25% of the denials resulted from respondents being subject to mandatory detention. Half were based on the judge's determination of danger, and nearly 20% of the time the judge listed flight risk and danger. Not surprisingly, flight risk alone was rarely the reason for bond being denied given the purpose of setting the bond is to mitigate flight risk. The judge presumably sets a bond high enough to compel the respondent to comply with all conditions in order to get the bond funds back at the completion of the removal case.

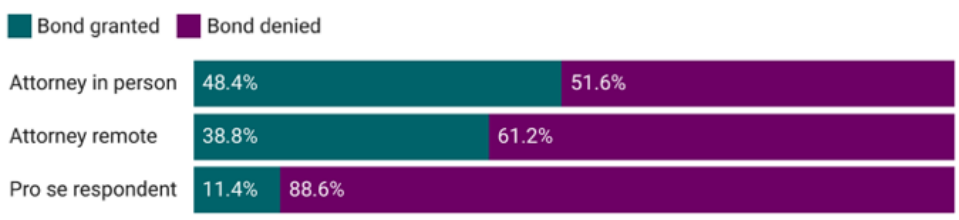
Bond grant rates by attorney representation

The following two charts indicate outcomes of completed bond hearings, distinguishing respondents who were represented versus those respondents who were pro se. Having an attorney is the most significant factor in bond decisions outside the statutory dictates for mandatory detention.



Bond grant rates: Remote versus in-person attorney representation

With the COVID pandemic, respondents shifted to all remote appearances from ICE detention. That was quickly followed by the option for remote appearances by representing attorneys, and the eventual adoption of WebEx, a secure video conferencing platform. The following chart shows comparative bond grant rates between pro se individuals, those whose attorneys were present in the courtroom, and those who appeared remotely. Video and audio-only appearances are grouped together in this chart because the project's observation form did not initially distinguish the two. While these are correlation and not

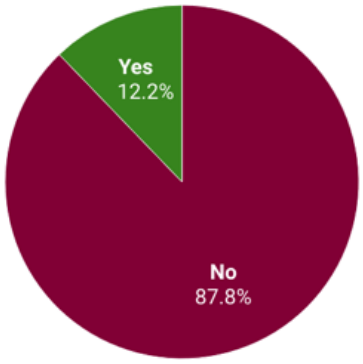


causation data, it is interesting to note that bond was granted significantly more often when attorneys appeared in person than when they appeared remotely.
The observation form has been updated, and it will be of interest in future reports to distinguish between audio only or video appearance by counsel, especially because remote appearances are now the norm.

Represented bond cases wherein a bond amount was agreed to in advance

Attorney representation for bond has many benefits. An attorney helps craft the legal argument in favor of bond, helps collect evidence, and is in a position to know what evidence is most pertinent and beneficial. An attorney can help with document translation and, of course, is more likely than a pro se respondent to be comfortable with protocols and experienced speaking in court. Critically, unlike pro se individuals, attorneys can also negotiate with the DHS attorney in advance. The two parties—the respondent's counsel and the attorney for DHS—may be able to agree on a bond amount in advance or at least narrow the issues of disagreement in the case.

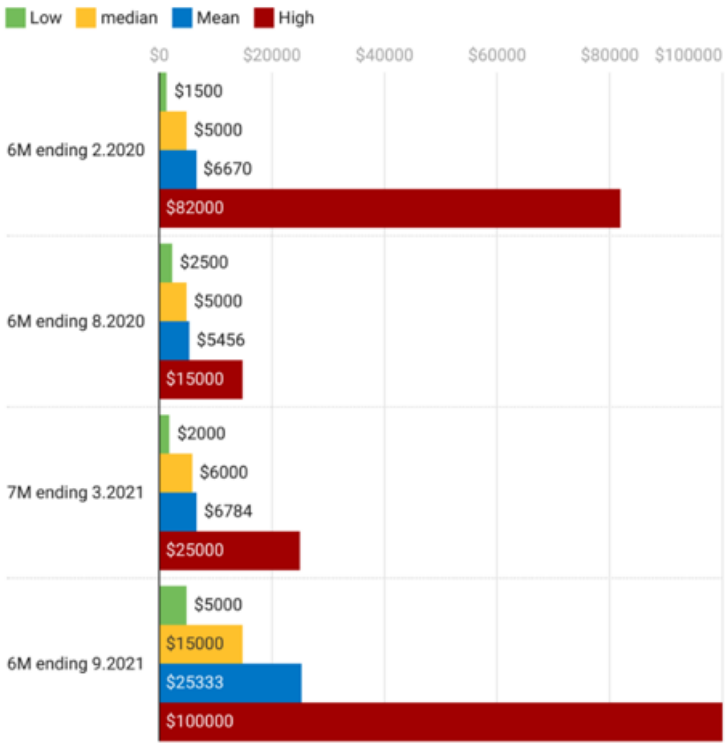
The observation form used for bond hearings asks if the two parties agreed to a bond amount in advance of the hearing. If yes, the judge issues a bond in that amount, and the case concludes. Sometimes observers noted that the two sides reported discussing the case in advance of the hearing but coming to no agreement. In most bond hearings where the respondent has a lawyer, observers were unaware of whether any advance discussion took place in the absence of a bond agreement.



Of the observed represented bond cases, two sides agreed on a bond amount prior to the hearing 12.2% of the time. If the two parties came to an agreement on bond in advance of the scheduled hearing, the bond amounts tended to be lower than average. The lowest was $2,000, the median $5,000, the mean $4,674, and the highest $6,000. For bonds granted when there wasn't an agreement in advance, the median bond was $5,500 and the mean was $9,065. The lower amounts with a negotiated agreement were likely because ICE is inclined to agree only in cases where there is minimal criminal history, if any, and minimal flight risk. Often the respondent's attorney has been able to demonstrate with evidence and letters of support that the respondent has community ties or has gone through a rehabilitation process following a criminal conviction.

Bond amounts over time

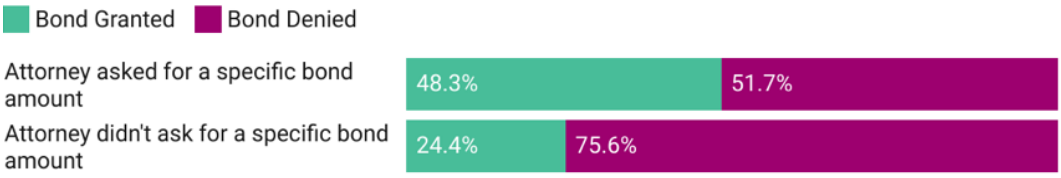
Immigration bonds are expensive and must be paid in full. By law the lowest possible bond an IJ can set is $1,500. There is no upper limit. In Minnesota, most bonds documented since this observation project began have been $3,000-$15,000, but bonds can be much higher. The median bond across the United States in 2020 was $8,000; in 2021 it was $7,000, both of which are higher than the median bonds we have documented in Minnesota. The single highest bonds we recorded in 2020 ($82,000) and 2021 ($100,000) were outliers because of unique circumstances.



We observed only 23 bond cases with decisions between April 1 and September 30, 2021. We saw a significant increase in in the median and mean bond during those six months. This could simply demonstrate the skewing effect of the single very large bond. It could indicate a difference in the population of people detained and seeking bonds. In the summer of 2021, migrants were brought to Minnesota from the border; it is possible that bonds in this timeframe were higher as new arrivals were deemed more of a flight risk.

Impact of asking for a specific bond amount

When a bond hearing commences, the immigration judge often will ask the respondent, or their attorney if represented, what amount they are seeking. Some, in laying out their bond argument, will request a specific bond amount. There may or may not be mention of the respondent's particular financial situation. Observers will document the specific bond amount requested if there is one.



The preceding chart reflects outcomes for completed bond cases where the respondent was represented by an attorney excluding those cases where the two parties already agreed to a bond amount in advance. The chart suggests that requesting a specific bond amount has a positive impact on the bond decision. While this is correlation and not causation, when the respondent's attorney requested a specific bond amount in their presentation, the respondent was granted bond 48.3% of the time and denied bond 51.7%. When the attorney did not specify a bond amount in the bond request, bond was only granted 24.4% of the time. It is possible that when attorneys are less confident about meeting the burden of proof for bond, they are less likely to specify a bond amount. Alternatively, stating a bond amount implies to the judge that bond is warranted or assumed, and this may affect the judge's perspective on the merits of the bond argument.

Pro se respondents rarely requested a specific bond amount. In the few cases where pro se respondents specified a bond amount, most were granted bond. It is quite possible these individuals had been

screened and counseled by an attorney in advance of the bond hearing. In 96.8% of the cases where respondents were pro se and did not request a specific bond amount, they were denied bond. It is common for a pro se respondent to say they have very little money with which to pay a bond. This may be unrelated to whether they asked for a particular bond amount but simply be an indication that the vast majority of pro se respondents are unprepared with the evidence and testimony needed to meet the burden of proof on dangerousness and flight risk.

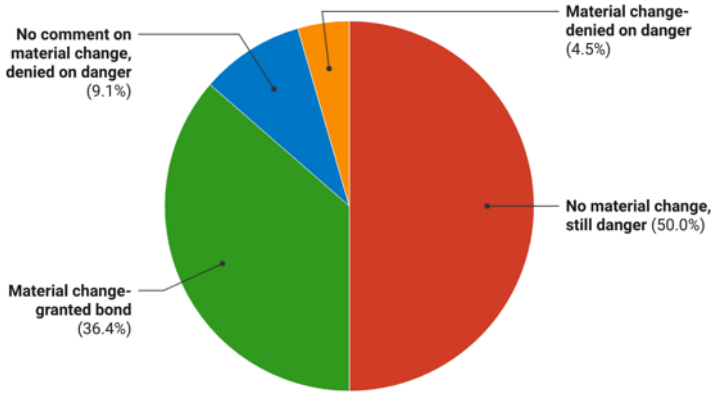
Impact of failure to consider ability to pay when setting bond.

Judges are not required to consider ability to pay in setting a bond. If a bond is set beyond the means of the respondent, this serves as de facto mandatory detention. Although respondents can appeal the decision to the Board of Immigration Appeals (BIA), they will remain detained while the appeal is pending. Some respondents, when faced with an unaffordable bond, will request deportation, regardless of the merits of the relief application in their removal case. This was the case for a pro se respondent who specifically requested the statutory minimum of $1,500 but was granted a $5,000 bond, which he could not afford. He requested deportation, despite having lived in the United States for 15 years, because he could not afford the bond and tolerate prolonged detention. This is the human cost of a system that does not require consideration of ability to pay.

Requesting a new bond hearing based on material change

A respondent is entitled to only one bond hearing as a right. A judge may reconsider a bond if a respondent can demonstrate a material change in circumstance since the prior bond determination. During this reporting period, a number of respondents requested new bond hearings on the basis of a purported material change in circumstance and were thus scheduled for a subsequent bond hearing before an immigration judge.

As demonstrated in the following chart, in 50% of those cases, the judge ruled that the testimony or evidence did not qualify as a material change in circumstances and therefore custody (bond) would not be reconsidered. Examples of what was found to not qualify as a material change in circumstance include (a) the birth of a U.S. citizen child while respondent was detained or (b) having a chemical dependency assessment and a plan for treatment. In some cases, the judge withheld comment on whether there was a material change but denied bond based on danger. In one case the judge noted that there was a material change in circumstance but that they were still denying bond based on danger.

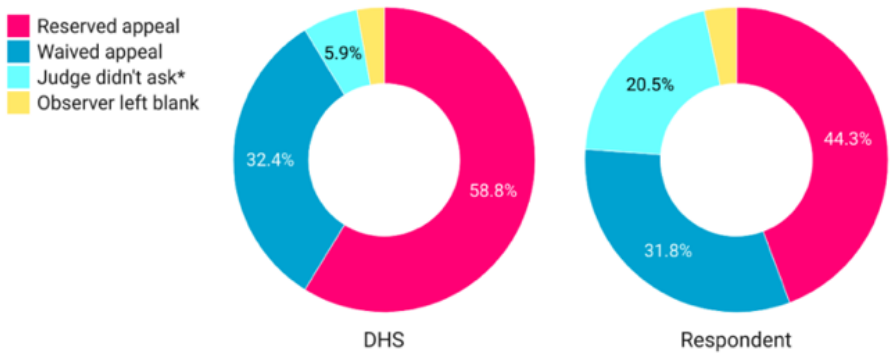


In just over 36% of these renewed bond cases, the judge ruled that there was a material change in circumstance and the person was no longer a danger; thus, bond was granted. In the vast majority of these cases, the material change in circumstance related to a resolution of criminal charges after an arrest. Either criminal charges were dropped, the respondent was acquitted, or the initial criminal charges were pled down to a misdemeanor offense. In most instances a respondent had been charged with domestic assault, which was ultimately pled down to a disorderly conduct conviction. In one instance, following a petition for writ of habeas corpus, a federal judge ordered the immigration court to conduct a bond hearing and ordered the burden of proof for dangerousness be shifted to the government; bond in this case was granted.

Of note, the median bond granted in these subsequent bond hearings based on material change was $7,500; the mean was $10,500. This is higher than the overall mean and median bond, $5,000 and $8,900, respectively, in the 19 months covered by this report.

Reserving appeal

After the immigration judge makes a bond determination, both sides have a right to appeal the decision to the BIA. The judge will typically ask if parties wish to reserve the right to appeal or if they waive appeal. Regardless of whether the judge asks, unless the parties waive appeal on the record, the right to appeal is reserved. Appeals are before the BIA and must be received within 30 days to be considered. Just as for the bond hearing and removal case, having an attorney to assist in filing an appeal is extremely helpful. Many respondents do not understand the concept of an appeal as it is explained in court.



The chart to the left shows how frequently each side reserves appeal of an *adverse* decision, that is, how frequently the attorney for the Department of Homeland Security appeals a grant of bond, and how frequently the respondent appeals a bond denial. In one or two cases a respondent reserved appeal for an excessively

high bond. Although observers document when the right to appeal is reserved, information about whether an appeal of the bond decision is actually filed is not available.

How the court treats criminal history in bond cases

Criminal history was by far the most significant factor in observed bond decisions. Convictions are frequently the grounds for which a respondent is statutorily subject to mandatory detention. Criminal history, whether convictions or allegations/charges, appears to outweigh all other considerations in a judge's determination of dangerousness. Before delving into the data on criminal history and bond decisions, one critical thing must be noted for context: the vast majority of immigration cases in the Fort Snelling Court, and across the United States, involve respondents with no criminal history and who are not detained.[1] Even among those in ICE detention across the United States, 66.3% of ICE detainees had no criminal record according to the Transactional Records Access Clearinghouse as of September 2022.[2] Looking at the data below on bond decisions and criminal history should not obscure this fact.

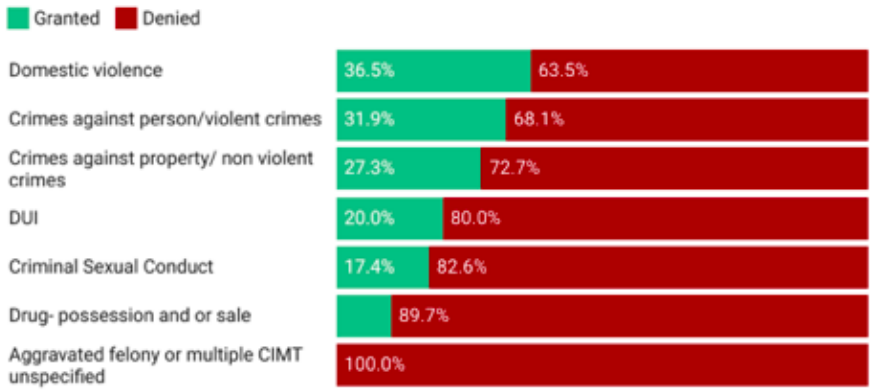
A judge is expected to make an individual assessment of bond eligibility, dangerousness, and flight risk. The evaluation of criminal history is inherent in this process and includes review of police reports for pending charges, conviction records including the length of sentences, a history of repeat offenses, compliance with probation or parole, and sometimes the outcome of diversion programs or rehabilitation efforts. Evidence submitted attesting to the respondent's good character may serve as a mitigating factor in evaluating criminal history. Court observers are not privy to court files and their understanding of arrest and conviction histories is limited to what is discussed in court. The categorization of crimes is complex and may not be fully understood by observers in an immigration context. The legal nuances of the intersection of criminal and immigration law are beyond the scope of the court observation project. The subsequent charts should be reviewed with this in mind.

The following charts illustrate bond grant rates as correlated with categories of criminal charges and convictions.

[1] More than 1.9 million cases were pending before immigration courts nationwide as of August 2022. As of September 25, 2022, ICE held 23,134 people in detention. *See* TRAC Immigration Quick Facts, *available at* https://trac.syr.edu/immigration/quickfacts/.

[2] *See* TRAC Immigration Quick Facts, *available at* https://trac.syr.edu/immigration/quickfacts/.

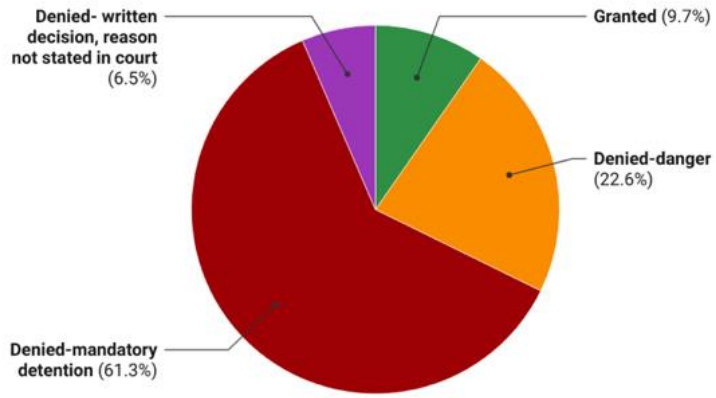
Bond grant rates based on type of criminal allegation or conviction



The chart to the left shows the bond grant rates for people arrested for or convicted of different categories of criminal offenses. The individuals in the dataset may have more than one arrest or conviction, so categories are not mutually exclusive. In immigration court during this time period, the most prevalent offense was driving under the influence. The least likely to get a bond are those with convictions for drug possession because most are subject to mandatory detention. Anyone convicted of an "aggravated felony,"[3] as defined in immigration law, but not necessarily criminal statute, and anyone convicted of multiple "crimes involving moral turpitude,"[4] is subject to mandatory detention, regardless of how old a conviction is.

Bond hearing outcomes and drug-related offenses

Observers frequently note that the criminalization of addiction contravenes our U.S. public health objectives. The criminalization of addiction also has grave immigration consequences that can put legal permanent residents on a path to deportation. There are limited exceptions, for example, such as legal permanent residents with small amounts of marijuana. Most drug-related offenses subject a respondent to mandatory detention during their removal proceedings. Observers noted several instances where the respondent withdrew a bond request after learning they were subject to mandatory detention because of drug convictions. The chart to the left reports the outcomes of completed bond hearings for respondents with drug offenses. Of the respondents, 90.9 % were male and 9.1% were female; these individuals may have had additional criminal charges or convictions that were not drug-related. More than 90% were denied bond; of those granted a bond, the judge outlined the rationale for deciding in their favor. Examples



[3] American Immigration Council, "Aggravated Felonies: An Overview" (https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview)
[4] Immigrant Legal Resource Center, "All Those Rules about Crimes Involving Moral Turpitude" (https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude)

include the following. One respondent had only a small amount of marijuana and an open bottle of alcohol, which a passenger was drinking in the respondent's vehicle. The respondent was granted a $10,000 bond. Another bond grant was for a respondent with a pending case who submitted evidence of strong community ties; a $5,000 bond was granted. In a couple of cases, the attorneys for the respondents successfully argued that the convictions were not deportable offenses. The stated rationale for one respondent granted a bond was that the case had been referred to drug court. This suggests the respondent was particularly amenable to treatment. It should be noted, however, that court-ordered drug treatment, diversion programs, and other alternatives to incarceration are still considered convictions for immigration purposes if the defendant made an admission of guilt.

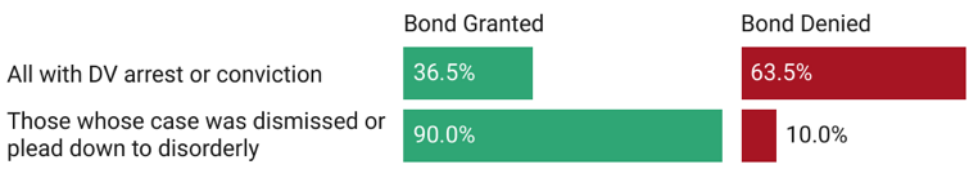
Determining dangerousness: A look at charges of domestic violence and driving under the influence

The following section takes a deeper look at bond hearings for respondents with arrests or convictions for domestic violence and driving under the influence. Not only are these the most prevalent crimes we note among detained noncitizens, they are not de facto classified as "crimes involving moral turpitude" (which can be grounds for mandatory detention), and therefore give a window into how immigration judges evaluate dangerousness. When a respondent has an arrest or conviction for driving under the influence (DUI) or domestic violence (DV) against an intimate partner, the attorney for DHS frequently submits into evidence their "standard packet" for DUI or DV. The implication of the DHS attorneys' arguments is that there is no such thing as an isolated incident, and that anyone arrested or convicted once has a pattern of the alleged behavior. This argument is extremely difficult to rebut through evidence, requiring one to prove a negative.

Bond decisions in cases with domestic violence allegations or convictions

As noted in the comparative chart on the preceding page, more than one third of respondents with a domestic violence arrest or conviction were granted a bond. This is the highest bond grant rate for a category of crime analyzed for this report. When an arrest has not yet led to charges, or when a criminal trial is pending, the immigration judges seem to give significant deference to the police report. Often the respondent, or their attorney if they have one, is unable to obtain the police report and therefore is not in a position to effectively testify about the allegations it contains. A police report would be subject to testimony and cross-examination in a criminal trial but appears to be treated as a statement of fact in immigration court. Immigration judges also frequently comment that any statement a victim gives at the time of the incident is more credible than any statement or retraction made later, such as a character letter sent to the court in favor of the respondent.

There was a stark difference in bond grant rates if a DV case was resolved with a misdemeanor conviction or a dismissal, as opposed to being a pending DV charge or a conviction for domestic assault.

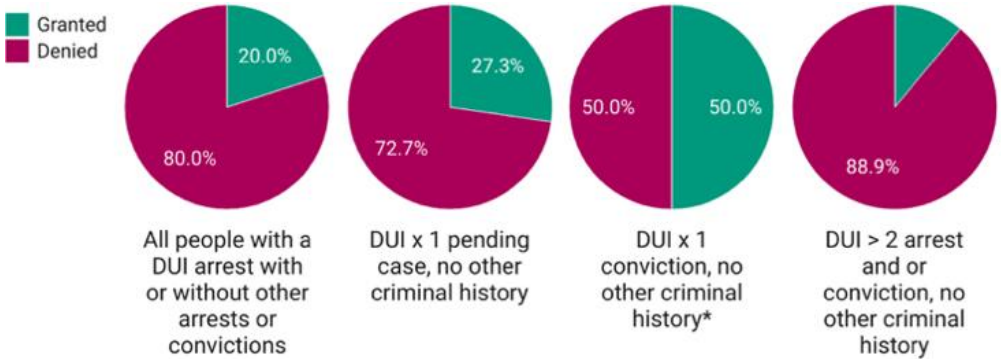


Of those cases where the respondent was arrested on a charge of domestic violence

but pled down to disorderly conduct (a misdemeanor) or had the charges dropped, 90% were granted bond and only 10% were denied. This remarkable divergence was not noted with other crimes.

Bond decisions with a conviction or arrest for driving under the influence

Respondents with a DUI arrest or conviction were denied bond 80% of the time. Looking exclusively at respondents whose only offenses related to DUI enabled us to compare pending and concluded charges, and between single violations versus multiple DUI violations. Those with pending DUI charges were less likely to get bond than those who had one DUI conviction. This seems counterintuitive, but immigration judges provided several explanations in their bond decisions:



- Criminal court records indicated a blood alcohol level just over the legal limit.
- The DUI offense was long ago and not repeated.
- The respondent had abstained from alcohol or gone to treatment since the conviction.
- The conviction was pled down to reckless driving as opposed to DUI.
- The respondent had lived in the United States a long time, and this was their only arrest and conviction.

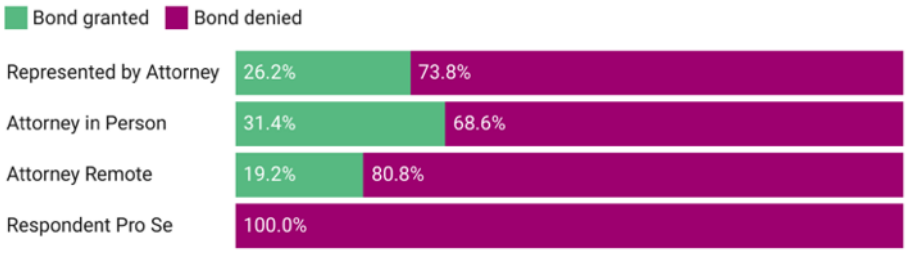
As noted previously, the low bond grant rate for people with a pending DUI charge does demonstrate the disproportionate weight given to police reports that have not yet been subject to testimony and cross-examination in court.

If bond was granted after a DUI arrest or conviction, the median bond amounts varied significantly based on the respondents' other offenses:

- All respondents with a DUI arrest or conviction, including those who may or may not have other arrests or convictions: $6,000.
- One DUI case pending, no other arrests or convictions: $5,500.
- One DUI conviction, no other arrest or conviction on record: $3,000.
- Two or more DUI arrests or convictions, no non-alcohol-related arrests or convictions: $15,000.

Of all the observed cases with DUI arrests or convictions, 97.6 % were male and 2.4% were female.

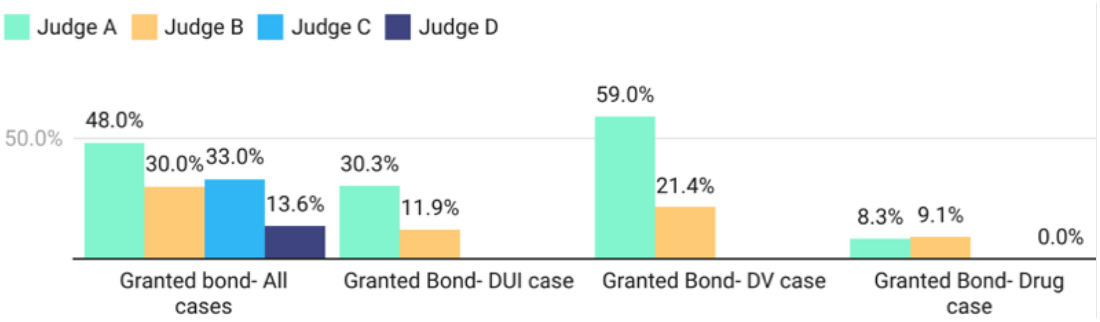
Bond grants for DUI arrest or conviction-impact of attorney representation



Having an attorney for bond always matters. As noted earlier, an attorney knows how to craft a bond argument, has insight into relevant evidence and testimony, and can more easily obtain letters of support. In cases of DUI, an attorney can also obtain a chemical dependency assessment and, if appropriate, assist with arranging a treatment program. Having a contrite respondent ready to participate in substance abuse treatment, with a treatment program arranged, makes a bond grant much more likely. Addressing the issue of chemical dependency through an assessment is vital, especially given the DHS attorneys' standard argument that most who get caught once are repeat offenders.

Bond grants rates vary by judge

The following chart compares bond grant rates for the four immigration judges who heard bond cases at the Fort Snelling Court during this reporting period. The bond grants rates varied significantly between judges. As it is highly unlikely that any one judge saw a population of respondents significantly distinct from that of other judges, these results suggest that judges have broad discretion in the determination of dangerousness and flight risk.



If a judge didn't hear at least 10 bond cases involving a respondent with the particular criminal history delineated, they were excluded from the calculation in the chart above. For better or worse, the determination of dangerousness and flight risk is not delineated in case law.

CONCLUSION

Immigration custody involves a loss of liberty imposed for an administrative purpose. Detained noncitizens universally want to be released in order to work, be with family, and enjoy simple everyday freedoms. Those pursuing relief from deportation outside of detention are far more likely to succeed, in no small part because they have better access to legal representation and key resources, including evidence. Those without legal representation are usually ill-equipped to understand how to successfully argue in favor of bond. This disadvantage is amplified in their removal cases, which proceed quite

quickly if they remain detained (weeks rather than months or years). The stakes are high for respondents seeking release on bond.

Court observers throughout the history of this project have reached several conclusions about detained removal proceedings:

1. Anyone detained should be provided clear, accurate, and understandable information about the bond process prior to their first court appearance.
2. Detention should be the exception rather than the default.
3. Mandatory detention laws and statutory minimum bonds should be abolished.
4. All respondents should be provided legal representation.
5. Interpretation and translation services must be available and complete.

Detention adds significant barriers to an already complex and adversarial immigration system. This is why detained noncitizens are so desperate for release. This report shows many of the ways the odds are stacked against them.

This report was prepared by Amy Lange, Project Coordinator, Immigration Court Observation Project for The Advocates for Human Rights. Inquiries can be made to Amy Lange: alange@advrights.org

Cover art courtroom sketches were created by artist Anita White. Ms. White observed immigration court hearings and documented her observations in a series of powerful drawings that convey the complexity of immigration court hearings.

Graphics were prepared using Datawrapper: https://www.datawrapper.de/

Information about the Immigration Court Observation Project can be found at: https://www.theadvocatesforhumanrights.org/Immigration_Court

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