§ N.5 Immigration Holds and Immigration Detention; When to Obtain Release from Criminal Incarceration, and When Not To

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For more information about immigration holds/detainers, and state enforcement of immigration laws, see Defending Immigrants in the Ninth Circuit, Chapter 12

A. Immigration Hold

Once ICE becomes aware of a suspected deportable alien, through notification by local authorities or through its own investigatory processes and periodic visits to local jails and prisons, it may file an immigration “hold” or “detainer” (which we will refer to as an immigration “hold”) with the local, state, or federal law enforcement agencies who have custody of the person. The regulation governing immigration holds/detainers is 8 CFR 287.7.

On December 4, 2012 California Attorney General Kamala Harris issued an Information Bulletin to local law enforcement agencies clarifying that immigration detainers are “requests, not commands,” and that local agencies are free to decide whether to honor them.1 In fact, some jurisdictions in California have decided to wholly or partially ignore immigration detainers.

The Attorney General’s statement is consistent with the governing federal regulation, which provides that an immigration hold is a request that another Federal, State or local law enforcement agency notify DHS prior to release of an alien in order for DHS to arrange to assume custody for the purpose of arresting and removing the alien. The request is for a limited time only:

Upon a determination by the Service to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period of not to exceed 48 hours, excluding Saturday, Sundays, and holidays2 in order to permit assumption of custody by the Service.

Some state and local governments across the U.S. have decided to wholly or partially refuse to cooperate with holds, and others are considering this strategy, due to community outcry against holds as well as the unreimbursed cost of detaining inmates for the federal government. For a toolbox on this issue see http://nationalimmigrationproject.org/community/All_in_One_Guide_to_Defeating_ICE_Hold_Requests.pdf.

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2 Form I-247 indicates that “holidays” means Federal holidays.
B. Who Should Not Be the Subject of a Detainer?

On December 21, 2012 the Immigration & Customs Enforcement (ICE), issued a new, national policy memorandum on detainers, a/k/a holds.\(^3\) Entitled “Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems,” this memo is an improvement over past policy in that it limits detainers to persons with a relatively more serious criminal record. Regarding who should receive a detainer, the new memorandum states:

Consistent with ICE's civil enforcement priorities and absent extraordinary circumstances, ICE agents and officers should issue a detainer in the federal, state, local, or tribal criminal justice systems against an individual only where (1) they have reason to believe the individual is an alien subject to removal from the United States and (2) one or more of the following conditions apply:

- the individual has a prior felony conviction or has been charged with a felony offense;
- the individual has three or more prior misdemeanor convictions; n.2
  
  [N. 2 provides: “Given limited enforcement resources, three or more convictions for minor traffic misdemeanors or other relatively minor misdemeanors alone should not trigger a detainer unless the convictions reflect a clear and continuing danger to others or disregard for the law.”]
- the individual has a prior misdemeanor conviction or has been charged with a misdemeanor offense if the misdemeanor conviction or pending charge involves no violence, threats, or assault;
- sexual abuse or exploitation;
- driving under the influence of alcohol or a controlled substance;
- unlawful flight from the scene of an accident;
- unlawful possession or use of a firearm or other deadly weapon;
- the distribution or trafficking of a controlled substance; or
- other significant threat to public safety; n. 3
  
  [N. 3 provides: “A significant threat to public safety is one which poses a significant risk of harm or injury to a person or property.”]
- the individual has been convicted of illegal entry pursuant to 8 U.S.C. § 1325;
- the individual has illegally re-entered the country after a previous removal or return;
- the individual has an outstanding order of removal;

\(^3\) The memo was issued on Dec. 21, 2012 by John Morton, Director of ICE and is posted at http://xa.yimg.com/kq/groups/6503708/1232930262/name/detainer-policy%2012-21-2012.pdf.
• the individual has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud; or
• the individual otherwise poses a significant risk to national security, border security, or public safety.

[N. 4 provides: “For example, the individual is a suspected terrorist, a known gang member, or the subject of an outstanding felony arrest warrant; or the detainer is issued in furtherance of an ongoing felony criminal or national security investigation.”]

C. Strategies for Noncitizens Awaiting Trial

1. Where there is not yet an immigration hold/detainer; Who is subject to a detainer

The first thing a criminal practitioner should do when he finds out that his client is an alien and is in custody is to attempt to have that person released on recognizance or bail before any hold or detainer is placed. When a defense attorney speaks with the defendant in custody the defendant should also be advised that he or she has a right to remain silent in the face of any interrogation by ICE or border patrol and that he or she should particularly be advised not to answer any questions concerning place of birth. Once an alien discloses that he or she is born outside the United States, it is the alien’s burden under immigration law to prove that he or she has lawful immigrant or non-immigrant status in the United States.4

For a criminal defendant awaiting trial, usually a detainer will not be issued against a defendant unless the defendant is either undocumented or out of status, in which case the defendant is already subject to removal, or if the defendant has lawful status but has prior convictions rendering the defendant deportable. Defendants who have lawful permanent resident status or other lawful status with no prior convictions which make them removable, should not have a detainer issued against them.

2. What to do when there is an immigration hold/detainer; Mandatory detention

If a detainer has been issued, counsel should obtain a copy of the detainer from the criminal justice agency to which it has been issued. Defense counsel should check which boxes on the detainer form have been checked. A detainer could be issued for several alternative reasons: Temporary Detention; a warrant of arrest by INS was issued; deportation or removal has previously been ordered; a Notice To Appear or other charging document initiating removal proceedings has been served; or, INS is only investigating the alien.

If INS issues a detainer and does not assume custody of the alien, either by taking the alien into actual INS custody or by issuing a warrant of arrest, within 48 hours after the alien would otherwise be released by a criminal justice agency, excluding Saturday, Sundays and

Federal holidays, then the criminal defense attorney should demand the alien’s immediate release from custody from the criminal justice agency holding the prisoner.\(^5\)

If the defendant is not immediately released the criminal justice agency is subject to a suit for damages and injunctive relief can be obtained to prevent further violations.\(^6\) A writ of habeas corpus can also be filed to obtain the defendant’s immediate release from custody.\(^7\) A copy of such a writ is included in *Defending Immigrants in the Ninth Circuit*, Appendix 12-A.

Counsel should make sure the defendant has not signed a voluntary departure under safeguards. If the defendant has signed this form (Form I-274) then ICE has custody of the person. However, the noncitizen or her attorney retains the right to revoke the request for voluntary departure. To revoke a request for voluntary departure the alien’s attorney must present a G-28 Form to the INS or the border patrol showing that the attorney is authorized to represent the alien. Before doing this, however, analyze the situation and check with immigration counsel, if possible. If the only other possibility for the defendant is removal, it may be better to accept the voluntary departure.

**Where there is an immigration hold, it may well be in the client’s best interests not to be released from criminal incarceration.** Immigration detention is worse than criminal incarceration. Immigration bond is unavailable for most criminal grounds for deportation. Even if bond is possible, immigration bonds require real property collateral and 10% cash deposit or full cash deposit and are set at $1,500 or more. While detained by immigration authorities, the detainee can be moved hundreds of miles away, to another state and outside the jurisdiction of the Ninth Circuit. Conditions in immigration detention generally are even worse than in jails.

If a hold has been issued, defense counsel should consult with an immigration attorney concerning the alien’s chances of being released on an immigration bond and possible relief from removal. A criminal defendant with a detainer must first post bond or be granted O.R. before the defendant will be picked up by INS. If it is possible to obtain release pending removal proceedings on an immigration bond, the criminal attorney can assist the defendant in seeking release on bail or O.R. on the criminal charge. If bond on the immigration case is not available, the criminal defense attorney will probably not want the alien to be released on own recognizance or bond on the criminal charges because then the alien will be taken into immigration custody.

**Which defendants are subject to “mandatory” detention by ICE?** Under the mandatory detention provisions of INA § 236(c)(1), 8 USC § 1226(c), immigration authorities must “take into custody,” and thereafter not release, a noncitizen who is inadmissible under grounds relating to moral turpitude, drug conviction, drug trafficking, prostitution, miscellaneous convictions, diplomatic immunity, human trafficking, money laundering and terrorist activities.\(^8\) The

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\(^5\) Many local criminal justice agencies incorrectly assume that a detainer requesting Temporary Detention authorizes detention for 5 days after a prisoner would otherwise be released confusing an INS request for Temporary Detention with the statutory period allowed to hold prisoners with out-of-county warrants.

\(^6\) See e.g., *Gates v. Superior Court*, supra, 193 Cal.App.3d at p. 219-221 (interpreting prior “24 hour rule” of 8 CFR 287.3); *Cervantez v. Whitfield*, supra, 776 F.2d at p. 557-559 (stipulation concerning prior “24 hour rule.”)

\(^7\) See Section 12.4, infra.

\(^8\) INA § 236(c)(1)(A) and (D), 8 USC § 1226(c)(1)(A) and (D).
Attorney General must also “take into custody,” and thereafter not release, a noncitizen who is deportable under any of the following grounds: conviction of one crime of moral turpitude committed within five years of last entry if a sentence of one year or more of imprisonment was imposed, convictions for two crimes of moral turpitude, an aggravated felony, a drug offense, a firearms offense or miscellaneous crimes (sabotage, espionage), and drug abuse/addiction or terrorist activities (no conviction required). Notably, a person who is deportable for conviction of a crime of domestic violence, stalking, child abuse and/or neglect, or conviction of one crime involving moral turpitude within five years of admission with a sentence imposed of less than one year, is not subject to mandatory detention. To see further discussion of mandatory detention, see basic immigration materials or see Defending Immigrants In the Ninth Circuit (www.ilrc.org), § 11.28.

A defendant who is not subject to mandatory detention still may be detained, but the person has the right to ask ICE and an immigration judge for release from immigration detention. Release can be denied based on a finding that the person is a flight risk or danger to the community. Criminal record such as one or more DUI convictions, or adult or juvenile dispositions with gang enhancements, often are held a basis to deny release. Otherwise, generally release will be granted to a defendant who is removable but is eligible to apply for some relief from removal, such as cancellation of removal or adjustment of status. In the best scenario, in some cases ICE will release persons from custody and might not even put them in removal proceedings, as a matter of prosecutorial discretion, if the person does not have any significant criminal record, has strong ties in the U.S., and meets other criteria.

Summary of Strategy:

- Attempt to obtain your client’s immediate release on O.R. or bail before any hold or detainer is place;
- If your client signed a voluntary departure request you can revoke it. You should consult an immigration attorney before doing this;
- If the hold appears to be in error because the person is not removable (e.g., a permanent resident who does not have a deportable conviction), you or the immigration attorney can call ICE to get the hold removed;
- If your client is held more than 48 hours, excluding Saturdays, Sundays and Federal Holidays, beyond the time the defendant should be released on the criminal charge and the client has not signed a voluntary departure request you should seek your client’s immediate release from custody by threatening a false imprisonment or civil rights violation suit against the custodial agency, city or country and/or file a writ of habeas corpus;

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9 INA § 236(c)(1)(B) and (C), 8 USC § 1226(c)(1)(B) and (C).
10 INA § 236(c); 8 USC § 1226(c).
- If a detainer is filed against your client and your client is eligible for immigration bond, attempt to obtain your client’s release on O.R., or bond on the criminal charge and then on the immigration matter after INS picks up your client. You should plan and coordinate this with an immigration attorney. However, most criminal removal grounds make the alien ineligible for release on bond from immigration detention.

- If your client will be deportable by reason of the current charge, consider a jury or court trial or submitting the matter on a preliminary examination transcript or police report or pleading guilty after a suppression motion (1538.5 PC), and then filing an appeal. See Note 2: Definition of Conviction. If the matter is on direct appeal when the defendant finishes his jail or prison sentence, ICE cannot use the conviction as a basis for deportation.

D. Prisoners with Detainers Serving Sentences

Detainers are routinely lodged against aliens serving sentences in jails or prisons if they are subject to deportation. Strategies include:

- During the criminal case, if the defendant is removable (i.e., undocumented, or has lawful status but has a deportable conviction), it is important to try to obtain a sentence that would not require the defendant’s incarceration, in order to avoid contact with immigration.

- A defendant sentenced for an offense is not subject to being taken into custody by ICE until after completion of the defendant’s sentence to confinement. ICE can take custody of the individual even if the defendant is released on probation or parole or supervised release. In relatively rare cases, removal hearings are held in prison, before the noncitizen completes his or her sentence.

- Warn a defendant who will be deported about the risk of federal prosecution for illegal re-entry into the United States following a removal or deportation. The penalties are especially severe if there is a prior conviction of an aggravated felony or certain other felony convictions. See Note 1: Defense Goals, Part D. “The Immigration Strike” and 8 USC §§ 1325, 1326

- Avoid illegal re-entry prosecution by getting voluntary departure rather than removal. If the defendant has not been convicted of an aggravated felony, and will not be applying for other immigration relief, he or she can request an immigration judge for pre-hearing “voluntary departure” rather than removal. Among other advantages, illegal re-entry following a voluntary departure is not a federal felony under 8 USC § 1325; like any unlawful entry, it is a misdemeanor and might be far less likely to be prosecuted. The client should wait to apply for voluntary departure from an immigration judge in detention, which may take a few weeks. Some ICE officers have detainees sign papers that they believe are voluntary departure, but in fact are self-removals.