AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Policy Brief: ICE's New Plan to Detain Undocumented People Would Deprive Millions of Liberty and Undermine Immigration Courts' Authority

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Contact: Vanessa Dojaquez-Torres vdojaquez-torres@aila.org, Gregory Chen gchen@aila.org

On July 8, Immigration and Customs Enforcement (ICE) issued a directive to its attorneys outlining the agency's new legal position on the detention of people who are physically in the United States but have not been legally admitted. The memo says nearly all these individuals, no matter how long they have been in the country, are subject to mandatory detention pursuant to Immigration and Nationality Act (INA) § 235. This change contradicts the Department of Homeland Security (DHS) and the immigration court's longstanding legal interpretation of the INA, and if adopted widely, would massively expand ICE's detention authority, potentially requiring millions of people to be detained. Furthermore, if courts adopt this legal interpretation, they will no longer have jurisdiction to decide whether to release these people from custody, ending the right to individualized bond review for thousands of noncitizens, regardless of whether they pose a flight risk or a danger to the community.

Why It Matters

If fully implemented, the new ICE policy would apply to millions of people who entered the country without inspection and, as a result, would mandate their detention.[1] Such a massive increase in detention would be facilitated by the $45 billion in new detention funding Congress enacted in the One Big Beautiful Bill, which will enable ICE to double detention capacity to 100,000 beds.

The people impacted by this policy include those who have lived in the United States for years, are employed, and have family and other community ties. ICE has already sought to apply it to people who have lived in the U.S. for over a decade, including someone living here for 25 years. ICE is also applying the policy to people who have no criminal convictions and pose no threat to public safety. By its terms, the policy should not cover those who currently do not have legal status but originally entered with a valid visa and overstayed or through a humanitarian parole program.[2]

Beginning in early July, AILA members began reporting that ICE attorneys were making this argument in at least 22 different immigration courts nationwide. Some judges accepted ICE's

legal interpretation and rejected the person's request to be released from detention on the grounds that the court no longer has the power to review their detention status. Some courts are still granting bond and ordering the person's release. In several cases, ICE is appealing the judges' decisions to release the person on bond. To date, AILA is not aware of a national directive issued by the Department of Justice or the immigration court system instructing judges on this legal interpretation. The immigration judges in Washington State, however, have been applying this legal interpretation since as early as 2022.[3]

The timing of this new policy will put even more people into immigration detention, where conditions are often unsafe, unsanitary, and massively overcrowded. Moreover, the Trump administration has effectively shut down oversight agencies, including the Office of Civil Rights and Civil Liberties and the Office of Immigration the Detention Ombudsman, whose purpose is to hold it accountable for abuses and inhumane practices.

ICE's Legal Position Is Flawed, a Federal Court Has Already Concluded

ICE's new position rests on an incorrect legal interpretation that INA § 235 governs the detention of people who have not been legally admitted and mandates their detention (with the limited exception that ICE retains the authority to parole someone from custody pursuant to INA § 212(d)(5)). Until now, immigration courts and the Department of Homeland Security had long interpreted INA § 236 as governing this population's detention status. Moreover, by asserting that INA § 235 governs this population, ICE strips the immigration courts of jurisdiction to review their custody status.

In April, a federal court in Washington State ruled on this issue and granted a preliminary injunction against the government, concluding that INA § 236 is the default and appropriate statute governing the detention status of people who have not been legally admitted. See *Ramon Rodriguez Vazquez, v. Drew Bostock, et al.*[4] The court held that the plaintiff, Mr. Rodriguez, a long-term resident arrested inside the United States, was subject to INA § 236(a), not mandatory detention under INA § 235. The court found that interpreting INA § 235 to cover people who had not been legally admitted would render key portions of INA § 236(c) "superfluous" and thereby violate a basic principle of statutory interpretation that requires consideration of the overall statutory scheme.[5]

The court's order begins by finding that the plain language of INA § 236 applies to someone who "is present without being admitted" and is the "default" statutory provision governing detention and bond procedures for that population.[6] It also concluded that the statute's legislative history" and "longstanding agency practice indicate that he is governed under [INA § 236(a)]'s 'default' rule for discretionary detention."[7] When Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, it clarified that INA § 236(a) governs arrest, detention, and bond for "non-criminal" noncitizens, including entrants without inspection apprehended inside the U.S. In 1997, implementing regulations explicitly stated that "[n]oncitizens who entered without inspection... will be eligible for bond and bond redetermination."[8]

The court also found that Congress's recent enactment of the Laken Riley Act (LRA) further supports its decision. The LRA added mandatory detention for entrants without inspection who have been arrested for, charged with, or convicted of certain crimes. The LRA's changes would be unnecessary if entrants without inspection were already mandatorily detained under INA § 235(b)(2)(A), thus reinforcing that INA § 236(a) is the default authority for people who *do not* have criminal history covered by the LRA.

Based on this analysis the federal court in *Rodriguez v. Bostock* concluded that "the text of [INA § 236], canons of interpretation, legislative history, and longstanding agency practice indicate that" an individual who is not legally admitted "is governed under INA § 236(a)'s "'default' rule for discretionary detention. Importantly, the court concluded that the plaintiff was "likely to succeed on the merits that he is unlawfully detained under INA § 235(b)(2)'s mandatory detention provision."[9]

ICE Cannot Strip Immigration Courts of the Power to Decide Whether People Should Be Detained

The federal regulations implementing INA § 236 state that custody and bond determinations made by ICE may be reviewed by an Immigration Judge.[10] The law specifies that a detainee who objects to ICE's initial detention determination may request release from an immigration judge, and the judge is authorized to continue detention, order release or release on a bond. The federal court in *Rodriguez v. Bostock* recognized INA § 236 "includes the right to a bond hearing before an immigration judge" and ordered that the plaintiff, a longtime resident who had not been legally admitted, be provided a bond hearing.

The July 8 ICE directive attempts to strip noncitizens of this statutory right to have a judge review whether their detention is necessary. In response to ICE attorneys' representations in court, some judges are accepting ICE's legal interpretation. As a result, individuals who have lived in the U.S. for years, raised families, paid taxes, and have no criminal background are being swept into mandatory detention with no opportunity to make their case in court.

The good news: AILA attorneys are reporting that some immigration judges are rejecting ICE's legal interpretation and are granting release with a bond. Unfortunately, so far in all such cases reported by AILA attorneys ICE is appealing the immigration judges' bond rulings and refusing to release the individuals pending appeal. AILA has issued a practice alert with guidance for attorneys.

Recommendations

- Congress should conduct immediate oversight into ICE's incorrect legal policy.
- Congress should hold ICE accountable to ensure people who have not been legally admitted are not wrongfully detained under INA § 235 or deprived of the right to have a custody determination by an immigration judge.

- Congress should demand EOIR to disclose any unpublished guidance or instructions regarding the implementation of the July 8 ICE directive, including whether DOJ or EOIR have provided related guidance to judges.

Conclusion

ICE's new policy is an unlawful attempt to strip noncitizens of their statutory right to a bond hearing and will subject millions of people to mandatory detention and possible fast-track deportation under expedited removal. ICE's legal position grossly misinterprets federal law and has already been struck down by a federal court. The public deserves immediate action by Congress to hold the agencies accountable to the rule of law and to prevent such a radical shift from impacting the lives of people who have lived in the country for years and are waiting for their day in court.

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[1] Recent estimates of the undocumented population range from 11 million to nearly 14 million with the majority being people who entered without legal authorization. See DHS Office of Homeland Security Statistics; Pew Research Center; Migration Policy Institute.

[2] People who enter the United States with humanitarian parole under INA § 212(d)(5) are arriving aliens. When an arriving alien is placed into INA § 240 removal proceedings, they are generally subject to mandatory detention under 8 C.F.R. 1001.1(q). Based on data from 2008 to 2014, the Center for Migration Studies estimated 42 percent of the population are overstays, and in 2018 Pew Research Center estimated overstay numbers were increasing.

[3] See *Ramon Rodriguez Vazquez, v. Drew Bostock, et al.,* 3:25-cv-05240 (W.D. Wash.) (Order Granting Preliminary Injunction). https://nwirp.org/our-work/impact-litigation/assets/vazquez/29grantingPI.pdf

[4] *Id.*

[5] *Id. at* pg. 26.

[6] *Id. at* pg. 23

[7] *Id. at* pg. 32.

[8] 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

[9] See *Ramon Rodriguez Vazquez, v. Drew Bostock, et al.,* 3:25-cv-05240 (W.D. Wash.) (Order Granting Preliminary Injunction) at pg. 32.

[10] 8 C.F.R. §§ 1236.1(d)(1).