Is my client subject to mandatory detention?
How advances in ICE hold policies will reduce those subject to mandatory detention

2014 has seen a wave of changes in ICE hold policies. As of August 2014, **over 240 localities across the U.S. limit or altogether eliminate compliance with ICE holds**, including the majority of counties here in California. This benefits the many people who are able to avoid ICE custody entirely. It also benefits those that eventually do find themselves in ICE custody, particularly those that ICE considers subject to mandatory detention. Mandatory detention requires that an individual be apprehended by ICE "when released" from criminal custody. Because these ICE hold policies mean that fewer people will be transferred to ICE immediately after release from criminal custody, **fewer people will ultimately be subject to mandatory detention**.

What is an ICE hold?

An Immigration and Customs Enforcement (ICE) hold is a *request* from ICE to law enforcement, asking the locality to hold someone for an additional 48 hours, plus weekends and federal holidays, so that ICE can take custody of the individual. While various programs such as Secure Communities facilitate the *identification* of noncitizens, the ICE hold facilitates ICE's ability to take *custody* of an individual directly from jail. It is important to note that an ICE hold is merely a request and is not commensurate to a warrant.[1] Increasingly, state and local jurisdictions are deciding to say "no" to this request and not detain the person for the extra time.

How and why have ICE hold policies changed?

A recent Federal Oregon District court decision, *Miranda-Olivares v. Clackamas County*,[2] coupled with *years of organizing*, has spurred a wave of change in ICE hold policies. In April 2014, *Miranda-Olivares* found that detaining individuals based on ICE holds is unconstitutional because they do not provide probable cause. Thus, a locality can be found legally liable if they detain someone based simply on an ICE hold. As a result, many localities have changed their policy to limit or altogether eliminate, compliance with ICE holds.

How do I know what the ICE hold policy is in a given jurisdiction?

The ILRC maintains a map of policies that limit compliance with ICE holds at www.ilrc.org/enforcement

However, even if your client is not in a jurisdiction that limits ICE holds, remember that they could have been transferred from one that does.

---

1 *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014) (concluding that ICE holds are voluntary and not mandatory); *Morales v. Chadbourne*, 2014 WL 554478, *16 (D.R.I. ("Warrants are very different from [ICE] detainers"); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency advise [ICE], prior to release of the alien, in order for [ICE] to arrange to assume custody.").
2 *Miranda-Olivares v. Clackamas Cnty.*, 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

Is my client subject to mandatory detention?
How advances in ICE hold policies will reduce those subject to mandatory detention

What is mandatory detention?

Mandatory detention refers to a provision of the INA that states that non-citizens with certain criminal convictions must be detained by ICE. People who are subject to mandatory detention are not entitled to a bond hearing and must remain in detention while removal proceedings are pending against them.

The rules for mandatory detention are contained in INA § 236 (c) which states that "the Attorney General *shall* take into custody any alien who" is inadmissibility or deportable under select grounds … "*when the alien is released.*" (emphasis added).

Who is subject to mandatory detention?[3]

For a person to be subject to mandatory detention, all the following criteria must be met:

First, the person must come within certain crimes grounds of deportability or inadmissibility. *See* INA 236(c)(1)(A) – (D)

A. Persons who are ***inadmissible*** for having committed an offense described in INA § 212(a)(2) [e.g. crimes of moral turpitude (CIMT) and drug offenses];[4]

B. Persons who are ***deportable*** for having committed any offense in INA § 237 (a)(2)(A)(ii) [multiple CIMTs], 237(a)(2)(A)(iii) [aggravated felony], 237(a)(2)(B)[drug offense] 237(a)(2)(C)[firearms offenses], or 237(a)(2)(D) [crimes related to espionage];[5]

C. Persons who are ***deportable*** under INA § 237(a)(2)(A)(i) [has been convicted of a crime of moral turpitude that was committed within five years of admission] and has been sentenced to a term of imprisonment of at least one year; and[6]

D. Persons who are ***inadmissible*** under INA § 212(a)(3)(B) or ***deportable*** under INA § 237(a)(4)(B) [involved in terrorist activities]

Second, ICE must take the person into custody when the person is released from criminal custody. INA 236(c) states that "the Attorney General *shall* take into custody any alien who" comes within these grounds "*when the alien is released.*"

---

3 An additional category of people subject to mandatory detention though less applicable here, are arriving aliens in removal proceedings. This includes an applicant for admission coming or attempting to come into U.S. at a Point of Entry. 8 C.F.R. 1001.1(q). This also includes a returning lawful permanent resident who is seeking admission. 8 C.F.R. 1003.19(h)(2)(i)(B).
4 An exception to this is the Petty Offense Exception. If the individual has one crime of moral turpitude (CIMT), they may qualify for the "petty offense exception" and therefore not be subject to mandatory detention. To qualify, 1) the individual must have only *one* CIMT, 2) the individual must not have been *sentenced* to a term of imprisonment in excess of six months, and 3) the offense or conviction carried a maximum possible sentence of one year or less. *See* INA § 212(a)(2)(A) (II), 8 U.S.C. § 1182(a)(2)(A) (II).
5 There is a special exception for the drug offense ground. Look out for a possession of marijuana that is less than 30 grams or less. Your client will not be subject to mandatory detention and will not be deportable.
6 The date of 'admission' may require its own individualized analysis. Do not assume that the admission date is when your client became a lawful permanent resident. *See Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011); *ILRC Practice Advisory: Adjustment of Status Following an Admission Does Not "Re-Start" the Five-Year Clock for Purposes of the Moral Turpitude Deportation Ground*, available at http://www.ilrc.org/crimes

Third, because the mandatory detention law went into effect October 9, 1998, the release must be from criminal custody after October 9, 1998.

Fourth, the person must be in custody for an offense that triggers mandatory detention, at the time of release.[7]

What does 'when released' mean?

INA Section 236(c) states that the government "shall take into custody" individuals "*when the alien is released*…." The application of the "when released" language has been a point of dispute. The question is whether ICE must take someone into custody *immediately* when they are released from criminal custody, meaning when they are released from jail or prison.

The Government has argued that in order to subject someone to mandatory detention, ICE does not have to take the person into custody immediately upon release from criminal custody. Rather, ICE argues that mandatory detention applies even if it picks the person up days, months, *or years after release*. Under this reasoning, someone could be subject to mandatory detention despite having been out in the community for years after their criminal release. The Board of Immigration Appeals agreed with this reasoning in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001).[8]

However, a growing number of federal district courts[9] have held that "when released" requires ICE to detain the person *immediately* at the time of their release from criminal custody. Thus, the release must be from *actual*[10] criminal custody, and ICE cannot subject someone to mandatory detention when they pick them up in the community after their criminal release. Notably, in *Preap v. Holder*, a federal district court granted a motion requiring the government to provide bond hearings in this context throughout California.[11]

How is the 'when released' provision affected by changes in ICE hold policies?

Because of new ICE hold policies, it may become more common for ICE to take custody of someone *after* they have been released into the community, if ICE apprehends him/her at all. Thus, fewer people will be subject to mandatory detention.

ICE holds greatly facilitate ICE's ability to take custody of someone *immediately upon* criminal release. ICE holds are *requests* for a jail to detain the person for up to two extra days, so that ICE can more

---

7 *Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).
8 Certain federal courts, including the Courts of Appeal for the Third and Fourth Circuits, have also agreed. *Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012).
9 *See e.g., Castaneda v. Souza*, 952 F.Supp.2d 307 (D. Mass. 2013); *Nimako v. Shanahan*, 2012 WL 4121102 (D.N.J. 2012); *Khoury v. Asher*, 2014 WL 954920 (W.D. Wash. 2014); *see also, Challenging Matter of Rojas: does mandatory detention apply if ICE does not take custody "when the alien is released" from criminal custody?* available at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/challenges-unlawful-detention; *but see, e.g., Sylvain v. Attorney Gen. of U.S.*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012).
10 For mandatory detention to apply, the release must be from actual, physical custody of the state. *Matter of West*, 22 I&N Dec. 1405 (BIA 2000) (where person was sentence to probation, he was not subject to mandatory detention because he was not released from the physical custody of the state).
11 *Preap v. Holder*, No. 13-cv-05754-YGR (N.D. Cal. May 15, 2014), available at https://www.aclunc.org/sites/default/files/048%20Order%20Granting%20Preliminary%20Injunction.pdf

easily pick up the individual directly from jail. Since fewer jurisdictions are enforcing ICE holds, fewer people will be transferred directly from criminal custody to ICE custody. Thus, fewer people should be subject to mandatory detention because fewer people will have been 'released' immediately from criminal custody at the time ICE takes them into custody.

How should this change the way that I look at my cases?

First, advocates should always argue that the "when released" language applies to release *immediately after* criminal custody. Owing to this growing body of case law, we now have more authority to cite to, notably in California due to *Preap v. Holder*. That said, advocates should research the law in their current jurisdiction.

Second, carefully question your detained client regarding how they ended up in detention, to see if they are subject to mandatory detention. Did ICE pick them up immediately at the jail? Or, did ICE pick them up at their home or elsewhere *after* they were released from criminal custody? Was there *any* gap in time between criminal custody and ICE custody?

Also, if ICE apprehended your client immediately from jail, were they in jail for a conviction that would trigger mandatory detention, or for another conviction? If the person had a prior conviction – for example, a drug offense – that could have triggered mandatory detention, but now they are in jail for a conviction that does not do that – for example, a California drunk driving conviction – then the person should not be subject to mandatory detention.[12]

Are there any other ways to challenge mandatory detention?[13]

Yes. While this is beyond the scope of this advisory, advocates should know that there are other bases upon which to contest mandatory or prolonged detention.

Some examples include, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), a case out of the California Central District, which states that a bond hearing should be made available after six months of detention, even if subject to mandatory detention. *Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), a Ninth Circuit case, states that a bond hearing is available when the Ninth Circuit grants review of a BIA order of removal. *Franco-Gonzalez v Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010), a California Central District case, provides bond hearings and counsel for persons with mental disabilities. Finally, Joseph hearings pursuant to the BIA case *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), provide bond hearings when it is substantially unlikely that the government will prevail on a charge of removability specified under INA section 236(c)(1).

12 *See Matter of Garcia-Arreola*, 25 I&N Dec. 267 (BIA 2010).
13 For a more complete discussion regarding how to challenge mandatory and prolonged detention, see ACLU Immigrants' Rights Project, *Challenging Mandatory and Prolonged Detention Pending a Final Decision of Removal*, available at https://www.aclu.org/files/assets/mandatory_detention_tips_-_june_2013_final.pdf