THE ALL-IN-ONE GUIDE TO

DEFEATING ICE HOLD REQUESTS

(a.k.a. Immigration Detainers)

APPENDIX 3

LEGAL AND POLICY DOCUMENTS ON DETAINERS

Washington Defender Association
WDA
ilrc Immigrant Legal Resource Center
national IMMIGRATION project of the National Lawyers Guild
NILC National Immigration Law Center
IDP Immigrant Defense Project

ALL IN ONE GUIDE TO DEFEATING ICE HOLDS

APPENDIX 3 : Legal and policy documents on detainers/ICE holds

Table of Contents

APPENDIX 3 : Legal and policy documents on detainers/ICE holds

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U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

INTERIM Policy Number 10074.1: Detainers

Issue Date: 08/02/2010
Effective Date: 08/02/2010
Superseded: LESC LOP 005-09 (September 23, 2009)
Federal Enterprise Architecture Number: 111-601-001-a

1. **Purpose/Background.** This directive establishes the interim policy of U.S. Immigration and Customs Enforcement (ICE) regarding the issuance of civil immigration detainers.

2. **Definitions.** The following definitions apply for purposes of this directive only.

2.1. A **detainer** (Form I-247) is a notice that ICE issues to Federal, State, and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA's custody. An immigration detainer may serve three key functions—

- notify an LEA that ICE intends to arrest or remove an alien in the LEA's custody once the alien is no longer subject to the LEA's detention;
- request information from an LEA about an alien's impending release so ICE may assume custody before the alien is released from the LEA's custody; and
- request that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody.

2.2. An **Immigration officer** includes an officer or an agent who is authorized to issue detainers pursuant to 8 C.F.R. § 287.7(b), or who a state, local, or tribal officer or agent who is delegated such authority pursuant to § 287(g) of the Immigration and Nationality Act.

3. **Policy.**

3.1. Only immigration officers may issue detainers.

3.2. Immigration officers shall issue detainers only after an LEA has exercised its independent authority to arrest the alien for a criminal violation.

4. **Procedures.**

4.1. Immigration officers shall not issue a detainer unless an LEA has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e., roadside or *Terry* stops)

but not arrested. This policy, however, does not preclude temporary detention of an alien by the LEA while ICE responds to the scene.

4.2. If an immigration officer has reason to believe that an individual arrested by an LEA is subject to ICE detention for removal or removal proceedings, and issuance of the detainer otherwise comports with this policy and appears to advance the priorities of the agency, the immigration officer may issue a detainer (Form I-247) to the LEA.

4.3. If the alien is the subject of an administrative arrest warrant, warrant of removal, or removal order, the immigration officer who issues the detainer should attach the warrant or order to the detainer, unless impracticable.

4.4. Immigration officers are expected to make arrangements to assume custody of an alien who is the subject of a detainer in a timely manner and without unnecessary delay. Although a detainer serves to request that an LEA temporarily detain an alien for a period not to exceed 48 hours from the time the LEA otherwise would have released the alien (excluding Saturdays, Sundays, and holidays) to permit ICE to assume custody of the alien, immigration officers should avoid relying on that hold period. If at any time after a detainer is issued, ICE determines it will not assume custody of the alien, the detainer should be withdrawn or rescinded and the LEA notified.

4.5. ICE shall timely assume custody of the alien if ICE has opted to lodge a detainer against an alien in any of the following categories—

- aliens who are subject to removal based upon certain criminal or security-related grounds set forth in INA § 236(c);
- aliens who are within the "removal period," as defined in INA § 241(a)(2); and
- aliens who have been arrested for controlled substance offenses under INA § 287(d).

4.6. Immigration officers shall take particular care when issuing a detainer against a lawful permanent resident (LPR) as some grounds of removability hinge on a conviction, while others do not [eg. removability pursuant to INA § 237(a)(4) and INA § 237(a)(1)(E).] Although in certain instances ICE may hold LPRs for up to 48 hours to make charging determinations, immigration officers should exercise such authority judiciously and seek advice of counsel for guidance if the LPR has not been convicted of a removable offense.

4.7. Immigration officers should consult their supervisors or local chief counsel office with all inquiries, questions, or concerns regarding this policy.

5. Authorities/References.

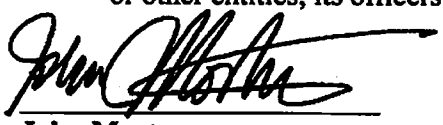
5.1. INA §§ 103(a)(3), 236, 241, 287.

5.2. 8 C.F.R. §§ 236.1, 287.3. 287.5, 287.7, 287.8, 1236.1.

6. Attachments.

6.1. Form I-247: Immigration Detainer - Notice of Action.

7. No Private Right Statement. This Directive is an internal policy statement of ICE. It is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States; its departments, agencies, or other entities; its officers or employees; contractors or any other person.



John Morton
Director
U.S. Immigration and Customs Enforcement

DEPARTMENT OF HOMELAND SECURITY

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID: Event #:	File No: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

☐ Initiated an investigation to determine whether this person is subject to removal from the United States.

☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____.
(Date)

☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____.
(Date)

☐ Obtained an order of deportation or removal from the United States for this person.

This action does not limit your discretion to make decisions related to this person's custody classification, work, quarter assignments, or other matters. DHS discourages dismissing criminal charges based on the existence of a detainer.

IT IS REQUESTED THAT YOU:

☐ Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.

☐ Provide a copy to the subject of this detainer.

☐ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☐ Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.

☐ Consider this request for a detainer operative only upon the subject's conviction.

☐ Cancel the detainer previously placed by this Office on _____.
(Date)

_____ _____
(Name and title of Immigration Officer) (Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to _____. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # _____ Date of latest criminal charge/conviction: _____

Last criminal charge/conviction: _____

Estimated release date: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

_____ _____
(Name and title of Officer) (Signature of Officer)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice from DHS informing law enforcement agencies that DHS intends to assume custody of you after you otherwise would be released from custody. DHS has requested that the law enforcement agency which is currently detaining you maintain custody of you for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) beyond the time when you would have been released by the state or local law enforcement authorities based on your criminal charges or convictions. **If DHS does not take you into custody during that additional 48 hour period, not counting weekends or holidays, you should contact your custodian** (the law enforcement agency or other entity that is holding you now) to inquire about your release from state or local custody. **If you have a complaint regarding this detainer or related to violations of civil rights or civil liberties connected to DHS activities, please contact the ICE Joint Intake Center at 1-877-2INTAKE (877-246-8253). If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) de EE. UU. ha emitido una orden de detención inmigratoria en su contra. Mediante esta orden, se notifica a los organismos policiales que el DHS pretende arrestarlo cuando usted cumpla su reclusión actual. El DHS ha solicitado que el organismo policial local o estatal a cargo de su actual detención lo mantenga en custodia por un período no mayor a 48 horas (excluyendo sábados, domingos y días festivos) tras el cese de su reclusión penal. **Si el DHS no procede con su arresto inmigratorio durante este período adicional de 48 horas, excluyendo los fines de semana o días festivos, usted debe comunicarse con la autoridad estatal o local que lo tiene detenido** (el organismo policial u otra entidad a cargo de su custodia actual) para obtener mayores detalles sobre el cese de su reclusión. **Si tiene alguna queja que se relacione con esta orden de detención o con posibles infracciones a los derechos o libertades civiles en conexión con las actividades del DHS, comuníquese con el Joint Intake Center (Centro de Admisión) del ICE (Servicio de Inmigración y Control de Aduanas) llamando al 1-877-2INTAKE (877-246-8253). Si usted cree que es ciudadano de los Estados Unidos o que ha sido víctima de un delito, infórmeselo al DHS llamando al Centro de Apoyo a los Organismos Policiales (Law Enforcement Support Center) del ICE, teléfono (855) 448-6903 (llamada gratuita).**

Avis au détenu

Le département de la Sécurité Intérieure [Department of Homeland Security (DHS)] a émis, à votre encontre, un ordre d'incarcération pour des raisons d'immigration. Un ordre d'incarcération pour des raisons d'immigration est un avis du DHS informant les agences des forces de l'ordre que le DHS a l'intention de vous détenir après la date normale de votre remise en liberté. Le DHS a requis que l'agence des forces de l'ordre, qui vous détient actuellement, vous garde en détention pour une période maximum de 48 heures (excluant les samedis, dimanches et jours fériés) au-delà de la période à la fin de laquelle vous auriez été remis en liberté par les autorités policières de l'État ou locales en fonction des inculpations ou condamnations pénales à votre encontre. **Si le DHS ne vous détient pas durant cette période supplémentaire de 48 heures, sans compter les fins de semaines et les jours fériés, vous devez contacter votre gardien** (l'agence des forces de l'ordre qui vous détient actuellement) pour vous renseigner à propos de votre libération par l'État ou l'autorité locale. **Si vous avez une plainte à formuler au sujet de cet ordre d'incarcération ou en rapport avec des violations de vos droits civils liées à des activités du DHS, veuillez contacter le centre commun d'admissions du Service de l'Immigration et des Douanes [ICE - Immigration and Customs Enforcement] [ICE Joint Intake Center] au 1-877-2INTAKE (877-246-8253). Si vous croyez être un citoyen des États-Unis ou la victime d'un crime, veuillez en aviser le DHS en appelant le centre d'assistance des forces de l'ordre de l'ICE [ICE Law Enforcement Support Center] au numéro gratuit (855) 448-6903.**

AVISO AO DETENTO

O Departamento de Segurança Nacional (DHS) emitiu uma ordem de custódia imigratória em seu nome. Este documento é um aviso enviado às agências de imposição da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja liberado. O DHS pediu que a agência de imposição da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas (excluindo-se sábados, domingos e feriados) após o período em que seria liberado pelas autoridades estaduais ou municipais de imposição da lei, de acordo com as respectivas acusações e penas criminais. **Se o DHS não assumir a sua custódia durante essas 48 horas adicionais, excluindo-se os fins de semana e feriados, você deverá entrar em contato com o seu custodiante** (a agência de imposição da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua liberação da custódia estadual ou municipal. **Caso você tenha alguma reclamação a fazer sobre esta ordem de custódia imigratória ou relacionada a violações dos seus direitos ou liberdades civis decorrente das atividades do DHS, entre em contato com o Centro de Entrada Conjunta da Agencia de Controle de Imigração e Alfândega (ICE) pelo telefone 1-877-246-8253. Se você acreditar que é um cidadão dos EUA ou está sendo vítima de um crime, informe o DHS ligando para o Centro de Apoio à Imposição da Lei do ICE pelo telefone de ligação gratuita (855) 448-6903**

5

THÔNG BÁO CHO NGƯỜI BỊ GIAM GIỮ

Bộ Quốc Phòng (DHS) đã có lệnh giam giữ quý vị vì lý do di trú. Lệnh giam giữ vì lý do di trú là thông báo của DHS cho các cơ quan thi hành luật pháp là DHS có ý định tạm giữ quý vị sau khi quý vị được thả. DHS đã yêu cầu cơ quan thi hành luật pháp hiện đang giữ quý vị phải tiếp tục tạm giữ quý vị trong không quá 48 giờ đồng hồ (không kể thứ Bảy, Chủ nhật, và các ngày nghỉ lễ) ngoài thời gian mà lẽ ra quý vị sẽ được cơ quan thi hành luật pháp của tiểu bang hoặc địa phương thả ra dựa trên các bản án và tội hình sự của quý vị. **Nếu DHS không tạm giam quý vị trong thời gian 48 giờ bổ sung đó, không tính các ngày cuối tuần hoặc ngày lễ, quý vị nên liên lạc với bên giam giữ quý vị** (cơ quan thi hành luật pháp hoặc tổ chức khác hiện đang giam giữ quý vị) để hỏi về việc cơ quan địa phương hoặc liên bang thả quý vị ra. **Nếu quý vị có khiếu nại về lệnh giam giữ này hoặc liên quan tới các trường hợp vi phạm dân quyền hoặc tự do công dân liên quan tới các hoạt động của DHS, vui lòng liên lạc với ICE Joint Intake Center tại số 1-877-2INTAKE (877-246-8253). Nếu quý vị tin rằng quý vị là công dân Hoa Kỳ hoặc nạn nhân tội phạm, vui lòng báo cho DHS biết bằng cách gọi ICE Law Enforcement Support Center tại số điện thoại miễn phí (855) 448-6903.**

对被拘留者的通告

美国国土安全部（DHS）已发出对你的移民监禁令。移民监禁令是美国国土安全部用来通告执法当局，表示美国国土安全部意图在你可能从当前的拘留被释放以后继续拘留你的通知单。美国国土安全部已经向当前拘留你的执法当局要求，根据对你的刑事起诉或判罪的基础，在本当由州或地方执法当局释放你时，继续拘留你，为期不超过 48 小时（星期六、星期天和假日除外）。**如果美国国土安全部未在不计周末或假日的额外 48 小时期限内将你拘留，你应该联系你的监管单位**（现在拘留你的执法当局或其他单位），询问关于你从州或地方执法单位被释放的事宜。**如果你对于这项拘留或关于美国国土安全部的行动所涉及的违反民权或公民自由权有任何投诉，请联系美国移民及海关执法局联合接纳中心（ICE Joint Intake Center），电话号码是 1-877-2INTAKE (877-246-8253)。如果你相信你是美国公民或犯罪被害人，请联系美国移民及海关执法局的执法支援中心（ICE Law Enforcement Support Center），告知美国国土安全部。该执法支援中心的免费电话号码是 (855) 448-6903。**

US. Department of Justice

Immigration and Naturalization Service

Immigration Detainer - Notice of Action

File No.
Date:

To: (Name and title of institution)	From: (INS office address)

Name of alien: _____

Date of birth: _____ Nationality: _____ Sex: _____

You are advised that the action noted below has been taken by the Immigration and Naturalization Service concerning the above-named inmate of your institution:

☐ Investigation has been initiated to determine whether this person is subject to removal from the United States.

☐ A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ A warrant of arrest in removal proceedings, a copy of which is attached, was served on _____ (Date).

☐ Deportation or removal from the United States has been ordered.

It is requested that you:

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment which he or she would otherwise receive.

☐ Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling _____ during business hours or _____ after hours in an emergency.

☐ Please complete and sign the bottom block of the duplicate of this form and return it to this office. ☐ A self-addressed stamped envelope is enclosed for your convenience. ☐ Please return a signed copy via facsimile to _____ (Area code and facsimile number).

Return fax to the attention of _____ (Name of INS officer handling case), at _____ (Area code and phone number).

☒ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☒ Notify this office in the event of the inmate's death or transfer to another institution.

☐ Please cancel the detainer previously placed by this Service on _____.

_____ (Signature of INS official) _____ (Title of INS official)

Receipt acknowledged:

Date of latest conviction: _____ Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____

(b)(6), (b)(7)c

From: (b)(6), (b)(7)c
Sent: Monday, February 07, 2011 6:00 PM
Subject: ICE OCR Close of Business Report (02-07-11)

ICE Office of Congressional Relations
Close of Business Report
Monday, February 7, 2011

SENATE: IN SESSION

HOUSE: NOT IN SESSION

ISSUES/INQUIRIES

- On Monday, January 31, 2011, staff of Representative Dan Burton (R-IN) contacted OCR regarding the case of (b)(6), (b)(7)c who was arrested by the Hamilton County Indiana Sheriffs Department on January 27, 2011. The staff did not have a privacy waiver, but reported (b)(6), (b)(7)c family was concerned about an ICE detainer lodged in the case despite the fact he was a naturalized citizen. Because of the USC claim OCR sought information through EARM. The record indicated that (b)(6), (b)(7)c had LPR status, however, there was no information related to naturalization. OCR was also advised a detainer was issued on January 28, 2011 and withdrawn on January 31, 2011. OCR contacted USCIS but they too were unable to confirm the citizenship claim. On the morning of February 7, 2011 USCIS contacted OCR and confirmed (b)(6), (b)(7)c (b)(6), (b)(7)was naturalized on April 23, 1974. (VA)

LEGISLATION

- Nothing to report

QUESTIONS FOR THE RECORD

- Nothing to report

HEARINGS, BRIEFINGS AND OTHER EVENTS TODAY

- Nothing to report

UPCOMING EVENTS

- **Briefing:** On Tuesday, February 8, 2011, at 1:00 p.m., in H2-176 Ford House Office Building, majority and minority staff of the House Committee on Homeland Security will receive an HSI 101 briefing. SME will be Janice Ayala, Assistant Director, Domestic Operations, HSI. The briefing was requested by staff and will be closed to the press. (JM)

8

- **Briefing:** On Tuesday, February 8, 2011, at 4:00 p.m., in 502 Hart Senate Office Building, staff of Senator Sheldon Whitehouse (D-RI) will receive a briefing on Operation In Our Sites. SME will be

Erik Barnett, Assistant Deputy Director. This briefing was requested by staff and will be closed to the press. (JM)

- **Meeting:** On Wednesday, February 9, 2011, at 11:00 a.m., in 2240 Rayburn House Office Building, Director John Morton will meet with Representative Bob Goodlatte (R-VA) concerning his priorities as chairman of the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition, and the Internet in the 112th Congress. This meeting was initiated by OCR and is closed to the press. (KM)

- **Meeting:** On Wednesday, February 9, 2011, at 1:30 p.m., in 1034 Longworth House Office Building, Director John Morton will meet with Representative Candice Miller (R-MI) to discuss her impending agenda as Chairman of the House Committee on Homeland Security, Subcommittee on Border, Maritime and Global Counterterrorism in the 112th Congress. This meeting was initiated by OCR and is closed to the press. (KM)

- **Meeting:** On Wednesday, February 9, 2011, at 3:30 p.m., in 1436 Longworth House Office Building, Director John Morton will meet with Representative Charlie Gonzalez (D-TX) to discuss his impending agenda as Chairman of the Congressional Hispanic Caucus. This meeting was initiated by OCR and is closed to the press. (KM)

- **Meeting:** On Wednesday, February 9, 2011, at 4:30 p.m., in 442 Cannon House Office Building, Director John Morton will meet with the House Republicans of the Georgia delegation to discuss the implementation of Secure Communities in the state of Georgia. This meeting is at the request of the Georgia delegation and is closed to the press. (KM)

- **Meeting:** On Thursday, February 10, 2011, at 12:30 p.m., in 1032 Longworth House Office Building, ICE officials will meet with Representative Jason Chaffetz (R-UT) to discuss HSI's role in international child pornography and child exploitation investigations. This meeting was initiated by OCR and is closed to the press. SMEs will be Jonathan Lines, ASAC - Salt Lake City; and Matthew Dunn, Section Chief, Cyber Crimes Investigations Center. (AP)

- **Meeting:** On Thursday, February 10, 2011, at 1:30 p.m., in 2449 Rayburn House Office Building, Director John Morton will meet with Representative James Sensenbrenner (R-WI) to discuss his priorities as the new chairman of the House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security. This meeting was initiated by OCR and is closed to the press. (KM)

- **Meeting:** On Friday, February 11, 2011, at 10:30 a.m., in 339 Cannon House Office Building, Director John Morton will meet with Representative Peter King (R-NY) to discuss his impending agenda as Chairman of the House Committee on Homeland Security in the 112th Congress. This meeting was initiated by OCR and is closed to the press. (KM)

- **Meeting:** On Monday, February 14, 2011, at 8:00 a.m., in Detroit, MI, Brian Moskowitz, SAC Detroit will meet with Senator Carl Levin (D-MI) to discuss the GAO Report, "BORDER SECURITY – Enhanced DHS Oversight and Assessment of Interagency Coordination Is Needed for the Northern Border." This meeting was initiated by Senator Levin due to a statement in the GAO report regarding the sharing of information between HSI and the Border Patrol in Michigan. It is anticipated that a Border Patrol representative will also be present at this meeting. This meeting will be closed to the press. (TG)

- **Meeting:** On Tuesday, February 15, 2011, at 2:30 pm, in 1237 Longworth House Office Building, Deputy Director Kumar Kibble will meet with Representative Trey Gowdy (R-SC) to discuss ICE's mission and immigration enforcement activities. This meeting was requested by Representative Gowdy and is closed to the press. (JR)

- **Meeting:** On Tuesday, February 15, 2011, at 4:00 pm., in 1708 Longworth House Office Building, Deputy Director Kumar Kibble will meet with Representative Allen West (R-FL) to discuss ICE's mission and activities. This meeting was requested by Representative West and is closed to the press. (JR)

- **Meeting:** On TBD (week of February 21st) in Honolulu, Hawaii, Wayne Wills, SAC- Honolulu will meet with Senator Daniel Inouye (D-HI) to discuss HSI operations and initiatives in the Hawaiian Islands. This meeting was initiated by OCR in an effort to increase congressional awareness of HSI and is closed to the press. (AP)

- **Event:** On Wednesday, February 23, 2011, in the Peace Bridge port of entry facility, SAC- Buffalo will host Members of Congress from the New York and Buffalo-area delegation for a briefing on the BEST task force located in Buffalo. A tour of the Peace Bridge port-of-entry will follow the briefing. SME will be Lev Kubiak, Special Agent in Charge - Buffalo. This event was initiated by OCR in an effort to increase congressional awareness of the BEST task force and is closed to the press. (AP)

- **Briefing:** On Thursday, February 24, 2011, at 1:30 p.m., in Detroit, MI, Brian Moskowitz, SAC-Detroit will meet with Representative Hansen Clarke (D-MI) to discuss HSI operations and initiatives in Michigan's 13th congressional district. On February 1, 2011, SAC Moskowitz and Representative Clarke spoke via telephone when their personal meeting was canceled due to severe weather. Representative Clarke requested this follow-up briefing and is closed to the press. (TG)

- **Briefing:** On Friday, February 25, 2011, at 10:00 a.m., in Grand Rapids, MI, Brian Moskowitz, SAC- Detroit will meet with Representative Justin Amash (R-MI) to discuss HSI operations and initiatives in Michigan's 3rd congressional district. This meeting was initiated by OCR in an effort to increase congressional awareness of HSI and is closed to the press. (TG)

- **Meeting:** On Tuesday, March 1, at 2:00p.m., in 2466 Rayburn House Office Building, Director John Morton will meet with Representative Bennie Thompson (D-MI) to discus his priorities as the new ranking member of the House Committee on Homeland Security. This meeting was initiated by OCR and is closed to the press. (KM)

- **Conference:** On Monday, February 28, 2011 – Friday, March 4, 2011, in the Capitol Visitors Center's Congressional Auditorium. OCR will participate in the USCIS 2011 Congressional Conference for Congressional staffers. SMEs TBD. This conference is closed to the press. (KM)

- **Event:** On Monday, March 7, 2011, at 9:00 a.m., in Fishers, Indiana, ICE will participate in the "2011 Youth Leadership Conference" hosted by Representative Dan Burton (R-IN). Each year Representative Burton invites approximately 150-250 high school seniors to this conference. The conference topic changes each year, this year's topic is "Immigration." SME will be Chris Bryant, Special Agent, RAC- Indianapolis. This event was initiated by the office of Representative Burton and is open to the press. (TG)

b6, b7c

From: b6, b7c
Sent: Wednesday, January 26, 2011 10:28 AM
To: b6, b7c
Subject: FW: Detainee deaths / Domestic Violence / Detainer policy

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From: b6, b7c
Sent: Wednesday, January 26, 2011 10:27 AM
To: (b)(6), (b)(7)(C)
Cc: b6, b7c
Subject: Detainee deaths / Domestic Violence / Detainer policy

Sir,
Please find the answers below. I also have some additional info re: the detainer policy.

What are the detainee deaths from FY08 – 10?

FY2008	11
FY2009	14
FY2010	8

Regarding Secure Communities, how do we speak to domestic violence concerns? How does ICE ensure victims of crimes, including domestic violence, are not being removed through this process?

The biometric information sharing capability only identifies those arrested for a crime. Members of the community who have witnessed or have been subject to crimes should continue to report them.

Additionally, DHS offers protection and assistance to victims of trafficking and violence, including individuals who might have been arrested for a crime and subsequently determined to be a victim, not a perpetrator. ICE works closely with law enforcement agencies and prosecutors handling victim related cases and offers protection to victims in those cases. U.S. Citizenship and Immigration Services also offers two types of visas to protect victims of human trafficking and other crimes, such as rape, murder, manslaughter, domestic violence, sexual assault and many more. T nonimmigrant status (T visa) provides immigration protection to victims of trafficking. U nonimmigrant status (U visa) provides immigration protection to crime victims who have suffered substantial mental or physical abuse as a result of the crime.

Through Secure Communities, ICE is focused on removing those aliens who pose a threat to community safety—criminals. Identifying and removing criminal aliens from the United States increases public safety. The National Sheriffs' Association, Major County Sheriffs' Association and the New York Association of Chiefs of Police have all issued formal statements in support of Secure Communities.

Is an ICE detainer a request or a requirement?
Answer: It is a request. There is no penalty if they don't comply.

We sent in a cleared email to the Hill (12/20/2010 to the House Judiciary Committee) the following: An ICE detainer expresses to a LEA that ICE has an interest in an alien being held. The detainer is a **request** that the LEA advise ICE prior to release of the alien in order for ICE to arrange to assume custody. In situations when gaining immediate physical custody is either impracticable or impossible the LEA shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays to allow ICE to assume custody. ICE derives its detainer authority from several federal statutes and regulations as well as ICE's general authority to detain aliens subject to removal. The pertinent regulatory provision mandates that the LEA maintain custody of the alien, per the terms described above.

b6, b7c
Deputy Chief of Staff to the Deputy Director
DHS / U.S. Immigration and Customs Enforcement
202.732. b6, (office) | 202.251 b6, (bb)
b6, @dhs.gov

Castle Point (CPD) began Secure Communities (SC) activation on Tuesday, January 11, 2011 at 0900 hours in the following two NYS counties within Castle Point's Area of Responsibility (AOR), the County of Putnam and County of Rockland. On Tuesday, February 8, 2011 Dutchess, Sullivan, and Ulster are scheduled for activation. On Tuesday, February 22, 2011 our two remaining counties, Orange and Westchester, are scheduled for activation. Prior to commencement, the North East Regional Command Center for Secure Communities Office (NERCC) in Buffalo, New York is requesting the following from CPD:

- All booking locations within the county engaging in SC operations to include a phone and fax number with 24/7 coverage. This information will also be uploaded into Enforce Ident/EARM.

  The list is created on a separate document, see attached spreadsheet.

- Point of contact information for CPD personnel assigned to SC.

  The below officers can be contacted 24/7 for any needs.

Points of Contact Info for Castle Point, New York Secure Communities (see detailed specific descending after-hours call order below)

Castle Point After-Hours Duty Agents/Officers
Primary Phone: 646-345-[redacted]
Secondary Phone: 347-996-[redacted]
Fax: 845-831-0724
Email: SecureCommunities.Cpd@dhs.gov

[redacted] *DO*
Assistant Secure Communities Field Coordinator New York
Blackberry/Cell: 646-296[redacted]
Desk: 845-831-[redacted]
Email: [redacted]

[redacted] *AFOD*
Secure Communities Field Coordinator New York
Cell: 646-488-[redacted]
Desk: 845-831-[redacted]
Email: [redacted]

- 24/7 contact information for CPD personnel on duty to respond to NERCC telephonic queries. ***Same as above.***
- A dedicated CPD SC mailbox where NERCC can electronically send detainer packets to SECURECOMMUNITIES.CPD@DHS.GOV
- Packets may also be faxed to 845-831-0724

After commencement of the SC program on January 11, 2011:

- CPD will cover all Immigration Alien Responses (IARs) from 0600hrs to 1800hrs during normal business days. NERCC will provide coverage on weekends, holidays and after normal working hours from 1800hrs to 0600hrs.

- CPD and NERCC will assume responsibility and respond to all IARs during the above mentioned time frame. In the event the office is unable to respond or the office is closed, the responsible party during the above time frame will notify both the LESC and the other party telephonically and via e-mail.

- NERCC shall place detainers on **ALL** Level 1 and 2 cases referred through interoperability that are amenable to removal via the IAR based on biometric matches. CPD request NERCC to place a detainer if subject is established to be removable through other means such as records checks/self-reporting, etc. If there is any question, the NERCC on-duty agents shall refer the LEA inquiry to the CPD Duty Agent/Officer for follow up directly with the LEA. NERCC will also lodge detainers on **ALL** Reinstatement and Visa Waiver cases, regardless of levels. In addition, NERCC will place detainers on all Final Order cases, regardless of levels, with the exception of those already out on an order of supervision unless the crime is of a very serious nature that would effect their condition of release. Absent direct knowledge that there is an outstanding, valid NTA/WA issued, with approved OCA legal sufficiency, **NO** detainers will be lodged on Lawful Permanent Residents (LPR).

- For purposes of this IRC protocol please note the definitions below of Levels 1-3 that should be utilized in order to determine the actual Level and required actions for all positive hits.

  Level 1- Currently Charged with or Previously/Currently Convicted of any single aggravated felony and/or two or more other felonies

  Level 2- Currently Charged with or Previously/Currently Convicted of a single, non-aggravated felony and/or 3 or more misdemeanors

  Level 3- Currently Charged with or Previously/Currently convicted of up to 2 misdemeanors

  Note: When determining the SC Level, for further clarification "Currently Charged With" in the above three Levels only refers to the instant offense for which the alien was arrested and charged. Current charges are important factors when determining an alien's SC Level. However, prior arrests, as opposed to instant offenses, are only reviewed for the sole purpose of determining whether the alien's prior arrests resulted in prior convictions ("Previously Convicted"). All prior convictions are considered when classifying an alien a Level 1-3, but not prior arrest charges. Prior arrest charges with no dispositions are not considered in classifying an alien's Level.

- CPD also request that a detainer be placed on any Level 3 illegal aliens with prior convictions or current charges relating to Sex Crimes, Crimes of Violence and

Firearms Offenses. This may need to be revised at a later time based on the volume of offenders identified and resources available. CPD will communicate any modifications at that time.

- Please contact our after-hours duty agent/officer or the duty supervisor if there are any issues placing a detainer. Also contact CPD via e-mail Monday through Friday by 0600 hours if it is required that the alien be taken into ICE custody from an LEA at the beginning of the next business day. If it is required from Monday through Friday morning that an alien be taken into custody within a few hours, and not the next business day, telephonically notify the duty agent/officer immediately. If it is required that an alien be taken into custody within a few hours between Friday evening and Monday morning, also telephonically notify the duty agent/officer immediately.

- By 0630 hours daily, the NERCC shall provide copies of the referral packet to CPD, which shall include a one page check list of all systems checks to include a copy of the actual checks run by the agents/officers, a copy of the detainer, the IAR and LEA contact/POC information, and any other pertinent information deemed necessary to assist in follow-up by CPD. This information shall be sent via e-mail to CPDSC mailbox. This information can also be faxed in an emergency to 845-831-0724.

- If a detainer is lodged, please include in the e-mail the Enforce Ident Event number. Please make all attempts to have LEAs hold subject(s) until the next business day whenever possible. Further, also advise arresting LEA to pursue local prosecution, and not drop charges in lieu of removal. This will serve to potentially allow for criminal prosecution if the alien is subsequently removed and illegally reenters in violation of Title 8 USC 1326, Reentry After Deportation. In addition, whenever appropriate, ask LEA to request a bail/commitment order when arraigning subject(s) taking into account subject's illegal status and likelihood to abscond.

  If no detainer is lodged, CPD request that all information be sent via e-mail so we may continue to maintain all information received to evaluate for future enforcement actions. All events created by NERCC where detainers are lodged will have an event code that begins with BTV.

- If the NERCC receives an IAR from the LESC on a non-SC case, which emanates from a routine IAQ sent to the LESC by an LEA in CPD's AOR, the NERCC should forward all relating information via e-mail for CPD's evaluation the next business day. The only instances where the NERCC should file a detainer on a non-SC matter would be on cases involving prior deports and final order cases, which fall under ERO's purview. Other than these two instances, it should be noted that if an alien arrested by an LEA is committed to a county jail within CPD's AOR, that case will be dealt with by CPD's CAP unit like any other jail case. A detainer by NERCC will not be required in these cases. If the removable alien arrested is not going to be committed to a county jail than those cases still remain the responsibility of HSI and fall under the category of general police calls.

- Call order for CPD after-hours will be as follows for all detainers in the Castle Point AOR. Please allow **10 minutes** for the person to respond before calling the next person.

  - ***Primary Duty Agent/Officer 24 hour phone, 646-345-***b6, b7c
  - ***Secondary Duty Agent/Officer 24 hour phone, 347-996-***b6, b7c
  - ***Supervisor on Duty, 24 hour phone, 917-659-***b6, b7c
  - ***Assistant Field Coordinator for SC, 646-296-***b6, b7c
  - ***Field Coordinator for SC, 646-488-***b6, b7c

- 24/7 Telephone numbers for the NERCC are as follows:

  - Primary Phone: 585-344-[redacted]
  - Secondary Phone: 716-583-b6, b7c
  - Fax: 585-344-7092
  - E-Mail: [redacted]

ICE/ERO Castle Point, New York Sub-Office (CPD) covers the following counties:

Dutchess	Orange	Putnam	Rockland
Sullivan	Ulster	Westchester	

ICE/ERO Castle Point, New York Office Contact:

DHS/ICE/ERO
Veterans Administration Complex
RT 9-D, Building #7
Castle Point, New York 12511
Ph: 845-831-[redacted]
Fax: 845-831-0724 or 845-831-7849

AFOD [redacted] (SC Field Coordinator)
Desk: 845-831-[redacted]
Cell: 646-488-[redacted]
Fax: 845-831-7849

SDDO [redacted]
Desk: 845-831-[redacted]
Cell: 347-996[redacted]
Fax: 845-831-7849

SDDO [redacted]
Desk: 845-831-[redacted]
Cell: 646-996-[redacted]
Fax: 845-831-0724

SIEA [redacted]
Desk: 845-831-[redacted]
Cell: 646-358[redacted]
Fax: 845-831-0724

DO [redacted] (Assistant SC Field Coordinator)
Desk: 845-831-[redacted]
Cell: 646-296-[redacted]
Fax: 845-831-0724

Duty Supervisor Cell Phone
Desk: 845-831-[redacted]
Cell: 917-659-[redacted]

Fax: 845-831-7849

ICE/ERO Buffalo NERCC Points of Contact

See attached list

b6, b7c b6, b7c b6, b7c

From: Venturella, David
Sent: Friday, October 29, 2010 11:15 AM
To: b6, b7c b6, b7c (b)(6), (b)(7)c
Subject: RE: CHC Brief Notes

My edits in blue.

David J. Venturella
Assistant Director - Secure Communities
Office: (202)732-(b)(6) **; Cell: (202)907-** (b)(6)
FAX: (202)732-4030
http://www.ice.gov/secure_communities/

From: b6, b7c b6, b7c
Sent: Friday, October 29, 2010 10:04 AM
To: Venturella, David; (b)(6), (b)(7)c
Subject: CHC Brief Notes

Gentlemen

Below are my notes from yesterdays brief to the CHC staff. I know I missed some questions and answers, so if you have notes or a good recollection of certain points please add them to the list in the appropriate location. Also, as always, please feel free to edit these notes as you deem appropriate. The will go into a formal internal OCR memo after I receive your response.

Memorandum

TO: (b)(6), (b)(7)c

FROM: b6, b7c

SUBJECT: Secure Communities Briefing (Congressional Hispanic Caucus)

DATE: October 28, 2010

19

On Thursday, October 28, 2010, staff aides from offices of Members of the Congressional Hispanic Caucus received a briefing on the ICE Secure Communities initiative. The briefing was facilitated by

the office of Representative Gutierrez (D-IL). The ICE SME was David Venturella, Assistant Director, Secure Communities, and Jeremy Winkler from DHS OLA was in attendance. The below of aides participated in the briefing.

- Kerri Talbot – Sen. Robert Menedez (D-NJ)
- Reiniero Rivera - Rep. Joe Baca (D-CA)
- Brenda Villannera – Rep. Joe Baca (D-CA)
- Cheryl Bassett - Rep. Henry Cuellar (D-TX)
- Alyssa Adams – Rep. Raul Grijalva (D-AZ)
- Susan Collins – Rep. Luis Gutierrez (D-IL)
- Evelyn Rodriguez – Rep. Luis Gutierrez (D-IL)
- Rosa Garcia – Rep. Luis Gutierrez (D-IL)
- Matthew Lee – Rep. Lucille Roybal-Allard (D-CA)
- Mark Carrie – Rep. Solomon Ortiz (D-TX)
- Hannah Izon – Rep. Albio Sires (D-NJ)
- Max Trijillo – Rep. Nydia Velazquez (D-NY)
- Gabriela Domenzain – Congressional Hispanic Caucus
- Patricia Tamez – Congressional Hispanic Caucus

Susan Collins opened the meeting and asked for each attendee to introduce themselves, after which, David provided an overview of Secure Communities. In his talk he touched on several points including the following points:

- SC leverages use of existing technologies to share information at the federal level
- SC does not extend immigration enforcement authorities to local LE. It is not 287(g)
- LE can continue to use the existing Immigrant Alien Query through the LESC
- There is a complaint process through both the DHS and DoJ CRCL

Following his remarks staff was invited to ask questions, from which the below notes were developed.

- You stated training for local LE is not required, so how are the local supposed to know what to do when information comes back positively identifying someone as being in the country unlawfully?
  - The local booking process does remains the same under SC, so local are not being asked to take any action in the case of immigration information being returned on an arrestee, so training in that process is not required. However, in cases where there could be an ICE action in a case, information is provided to local LE during the SC outreach process that talks about what types of enforcement actions ICE could take in a case and what the local LE could expect to see occur in those instances. So there is some information put out with explanations of what the information means.
- Whap happens in cases where there is a 'no match' response from an inquiry? Would ICE still initiate a file in the case?
  - If there is 'no match' to an inquiry, then ICE is not notified of the arrest and therefore an immigration enforcement action is not initiated. However, if the arresting LE agency chooses to initiate a query directly with ICE, an ICE officer can interview the person, and if warranted an action can be initiated.

- What happens when someone is booked on a minor charge, for instance spousal abuse, that typically would not require their prints to be taken, however, the prints are taken anyway and run against the DHS data base? This is a serious concern in the immigrant community that results in crime not be

reported?

- ICE takes these types of concern very seriously and there is a process through CRCL at DHS and Justice established for these incidents. However, in order for these allegations to be reviewed they have to be reported. Also, the states control which prints are submitted to the FBI for criminal checks, so unless prints are released from the state they cannot be checked against the DHS systems. For instance in the states of Virginia and Texas Class-C misdemeanors are not offenses for which prints are provided to federal authorities.

- Can the federal government set a national standard for what types of fingerprints are submitted at the time of booking?
  - No. Each state and even the local government set their own law and procedures that govern law enforcement and an overarching federal standard would undermine their authority.

- Often times a person is arrested and never convicted or convicted of a minor offense, so can ICE not check prints or not initiate action in a case until a conviction is handed down by a court?
  - Under SC prints are checked as part of the criminal background check process, so it is automatic, and often times there is a pre-existing conviction upon which action can be taken so early identification is key. In cases where the charge under which the person is being held may be so serious that they would not be released, ICE can wait for the criminal prosecution to be completed before a Detainer is issued in the case. Also, local LE are not mandated to honor a detainer, and in some jurisdictions they do not.

- What percentage of enforcement actions are taken for serious crime (L1) vs. other crime levels?
  - Approximately 25% of the criminal aliens removed as a result from an interoperability match had a L1 conviction(s). This is in line with national crime statistics.

- Trust between the immigrant community and LE is important, however, there is a concern crime may not be reported because of the fear of the potential for immigration action?
  - ICE will improve outreach to communities and groups concerned with the impact of SC on the immigrant community. However, local police have the responsibility to alleviate the fears of immigrants living in their communities through their community policing initiatives and efforts. For example, a police department in Oklahoma put out signs stating 'We are not ICE' in neighborhood businesses located in heavily populated immigrant communities.

- What triggers ICE to initiate proceedings?
  - Generally, if a person is identified who is or may be in the U.S. unlawfully ICE can initiate proceedings. However, these decisions are made on a case by case basis that involve consideration of available immigration resources and the specific circumstances that led ICE to the alien.

- How can family members obtain information on the whereabouts of someone who is turned over to ICE? Currently once a person is placed into ICE custody they seem to disappear into a black hole leaving the family without any information on their case.
  - As part of the detention reform effort ICE has developed the on line detainee locator system which allows anyone to enter data to find out where someone is being detained so they can seek to contact that person.

- Is there a toll free number to call for this information? In some cases a person seeking to find someone may not have access to a computer, or they may not know how to use the internet.
  - We don't know. But we will research this issue and send the response to Mr. Gutierrez's staff for dissemination.

- Is the on line system in other languages?
  - Yes.

- If a person is arrested for a minor offense, is a record initiated on them?
  - Under SC if a persons prints are submitted to the FBI system, only then will they be checked against the DHS database. If they are not found in the DHS systems ICE will not pursue the case, unless local LE contacts the agency directly seeking a follow up inquiry.

- What happens in the case of a rogue LE agency that misuses its authority just to run immigrants through this system? Can their access be shut off?
  - Technically we can suspend an agency's access to our information. Each booking location has a unique coded identifier that is attached to each record from that agency and it can be isolated.

- Previously someone indicated that it would not be possible to turn off this technology for a specific agency
  - That is not true. The technology is not too different from an e-mail system. Each sender has a unique address that can be isolated and not responded to if warranted.

- Does the state or the local LE agency enter into the MOA with ICE?
  - It is the state that enters into the MOA.

- How many states have SC and what was the process for activation? Was it alphabetical or some other random methodology?
  - Every state and each territory has been provided the MOA. Currently SC is active in 34 states and over 700 jurisdictions. Deployment of SC was based upon statistical data showing where the significant populations of criminal aliens are located, and also where required resources were in place to support the initiative.

- Can states amend the MOA?
  - Yes. In fact a few states have made requests for changes. In one case a state requested language be added to provide statistics back to the state to show the impact of SC.

- Are the SC levels aligned with the NCIC Code and are they trackable by those codes?
  - Yes, the SC levels are set based on NCIC Codes, and crimes are trackable using those codes. However, often the LE agency enters a broad code header and not the specific crime code, so it would be difficult to report on sexual assault against children, because the crime would most likely be entered by the LE agency as sexual assault.

- What impact does SC have on local LE? Is their process hampered by the initiative?
  - When a local LE agency makes an arrest, their process should move forward as t always does. The only difference will be that they would receive additional indentifying information on the arrestee provided by the DHS systems. The LE agency is not asked to stop or alter their protocols if a there is a response on the arrestee, however, they would know to possibly expect ICE to contact the agency to express interest in the case.

- How does SC work in places where 287(g) is operation?
  - SC and 287(g) are separate; however, SC is a benefit to 287(g) trained officers, because of the additional DHS identifying information on a particular subject. Those officers can use that information to initiate action, rather than using the manpower to conduct an interview of a subject, then making a determination to take action. SC allows for greater efficiency.

- Is there an appeals process for someone who is misidentified through SC?

– Yes, the ICE website does provide information on the CRCL process.

b6, b7c
Office of Congressional Relations
U.S. Immigration and Customs Enforcement
(202) 732- (b)(6)

08/10/2011 WED 14:30 FAX 7178407254

Office of Enforcement and Removal Operations
Philadelphia
U.S. Department of Homeland Security
1600 Callowhill Street
Philadelphia, PA 19130

U.S. Immigration and Customs Enforcement

August 10, 2011

Warden Brian Clark
Adams County Prison
45 Major Bell Lane
Gettysburg, PA 17325

Warden Clark,

Please consider this letter as a reminder that under 8 CFR 287.7, an immigration detainer (form I247) only authorizes an institutional facility to hold an alien for a period of time, **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays and Holiday, beyond the time when subject would have otherwise been released from your custody to allow DHS to take custody of the subject. An Immigration detainer does not authorize you to hold a subject beyond these 48 hours. As early as possible, prior to the time you would otherwise release the subject, please notify this office at (717) 840-7286 by fax to (717)755-3576 or by email to CAP.PHI@dhs.gov. If you cannot reach this office at any of the above numbers please contact the Immigration and Customs Enforcement, Law Enforcement Support Center in Burlington, VT at (802) 872-6020.

For those facilities which are authorized to house aliens under an Intergovernmental Service Agreement (IGSA), an alien may be detained beyond the 48 hours only when the alien is turned over to ICE custody with the issuance of an ICE form I-203, Order to Detain Alien.

Thank you for your cooperation in this matter. Please do not hesitate to contact Supervisory Detention and Deportation Officer Joseph Dunn at (717)840-7292 if you have any additional questions.

Sincerely,

Thomas Decker
Field Office Director

LEGAL ACTION CENTER
AMERICAN IMMIGRATION COUNCIL

Select PROGRAMS:

Enforcement, Detainers

Challenging the Use of ICE Immigration Detainers

Under 8 CFR. § 287.7, an "authorized immigration officer" may issue Form I-247, Immigration Detainer – Notice of Action, to a law enforcement agency (LEA) that has custody of an alleged noncitizen. A detainer is a *request* that an LEA notify ICE prior to releasing the individual so that ICE may make arrangements to assume custody within 48 hours after the person would otherwise have been released.

In June 2011, ICE released a new detainer form. According to ICE, the new form more clearly indicates that state and local authorities may not detain an individual for more than 48 hours; that local law enforcement authorities are required to provide arrestees with a copy of the detainer form, which has a phone number to call if the subject of the detainer believes his or her civil rights have been violated; and that ICE has flexibility to issue a detainer contingent on conviction. It remains to be seen whether changes to the form will resolve longstanding problems with detainers that increasingly have resulted in litigation.

Lawsuits generally have challenged local law enforcement authorities' unlawful practice of holding noncitizens on expired detainers. Below is a non-exhaustive list of cases that have addressed immigration detainer issues.

California

***Comm. for Immigr. Rights of Sonoma County v. County of Sonoma*, No. 08-4220 (N.D. Cal. *filed* Sept. 8, 2008) (CASE CLOSED)**

An immigrant rights organization and three individual plaintiffs filed suit against ICE and the County of Sonoma (County) to challenge their policies of arresting and detaining individuals suspected of immigration violations. The complaint alleges, among other things, that ICE agents and Sonoma County police officers use race as a motivating factor for traffic stops and other detentions; stop, interrogate, search and arrest persons without adequate justification; and hold individuals in the County jail without any lawful basis for detention. Plaintiffs allege violations of their constitutional rights under the Fourth, Fourteenth and Fifth Amendments and violations of federal and state law. Plaintiffs seek declaratory and injunctive relief, damages and attorneys' fees.

On July 28, 2009, the district court granted in part and denied in part defendants' motions to dismiss and granted plaintiffs leave to amend their complaint. On September 14, 2009, plaintiffs filed an amended complaint. In a March 10, 2010 order, the district court again granted in part and denied in part defendants' motions to dismiss. The court found ICE's use of detainers lawful because "the plain language of § 287.7 authorizes, and does not preclude, the issuance of immigration detainers for individuals who are not already in arrest." However, the court refused to dismiss plaintiffs' constitutional claims.

The parties initiated settlement negotiations, and at a mandatory settlement conference on March 4, 2011, individual plaintiffs and the federal defendants finalized a settlement agreement. On May 25, 2011, all plaintiffs reached a global settlement agreement in principle with the County defendants, and on June 1, 2011, plaintiff Committee for Immigrant Rights for Sonoma County (CIRSC) ratified the agreement in principle.

The district court issued an opinion on June 16, 2011, affirming the denial of plaintiffs' motion for a global protective order that would have precluded the use of other immigration status-related information outside the context of the litigation. The court ordered the parties to resume meet and confer negotiations regarding the form of a general protective order governing discovery in the action.

On July 22, 2011, and August 25, 2011, and December 12, 2011 the court stipulated to the dismissal of all plaintiffs' claims against all defendants pursuant to the parties' settlement agreements.

- Plaintiff's Amended Complaint
- Defendant County's Motion to Dismiss
- Federal Defendant's Motion to Dismiss
- Order on Defendants' Motions to Dismiss
- June 2, 2011 Joint Case Management Conference Statement
- Ruling on Motion for Entry of a "Global Protective Order"

Victories

En Banc Court Reverses Adverse Holding, Says Immigrants Can Pursue Cases from Outside the United States

Another Court Upholds Immigrants' Right to Pursue Case From Outside the U.S.

BIA Sets Favorable Precedent for Children of Fiancées (K-2 Visa Holders)

Court Protects Immigrants' Right To Reopen Cases From Outside the U.S.

Blog Postings

Appellate Court Hears Arguments in Case Challenging DOMA, Bi-National Married Couples File New Suit

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AMERICAN IMMIGRATION COUNCIL

The LAC Docket | Volume II, Issue 2

Issue Pages

These webpages focus on topics being litigated in courts

nationwide.

Select

Colorado

***Quezada v. Mink*, No. 10-0879 (D. Co. *filed* Apr. 21, 2010) (CASE CLOSED)**

A Colorado resident brought suit against Jefferson County Sheriff Ted Mink alleging that the sheriff illegally detained him for 47 days on an expired ICE detainer. In his Third Amended Complaint filed on December 16, 2010, Quezada included individual ICE employees and the United States as defendants. Plaintiff Quezada alleged violations of the Fourth and Fourteenth Amendments as well as false imprisonment and negligence claims.

On May 13, 2011, the Court dismissed all claims against the United States of America. On June 3, 2011, plaintiff Quezada and defendant Mink entered into a voluntary settlement fully resolving the dispute and stipulated to dismissal of the action, with prejudice, and with no award of fees or costs to either party.

- Plaintiff's Third Amended Complaint
- Answer to Third Amended Complaint by Sheriff Mink
- Answer to Third Amended Complaint by United States

Connecticut

***Brizuela v. Feliciano*, No. 12-0226 (D. Conn. *filed* Feb. 13, 2012)**

A Connecticut resident, represented by students in Yale Law School's immigration clinic, filed a representative habeas petition and class action complaint challenging the Connecticut Department of Corrections' practice of holding individuals after their lawful state custody has expired solely on the basis of an immigration detainer. The suit was filed on behalf of the petitioner and all similarly situated individuals currently in custody of, and in future custody of, the Connecticut Department of Corrections. The suit alleges violations of the Fourth, Tenth, and Fourteenth Amendments and seeks declaratory and injunctive relief. Petitioner also filed a motion for class certification or representative habeas action on February 13, 2012. In light of DHS' imminent plan to activate Secure Communities in Connecticut, on February 22, 2012, Petitioner filed a motion seeking the court to order Respondents to show cause why the writ should not issue and why declarative and injunctive relief should not be granted.

- Petition for Writ of Habeas Corpus and Complaint

Florida

***Bernabe v. Kronberg*, No. 10-22829 (S.D. Fla. *filed* Aug. 5, 2010) (CASE CLOSED)**

An individual held on an expired ICE detainer filed a habeas petition alleging that the sheriff's office had unlawfully detained him in excess of 48 hours. Following his transfer to ICE custody, the plaintiff amended his petition to state that his continued detention violated his Fourth, Tenth, and Fourteenth Amendment rights.

On September 19, 2010, the court dismissed the case after receiving petitioner's status report indicating that he had been released from custody. The stipulated dismissal stated that the Miami Dade County Department of Corrections had issued a new written directive that "all relevant detainees be released, consistent with their interpretation of the federal guideline, and not be held longer than 48 hours."

- Plaintiff's Amended Complaint
- Sept. 17, 2010 Status Report

***Florida Immigration Coalition v. Palm Beach County Sheriff*, No. 09-81280 (S.D. Fla. *filed* Sept. 3, 2009) (CASE CLOSED)**

Three Florida immigrant rights organizations and an individual plaintiff filed a habeas petition and complaint seeking to enjoin the policies and practices of the defendant, Palm Beach County Sheriff, that result in confinement of pre-trial detainees for longer than the statutorily permitted 48 hours. The individual plaintiff was held by the Palm Beach County sheriff for more than five months. The complaint alleged that the defendant's policies of not releasing individuals subject to an ICE detainer on bond and holding individuals subject to detainers for longer than 48 hours violated plaintiffs' rights under the Fourteenth and Fourth Amendments.

The court granted the defendant's motion for summary judgment on October 28, 2010 and ordered the case closed. Plaintiffs appealed the case to the Eleventh Circuit and the court later granted plaintiffs' motion to dismiss the appeal voluntarily with prejudice.

- Plaintiff's Complaint
- Defendant's Motion for Summary Judgment
- Order on Motion for Summary Judgment

***Cote v. Lubins*, No. 09-0091 (M.D. Fla. *filed* Feb. 23, 2009) (CASE CLOSED)**

A Florida resident filed a habeas petition challenging her detention at the Lake County Jail where she had been held for one week without charges and without the opportunity to be heard. The complaint alleged, among other things, that the plaintiff's arrest without a warrant and her detention without charges or a hearing violated her rights under the Fourth and Fourteenth Amendments. Plaintiff further alleged that Form I-247 did not authorize her detention.

On February 23, 2009, the same day plaintiff filed her complaint, the court issued an Order to Show Cause. The following day, respondents transferred the plaintiff to ICE custody. ICE released the plaintiff on March 5, 2009. The district court granted the plaintiff's motion to voluntarily dismiss her habeas petition on March 25, 2009.

- **Emergency Petition for Writ of Habeas Corpus**

Illinois

***Jimenez Moreno v. Napolitano*, No. 11- 05452 (N.D. Ill. *filed* Aug. 11, 2011)**

Two individuals filed a class action lawsuit challenging ICE's assertion of authority to instruct law enforcement agencies to detain alleged noncitizens for the sole purpose of investigating their immigration status. Plaintiffs allege violations of the Fourth, Fifth and Tenth Amendments, among other claims.

Plaintiffs seek to certify a class consisting of all current and future persons against whom ICE has issued an immigration detainer from the Chicago Area of Responsibility (AOR); where ICE has instructed the LEA to detain an alleged noncitizen for longer than 48 hours; and where ICE has indicated that the basis for continued detention is to investigate the person's removability. The class does not include noncitizens subject to mandatory detention.

Plaintiffs seek declaratory and injunctive relief and attorneys' fees.

- **Complaint**

Indiana

***Melendrez Rivas v. Martin*, No. 10-0197 (N.D. Ind. *filed* June 16, 2010) (CASE CLOSED)**

An individual filed suit against the LaGrange County Sheriff and jail administrators for holding her on an ICE detainer for ten days after she posted bond. The complaint alleged that Rivas' detention violated her rights under the Fifth and Fourteenth Amendments. She is seeking injunctive relief, damages and attorneys' fees.

On March 18, 2011, the district court denied defendants' motion to dismiss for failure to state a claim, finding that plaintiff had sufficiently stated a claim for violation of her due process rights. On September 1, 2011, the parties stipulated to dismissal with prejudice of all claims against the defendant. The case was formally dismissed on September 6, 2011.

- **Plaintiff's Complaint**
- **Defendant's Motion to Dismiss**
- **Order on Motion to Dismiss**
- **Stipulation to Dismiss**

***Jimenez v. United States*, No. 11-1582 (S.D. Ind. *filed* Nov. 30, 2011)**

A U.S. Citizen who was unlawfully held for three days pursuant to an ICE detainer and denied bond filed suit against unknown individual ICE officers and the United States. The complaint alleges violations of plaintiff's Fourth Amendment rights and includes claims under the Federal Tort Claims Act for negligence, false imprisonment, and other torts. The plaintiff seeks compensatory damages and other proper relief.

- **Plaintiff's Complaint**

Louisiana

***Ocampo v. Gusman*, No. 10-4309 (E.D. La. *filed* Nov. 12, 2010)**

An individual filed a habeas petition challenging his 95-day detention in Orleans Parish Prison, pursuant to an immigration detainer. The petitioner alleged violations of his Fourth, Fifth, and Fourteenth Amendment Rights. In addition to habeas relief, the petitioner requested declaratory relief and attorneys fees. The petitioner simultaneously filed a motion for a temporary restraining order requesting the court to 1) enter an order declaring that transfer subject to an expired detainer would be unlawful; and 2) restrain respondents from any lawful but discretionary transfer to ICE custody during the pendency of his writ petition. The court granted the petitioner habeas relief on November 15, 2010, ordering his immediate release.

- **Petition for Writ of Habeas Corpus**
- **Plaintiff's Motion for Temporary Restraining Order**

***Cacho v. Gusman*, No. 11-0225 (E.D. La. *filed* February 2, 2011)**

Two Louisiana residents filed suit to challenge Orleans Parish Sheriff Marlin N. Gusman's policy and practice of detaining them and other New Orleans residents for indefinite periods without legal authority. The complaint alleges that the sheriff held the plaintiffs for approximately 164 and 91 days after the expiration of their respective ICE detainers, in violation of their Fourth, Fifth, and Fourteenth Amendment rights and that they were falsely and negligently imprisoned in violation of state law. They seek declaratory relief, damages and attorneys' fees.

Discovery is ongoing and a settlement conference is scheduled for April 12, 2012. Trial is set for October 22, 2012.

- Plaintiff's Complaint
- Defendant's Answer

Missouri

***Keil v. Triveline*, No. 09-3417 (W.D. Mo. *filed* Nov. 6, 2009) *appeal docketed,* No. 11-1647 (8th Cir., Mar. 24, 2011)**

A U.S. citizen sued individual ICE officers and a Department of State official alleging that they violated his Fourth and Fifth Amendment rights by unlawfully arresting and holding him in a county jail pursuant to an ICE detainer. He sought damages and attorneys' fees.

On January 6, 2011, the district court granted defendants' motions for summary judgment, finding, among other things, that plaintiff's Fourth Amendment claim failed because defendants had probable cause to arrest plaintiff for falsely claiming U.S. citizenship and misusing a U.S. passport. The court also found that the plaintiff could not state a Fourth Amendment claim based on the defendants' issuance of a detainer, as there was no evidence that the detainer had served as a basis for the plaintiff's arrest.

Plaintiff filed a notice of appeal to the U.S. Court of Appeals for the Eighth Circuit in March 2011. Oral argument took place on September 22, 2011. The Eighth Circuit affirmed the lower court decision in an opinion dated November 21, 2011, finding that the immigration agents had at least arguable probable cause to arrest Keil for one or more violations of federal law.

- Plaintiff's Complaint
- Order on Defendants' Motion for Summary Judgment
- Appellant's Opening Brief
- Appellee's Opposition
- Appellant's Reply Brief
- Eighth Circuit Decision

New York

***Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. *filed* Jan. 16, 2007) (CASE CLOSED)**

A pro se plaintiff filed suit against the City of New York and employees of the Department of Corrections after he was twice held at Rikers Island pursuant to ICE detainers for a total of more than 140 days. An amended complaint was filed by plaintiff's legal representatives on October 30, 2008 alleging violations of plaintiff's First, Fourth, Fifth, Sixth, and Fourteenth Amendment rights and federal law. The complaint sought damages, injunctive relief, and attorneys' fees.

Defendant City of New York filed an answer to the third amended complaint on December 22, 2008. The parties settled the case for $145,000 and the case was dismissed on June 12, 2009.

- Plaintiff's Third Amended Complaint
- Stipulated Dismissal and Settlement

Pennsylvania

***Galarza v. Szalczyk*, No. 10-6815 (E.D. Penn. *filed* Nov. 19, 2010)**

A U.S. citizen filed suit against individual ICE officers, local law enforcement officers, the City of Allentown, Lehigh County, and various city and county officials, alleging that he was unlawfully held for three days on an immigration detainer. The complaint alleges, among other things, that defendants violated the plaintiff's Fourth, Fifth, and Fourteenth Amendment rights when they, issued a detainer without probable cause that plaintiff was an "alien" subject to detention and removal and based solely on plaintiff's Hispanic ethnicity. Plaintiff seeks damages and attorneys' fees.

On April 6, 2011, plaintiff filed an Amended Complaint and on April 25, 2011, Lehigh County, the City of Allentown, and individual defendants filed motions to dismiss. On August 3, 2011, plaintiff filed a related lawsuit against the United States under the Federal Tort Claims Act for false arrest, false imprisonment, and negligence. On November 4, 2011, the two cases were consolidated under 10-6815. Discovery is ongoing and a settlement conference is scheduled for September 19, 2012.

- Plaintiff's Amended Complaint
- Federal Tort Claims Act Complaint

***Urbina v. Rustin*, No. 08-0979 (W.D. Pa. *filed* July 11, 2008) (CASE CLOSED)**

Two individuals filed a habeas petition and class action suit against the Warden of Allegheny County Jail challenging their continued detention pursuant to ICE detainers and alleging violations of the Fourteenth Amendment. The District Court issued an order to show cause on July 14, 2008. The United States responded to the habeas petition and show cause order on July 21, 2008, arguing that the adult and minor plaintiffs were in the lawful custody of ICE and HHS Unaccompanied Children's Services, respectively, and were not at present being held under an immigration detainer. Plaintiffs filed a motion for class certification on July 23, 2008, seeking to certify a class consisting of all who are or will

be detained in the Allegheny County Jail based solely on an immigration detainer and without the opportunity to object to their detention. The same day, the district court denied the habeas petition as moot, dismissed the action, and denied the motion for class certification because ICE had assumed custody of both petitioners.

- **Petition for Writ of Habeas Corpus**

Tennessee

***Ramos-Macario v. Jones*, No. 10-0813 (M.D. Tenn. *filed* Aug. 30, 2010)**

A Tennessee resident brought a class action lawsuit against the Rutherford County Sheriff's Office, the Rutherford County Sheriff, and other individual employees of the Sheriff's Office- alleging he was unlawfully detained for four months pursuant to an ICE detainer after he was otherwise eligible for release. He alleges, among other things, that his illegal seizure and prolonged detention violated his constitutional rights and state law. He seeks to represent a class that includes prisoners of Rutherford County Jail who were detained unlawfully pursuant to detainers. Plaintiff seeks declaratory and injunctive relief, damages and attorneys' fees.

On March 3, 2011, the court dismissed Ramos-Macario's federal and state law claims against Sheriff Jones and one of his chief deputies. The court denied defendants' motions to dismiss in all other respects and denied their motion for summary judgment. On March 17, 2011, defendants answered plaintiff's amended complaint.

The parties have reached a provisional settlement agreement and are awaiting court approval of portions of the agreement.

- **Plaintiff's Amended Complaint**
- **Order on Defendant's Motion to Dismiss**
- **Defendants' Answer to Plaintiff's Amended Complaint**
- **Joint Motion for Case Status Conference to Present Provisional Settlement Agreement**

Utah

***Uroza v. Salt Lake County*, No. 11-0713 (D. Utah. *filed* Aug. 5, 2011)**

A twenty-two-year-old college student brought suit against the county and its employees challenging the county's policy and practice of holding certain individuals beyond the 48-hour period permitted by an immigration detainer in violation of the Fourth, Fifth, and Fourteenth Amendments and the state constitution. After posting bond, plaintiff was held in county jail pursuant to an ice detainer for an additional 39 days. He seeks declaratory judgment, compensatory damages, and attorneys' fees.

Defendants answered the complaint on August 29, 2011. Discovery is currently ongoing.

- **Plaintiff's Complaint**

Washington

***Castillo v. Swarski*, No. 08-5653 (W.D. Wa. *filed* Nov. 13, 2008) (CASE CLOSED)**

A U.S. Citizen and army veteran brought suit against individual ICE officers alleging he was unlawfully detained, interrogated, and imprisoned for seven and a half months pursuant to an ICE detainer before he was unlawfully ordered removed. The complaint alleged violations of plaintiff's Fourth and Fifth Amendment rights and sought compensatory damages, punitive damages, and attorneys' fees.

Defendants filed a motion to dismiss plaintiffs' amended complaint or in the alternative, for summary judgment on October 2, 2009. The District Court granted defendant's motion to dismiss with respect to one defendant, but denied it with respect to the other defendants on December 10, 2009. Defendants filed a notice of appeal on January 11, 2010.

The parties settled the case for $400,000 and received a letter of apology from the U.S. Attorney's Office in Seattle, Washington. The case was dismissed on December 28, 2010.

- **Plaintiff's Complaint**
- **Order on Defendants' Motion for Summary Judgment/Motion to Dismiss**

RESOURCES

Legal Action Center, **Response to the Department of Homeland Security's request or comments in connection with a review of existing regulations**: Docket No. DHS-2011-0015 - Reducing Regulatory Burden; Retrospective Review Under Executive Order 13563, 76 Fed. Reg. 13526 (Mar. 14, 2011) (submitted April 13, 2011).

NGO **Comments on Proposed Detainer Guidance** (Oct. 5, 2010).

Immigration Policy Center, **The Secure Communities Program: Unanswered Questions and Continuing Concerns** (Updated Nov. 2010).

Immigration Policy Center, **ICE's Enforcement Priorities and the Factors that Undermine Them** (Nov. 2010).

Detention Watch Network, Immigrant Defense Project, Immigrant Legal Resource Center, Washington Defender Association's Immigration Project, National Immigration Project of National Lawyers Guild, National Immigration Law Center, Rights Working Group, **A Dangerous Merger: ICE Enforcement Programs in the Criminal Justice System** (March 2010).

Immigration Policy Center, **Immigration Detainers: A Comprehensive Look** (Feb, 17, 2010).

National Immigration Project, Washington Defender Association, Immigrant Legal Resource Center, **Understanding Immigration Detainers: An Overview for State Defense Counsel** (March 2011).

Erich C. Straub, Davorin J. Odrcic and Steve Laxton, **Immigration Detainers and Unlawful Detention: A Guide for Criminal Attorneys** (Jan. 2011).

Washington Defender Association's Immigration Project, **Understanding Immigration Detainers: A Basic Primer for Defense Counsel** (Spring 2010).

 

TO: Speaker Christine C. Quinn, New York City Council
FROM: Immigration Justice Clinic, Benjamin N. Cardozo School of Law
RE: NYC's discretion not hold detainees subject to immigration detainers
DATE: April 16, 2010

QUESTIONS PRESENTED:
Does the New York City Department of Corrections (DOC) have the legal authority to exercise discretion when to hold, and when not to hold, DOC detainees at the City's expense on civil immigration detainers issued by the U.S. Immigration and Customs Enforcement agency (ICE)?

SHORT ANSWERS:
Yes, DOC has the legal authority to determine when it will hold an individual subject to a detainer issued by ICE. There is an ambiguous federal regulation, 8 C.F.R. § 287.7, that contains language which may be read to require DOC to hold individuals on civil immigration detainers. However, even assuming *arguendo* that the regulation purports to preempt DOC's discretion, the federal regulation is necessarily trumped by the anti-commandeering doctrine. Under that doctrine, the Tenth Amendment dictates that the federal government cannot require DOC to use its local resources in furtherance of a federal objective and DOC has several legitimate local interests in declining to honor ICE detainers including, *inter alia*: avoiding the fiscal burden such detainers impose upon the City, fostering immigrant communities' cooperation with local police, and promoting the unity of New York families.

DISCUSSION:
ICE issues immigration detainers to DOC when ICE suspects that a DOC detainee is an "alien" subject to civil immigration removal (deportation) proceedings. The only explicit statutory authority for ICE to issue detainers on DOC inmates comes from I.N.A. §287(d), which provides:

> **(d) Detainer of Aliens for Violation of Controlled Substances Laws**
> In case of an alien who is arrested by a Federal, State or Local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—
>
> (1) has reason to believe that the alien may not have been lawfully admitted to the United State or otherwise is not lawfully present in the United States.
> (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and or facts concerning the status of the aliens, and
> (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,
>
> the officer or employee of the Service shall promptly determine whether or not to issue such detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

Purportedly acting pursuant to I.N.A. § 287(d), ICE has issued a regulation governing ICE detainers, which states, in pertinent part, that:

> Upon a determination by the Department 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 not to exceed 48 hours*, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

8 C.F.R. § 287.7(d) (emphasis added). The regulation can be read as purporting to require DOC to hold individuals in DOC facilities for 48-hours beyond the time when they would otherwise have been released, in order to facilitate their transfer into ICE custody. However, elsewhere the same regulation characterizes detainers as "a request" not a requirement. 8 C.F.R. § 287.7(a). In order to reconcile this apparent conflict, *see generally Brotherhood of Ry. v. Rea Express, Inc*., 523 F.2d 164, 169 (2d Cir. 1975) (explaining well established cannon of construction that apparent conflicts between different provisions must be resolved, when possible, by interpretation which gives effect to both provisions), it is possible to read § 287.7(d) not as requiring local jails to hold individuals subject to detainers but instead as imposing a limit on the maximum length of detention authorized by a detainer.[1] Fortunately, it is not necessary to determine the precise meaning of the regulation in order to resolve the question at hand.

Even assuming, *arguendo*, that the detainer regulation is mandatory, DOC nevertheless maintains the discretion not to hold individuals on ICE detainers. As a general rule, of course, a locality is bound by federal law and any action in direct conflict with federal law is preempted. *See generally* U.S. Const. art. VI, § 2. The contemplated policy of not honoring all, or certain, ICE detainers could be interpreted as conflicting with the mandatory language of the detainer regulation, discussed above. Notwithstanding any conflict, however, DOC's discretion whether or not to hold people pursuant to such detainers is squarely protected by the anti-commandeering doctrine.[2]

The anti-commandeering doctrine is derived from the Tenth Amendment of the Constitution and

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[1] Moreover, as the discussion below explains, the latter interpretation of this regulation may be required under the constitutional avoidance doctrine. *See Miller v. Johnson*, 515 U.S. 900, 922 (1995) ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions[.]"). In addition, the federal government itself repeatedly refers to detainers not as commands but as requests. *See, e.g*., Response from U.S. Immigration and Customs Enforcement, *Follow-Up Information to NGO Meeting on Detainers* (December 2, 2009) (on file with Benjamin N. Cardozo Immigration Justice Clinic) ("ICE uses detainers to *request* that the LEA [Law Enforcement Agency] maintain custody of an alien who would otherwise be released" (emphasis added)). Finally, there is some reason to question whether DOC even has the authority to hold individuals on immigration detainers under New York State law. *Cf.* N.Y. A.G. Opinion No. 2000-1 (Mar. 21, 2000) (finding that "state and local officers have no authority to arrest an individual under the [civil provisions of the] INA").

[2] The presumption that a regulation is valid is of no consequence here because all of the binding constitutional jurisprudence points in the same direction. While the entity challenging the constitutionality of a regulation bears the burden persuasion, no deference will be afforded to an agency's interpretation of constitutional law and, therefore, the court will evaluate the claim *de novo*. *See generally Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The language from *New York City v. United States* about the "substantial burden" in challenging the regulation in that case was specifically about "[a] facial challenge to a legislative Act [which] is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 179 F.3d 29, 33 (2d. Cir. 1999) (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). There would be no heightened burden here, challenging the *constitutionality* of a *specific application* of a federal regulation.

protects local authority by prohibiting the federal government from requiring any state or local[3] government to adopt or enforce a federal regulatory program or policy. *See Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992). The federal government is not allowed to direct states to implement particular programs "nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Printz*, 521 U.S. at 945-46. One of the primary concerns behind the doctrine is based on political accountability because "[a]ccountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *New York*, 505 U.S. at 169. Accordingly, the anti-commandeering doctrine is intended to protect state and local government's discretion about how to utilize resources, determine the duties of its employees, and enact policies that impact their local relationship with citizenry.

The Supreme Court spoke directly to this issue in *Printz*. The Court rejected a federal law placing the burden of performing background checks of prospective gun buyers on local chief law enforcement officers, because it violated the anti-commandeering doctrine. In *Printz* the Court equated the tasks involved in performing background checks of prospective handgun buyers to a financial burden. 521 U.S. at 929-30. Further, the Supreme Court said that the federal government could not compel state officers to execute a federal law because "the federal government's power would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States." *Id.* at 935. Similarly, a DOC policy prohibiting the expenditure of resources on the enforcement of ICE detainers is protected. The federal government cannot coerce the DOC into utilizing its own resources for the purpose of enforcing immigration laws.[4]

It is notable that the United States Court of Appeals for the Second Circuit has considered a Tenth Amendment anti-commandeering claim specifically in the context of New York State confinement of undocumented immigrants. *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996). In *Padavan*, several state senators sued the federal government seeking compensation for state expenses incurred as the result of the federal government's alleged "fail[ure] to control illegal immigration." 82 F.3d at 25. One count of the complaint sought reimbursement from the federal government for the "incarceration of illegal immigrants convicted of state felonies." *Id*. at 29. Ultimately the Court correctly rejected this claim but critically it reasoned that, "the district court properly dismissed the plaintiffs' Tenth Amendment claim" because "the state's obligation to incarcerate illegal aliens stems from its own laws, *and not from any federal mandate*." *Id*. (emphasis added). Implicit in the

[3] The anti-commandeering doctrine protects localities as well as states from federal interference. For example, in *Printz v. United States*, 521 U.S. 898 (1997), the Court held that those provisions of the Brady Handgun Violence Protection Act that ordered certain *county level* law enforcement officers to conduct background checks were unconstitutional.

[4] This is an uncontroversial conclusion, as even the conservative restrictionist Center for Immigration Studies has concluded that:

> It bears reiterating that any assistance that state or local police provide to the federal government in the enforcement of federal immigration laws is entirely voluntary. There is no provision of the U.S. Code or the Code of Federal Regulations that obligates local law enforcement agencies to devote any resources to the enforcement of federal immigration laws.

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Kris W. Kobach, *State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists*, Center for Immigration Studies Backgrounder (June 2004).

Court's holding in *Padavan* is the recognition that if the federal government required states to hold immigrants, such a mandate would run afoul of the Tenth Amendment anti-commandeering doctrine.[5]

The monetary and non-monetary costs to the City of DOC's current policy of holding individuals on detainers are substantial considering the amount of money it costs just to house a detainee for one day, which is about $170 per day.[6] Using this estimate and ICE's estimate that it has issued approximately 13,000 detainers on inmates in DOC custody between 2004-2008, the approximate costs to DOC of detaining inmates on ICE detainers over that four year period was nearly $4.5 million.[7] However, it is critical to recognize that this estimate does not account for the full, or even the majority, of actual costs to DOC of its current policy. Most immigration detainers are issued shortly after an individual enters DOC custody, often within the first 24-hours. Many DOC detainees subject to these detainers would, but for the detainers, either be bailed out or would receive non-incarceration diversion programs.[8] However, once a detainer is issued, families are no longer willing to spend their bail money just to see a loved one shuttled into immigration detention in some far off location and courts do not order appropriate diversion programs. As a result, many detainees spend substantial pre-trial periods in DOC custody, when they otherwise would have been released on bail or to some diversionary program. By choosing to hold these individuals on federal immigration detainers, DOC is forced to absorb the extra costs of detaining individuals that would otherwise be released.[9]

While the costs of holding individuals on ICE detainers are substantial, as a constitutional matter, the level of cost is not relevant. The Court in *Printz* specifically rejected the idea that a balancing analysis should be used to compare the cost to the state with the benefit to the federal government. The Court said "[i]t matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary." *Printz*, 521 U.S. at 935. The federal government requiring states to address particular problems or commanding the States' officers to administer or enforce a

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[5] *See also California v. United States*, 104 F.3d 1086, 1093 (9th Cir. 1997) (considering the same Tenth Amendment claim for reimbursement of costs of state criminal incarceration of undocumented immigrants and "concluding that California has failed to allege a Tenth Amendment violation *because no federal mandate requires California to pursue a penal policy resulting in these costs*" (emphasis added)); *New Jersey v. United States*, 91 F.3d 463, 466-67 (3d Cir. 1996) (explaining, in context of same type of claim, that the "federal government . . . cannot *require* the states to govern according to its instructions" but denying the claim because the "federal government has issued no directive to the State of New Jersey" and because "the state's incarceration of illegal aliens [does not] . . . result from any command by Congress.").

[6] *See* Marsha Weissman, *Aspiring to the Impracticable Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 244 (2009) (citing N.Y. City Alternatives to Incarceration Coal., Alternatives to Incarceration Programs: Cut Crime, Cut Costs and Help People and Communities, http://www.cases.org/Papers/ATIs.htm) (explaining that "[a]ccording to the City's Department of Correction, the average annual cost per jail inmate is $62,595" which works out to be approximately $170/day).

[7] *See* ICE FOIA Response Letter to Nancy Morawetz dated Dec. 12, 2008. This calculation is based on the assumption that ICE actually picked up detainees at the expiration of the 48 hour period; however, there is substantial evidence that during this four year period inmates were routinely held beyond the 48 hours permitted by regulation.

[8] *See* Committee on Criminal Justice Operations, *Immigration Detainers Need Not Bar Access to Jail Diversion Programs*, ASS'N OF THE BAR OF THE CITY OF N.Y., at p. 3 (June 2009) (explaining how, in practice, people with detainers have not been given appropriate non-incarceration diversion programs).

[9] The City also incurs the, admittedly less direct, costs of previously self-sufficient families becoming reliant on the City's safety net programs when their loved one is detained or deported. *See* Ajay Chaudry et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, The Urban Institute (Feb. 2010). There are also a host of human and law enforcement costs the flow from the City's current immigration detainer policy.

federal regulatory program is "fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* Thus, while there is a federal program that provides *partial* reimbursements to local departments of corrections to reimburse them for *some* expenses incurred as the result of holding *some* non-citizens in custody, this does not alter the analysis.[10] As a practical matter, DOC is not reimbursed for the majority of expenses incurred by holding individuals on ICE detainers. The Supreme Court has made clear that *any* forced outlay of resources is prohibited. Notably, the cost to the City of holding individuals on immigration detainers is substantially greater that the "discrete, ministerial tasks" the Supreme Court in *Printz* found impermissible to require of local law enforcement officials. 521 U.S. at 929. Moreover, even with full reimbursement there are, for example, some unreimbursable opportunity costs associated with using DOC's limited facility space and personnel to hold ICE detainees.

It is conceivable (though unlikely) that Congress could elect in the future to fully reimburse DOC for its expenses related to holding individuals on ICE detainers. Congress could not, however, affirmatively require DOC to honor such detainers and accept the reimbursement. While the required direct outlay of local money to cover the cost of housing, feeding and guarding detainees held on ICE detainers is perhaps the clearest violation of the anti-commandeering doctrine, money is only part of the issue. The anti-commandeering doctrine also protects localities against the federal government interfering with the local policy determinations of how best utilize limited resources and to meet the needs of the local citizenry. More importantly, the anti-commandeering doctrine is designed to protect localities from having their interests and political accountability compromised by the federal government forcing them to act contrary to their local interests. As the Supreme Court explained, "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Printz,* 521 U.S. at 930. [11]

There are several legitimate local interests that are undermined by enforcing ICE detainers, including, for example: (a) protecting the City from liability for ICE's conduct;[12] (b) fostering immigrant communities' cooperation with local police by ensuring that delineation between DOC

[10] The State Criminal Alien Assistance Program (SCAAP) is a payment program from the federal government to states and localities to subsidize some of the costs of incarcerating undocumented "criminal aliens" in state or local custody during the pendency of their criminal cases. SCAAP only reimburses localities for undocumented "aliens" who have at least one felony or two misdemeanor convictions and who were incarcerated in the correctional facility for at least four consecutive days during the reporting period. *See* Bureau of Justice Assistance, Office of Justice Programs, *FY 2009 SCAAP Guidelines*, http://www.ojp.usdoj.gov/BJA/grant/2009_SCAAP_Guidelines.pdf. In addition, not all correctional costs are covered by SCAAP. SCAAP only reimburses for the costs incurred from correctional officer salaries and not other correctional costs. Moreover, SCAAP does not even reimburse fully for the covered expenses because, as an under-funded program, it cannot only reimburse for a percentage of the covered costs. *See* DOJ Office of Inspector General Report on the SCAAP Program (January 2007), *available at* www.usdoj.gov/oig/reports/OJP/a0707/final.pdf.

[11] There is also an important difference between the federal government placing an affirmative obligation on the state or local government to utilize its resources in a certain way, which is considered commandeering, versus the federal government prohibiting the state or local government from engaging in certain conduct, which would not be considered commandeering. *See Reno v. Condon*, 528 U.S. 141 (2000). In *Reno v. Condon*, Chief Justice Rehnquist stated that the federal policy does not violate the anti-commandeering doctrine because "[i]t does not require the [state government] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id*. at 151.

[12] For example, New York City recently settled a lawsuit for $145,000 for an individual who ICE failed to pick up after 48-hours detainer in DOC facility. *See* http://stateswithoutnations.blogspot.com/2009/09/deported-new-york-city-resident.html).

and ICE is clear and local arrest is not funnel for ICE detention;[13] (c) protecting local families from being separated by the detention and deportation of loved ones.[14] Forcing the local government to enforce federal policies would undermine these legitimate interests and violate the anti-commandeering doctrine because it would "require state officials to assist in the enforcement of federal statutes regulating private individuals" and would "require the State[] in their sovereign capacity to regulate their own citizens." *Reno v. Condon*, 528 U.S. 141, 151 (2000).

Accordingly, the City has the discretion whether or not to use its limited resources to hold individuals subject to ICE detainer beyond the time they would otherwise be released from City custody and the federal government cannot, under the anti-commandeering doctrine, intrude upon that discretion.

[13] This is a particular concern in the domestic violence arena where some immigrant woman now fear calling the NYPD for assistance in domestic situations for fear that their loved one will end up in DOC custody and then deported.

[14] These same local concerns justify the Commissioner's discretion under federal law, on a related issue: whether to regularly provide lists of foreign-born inmates in DOC custody to ICE. This is, in fact, an easier issue because there is no initial conflict with federal law. The only federal statue that comes close to this policy is 8 U.S.C. §1373. Section 1373 says the Federal, State or local government entities or officials "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving" information from INS "regarding the citizenship or immigration status, lawful or unlawful, of any individual." This statute was drafted to prohibit states and localities from prohibiting the sharing of information. The double negative is employed because Congress is cognizant that under the anti-commandeering doctrine it cannot affirmatively require the sharing of information. *See generally New York City v. United States,* 179 F.3d 29 (2d. Cir. 1999) (holding that former NYC Executive Order 124, prohibiting employees from *voluntarily* sharing immigration information, was preempted – but noting that such prohibition even of such voluntary information sharing may be permissible if it was part of a broader City privacy policy enacted to protect a local interest). Accordingly, nothing in § 1373 affirmatively requires DOC to generate lists or share data with ICE. Moreover, if § 1373 did contain such a requirement it would fail under the anti-commandeering doctrine for the same reasons set forth above.

County of Santa Clara
County Counsel

PSJ CC01 090110

Prepared by: Anjali Bhargava
Impact Litigation Fellow

THIS RELATES TO BSC Agenda 9/1/10 Item No. 4
Supplemental Information No. 1

DATE: September 1, 2010

TO: Supervisor George Shirakawa, Chairperson
Supervisor Donald F. Gage, Vice Chair
Public Safety & Justice Committee

FROM: Miguel Marquez
Miguel Marquez
County Counsel

SUBJECT: U.S. Immigration and Customs Enforcement's Secure Communities program

RECOMMENDED ACTION

Accept report relating to options regarding participation in the Secure Communities program (Referral from August 10, 2010, Board of Supervisors' Meeting, Item No. 15).

Possible future action by the Board of Supervisors:

a. Direct the County Executive and County Counsel to notify U.S. Immigration and Customs Enforcement and the California Department of Justice of the County's opposition to participating in Secure Communities by requesting a discontinuation of the use of ten-fingerprint data IDENT queries sent by the County.

b. Direct Administration to ensure that County funds are only used to comply with requests by U.S. Immigration and Customs Enforcement to the extent they are subject to reimbursement or required by law.

FISCAL IMPLICATIONS

There is no impact to the General Fund associated with accepting this report back. There is no immediate financial impact associated with performing any of the suggested actions with respect to the Secure Communities program.

REASONS FOR RECOMMENDATION

On August 10, 2010, the Board asked County Counsel to report back through the Public Safety and Justice Committee on the County's options regarding participation in the Secure Communities program operated by U.S. Immigration and Customs Enforcement (ICE).

The Board asked County Counsel to seek clarification regarding the Secure Communities program, as necessary, from the U.S. Department of Homeland Security, the California Department of Justice, and/or other government agencies including U.S. Congressional representatives.

To determine whether Secure Communities is consistent with the County's priorities and the effective operation of County departments, the Board requested clarification on the following:

1. How Secure Communities operates at the local level;

2. The extent of the County's obligation to participate in Secure Communities, including the County's obligation to:

a. Share biometric data with ICE;

b. Provide information on individuals' identities and locations to ICE;

c. Grant ICE agents access to individuals in County custody;

d. Comply with immigration hold requests or "detainers," which ask the County to detain individuals of interest to ICE.

3. The availability of federal or state funds to reimburse the County for detaining individuals of interest to ICE;

4. The process by which the County may opt out of Secure Communities when desired.

BACKGROUND

On August 10, 2010, the Board asked County Counsel to report back through the Public Safety and Justice Committee on the County's options with respect to the Secure Communities program.

The Secure Communities program includes an automated information-sharing program in which fingerprint data collected at local correctional facilities is compared against ICE's database in an effort to apprehend immigrants with criminal histories. In May 2009, the California Department of Justice entered into a Memorandum of Agreement (MOA) with ICE allowing for implementation of Secure Communities in California localities. Since then, the program has been deployed in 28 of 58 California counties, including Santa Clara County.

I. County Communication with Federal and State Agencies Regarding Secure Communities

The County first became aware of Secure Communities in October 2009, when the Department of Correction (DOC) received an informational packet from ICE. The packet included a set of Standard Operating Procedures for the program and a questionnaire regarding current booking practices in the County jail. The cover page of the Standard Operating Procedures said they were "[d]istributed for adoption by participating county and local law enforcement agencies." Because DOC believed that adoption of the procedures, participation in the program, and return of the questionnaire were all voluntary, it chose not to take any action with respect to the standards and did not complete or return the questionnaire.

However, in April 2010, the DOC received further correspondence from ICE stating that Secure Communities was being activated by ICE in the County. When DOC responded that Secure Communities had not been approved by the Board of Supervisors or any other County official, ICE replied that local approval was not necessary for the program to take effect. Secure Communities thus was activated by ICE in Santa Clara County on May 4, 2010.

Pursuant to the Board's August 10th referral, County Counsel sent a letter to David Venturella, Director of Secure Communities for ICE, on August 16th, seeking clarification of the County's obligations under Secure Communities (Attachment A). As of the writing of this report, we have yet to receive a response from Mr. Venturella or any other representative of ICE.

Additionally, County Counsel sent a letter to California Attorney General Gerald Brown on August 16th, seeking clarification of the California Department of Justice's authority to enter an MOA with ICE that implements the Secure Communities program in California counties, as well as its authority to determine which counties must comply (Attachment B). In May 2010, when San Francisco Sheriff Michael Hennessey sent a letter to Attorney General Brown requesting that San Francisco be allowed to "opt out" of the program, Attorney General Brown denied the request, suggesting that the Justice Department has the authority to transmit fingerprint data from any California county to ICE, or to withhold that information from ICE, at its discretion. In our letter to Attorney General Brown, County Counsel sought an explanation of the basis of this authority. As of the writing of this report, we have yet to receive a response to this request.

II. Operation of Secure Communities in Santa Clara County

Secure Communities was activated by ICE in Santa Clara County on May 4, 2010. As noted earlier, we are still waiting to receive responses to several outstanding questions we have about Secure Communities, so the following describes our best understanding of the program at this point in time.

Under Secure Communities, fingerprint data collected by DOC is now forwarded by the California Department of Justice to be compared against fingerprints in the Department of Homeland Security's Automated Biometric Identification System (IDENT). As a result, ICE tries to identify individuals booked by DOC who may be in violation of immigration law, and it may issue requests for assistance by DOC staff in detaining, questioning, and eventually taking custody of such individuals.

a. Fingerprints Collected and Transmitted by Local Agencies

Fingerprint collection and transmittal by DOC has not changed under Secure Communities. Before and after deployment of Secure Communities, when an individual is booked on criminal charges, DOC officials and/or officers from the local arresting agency take that individual's fingerprints. Fingerprints collected at arrest or booking are typically transmitted

to the San Jose Police Department, which transmits all fingerprints from law enforcement agencies in the County to the California Department of Justice. DOC can also send fingerprints to the Department of Justice through a separate system. California Penal Code § 13150 requires local law enforcement agencies in California to provide ten-fingerprint submissions along with arrest data to the Department of Justice. Local agencies also are required under California Penal Code § 296 to provide the State with right thumbprints and full palm print impressions of each hand, as well as certain biological samples, for adults arrested or charged with a felony offense, as well as certain adjudicated juveniles. To our knowledge, however, Secure Communities only implicates ten-fingerprint submissions.

b. Information Transmitted by State and Federal Agencies

Once the San Jose Police Department and/or DOC has sent a ten-fingerprint submission to the California Department of Justice, the Department transmits an electronic fingerprint query to the FBI. Before Secure Communities was deployed in Santa Clara County, the FBI compared the prints collected in the County only to records in the Integrated Automated Fingerprint Identification System (IAFIS) database, which is used for crime and terrorism detection and prevention. Now that Secure Communities is operational, the FBI also runs a fingerprint query through the Department of Homeland Security's IDENT database, which contains immigration status records. As described above, the County never authorized the FBI to use fingerprints in this way, but the California Department of Justice consented to submitting fingerprints for IDENT queries in its 2009 MOA with ICE. Neither the MOA nor the Secure Communities Standard Operating Procedures specify whether all fingerprints collected in an activated county are compared against the IDENT database, or whether the comparison is limited to fingerprints taken in the jail.

If the fingerprints transmitted match any records in IDENT, the FBI sends an automatic notification to ICE. A match does not necessarily indicate that an individual is an immigration law violator; in fact, ICE notes in the "frequently asked questions" in its monthly reports on IDENT/IAFIS Interoperability that IDENT includes lawfully present immigrants, as well as U.S. citizens who are naturalized or who have been fingerprinted for other reasons, such as applying for an international adoption or seeking TSA aviation worker credentials. (A compilation of these reports is available at: http://ccrjustice.org/files/2.%20IDENT%20Interoperability%20Statistics.pdf.) Upon receiving notification of a match, ICE makes a determination about the individual's current immigration status and "possible removability." We have not been able to obtain information about how ICE makes that determination.

If ICE determines that an individual is possibly removable, ICE allegedly sends a notification (called a "match message") to the FBI, as well as to the ICE field office in San Francisco. The FBI should then transmit the match message to the California Department of Justice, which should then transmit it to DOC. According to the Standard Operating Procedures, the match message is not supposed to request DOC to take any action with respect to the arrestee; it should simply contain biographic information and ICE's preliminary determination of the individual's alienage and possible removability. DOC, however, does not report receiving any match messages to date.

c. County Actions Requested by ICE

Although a match message would not require DOC to take any action, ICE may separately decide to issue an immigration "detainer" (Form I-247). A detainer is a notice sent from ICE to DOC, informing DOC that ICE has taken, or plans to take, some sort of action against a named individual—for example, opening an investigation into the individual's removability, initiating removal proceedings, or executing an existing removal order. The detainer may direct the DOC to notify ICE prior to the individual's release, or to detain the individual temporarily (for up to 48 hours, excluding weekends and federal holidays) until ICE assumes custody.

Secure Communities classifies individuals according to their criminal charges or convictions, which fall into 3 "levels." Level 1 includes what ICE considers to be the most serious crimes, including national security violations, homicide, kidnapping, robbery, threats of bodily harm, sex offenses, and drug offenses involving a sentence of greater than one year. Level 3 includes the least serious offenses, such as gambling, alcohol-related offenses, damage to property, immigration violations, and military servicemembers' violations. According to ICE's Standard Operating Procedures for Secure Communities, the program prioritizes the removal of individuals charged or convicted of Level 1 offenses: "When ICE determines an alien has been charged or convicted of a Level 1 offense that could result in removal, or when an alien who is already subject to removal is charged with a Level 1 offense, ICE will file an Immigration Detainer (Form I-247) at the time of booking[.]" However, reports released by ICE show that 77% of detainers issued through Secure Communities nationally did not involve Level 1 charges and 80% of Secure Communities removals reported by ICE did not involve Level 1 offenders. Form I-247 does not have a space where the "level" of offense for which the individual was identified can be indicated.

The Standard Operating Procedures list a number of "cooperative actions" that can be requested from local agencies like DOC after a detainer is issued. These actions include:

42

- "Abide by Immigration Detainer conditions," which include detaining the individual for 48 hours, excluding weekends and federal holidays, beyond the time of scheduled release.
- "Place detainer in subject's file/record."
- "Inform ICE if subject is transferred or released . . . thirty days in advance of any release or transfer, or as soon as known, if less than thirty days."
- "Allow [ICE] access to detainees . . . to conduct interviews and serve documents."
- "Assist ICE in acquiring information about detainees" including "booking and/or detention information."

To date, DOC has abided by ICE's immigration detainer conditions, including placing detainers in inmates' files, informing ICE of impending transfers and releases, and holding individuals in custody for up to 48 hours at ICE's request. Since the launch of Secure Communities, DOC reports holding most individuals on detainers for almost a full 48 hours before ICE comes to pick them up, though ICE has never exceeded the 48 -hour time period. As of this writing, 375 individuals in DOC custody have immigration detainers in their files. If the County continues to honor immigration detainers, it could incur the cost of 18,000 hours of detention or more while awaiting pick-up by ICE agents.

d. Outcomes of the Program

The Secure Communities program has been surrounded by national controversy. ICE maintains that the program focuses immigration enforcement efforts to prioritize the apprehension and removal of immigrants who pose the greatest threat to public safety. The Secure Communities Standard Operating Procedures classify crimes into three "levels," prioritizing individuals charged with or convicted of Level 1 crimes (national security offenses, homicide, kidnapping, sexual assault, robbery, aggravated assault, threats, extortion, sex offenses, cruelty toward child or wife, resisting an officer, weapon, hit and run, and drug offenses with a sentence longer than a year). According to the MOA between ICE and the California Department of Justice, "ICE is committed to identifying and processing for removal of convicted and incarcerated Level 1 aliens. Detention of Level 2 and Level 3 aliens is discretionary and will be evaluated by ICE as each situation demands."

In contrast to this characterization of Secure Communities, opponents of the program claim 43
that it is a dragnet that pulls individuals with minor or no criminal histories into the

immigration detention and removal system based upon "matches" in an unreliable ICE database. Arizona Senate Bill 1070, which the Board has opposed, has invigorated discussions about local immigration enforcement in communities around the country. Some opponents of Secure Communities have compared it to SB 1070 on the basis that it diverts local law enforcement resources to the enforcement of civil immigration law and opens up a potential for racial profiling by arresting officers who ultimately wish to ensnare individuals in the immigration system.

Secure Communities has been operating in Santa Clara County for less than four months, so there is limited information upon which to determine whether the program is conforming to the goals provided by ICE, or whether it has led to the kinds of problems feared by opponents. Nationally, there is truth to claims that the program overreaches beyond its stated focus on Level 1 crimes. Cumulative national statistics between October 2008 and June 2010 reveal that the vast majority of people apprehended through Secure Communities were not Level 1 offenders:

- 21,810 of 89,019 (24.5%) people arrested by ICE or booked into ICE custody were Level 1 offenders.
- 9,831 of 46,929 (20.9%) people deported were Level 1 offenders.

The limited Secure Communities data available from ICE for Santa Clara County (from May 4, 2010 to June 30, 2010) reflect a similarly low representation of individuals with Level 1 offenses:

- 32 of 107 (29.9%) people arrested by ICE or booked into ICE custody were Level 1 offenders.
- 7 of 39 (17.9%) people deported were Level 1 offenders.

This data may not be representative of the long-term effects of Secure Communities, given the short time frame, because many individuals who are identified and detained through the program may still be awaiting criminal prosecution, serving criminal sentences in the County or in state prison, or undergoing removal proceedings in immigration court.

There is also evidence that Secure Communities is used to identify, arrest, and deport individuals who have no criminal convictions. According to cumulative national statistics reported by ICE in June, between October 2008 and June 2010, a significant portion of the individuals apprehended by Secure Communities had no criminal convictions:

- 24,706 of 89,019 (27.7%) people arrested by ICE or booked into ICE custody were non-criminals
- 12,293 of 46,929 (26.2%) people deported were non-criminals

Notably, two months earlier, ICE had reported that 16,880 of 37,405 (45.1%) of people deported between October 2008 and April 2010 through Secure Communities were non-criminals. The reduction in this number may be the result of ICE returning to the records of individuals already deported and identifying that some had prior criminal records. Regardless of why these adjustments were made, the fact that ICE reported close to half of Secure Communities deportees as "non-criminals" in April does call into question ICE's claims about prioritizing dangerous criminals after assessing the risk they pose to the community.

As of this writing, no data is available regarding the number of individuals without criminal convictions apprehended through Secure Communities in Santa Clara County. DOC does report that in an average week, it detains approximately 2 to 5 individuals who typically would be released with a citation but for the issuance of an immigration detainer at the time of fingerprinting. Furthermore, although individuals held under detainers may be acquitted or have their charges dismissed, DOC reports that ICE always picks up those individuals upon release and almost never revokes or withdraws the detainer.

The lack of clarity in ICE's reports and the lack of availability of county-specific data contribute to the uncertainty about Secure Communities. The County has no independent way of tracking individuals who are booked into ICE custody or removed by ICE following their release from DOC custody. Thus, while ICE data provides some insight into the program's outcomes, the County is currently unable to access more specific relevant data about individuals detected by Secure Communities in the County, such as the nature of their specific convictions (if any), their family circumstances, or how long they lived in the County.

III. The County's Obligation to Participate in Secure Communities

Pursuant to the Board's referral, County Counsel has sent letters to ICE and the California Attorney General seeking information regarding the County's obligations under the Secure Communities program. (See Attachments A & B.) So far, County Counsel has not received a response to either letter. This report back describes the extent of the County's known obligations at this time, pending further clarification from federal and state officials.

a. Sharing Biometric Data with ICE

The County is not obligated to share fingerprint data with ICE. It should be noted, however, that Secure Communities does not depend upon the County sharing fingerprint data directly with ICE. Rather, under Secure Communities, DOC and other law enforcement agencies in the County share fingerprints with the California Department of Justice, and the Department of Justice, in turn, shares them with the federal government and allows for their comparison against the immigration status information in the IDENT database.

County Counsel is awaiting clarification from both ICE and the California Department of Justice regarding whether they will agree to stop the IDENT queries on fingerprints sent by the County. If either ICE or the California Department of Justice agrees to exclude fingerprints from Santa Clara County from this process, there is no separate law or requirement mandating the County to share fingerprint data or other data with ICE.

If federal and state officials refuse to assist the County in limiting the use of its ten-fingerprint data, the County is probably under an obligation to continue facilitating the transmission of that data to the State. The State is required by California Penal Code § 11105 to maintain "state summary criminal history information," including fingerprints, and to provide that information to local law enforcement agencies as requested. The Penal Code provides that local officers "may also transmit fingerprint images and related information to the Department of Justice to be transmitted to the Federal Bureau of Investigation." § 11105(b)(11). Although this aspect of information sharing appears to be permissive, Penal Code § 13150 provides that "[f]or each arrest made, the reporting agency shall report to the Department of Justice, concerning each arrest, the applicable identification and arrest data . . . and fingerprints, except as otherwise provided by law or as prescribed by the Department of Justice." Further research is needed to determine whether DOC is obligated to supplement fingerprint data submitted by arresting agencies by also submitting fingerprints obtained at booking.

b. Providing Information on Individuals' Identities and Locations to ICE

The Secure Communities Standard Operating Procedures mention three ways in which local correctional facilities may be asked to provide information to ICE:

- If an arrestee is released from custody before a detainer is issued, ICE may ask DOC for "information on the alien's identification and location."
- When individuals identified by an immigration detainer are going to be transferred or released, ICE requests that the DOC notify ICE thirty days in advance, or as soon as known.
- ICE requests that DOC assist ICE in "acquiring information about detainees," specifically "the booking and/or detention information on any alien against whom ICE has lodged a detainer."

The Standard Operating Procedures are ambiguous about whether ICE views the "requested" actions as mandatory or voluntary for local agencies. County Counsel is awaiting a response from ICE with respect to this question.

There is no statutory or regulatory requirement that DOC provide any information to ICE. The federal regulation governing the use of immigration detainers describes the detainer as "a request" that the facility inform ICE prior to the release of the specified individual so that ICE can assume custody. 8 C.F.R. § 287.7(a). Although other language in this regulation is ambiguous, the language that pertains to providing information is clearly voluntary language.

Similarly, the detainer itself (Form I-247) states "[i]t is requested that you . . . [n]otify this office of the time of release at least 30 days prior to release or as far in advance as possible . . . [n]otify this office in the event of the inmate's death or transfer to another institution." Nothing in this language suggests that such information sharing is mandatory.

Unless ICE provides further clarification that any or all of these actions are mandatory under Secure Communities, and provides a legal basis for this authority, County Counsel believes that there is no obligation for the County to provide information on individuals' identities and locations to ICE.

c. Granting ICE Agents Access to Individuals in County Custody

The Secure Communities Standard Operating Procedures use ambiguous language with respect to granting ICE agents access to detainees, stating first that "ICE *requests* that the [local agencies]: . . . Allow access to detainees" and then that "[t]he local [agency] *will* allow ICE Agents and Officers access to detainees to conduct interviews and serve documents."

County Counsel is awaiting a response from ICE with respect to whether Secure Communities imposes a requirement on the County to allow ICE agents to conduct interviews and serve documents in the jail. We have found no federal statute or regulation dealing with requests by ICE for access to local facilities. However, such requests from law enforcement officers are often honored as a matter of courtesy.

Unless ICE provides further clarification that allowing access to detainees is mandatory under Secure Communities, and provides a legal basis for this authority, County Counsel believes that there is no obligation for the County to do so.

d. Holding Individuals on Immigration Detainers

Immigration detainers, effectuated through Form I-247, predate the Secure Communities program. Detainers are informational notices from ICE to the local law enforcement agency, notifying the local agency of ICE's interest in the individual. ICE agents can check boxes on a Form I-247 requesting the local agency to do any of the following:

- Detain the individual for up to 48 hours (not including weekends and holidays) beyond scheduled release, "to provide adequate time for [ICE] to assume custody. . . ."
- Return the signed Form I-247 to ICE with information regarding the date of the individual's last conviction, the latest conviction charge, and the estimated release date.
- Notify ICE of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify ICE in the event of the inmate's death or transfer to another institution.

As discussed above, there is no statutory or regulatory requirement that the County comply with a detainer's notification or information sharing provisions. Nevertheless, ICE's Secure Communities materials are ambiguous about the mandatory or voluntary nature of the 48

County's response to Form I-247 request for detention beyond scheduled release, as shown in the following provisions:

- The Standard Operating Procedures state that "ICE *requests* that the [local agencies]: . . . Abide by Immigration Detainer conditions" and then that "[t]he local [agency] *will* abide by the conditions stated in the Immigration Detainer, Form I-247."
- The federal regulations describe a detainer as a "*request*," 8 C.F.R. § 287.7(a), but then state that an agency "*shall* maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department," § 287.7(d).
- The Form I-247 itself, which first states that "[i]t is *requested* that you: [p]lease accept this notice as a detainer" but then states that "[f]ederal regulations *require* that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays. . . ."

County Counsel has asked ICE to clarify whether its position is that localities are legally required to hold individuals pursuant to Form I-247, or whether detainers are merely requests with which a county could legally decline to comply. Although County Counsel has received no reply as of yet, we have serious doubts about whether ICE could make detainers mandatory under any circumstances due to the Tenth Amendment to the U.S. Constitution, which forbids the federal government from "commandeering" state or local officials to implement federal policy objectives. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

Thus, County Counsel believes that there is no obligation for the County to hold individuals for 48 hours or more pursuant to immigration detainers.

IV. Availability of Reimbursement for Detention

The County currently does not receive reimbursement from the federal government to cover the costs of detaining individuals pursuant to immigration detainers. Additionally, to our knowledge, ICE does not indemnify local agencies for liability incurred as a result of detaining someone beyond the time of scheduled release. County Counsel's letter to Mr. Venturella at ICE requested further clarification about the availability of both reimbursement and indemnification for detention. To date, ICE has not responded to this request.

The federal regulation regarding detainers, 8 C.F.R. § 287.7, is somewhat unclear about who should bear the cost of extended detention. Paragraph (e) of the regulation states that "[n]o detainer . . . shall incur any fiscal obligation on the part of the Department [of Homeland Security], until actual assumption of custody by the Department, except as provided in paragraph (d) of this section." Yet nothing in paragraph (d) clarifies what financial reimbursement the Department might provide to local agencies.

Under the State Criminal Alien Assistance Program (SCAAP), the federal government does provide a small per diem reimbursement when the County detains a person who is undocumented and has at least one felony or two misdemeanor convictions. Presumably, the SCAAP per diem reimbursement that the County collects for an individual meeting these criteria would be available during the additional time when the individual is held on an immigration detainer, beyond the time of his or her scheduled release from criminal custody. However, these funds provide only partial reimbursement at best, and no funds are provided for individuals who do not meet the SCAAP criteria. The County's revenue from the SCAAP program is not significantly affected by the 48-hour detentions of individuals pursuant to immigration detainers.

Absent further correspondence from ICE, County Counsel does not believe that full reimbursement or indemnification is available for detention of individuals identified under immigration detainers.

V. Options for Opting Out of or Limiting Secure Communities

County Counsel has yet to identify a definitive approach to opting out of Secure Communities completely. As the agency responsible for "deploying" the program in counties in California, ICE appears to have the ability to allow the County to opt out of the ten-fingerprint queries in the IDENT database that are the foundation for Secure Communities. Additionally, Attorney General Brown has suggested that he may have discretion to allow counties to opt out, though he declined to allow San Francisco to block transmission of its fingerprints. County Counsel is awaiting a response from both ICE and the Attorney General.

Without knowing whether steps are available for opting out of Secure Communities, the County may be able to limit its participation in Secure Communities and mitigate the effects of the program on County residents in a variety of ways. To achieve these goals, the Board of Supervisors could consider one or more of the following actions:

a. Demanding to Opt Out of Secure Communities

The Board could call on ICE and/or the California Attorney General to cease using fingerprints collected in the County for the purposes of determining immigration status or investigating immigration violations.

b. Limiting Fingerprint Data Collected/Transmitted

The Board could direct Administration and County Counsel to continue researching possible limitations on the fingerprints that County departments and agencies collect and transmit to the California Department of Justice. For example, although the State of Texas has an MOA to share fingerprints with ICE through Secure Communities, the County of El Paso, Texas, has been able to limit the fingerprints it sends to the State of Texas to exclude low-level misdemeanors. However, because local law enforcement agencies in California are bound by California Penal Code § 13150 to submit arrestees' fingerprints to the California Department of Justice, further research is needed to determine whether a change in procedure could limit the fingerprint data ultimately shared with ICE.

c. Limiting Detainer Compliance

The Board could direct Administration to limit the additional unreimbursed expenses associated with immigration detainers (Form I-247). As described above, we believe that immigration detainers are requests only and that they cannot impose requirements on the County. Thus, the Board could direct Administration to ensure that the County does not expend any resources in response to ICE's voluntary requests made in detainers; or, if desired, the County could agree to inform ICE when an individual is being released, but could decline to hold anyone past their scheduled release time if ICE fails to come to pick them up. Either option would reduce the County's expenses and exposure incurred by holding individuals without reimbursement or indemnity from ICE. The Board could also prohibit the use of County funds to detain low-level offenders for ICE, requiring ICE to provide DOC with information regarding the "level" of offense under which it classifies an individual subject to a detainer.

d. Limiting Other Aspects of Cooperation with ICE

Some of the information that ICE may seek about detainees is public information. DOC could refuse to share confidential information, however, such as information regarding the location of individuals who have been released from DOC custody. Similarly, DOC could impose limitations on when it will allow ICE agents to have access to detainees, without necessarily restricting the delivery of documents or the ability to conduct other necessary interviews.

If desired, the Committee could direct County Counsel to present further research or prepare a resolution including any of these actions, with an additional referral to Administration to report back on the feasibility and potential timeline for such actions.

CONSEQUENCES OF NEGATIVE ACTION

Failure to accept the report will result in the Committee not receiving the information requested.

ATTACHMENTS

- Letter to David Venturella, Executive Director, Office of Secure Communities
- Letter to Edmund G. Brown, Jr., Attorney General, State of California

PROPOSED TRANSMITTAL TO THE PUBLIC SAFETY & JUSTICE COMMITTEE'S AUGUST MEETING

SUBJECT

Report Back regarding Policy on Civil Immigration Detainer Requests.

RECOMMENDED ACTION

Consider recommendations from the Office of the County Counsel on behalf of the Civil Detainer Task Force relating to a policy on civil immigration detainer requests, and forward to the Board of Supervisors for consideration. (Referral from December 2, 2010 Public Safety & Justice Committee, Item No. 9)

Possible future action by the Board of Supervisors

a. Adopt Board Policy Resolution No. YY-NN adding Board of Supervisors' Policy Manual section X.X relating to Civil Immigration Detainer Requests. (Roll Call Vote)
b. Direct Clerk of the Board to include Policy in Board of Supervisors' Policy Manual.

FISCAL IMPLICATIONS

Approving the recommended action will have a positive impact on the General Fund by reducing inmate housing costs related to detaining non-criminal and low-level offenders for suspected violations of federal civil immigration provisions. County costs would also be reduced to the extent there is a reduction in the number of children who are placed in the dependency system when their parents are detained in administrative removal proceedings.

CHILD IMPACT STATEMENT

Releasing inmates into Immigration Customs Enforcement (ICE) custody so that ICE can investigate suspected civil immigration violations unexpectedly separates parents from their children and families for extended periods. Some parents are ultimately deported and their U.S. citizen children are left behind. This separation causes negative effects on children, both psychologically and economically. When both parents are separated from their children, the County must intervene and such children often spend extended time in the dependency system, resulting in significant costs for the County.

REASONS FOR THE RECOMMENDATION

The staff recommendation regarding a civil immigration detainer policy for the County attempts to balance multiple competing interests. The recommendation was reached by the civil detainer

task force ("Task Force") created by the Public Safety & Justice Committee, which met over a series of months to discuss and receive public comment in order to advise the Board. The Task Force prioritized development of a policy that comports with the Board's June 22, 2010 Resolution on "Advancing Public Safety and Affirming the Separation between County Services and the Enforcement of Federal Immigration Law." To do so, the Task Force scrutinized the County resources implicated by civil detainer requests. The Task Force also aimed to enhance public safety in two ways: 1) protecting local law enforcement from being used to cast an overbroad net for use by ICE, a practice known to erode the trust needed for effective community policing, while also 2) allowing the most serious and violent offenders to be investigated for removal before being released back into the community.

Currently, once the County receives a detainer request from ICE, it immediately applies a hold to the named inmate. Applying civil immigration holds to inmates prevents their release while criminal allegations are pending, even if bond is posted or a State court judge orders the inmate released on his or her own recognizance. The hold also requires that the County detain the inmate for up to 48 hours after his or her sentence is finished or criminal proceedings are completed so that ICE may assume custody. Together this means that the presence of a detainer lengthens the period of detention and imposes non-mandatory costs on the County.

The County houses two groups of inmates for an extended period of time that it could lawfully release:

1. Inmates with pending criminal allegations who have posted bond or have been ordered released by a State court judge. The time period for which these inmates is held is based upon how many days it takes to adjudicate the respective case – at least one study in a different jurisdiction has shown that this period averages more than 70 days per inmate.
2. Inmates who have finished serving a sentence or whose court proceedings have ended. These inmates are held for up to 48 hours not including weekends or holidays.

Neither State nor Federal law requires the County to honor civil detainer requests. Further, ICE has confirmed in its recent correspondence that it will provide no reimbursement or indemnification to the County for housing these inmates on ICE's behalf. The Task Force therefore worked to reduce the County's costs related to civil detainer requests.

To analyze potential ways to limit the costs of civil detainer requests, the Task Force looked at the impacts of the Secure Communities program, which is one of the main information-gathering tools that ICE uses to issue civil detainer requests. In large part as a result of Secure Communities, deportation of undocumented persons with criminal records increased by more than 70% in 2010 as compared to 2008 when ICE began implementing the program. (White House Report: "Building a 21st Century Immigration System," May 2011.) According to

official ICE statements, the program is aimed at apprehending undocumented persons convicted of serious criminal offenses. However, Secure Communities is frequently criticized for detaining and removing high percentages of non-criminals and low-level offenders.

The reality is that despite ICE's stated priority of targeting serious criminal offenders, the program primarily results in detaining non-criminal and low-level offenders. In the nine Bay Area counties, for example, serious criminal offenders account for less than 30% of detainees. Since May 2009 when the first California county was activated until January 31, 2011, more than 79% of individuals identified and taken into ICE custody as a result of Secure Communities had never been convicted of serious or violent offenses. (February 24, 2011 News Release by ICE, http://www.ice.gov/news/releases/1102/110224losangeles.htm.)

The negative effect of detaining large numbers of non-criminal and low-level offenders on Santa Clara County's large immigrant community extends to the community at large. One-third of County residents are foreign born and two-thirds of households in the County have at least one foreign-born member. Testimony offered by members of the public indicated that the wide net cast by Secure Communities has eroded trust and has negatively impacted community policing efforts. This affects the broader community by impacting public safety generally, and could result in a reduction in the provision of essential services like healthcare to County residents who fear Secure Communities because they live with someone who is undocumented or is in the midst of addressing an immigration matter. By its June 2010 resolution, the Board has committed to fostering an environment of inclusiveness and trust between the County and all of its residents in order to reduce these negative effects on the community at large.

Serious and violent offenders, however, raise different public safety concerns. These offenders pose a greater threat given that the underlying conduct for which they were convicted is particularly egregious, as indicated by the special classification of their crimes in the California Penal Code. Serious and violent offenders also have a greater likelihood of reoffending and potentially doing so with an escalation of criminal conduct. Thus, public safety concerns weigh in favor of detaining these uniquely high-risk offenders upon completion of their criminal sentences to enable other law enforcement agencies to take appropriate actions before they are released into the community.

Since the County has the discretion to determine how to balance the numerous issues raised by civil immigration detainers such as threats to public safety, sustaining community trust, and the use of County resources, the Task Force has developed its recommendation to be consistent with existing County policies and priorities as enunciated by the Board. As described in more detail below, the Task Force recommends that the Board adopt a policy to honor only those civil immigration detainer requests relating to individuals who have been convicted of a serious or violent felony.

BACKGROUND

The question of which civil immigration detainer requests the County should honor was posed to the Task Force against the backdrop of the involuntary activation of Secure Communities in the County and ICE's refusal to honor the Board's unanimous vote to opt out of the program. Secure Communities was initiated and implemented by ICE, an agency of the U.S. Department of Homeland Security. Secure Communities creates automated information-sharing technology through which fingerprints collected by local law enforcement officers at booking are submitted by the California Department of Justice to the FBI, which in turn shares those fingerprints with ICE.

ICE compares the fingerprints from the California Department of Justice with its civil immigration status database (IDENT) in an effort to identify and apprehend noncitizens who may not be in compliance with civil immigration law. If ICE identifies such a person, the agency uses a "civil immigration detainer request" to ask the County to hold the individual for up to 48 hours after the individual would otherwise be released so that ICE can assume custody of the individual. The County is not required by law to detain the individual for ICE, and ICE provides no direct reimbursement or indemnification for the additional time the County houses these inmates.

ICE began activating the Secure Communities program on a county-by-county basis in California after the California Department of Justice entered into a Memorandum of Agreement with ICE in May 2009. The County learned about Secure Communities in October 2009, when the Department of Correction (DOC) received an informational packet from ICE.

Although County officials were initially led to believe that participation in the program was voluntary, in April 2010, ICE unilaterally activated Secure Communities in the County. When notified that the Board of Supervisors had not approved participation in this program, ICE stated that Board approval was not necessary. ICE activated the program in our County on May 4, 2010. All California counties are now active.

On June 22, 2010, the Board of Supervisors adopted a Resolution entitled "Advancing Public Safety and Affirming the Separation between County Services and the Enforcement of Civil Immigration Law." Recognizing the deleterious effect on community trust, this resolution prohibits the County from diverting County resources to fulfill the federal government's role of enforcing civil immigration law. According to the Resolution, no County department, agency or employee can initiate any inquiry or enforcement action, or question, apprehend or arrest an individual based on suspected immigration status.

Furthermore, on September 1, 2010, the Public Safety and Justice Committee recommended that the Board of Supervisors direct the County Executive and County Counsel to take all necessary actions to opt out of Secure Communities. Based on this recommendation and ICE's prior statements that local jurisdictions were permitted to decline participation, the Board unanimously

voted to opt out of Secure Communities on September 28, 2010. Pursuant to the Board's direction, the County Executive and County Counsel have taken all possible steps to remove the County from the Secure Communities program. ICE officials, however, have refused to honor the Board of Supervisor's decision. Despite allowing other jurisdictions in the country to withdraw from the program, ICE has repeatedly stated that the program is mandatory in California.

After learning that the County would not be allowed to withdraw from the program, the Committee asked County Counsel to provide further information regarding an alternative possible action by the Board. County Counsel advised that the County could exercise its discretion to stop detaining inmates for suspicion of civil immigration violations, or it could form an advisory task force to consider which detainer requests to honor. At its December 2, 2010 meeting, the Public Safety and Justice Committee formed such an advisory task force. There are nine members of the Task Force, which is chaired by the Office of the County Counsel. The membership includes the District Attorney or his designee, Public Defender or her designee, Sheriff or her designee, Chief of Department of Corrections or his designee, Chief Probation Officer or her designee, Office of Pretrial Services or his designee, CJIC designee, Director of Office of Budget and Analysis or her designee, and the Presiding Judge of Santa Clara County Superior Court or his designee.

In the last six months, more data and information has been released about the Secure Communities program. Given the high number of non-criminal and low-level offenders affected by the program, there has been growing national discontent regarding the use of local resources to support the program and the harmful effects the program has visited upon local communities. Jurisdictions are beginning to take formal action to push back against the program. The Governor of the State of Illinois, for example, recently ended his State's participation in Secure Communities after ICE statistics showed that in Illinois more than three-quarters of those targeted for deportation through the program were convicted of no crimes or only minor misdemeanors. The State of Washington negotiated with ICE to ensure that Secure Communities could only be activated in local communities that "opt-in" to participate in the program. To our knowledge, no jurisdiction in Washington has chosen to opt-in. Other local jurisdictions throughout the nation in states such as Virginia, New Mexico, Maryland, and California, are looking for ways to limit the negative effects of the program on their communities and budgets. And Washington D.C. Council members unanimously passed a bill banning Secure Communities in their city.

Further, the release of internal ICE documents pursuant to a Freedom of Information Act (FOIA) demand have shed light on inconsistencies in the public messaging and implementation of Secure Communities. These documents have been carefully reviewed and contain ample evidence of ICE changing its message regarding local participation in the Secure Communities program. These contradictory and misleading statements, some made regarding our own jurisdiction, have prompted Congresswoman Zoe Lofgren to call for an investigation into misconduct by ICE or DHS personnel:

> "It is unacceptable for government officials to essentially lie to local governments, Members of Congress, and the public. Unfortunately, my review of the e-mails that have been made public suggests that some government personnel have been less than completely honest about this program over the last two years. It is critically important that you thoroughly investigate this matter and that any misconduct result in real consequences." (April 28, 2011 letter from Congresswoman Zoe Lofgren to the Acting Inspector General and the Assistant Director of the ICE Office of Professional Responsibility.)

The County Counsel has been in close contact with Congresswoman Lofgren as she seeks federal accountability regarding the implementation of the Secure Communities program at the local level.

RECOMMENDATION FOR COUNTY OF SANTA CLARA'S CIVIL DETAINER POLICY

Based on the background information provided above, and the Task Force meetings held to date, the Task Force recommends that the Committee approve and forward the attached policy for consideration by the full Board.

CONSEQUENCES OF NEGATIVE ACTION

The Task Force's recommendation will not be forwarded to the full Board for consideration.

STEPS FOLLOWING APPROVAL

The Public Safety and Justice Committee will forward the Task Force recommendation to the full Board of Supervisors for formal action. If adopted by the Board, the Office of the County Counsel will work with the Clerk of the Board to include this policy in the Board's Policy Manual.

ATTACHMENTS

1. Proposed Board Policy on Civil Immigration Detainer Requests
2. April 28, 2011 Letter from Congresswoman Zoe Lofgren to the Acting Inspector General and the Assistant Director of the ICE Office of Professional Responsibility
3. September 2010 Letter from ICE Assistant Director David Venturella to County of Santa Clara
4. Board Resolution 2010-316 (adopted June 22, 2010): "Advancing Public Safety and Affirming the Separation between County Services and the Enforcement of Federal Immigration Law"

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

ANITA ALVAREZ
STATE'S ATTORNEY

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July 26, 2011

Honorable Jesus G. Garcia
Commissioner – 7th District
Cook County Board of Commissioners
118 North Clark Street, Room 567
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: Duty to Enforce ICE Detainers

Dear Commissioner Garcia:

This letter is in response to your request that this Office render an updated legal opinion regarding the duty to enforce detainers issued by the Bureau of Immigration and Customs Enforcement (ICE).

ISSUE

Whether the duty to enforce ICE detainers is mandatory.

CONCLUSION

Based upon a recently decided federal court decision, ICE detainers are a not akin to a criminal warrant, but rather a voluntary request of a law enforcement agency to cooperate with ICE. It is our opinion that ICE detainers may be treated by the Sheriff as requests for voluntary cooperation, not as orders with which they are required to comply.

DISCUSSION

ICE has the authority to issue a detainer requesting that an inmate be held for a period of time after the completion of a term of imprisonment or release on bail. The regulation found at 8 CFR 287.7 governs ICE detainers and was promulgated pursuant to 8 USC 1227 and 1357 (Sections 236

and 287 of the Immigration and Nationality Act), which authorizes any immigration officer to issue a form I-247, Immigration Detainer, to any other Federal, State or local law enforcement agency. The purpose of ICE detainers are to allow ICE agents time to arrive at the Jail to take into custody a detainee whose immigration status is in question before the detainee is released from the Sheriff's custody. Although the regulations refer to the detainer as a "request," the language in the regulations directed that upon receipt of a retainer, the local law enforcement agency "shall maintain custody of the alien for a period not to exceed 48 hours." 8 CFR 287.7(d). Presumably in reliance on this language, ICE has always publicly suggested that a detainer requires cooperation by the local law enforcement agency.

However, a recent federal court opinion of first impression clarifies that local law enforcement agencies are not required to comply with ICE detainers. In *Buquer v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 68326 (S.D. Ind. June 24, 2011), a federal district court has provided the first clear guidance on the status of detainers as voluntary. The court stated that a detainer "is not a criminal warrant, but rather a voluntary request that the law enforcement agency "advise [the Department of Homeland Security (DHS)], prior to release of the alien, in order for [DHS] to arrange to assume custody." *Buquer* at *9. The court's interpretation provides the first clear indication that, despite some conflicting language within the regulations, ICE detainers are not mandatory orders, but merely a request for cooperation.

We further note that this interpretation is consistent with constitutional prohibitions against the federal government enacting laws directing states to participate in the administration of a federally enacted regulatory scheme. It is our opinion, based upon this recent clear authority from the federal courts, that ICE detainers may be treated by the Sheriff as requests for cooperation, not as orders with which they are required to comply. Please feel free to contact me if you have any further questions.

Very truly yours,

Patrick T. Driscoll, Jr.
Deputy State's Attorney
Chief, Civil Actions Bureau

AMERICAN CIVIL LIBERTIES UNION of MICHIGAN

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August 1, 2011

Director Daniel S. Heyns
Michigan Department of Correction
P.O. Box 30003
Lansing, MI 48909

Re: Clarification of Law Enforcement Obligations Regarding Immigration Detainers

Dear Director Heyns:

The American Civil Liberties Union of Michigan ("ACLU") and the Michigan Immigrant Rights Center ("MIRC") have received repeated complaints that local law enforcement agencies are misinterpreting or misapplying laws regarding "immigration detainers" issued by U.S. Immigration and Customs Enforcement ("ICE"). As you might already be aware, ICE has recently issued a new immigration detainer form, I-247, which clarifies some common misconceptions about the purpose and effect of immigration detainers. The new form is designed to ensure that immigration detainers are not illegally used to hold people longer than 48 hours, as has frequently happened in Michigan jails.

Today we are writing to all custodial facilities in Michigan to reemphasize the legal requirements surrounding the use of immigration detainers. We would like to highlight the following principles.

An immigration detainer does not indicate anything about an individual's immigration status. It is a common misconception that issuance of an ICE detainer means that the subject of that detainer is unlawfully present in the United States. That is simply not true. In fact, in most cases, at the time ICE places a "hold" on a person, no immigration judge has yet decided whether that individual will be deported. Immigration law is exceedingly complex, and when a person finally comes before an immigration judge, that judge may well determine that the person is not deportable, or qualifies for some form of relief as a result, for example, of having a spouse or children who are U.S. citizens. Moreover, immigration detainers are often placed on inmates based largely on the person's place of birth, with little investigation of that person's actual citizenship or immigration status. Consequently, detainers are frequently lodged against persons who are not in violation of any immigration laws, including many lawful permanent residents and a smaller number of U.S. citizens. These include immigrants and visa holders who are in compliance with all immigration laws, as well as naturalized citizens. Even U.S.-born citizens have had detainers issued against them if, for example, the person's name or other identifying information is similar to that of another individual in the database.

An immigration detainer is a request, not an order. The federal government cannot compel you to detain anyone on its behalf. When ICE sends a local law enforcement agency an I-247 form, that constitutes an official request to hold someone for up to an additional 48 hours so that the Department of Homeland Security ("DHS") can take custody of the individual. As the I-247 form itself indicates, detainers are *requests*. They are not arrest warrants. The federal government can only request your assistance; it cannot demand it. In fact, the Supreme Court has found that under the Tenth Amendment to the U.S. Constitution, the federal government is not allowed to command state officers to do federal business. *See Printz v. United States,* 521 U.S. 898, 925-35 (1997). This means that it is up to your agency to determine if ICE requests for detention are proper. ICE's issuance of a detainer does not limit your agency's discretion regarding the individuals in your custody.

Immigration detainers impose significant costs on your agency that are not reimbursed by the federal government. Although ICE detainers are federal requests asking local law enforcement agencies to hold inmates for up to 48 hours, the federal government does not typically reimburse local agencies for the costs incurred in holding inmates for several days beyond when they would otherwise be released. Pursuant to 8 C.F.R. 287.7(e), ICE is not responsible for incarceration costs of any individual against whom a detainer is lodged until "actual assumption of custody." ICE does sometime elect to provide limited reimbursement for certain immigrant detainees held post-conviction. However, there is no federal reimbursement available for detention in local jails based on immigration detainers at the pre-trial stage, for detainees who are never convicted, or for detainers applied post-conviction to lawfully-present individuals, such as legal permanent residents, visa-holders, or U.S. citizens. Moreover, ICE frequently fails to assume custody of individuals for whom it has issued detainers, meaning that local law enforcement agencies have held these individuals for naught. Many local law enforcement agencies are struggling with budget cuts. Because immigration detainers are simply requests, not orders, and because local law enforcement agencies bear much or all of the cost of complying with those requests, agencies that cannot afford to hold inmates without federal reimbursement, need not expend scarce resources on acquiescing to immigration detainers.

Under no circumstances should an individual be held on a detainer for more than 48 hours. The new I-247 states clearly in several places that local law enforcement should retain custody for a period **NOT TO EXCEED 48 HOURS** (excluding weekends and holidays). If ICE does not take custody within that time period, then the detainer automatically lapses and the prisoner must be immediately released from custody. *See* 8 CFR 287.7(d). In several recent court cases, inmates held unlawfully past the 48-hour limit have successfully obtained damages from local law enforcement agencies. Holding an individual more than 48 hours on the force of an immigration detainer is illegal, and could expose your agency to significant liability. *See, e.g. Quezada v. Mink*, No. 10-879 (D. Col.) (filed April 21, 2010) ($50,000 settlement); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y.) (filed June 12, 2009) ($145,000 settlement).

Individuals are free to post bond on state or local charges EVEN IF an ICE detainer is lodged. An individual may post bond on state or local charges even if ICE has issued an immigration detainer. Law enforcement should never tell an individual that a bond is not available or advisable because of the presence of an ICE detainer. Once a bond has been posted to allow pretrial release on state or local charges, then ICE must take custody within 48 hours or the local law enforcement agency must release the individual. Any additional detention is unlawful and violates pretrial release rules.

The ACLU and MIRC have serious concerns about the legality of imprisoning a person for 48 hours without any determination that there is probable cause to believe the person is subject to detention and removal. As discussed above, immigration detainers are routinely used without any judicial determination that a person is in the country illegally, and are frequently applied to people who have committed no immigration violations. Therefore, the legality of the 48-hour period of detention is a subject of dispute. *See, e.g., Galarza v. Szalczyk, et al.*, No. 10-6815 (E.D.Pa.) (filed Nov. 19, 2010) (litigation concerning constitutionality of ICE detainers); *Committee for Immigrants Rights of Sonoma County v. County of Sonoma*, No. 08-4220 (N.D. Cal.) (filed Sept. 5, 2008) (litigation concerning legality of county's reliance ICE detainers). Law enforcement agencies should be aware that questions about the legality of 48-hour detentions are unresolved. At the same time, law enforcement should understand that there is absolutely no question that a person must be promptly released when the 48-hour time period has expired.

Because unlawful detention could expose your agency to significant liability, we urge you to seek legal counsel if you have further questions about immigration detainer policies or the new I-247 form. Thank you for your attention to this important issue.

Sincerely,

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63

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July 16, 2009

Daniel Giustino, Chief of Police
Pembroke Pines Police Department
9500 Pines Boulevard
Pembroke Pines, Florida 33024

Dear Chief Giustino:

We understand that many local law enforcement offices in Florida engage in the practice of detaining individuals based upon "immigration detainers" issued by U.S. Immigration and Customs Enforcement ("ICE"). Such detainers do not provide a lawful basis for arrest or detention. We urge you to consult with counsel based upon the legal authorities set forth in this letter and, if you are currently engaging in this unlawful practice, to immediately cease and desist. Failure to do so will expose your office to significant liability.

The Federal Government Cannot Compel You to Detain Anyone

As an initial matter, the federal government has no authority to require you to arrest or detain anyone. The Tenth Amendment of the U.S. Constitution prohibits such commandeering of state officers by the federal government. *Printz v. United States*, 521 U.S. 898, 925-35 (1997). Detainer documents are at most requests by the federal government, not commands. You must decide whether those requests are proper and thereby accept legal responsibility for following them.

ICE Detainers are Not Arrest Warrants

An ICE detainer is not an arrest warrant. Warrants can only be issued by judicial officers, not law enforcement agents; federal arrest warrants are issued by federal district or magistrate judges pursuant to the procedures set forth in Federal Rule of Criminal Procedure 4. In fact, an ICE detainer does not even have the force of ICE's internal administrative "arrest warrants," which may be based on suspicion of a civil, not criminal, immigration violation. *Compare* Form I-200 (Warrant of Arrest) *with* Form I-247 (Immigration Detainer – Notice of Action).

Furthermore, an ICE "detainer" does not resemble an ordinary criminal detainer in anything but name. Criminal detainers pertain to *pending charges* and are subject to extensive procedural and substantive requirements and safeguards not applied to "detainers" in the immigration context, including the requirement that a judge approve the detainer. *See* Fla. Stat. § 941.45 (Interstate Agreement on Detainers); *see also* Major Cities Chiefs Immigration Committee Recommendations, www.majorcitieschiefs.org/pdfpublic/MCC_Position_Statement_REVISED_CEF_2009.pdf, at 8 (ICE's "civil detainers do not fall within the clear criminal enforcement authority of local police

agencies and in fact lay[] a trap for unwary officers who believe them to be valid criminal warrants or detainers").

ICE Detainers Cannot Support a Warrantless Arrest

Under the Fourth Amendment of the U.S. Constitution and Article I, § 12 of the Florida Constitution, absent a warrant you may not arrest or detain a person without, *at minimum*, ensuring that you have probable cause to believe that person has committed a crime. It is of no consequence that you may have originally taken custody of an individual based on a state criminal charge; once a person has posted bond or otherwise resolved that charge, it can no longer serve as a basis to detain. You must develop separate and independent probable cause to justify any additional detention. *Cf. State v. Diaz*, 850 So.2d 435, 437 (Fla. 2003) (once purpose for legitimate initial stop had been satisfied, further detention could not be justified). In addition to the constitutional limitations on your arrest and detention authority, Florida Statute § 901.15 further restricts the basis on which a law enforcement officer in this state may make warrantless arrests.

It should be clear that ICE detainers neither provide a basis for probable cause nor fall within the scope of § 901.15. The ICE detainer regulation, 8 C.F.R. § 287.7, does not specify that an ICE employee must have probable cause or satisfy any other legal standard of suspicion before issuing a detainer. Nor has ICE published any other rule or procedure explaining when and under what circumstances its employees may issue detainers. In fact, detainer documents themselves typically merely state that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States" – an assertion that falls far short of alleging, much less demonstrating, probable cause. *See Papachristou v. City of Jacksonville*, 405 U.S.156, 169 (1972) ("We allow our police to make arrests only on 'probable cause' . . . . Arresting a person on suspicion, *like arresting a person for investigation*, is foreign to our system.") (emphasis added). Such an investigation may not even be criminal, since unlawful presence in the United States is not, of itself, a crime. *See* Congressional Research Service, Immigration Enforcement Within the United States, www.fas.org/sgp/crs/misc/RL33351.pdf, at CRS-8 ("Being illegally present in the U.S. has always been a civil, not criminal, violation . . . .")

ICE Detainers Exceed Statutory Authority and Violate Due Process

Federal statutes only contemplate or authorize the issuance of an immigration detainer "[i]n the case of an alien who is arrested by a … State[] or local law enforcement official for a violation of any law *relating to controlled substances*," and do not provide for an additional detention period even in such cases. 8 U.S.C. § 1357(d) (emphasis added).[1] *Accord* Christopher Lasch, Enforcing The Limits Of The Executive's Authority To Issue Immigration Detainers, 34 William Mitchell L. Rev. 164, 186-93 & n.119 (finding that

[1] No other provision of the immigration code addresses or authorizes immigration detainers. Instead, Congress has carefully delineated the circumstances under which even ICE agents may make immigration arrests, *see* 8 U.S.C. §§ 1226(a), 1357(a)(2), and has provided state and local police with arrest authority only in particular narrow circumstances, *see* 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c), 1357(g). The use of detainers in non-controlled-substances cases contravenes this statutory scheme.

"DHS grossly exceeds the limits of its [statutory] authority to issue detainers" and noting Fourth Amendment problems).

In contrast, we understand that ICE routinely issues detainers for individuals who have not been arrested for any controlled substance violation, and that ICE's detainer documents purport to authorize you to detain individuals for several days when you have no other basis to do so. Neither of these practices is authorized by federal law.

In addition, detaining a person on the basis of the standardless, unilateral administrative decision reflected in an ICE detainer violates due process. The Fifth and Fourteenth Amendments of the United States Constitution impose substantive and procedural limitations on your ability to deprive persons of their liberty. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To deprive a person of liberty solely because an official wishes to investigate that person, without requiring any concrete showing that there is a legitimate and compelling interest in the person's detention, offends fundamental principles of justice. *See Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (striking down statute that allowed for commitment of individual without requiring governmental proof or an adversarial hearing); *cf. United States v. Salerno*, 481 U.S. 739, 749-52 (1987) (approving pretrial detention in "narrow circumstances" where suspect is arrested for an "extremely serious" offense, and government must demonstrate before a neutral decisionmaker in a "full-blown adversary hearing" both probable cause and that no release conditions can reasonably assure safety of others). Furthermore, as a procedural matter, subjects of detainers have no opportunity to contest them, and in at least some cases are not even notified that the detainers exist. Thus, the most basic and essential elements of constitutionally adequate procedure are missing. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.") (punctuation and citation omitted).

For the reasons described above, your office should immediately cease arresting or detaining individuals based upon the purported authority of ICE detainers if it is currently doing so. As I am sure you are aware, 42 U.S.C. § 1983 and Florida Statute § 768 provide ample means for people who have been unlawfully arrested or detained to seek recovery from your municipality and individual law enforcement officers who rely on such detainers.

Please confirm your receipt of this letter and inform us how you plan to proceed. If you have any questions, please contact us.

Sincerely,

Omar C. Jadwat, Esq.*
ACLU Immigrants' Rights Project
* Not admitted to practice in Florida

Glenn M. Katon, Esq.
ACLU of Florida

Ira J. Kurzban, Esq.
Kurzban, Kurzban, Weinger & Tetzeli, P.A.

AMERICAN CIVIL LIBERTIES UNION of COLORADO
FOUNDATION

Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

November 12, 2008

Sheriffs of the State of Colorado

Re: 48-Hour Detainers from Immigration and Customs Enforcement and Colorado Criminal Justice Records Act request for policies

Dear Sheriff:

In the wake of the passage of state "immigration" laws in Colorado, such as Senate Bill 90 passed in 2006 and House Bill 1040 passed in 2007, the ACLU of Colorado has received an increasing number of complaints regarding the misapplication or misinterpretation of the laws relating to 48-hour detainers issued by the Bureau of Immigration and Customs Enforcement ("ICE"). I write to emphasize the bright-line legal requirements regarding 48-hour detainers, and to request a copy of your law enforcement agency's written policy or procedure regarding these standards.

A 48-hour detainer (also known as an "ICE hold" or "immigration hold") is a request that a local law enforcement agency briefly continue to detain a prisoner, when he or she is otherwise entitled to be released, for the purpose of permitting ICE to investigate that person's citizenship or immigration status and determine whether or not ICE will assume custody of that person from the local law enforcement agency. A 48-hour detainer is not an arrest warrant and does not purport to authorize the arrest of any individual.

When a valid detainer is lodged against a prisoner, the local law enforcement agency is directed to detain the prisoner for up to 48 hours, excluding weekends and federal holidays, after the person is otherwise entitled to be released ("48-hour time period"). If ICE has not assumed custody of a person upon the expiration of the 48-hour time period, the prisoner must be immediately released from custody. As stated in the Code of Federal Regulations:

> Upon a determination by the Department 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 not to exceed 48 hours*, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.[1]

[1] 8 C.F.R. 287.7(d) (emphasis added).

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There are no exceptions to the requirement that a prisoner must be released promptly if the 48-hour time period has expired without ICE assuming custody of the prisoner.

It is important to understand what a 48-hour detainer is not: a 48-hour detainer is not a determination a person is in violation of federal immigration laws. A 48-hour detainer may be lodged against a prisoner any time ICE believes it has some reason to investigate that person's immigration status. An ICE agent will then determine whether or not there are sufficient grounds to believe a person has violated immigration laws, and if so, whether to assume custody of that person and begin administrative proceedings in immigration court. ICE often lodges a 48-hour detainer against a prisoner, but then never takes custody of that person.

Even in those cases where the government begins removal (deportation) proceedings against a person, immigrants charged with being deportable are entitled to due process, including a full adversarial hearing before an immigration judge and review of the immigration judge's decision by a federal court. The immigration judge may determine that the person is not legally subject to removal, or that he or she qualifies for a form of relief from removal that allows the person to remain legally in the United States.

The fact that a 48-hour detainer does not represent any determination of a person's immigration status is underscored by the manner in which 48-hour detainers are lodged against prisoners. A 48-detainer is often placed on a prisoner by an ICE agent focusing on that person's place of birth, with little investigation of that person's actual citizenship or immigration status. Consequently, 48-hour detainers are often lodged against persons who are not in violation of any immigration laws. These include naturalized citizens and immigrants and visa holders who are in compliance with all immigration laws. ICE detainers have even mistakenly been lodged against citizens born in the United States who are not deportable under any circumstances.[2]

The ACLU has serious concerns regarding the constitutionality of imprisoning a person for 48 hours without any determination that there is probable cause to believe that the person is in violation of federal immigration laws, and the legality of this 48-hour period of detention is currently a subject of dispute. Nevertheless, while existing federal law appears to authorize such detentions for up to 48 hours when ICE lodges a detainer, there is absolutely no question that a person must be promptly released when the 48-hour time period has expired.

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[2] See *Feds Admit Mistakenly Jailing Citizens as Illegal Immigrants*, Houston Chronicle (February 13, 2008); *U.S. Citizens Near-Deportation Not a Rarity*, Minneapolis St. Paul Star-Tribune (January 26, 2008); *Native was threatened with deportation; Woman jailed for unpaid tickets mistaken for illegal immigrant*, Dallas Morning News (September 1, 2007); ACLU of Colorado, *United States Immigration and Customs Enforcement Agency Releases Improper Hold on U.S. Citizen* (September 2006).

There is also no question that lodging of a 48-hour detainer against a prisoner does not affect that person's right to promptly post bond or complete other processing or paperwork necessary for release. Nor does the lodging of a detainer permit any other inferences regarding whether or not the person is in violation of immigration laws. Failure to release a prisoner promptly upon the expiration of the 48-hour time period may be the subject of a *habeas corpus* action for release from confinement, and a civil action for false imprisonment and violation of the prisoner's constitutional rights.

Although federal immigration law is exceedingly complex, the legal standards governing the right to release and 48-hour detainers are clear. If your law enforcement agency has a written policy or procedure regarding 48-hour detainers, I would appreciate a receiving a copy of that policy. Please consider this a request under the Colorado Criminal Justice Records Act.

If the policies are in electronic form or can be scanned, they may be sent to ACLU of Colorado Legal Assistant Debra Woods, at <dwoods@aclu-co.org>. If you are unable to send your jurisdiction's policies by email or would prefer to send by fax or mail, it can be sent to Ms. Woods by fax to 303-777-1773, or by mail to 400 Corona St., Denver, CO 80218.

If I can provide any additional information, please do not hesitate to let me know. I look forward to hearing from you.

Sincerely,

Taylor Pendergrass
Staff Attorney, ACLU of Colorado

ACLU FOUNDATION
AMERICAN CIVIL LIBERTIES UNION of SOUTHERN CALIFORNIA

LIBERTY | JUSTICE | EQUALITY

December 14, 2011

Supervisor Zev Yaroslavsky
821 Kenneth Hahn Hall of Administration
500 West Temple
Los Angeles, CA 90012

Dear Chairman Yaroslavsky and the Members of the Board of Supervisors:

We write to you as members of a countywide coalition of grassroots and civil rights organizations deeply concerned about the impact of the federal immigration program, Secure Communities ("S-Comm"), on the County of Los Angeles. We have recently learned that County authorities are routinely and unlawfully detaining American-born citizens for immigration officials through S-Comm. Accordingly, we write to urge the County Board of Supervisors to adopt policies to prevent the County from unconstitutionally detaining individuals for immigration authorities, detentions that also threaten public safety and drain vital local resources that should not be spent supporting a misguided federal program.

S-Comm is a federal immigration program that was implemented in Los Angeles in August 2009. Through S-Comm, when the Los Angeles County police or Sheriff's deputies take the fingerprints of an arrestee, those fingerprints are immediately shared with Immigration and Customs Enforcement ("ICE"). If those prints match a record in the immigration database that leads ICE to believe the person *could* be deportable, ICE will immediately send back to the local law enforcement agency an immigration detainer (or "immigration hold") requesting that the local agency detain the individual to allow time for ICE to investigate and determine whether to take the person into immigration custody for deportation proceedings. According to federal regulations, a local agency has the discretion to detain a person subject to an immigration detainer for up to 48 hours, excluding weekends and holidays, after the person's criminal release date. 8 C.F.R. § 287.7(d).

Currently, Los Angeles County complies with every immigration detainer request to detain inmates for ICE, despite the fact that such requests are not mandatory. County authorities also deny a person their right to be released on bail if they are subject to an immigration detainer.

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The Costs and Consequences of S-Comm for Los Angeles County

S-Comm is not simply a misguided federal immigration program. In order for it to work, it requires the voluntary participation of local city and county law enforcement agencies to detain people in their custody on the authority of the immigration detainer.

This has enormous costs and consequences for Los Angeles, and it is a problem the County can and must address. We highlight here a few of the most significant concerns that the County's enforcement of immigration detainers presents.

I. Legal Liability and Constitutional Violations

First, by agreeing to detain inmates subject to immigration detainers for ICE, County authorities are participating in the unlawful detention of individuals absent probable cause to believe they are deportable.

Before issuing a detainer, ICE does not conduct any individualized assessment of that person's immigration status.[1] Unlike criminal detainers, which only issue pursuant to a warrant, ICE agents issue immigration detainers without meeting any evidentiary standard, such as probable cause, to first determine whether the person is deportable. In fact, ICE issues a detainer first and then later investigates a person's status. As a result, ICE frequently issues immigration detainers in error against non-deportable lawful immigrants and U.S. citizens, resulting in their unlawful detention by Los Angeles authorities before ICE assumes custody.
To the extent these detentions are unlawful and unconstitutional, County authorities are complicit in those illegal detentions and expose themselves to legal liability. In recent months, our offices have learned of four U.S.-born citizens who were unlawfully detained by County officials solely on the authority of immigration detainers, despite the fact that they obviously cannot be deported.

Antonio Montejano (Booking No. 2924992) is a 40-year-old U.S. citizen who was born in Los Angeles, California. He resides in Los Angeles with his wife and four U.S. citizen children, ages 3, 6, 8 and 22.

On November 5, 2011, Mr. Montejano went to Sears in Santa Monica with his wife and three youngest children. Although he purchased approximately $600 worth of merchandise that day, a $10 bottle of perfume and candies that his children had taken inadvertently went unpaid. When confronted, Mr. Montejano told the Sears clerks that it was an honest mistake and offered to pay for the items. Instead, the clerks called the Santa Monica police, who arrested Mr. Montejano on a charge of petty theft. Mr. Montejano was booked into the Santa Monica Police Station. Normally, the police would have released Mr. Montejano within hours of booking him on a petty theft charge. However, ICE issued an immigration detainer to the Santa Monica Police Department, requesting Mr. Montejano's continued detention. As a result, the Santa

1 For example, under S-Comm, ICE does not interview the person prior to issuing an immigration detainer, nor does it perform any check to ensure that the person is not a U.S. citizen.

Monica Police Department did not release Mr. Montejano, but continued to detain him. On November 7, Mr. Montejano pled to an infraction of petty theft. The judge waived the fine associated with the infraction based on the fact that he had already served two days in jail and ordered his release. Rather than releasing him, however, the Santa Monica Police transferred Mr. Montejano to Los Angeles County custody on the authority of the immigration detainer.

County authorities detained Mr. Montejano at the Inmate Reception Center (IRC), the County booking facility for men in Los Angeles, for two days. Mr. Montejano spent two nights jailed in a booking cell at the IRC. He did not sleep. In violation of the Eighth Amendment and federal court precedent, County authorities did not provide Mr. Montejano a bed, a mattress or even a blanket.[2] *See Thomas v. Baca*, 514 F. Supp. 2d 1201, 1216 (C.D. Cal. 2007) (holding Los Angeles County Sheriff's practice of requiring inmates to sleep on the floor – whether with or without a mattress – violated the Eighth Amendment). *See also Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989).

When the ACLU of Southern California learned of his case and sent a copy of his birth certificate and passport to a senior ICE official, ICE lifted the immigration detainer. Once the detainer was lifted, the County released him the morning of November 9, 2011. Mr. Montejano spent four and a half haunting days, unlawfully jailed.

Romy Campos (Booking No. 2932388) is a 19-year-old U.S. citizen who was born in Hollywood, Florida. On November 12, 2011, Ms. Campos was arrested by the Torrance Police Department on a misdemeanor charge. ICE immediately issued an immigration detainer to the Torrance Police Department for her detention. As a result, the Torrance Police continued to detain her until she appeared in court on November 14. Ms. Campos pled no contest to the charge and was sentenced to ten days in County custody. Women sentenced to ten days in jail generally do not serve that time due to lack of jail space. However, on the purported authority of the immigration detainer, the Torrance Police transferred Ms. Campos to the Lynwood Jail of the Los Angeles County Sheriff's Department. For days, Ms. Campos' parents and Public Defender tried to get ICE agents to lift the erroneous immigration detainer by sending them copies of her birth certificate. The agents disclaimed their ability to do anything about the detainer and said Ms. Campos would have to wait until she was transferred to ICE custody to prove her citizenship. When the ACLU of Southern California learned of her case and sent a copy of her birth certificate to a senior ICE official, ICE lifted the erroneous detainer. County authorities released her from jail on November 16, after she spent four days unlawfully detained.

Rigoberto Amador Flores (Booking No. 2954420) is a 29-year-old U.S. citizen who was born in Northridge, California. He is a resident of Los Angeles County. On November 20, 2011, Mr. Flores was arrested by the Redondo Beach Police Department. Two days after he was arrested, Mr. Flores attempted to post bail but was told he could not do so because he had an immigration hold. Instead, he was transferred from Redondo Beach Police Department custody

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2 Mr. Montejano reports that there were many other inmates detained with him overnight at the IRC who were also forced to sleep on the floor without a mattress. He reports that he believes some people were detained there for numerous days.

to Los Angeles County custody at the Pitchess Detention Center. When the National Immigration Law Center learned of his case and sent a senior ICE official a copy of his birth certificate and passport, ICE lifted the immigration hold. Once the hold was lifted, Mr. Flores was released from custody on bail the morning of November 30, 2011. Mr. Flores spent at least 8 traumatizing days unlawfully detained and was prevented from spending the Thanksgiving holiday with his family.

Jose Velazquez, Jr. (Booking No. 2807156) is a 37-year-old U.S. citizen who was born in Huntington Park, California, where he currently resides with his wife and children. On or around 1 a.m. on July 13, 2011, the Los Angeles Sheriff's Department arrested Mr. Velazquez at his home. He was booked into Century Station in Lynwood. Sometime that day, ICE issued an immigration detainer to the County authorities for his detention. That same day, Mr. Velazquez's wife attempted to post bail for him, but was told he could not be released on bail because of the immigration hold. As soon as she learned of the immigration hold, Mr. Velazquez's wife and defense attorney immediately contacted the Sheriff's deputies at the station and ICE. It took them one day to reach the right authority at ICE to present a copy of Mr. Velazquez's birth certificate and passport and persuade ICE to lift the hold. On or around 5:30 p.m. on July 14th, once the hold was lifted, the Sheriff's deputies released Mr. Velazquez. Mr. Velazquez spent at least one day unlawfully jailed.

These recent cases are not aberrations from the norm – they are the norm. ICE's own data from the first year of S-Comm activation reveals that five percent of persons identified by the program were in fact U.S. citizens.[3] The fact that ICE illegally detains and even deports U.S. citizens as aliens has also been confirmed by a number of academic reports. A recent study by the Warren Institute of U.C. Berkeley found that ICE apprehended (i.e., arrested and detained) approximately 3,600 U.S. citizens through S-Comm since the program's initiation in 2009.[4] In addition, a recent report found that ICE has wrongly detained or deported as many as 20,000 citizens since 2003.[5] Given Los Angeles County's ominous distinction of being the County with the largest number of S-Comm referrals to ICE in the country, it should come as no surprise that a number of the cases involving U.S. citizens illegally detained or deported arise out of Los Angeles.

II. Public Safety Impact

Second, S-Comm has driven a wedge between the Los Angeles law enforcement and immigrant communities that jeopardizes police work and public safety.
Despite ICE's proclamations that S-Comm is a necessary tool to identify serious criminal aliens for removal, ICE has not adopted any procedural protections to ensure that only the intended

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3 ICE, *Secure Communities IDENT/IAFIS Interoperability, Statistics through October 31, 2009, available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2009.pdf.
4 Aarti Kohli, Peter Markowitz & Lisa Chavez, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 2 (Berkeley Law: Chief Earl Warren Institute on Law and Social Policy 2011).
5 Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VIRGINIA J. OF SOCIAL POLICY AND THE LAW 606, 608 (2011).

targets of the program – persons with histories of serious crimes – are identified. Rather, any person arrested by County authorities for any reason can be identified by ICE for detention and deportation through our County jails, even if they turn out to be the victim of a crime, and even if no charges were filed, their charges were dismissed, or they were arrested on only a misdemeanor or citable infraction.[6]

Because S-Comm identifies individuals for possible deportation at the moment their fingerprints are taken by the local law enforcement agency, immigrants fear interacting with the police at all because it could lead to deportation. In a period of just two years, S-Comm has unraveled the basic fabric of trust between the police and immigrant communities, and undermined the spirit and intent of Special Order 40.

Our offices have handled the cases of numerous Los Angeles residents caught in the S-Comm net after an interaction with the police that normally would not have resulted in arrest. For example, Isaura Garcia, a 20-year-old domestic violence victim in Los Angeles, was wrongly arrested by the LAPD after calling 911 for help, and placed in deportation proceedings through S-Comm. Blanca Perez and Adan Espinoza, street vendors in Los Angeles and South Gate respectively, were cited by local police for street vending, but arrested for identification purposes when the officers discovered they did not have a California ID. As soon as their fingerprints were taken at the station, ICE identified them for deportation. These and the thousands of other daily interactions between residents and Los Angeles law enforcement that result in deportation, chill the willingness of impacted communities to report crimes and cooperate in investigations, and present a significant threat to public safety in this City and County.

III. Expenditure of Local Resources

Third, Los Angeles County is expending vital resources detaining people for civil immigration purposes. Currently, Los Angeles police and Sheriff enforce every immigration detainer lodged on a person in their custody. As a result, a person subject to an immigration detainer spends far longer in police and County custody than they would otherwise. In many cases, such as in the cases of Mr. Montejano and Ms. Campos, described above, a person would not spend more than a few hours in custody were it not for the immigration detainer. Although federal regulations dictate that the local authorities can only detain a person pursuant to an immigration detainer for 48-hours, excluding weekends and holidays, beyond their release date,[7] Los Angeles County authorities do not allow bail-eligible detainees to post bail if there is an immigration detainer. As a result, detainees who would otherwise be released on bail, end up spending considerable time in local custody solely because of the immigration detainer. The presence of an immigration detainer may also make certain individuals ineligible for alternatives

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6 *See, e.g.,* Frank Stoltze, *Federal deportation program under fire in Los Angeles*, KPCC (May 13, 2011) (reporting on the case of Isaura Garcia, referred to ICE as a result of Secure Communities after her 911 call to police for help and to report domestic abuse), http://www.scpr.org/news/2011/05/13/federal-deportation-program-under-fire-los-angeles/.

7 *See* 8 C.F.R. § 287.7(d).

to detention or rehabilitative programs, further increasing the number of individuals jailed by Los Angeles authorities because of immigration detainers.

The County's routine compliance with immigration detainers has enormously burdened the County's jails and City police stations. From October 1, 2008 through June 21, 2010, ICE placed 14,756 detainers on individuals in Los Angeles County custody through S-Comm.[8] It is estimated that the County spends approximately $95-$140 per day to detain an inmate in its custody.[9] While we are unaware of any estimates in Los Angeles County of the average number of additional days that a person with an immigration detainer spends in jail, studies in other localities have estimated anywhere from 42.9 days[10] to 73 days.[11] Taking the lowest of these numbers (i.e. 42.9 days at a rate of $95), the County would spend an average of $ 4,075.50 per person to enforce an immigration detainer. Thus using these figures, between October 1, 2008 and June 21, 2010, Los Angeles County expended $60,138,078 to voluntarily detain people at ICE's request.

The costs expended by Los Angeles County to detain individuals for ICE – for federal civil immigration enforcement purposes – are not reimbursed by the federal government. According to an ICE representative, "ICE does not reimburse localities for detaining any individual until ICE has assumed actual custody of the individual. Further, ICE will not indemnify localities for any liability incurred..."[12] Therefore, the vast majority of the exorbitant costs associated with detaining an individual for ICE are borne solely by the County.[13] Los Angeles County's wholesale cooperation in detaining individuals for the purpose of civil immigration enforcement – a federal function – has significantly burdened vital local resources. At a time when jail bed space is at a premium and financial resources are constrained, it makes

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[8] These numbers were provided by ICE in response to a Freedom of Information Act request filed by the National Immigrant Justice Center on June 4, 2010. We are happy to provide the full dataset in electronic form upon request.

[9] Vera Institute of Justice, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT: FINAL REPORT at xviii (Oct. 26, 2011).

[10] A study in Travis County, Texas in 2007 found that the average length of incarceration was 21.7 days, however for individuals with an immigration detainer it was 64.6. Andrea Guttin, *Criminals, Immigrants, or Victims? Rethinking the "Criminal Alien Program,"* (May 2009) (unpublished thesis; on file with author).

[11] A 2008 study of data on all noncitizens charged with drug offenses in New York City found that, controlling for race and offense level, noncitizens with immigration detainers spent an average of 73 days longer in jail before being discharged than those without an immigration detainer. Aarti Shahani, Justice Strategies, *New York City Enforcement of Immigration Detainers* (Oct. 2010), *available at* http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf

[12] Letter from David Venturella, Assistant Director, Secure Communities to Miguel Marquez, Santa Clara County Counsel, Aug. 16, 2010, at 3, *available at* http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf [hereinafter "Venturella Letter"].

[13] State and local correctional facilities do receive some federal funding through the State Criminal Alien Assistance Program (SCAAP), but this funding covers at most only a fraction of the costs associated with enforcing immigration detainers. *See* GAO, Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs (March 2011), *available at* http://www.gao.gov/products/GAO-11-187 (documenting huge gaps between SCAAP funding and actual cost of incarceration). Importantly, no federal reimbursement is available for immigration-based detention in local jails based on immigration detainers at the arrest stage, for detainees who are never convicted, or for detainers applied post-conviction to lawfully-present individuals.

little law enforcement sense to forfeit bed space and resources to detain people for civil immigration violations when that bed space is needed for criminal law enforcement purposes.[14]

Los Angeles County's Responsibility to Enact Policies on Immigration Detainers

While ICE has made clear that no locality can "opt-out" of S-Comm, ICE has also made clear that immigration detainers are simply voluntary requests that the local agency hold a person for ICE, and are not mandatory.[15] Los Angeles need not comply with every immigration detainer request that ICE makes, nor should it for the reasons discussed above.

As a metropolis with one of the largest immigrant populations in the country, Los Angeles should be leading efforts to ensure that the relationship between our immigrant communities and the police is protected. Unfortunately, Los Angeles is behind the curve with major counties and cities such as Chicago, New York, San Francisco, and Santa Clara already implementing policies with this goal in mind. This is an issue of critical concern and therefore we ask the Board of Supervisors to urgently consider a policy, which would address the serious civil rights violations occurring at the hands of Los Angeles' authorities and preserve local resources in a time of strained municipal budgets.

In response to public safety concerns and the fiscal impact of S-Comm, several local communities around the country have adopted policies to limit when the local jail will detain individuals on an immigration detainer. For example, county officials in Cook County, Illinois, passed an ordinance that limits local compliance with an ICE detainer request to cases where there exists a "written agreement with the federal government by which all costs incurred by Cook County in complying with [the detainer request] are fully reimbursed."[16] Similarly, county officials in Santa Clara County, California recently passed an ordinance conditioning compliance with ICE detainer requests on federal reimbursement and further restricting enforcement of ICE detainers to individuals convicted of a serious or violent crime.[17]

These policies serve the dual purpose of allowing local communities to ensure that only individuals who may pose public safety risks based on their criminal history are referred to ICE for potential deportation, while also reducing the financial burden borne by local budgets to detain individuals at the behest of ICE.

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14 If ICE intends to pursue deportation of a person, nothing prevents them from apprehending that person once they have been released from County custody.

15 *See* Venturella Letter, *supra* fn. 12 ("ICE views an immigration detainer as a request . . . ."); ICE Memorandum on Secure Communities Briefing to Congressional Hispanic Caucus, Oct. 28, 2010, ICE FOIA 2674.020612 at 3, *available at* http://bit.ly/sHibJ7 ("Local LE are not mandated to honor a detainer, and in some jurisdictions they do not."); *see also Buquer v. City of Indianapolis*, --- F.Supp.2d ----, 2011 WL 2532935, *3 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency 'advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.'").

16 Cook County Ordinance, attached as Exh. A.

17 The Santa Clara County policy restricts enforcement of ICE hold requests to cases where the individual in question has been convicted of a serious and/or violent felony as defined in the California Penal Code §§ 667.5(c) and 1192.5(c). *See* Santa Clara County Ordinance, attached as Exh. B.

Conclusion

S-Comm threatens the constitutional rights and public safety of Los Angeles County and City residents, and it drains vital law enforcement resources. It is imperative that Los Angeles immediately takes steps to limit the impact of this program by adopting policies that restrict the circumstances in which local authorities will enforce immigration detainers. Doing so will limit the City and County's cooperation in detaining individuals unlawfully and unconstitutionally for immigration, help restore public trust in the police, and ensure that we are not expending millions of unreimbursed dollars needed for local law enforcement, to do the work of the federal government.

We are very eager to work with your office on this pressing issue. Please contact Melissa Keaney at (213) 674-2820 or Jennie Pasquarella at (213) 977-5236 to discuss this letter or to arrange a meeting.

Sincerely,

Melissa Keaney /sp

Melissa Keaney
Staff Attorney
National Immigration Law Center

Jennie Pasquarella
Staff Attorney
ACLU of Southern California

/s/ Jessica Karp
Jessica Karp
Staff Attorney
National Day Laborers Organizing Network of LA (CHIRLA)

/s/ Carl Bergquist
Carl Bergquist
Policy Advocate
Coalition for Humane Immigrants Rights

/s/ Nancy Ramirez
Nancy Ramirez
Western Regional Counsel
Mexican American Legal Defense and Educational Fund

Enclosures

cc: Supervisor Michael Antonovich
Supervisor Don Knabe
Supervisor Gloria Molina
Supervisor Mark Ridley Thomas

EXHIBIT A

11-O-73
ORDINANCE

Sponsored by

THE HONORABLE TONI PRECKWINKLE, PRESIDENT AND JESUS G. GARCIA, JOHN A. FRITCHEY, BRIDGET GAINER, JOAN PATRICIA MURPHY, EDWIN REYES, DEBORAH SIMS, ROBERT B. STEELE, LARRY SUFFREDIN AND JEFFREY R. TOBOLSKI COUNTY COMMISSIONERS

POLICY FOR RESPONDING TO ICE DETAINERS

NOW, THEREFORE, BE IT ORDAINED, by the Cook County Board of Commissioners, that Chapter 46 Law Enforcement, Section 46-37 of the Cook County Code is hereby enacted as follows:

Sec. 46-37. Policy for responding to ICE detainers.

(a) The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.

(b) Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.

(c) There being no legal authority upon which the federal government may compel an expenditure of County resources to comply with an ICE detainer issued pursuant to 8 USC § 1226 or 8 USC § 1357(d), there shall be no expenditure of any County resources or effort by on-duty County personnel for this purpose, except as expressly provided within this Ordinance.

(d) Any person who alleges a violation of this Ordinance may file a written complaint for investigation with the Cook County Sheriff's Office of Professional Review.

Effective Date: This Ordinance shall be in effect immediately upon adoption.

Approved and adopted this 7th day of September 2011.

TONI PRECKWINKLE, President
Cook County Board of Commissioners

Attest: DAVID ORR, County Clerk

EXHIBIT B

POLICY RESOLUTION NO. 2011-504

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA ADDING BOARD POLICY 3.54 RELATING TO CIVIL IMMIGRATION DETAINER REQUESTS

WHEREAS, the Board of Supervisors wishes to give direction and set policy for such matters for which the responsibility of decisions is placed on it by virtue of State codes, County Charter or specific ordinances and resolutions or relates to its broad policy-making authority to matters regarding Santa Clara County; and

WHEREAS, the Board of Supervisors wishes to clearly state and compile policies and to provide for distribution of those policies to affected decision-makers; and

WHEREAS, the Policy Manual is not set by ordinance, is not legally binding, and can be changed by adoption of a resolution approved by a majority of the Board of Supervisors and is intended to give guidance to staff and future members of the Board of Supervisors;

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OCT 18 2011

NOW, THEREFORE, BE IT RESOLVED, by the Board of Supervisors of the County of Santa Clara, State of California, that the Board of Supervisors' Policy Manual is hereby amended by adoption of this resolution to add Section 3.54, Civil Immigration Detainer Requests, attached hereto as Exhibit "A" and incorporated herein, and the Clerk of the Board is directed to incorporate the policy into the manual so that it is available to all County staff.

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on OCT 18, 2011, by the following vote:

AYES: CORTESE, ~~KNISS~~, SHIRAKAWA, ~~WASSERMAN~~, YEAGER
NOES: WASSERMAN
ABSENT: ~~KNISS~~
ABSTAIN: —

DAVE CORTESE, President
Board of Supervisors

ATTEST:

MARIA MARINOS
Clerk of the Board of Supervisors

APPROVED AS TO FORM AND LEGALITY:

JUNIPER DOWNS
Lead Deputy County Counsel

Exhibit to this Resolution:
A – Board Policy 3.54 for Civil Immigration Detainer Requests

446351

Exhibit A

3.54 Civil Immigration Detainer Requests

It is the policy of Santa Clara County (County) to honor civil detainer requests from the United States Immigration and Customs Enforcement (ICE) by holding adult inmates for an additional 24-hour period after they would otherwise be released in accordance with the following policy, so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed:

1. Upon written request by an Immigration Customs and Enforcement (ICE) agent to detain a County inmate for suspected violations of federal civil immigration law, the County will exercise its discretion to honor the request if one or more of the following apply:
    a. The individual is convicted of a serious or violent felony offense for which he or she is currently in custody.
        i. For purposes of the policy, a serious felony is any felony listed in subdivision (c) of Section 1192.7 of the Penal Code and a violent felony is any felony listed in subdivision (c) of Section 667.5 of the Penal Code.
    b. The individual has been convicted of a serious or violent felony within 10 years of the request, or was released after having served a sentence for a serious or violent felony within 5 years of the request, whichever is later.
        i. If the individual has been convicted of a homicide crime, an immigration detainer request will be honored regardless of when the conviction occurred.
        ii. This subsection also applies if the Santa Clara County Department of Corrections has been informed by a law enforcement agency, either directly or through a criminal justice database, that the individual has been convicted of a serious or violent offense which, if committed in this state, would have been punishable as a serious or violent felony.
2. In the case of individuals younger than 18 years of age, the County shall not apply a detainer hold.
3. Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.

Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE, IMMIGRATION & NATIONALITY LAW COMMITTEE, AND CORRECTIONS COMMITTEE

Int. 656-2011

A Local Law to amend the administrative code of the city of New York, in relation to persons not to be detained.

THIS BILL IS APPROVED

The New York City Bar Association's Criminal Courts Committee, Immigration and Nationality Law Committee and Corrections Committee support this bill, which would prohibit the use of New York City Department of Corrections' (DOC) resources to honor a civil immigration detainer provided that the subject of the detainer (i) has never been convicted of a misdemeanor or felony; (ii) is not a defendant in a pending criminal case; (iii) has no outstanding warrants; (iv) is not and has not previously been subject to a final order of removal; and (v) is not identified as a confirmed match in the terrorist screening database.

This bill marks an important first step in the City's imposing some limits on DOC's collaboration with U.S. Immigration and Customs Enforcement (ICE). DOC's current policy of unlimited collaboration costs the City millions of dollars every year, imposing a tremendous financial burden on the City's limited resources. The policy also causes significant harm to the City's residents while creating substantial roadblocks in the criminal justice system. The bill would result in significant cost-saving, as well as some reasonable restraints on DOC's practices in the holding of immigrants under ICE detainers.

This Bill is Timely and Justified

ICE's placement of immigration detainers against individuals at DOC facilities comprises the single largest means by which New Yorkers end up in immigration detention; each year 3,000-4,000 New Yorkers are transferred from DOC to ICE custody.[1] Given the overall immigration

[1] *See* ICE FOIA Response Letter to Prof. Nancy Morawetz, New York University School of Law, dated Dec. 12, 2008.

enforcement goals of the federal government, these numbers will likely increase if DOC continues to accede to every ICE detainer request.[2]

Many New York City immigrants have valid and strong defenses against deportation when placed in removal proceedings. Many immigrants are lawful permanent residents, refugees, and other immigrants who may be eligible for waivers of deportation. Even undocumented immigrants may also have strong defenses against removal. For example, undocumented immigrants may have a current or foreseeable basis to obtain lawful permanent residence through a family member. They may have been victims of trafficking or other crimes that provide a basis for their obtaining special visas designed to protect them. They may have legitimate asylum claims based on their fear of persecution if returned to their home countries. In addition, their criminal case may result in a dismissal or other disposition that does not block the availability of these defenses. Nevertheless, if they spend any time at Rikers Island and an immigration detainer is lodged against them, these individuals end up trying to fight their deportation cases from detention facilities as remote as Louisiana and Texas, far away from family and access to adequate legal counsel; as a result they are often unable to defend themselves against their removal charges.[3]

If left unrestrained, DOC's extensive collaboration with ICE would remain inconsistent with New York City's interests in protecting the due-process rights and other rights of its immigrant residents. As elaborated below, ongoing and unlimited collaboration also raises economic and public safety concerns.

<u>This Bill Would Save Valuable City Resources</u>

Preliminary findings by Justice Strategies indicate that noncitizens at Rikers Island with an immigration detainer spend an average of *73 days longer in jail* before being discharged than people without an ICE detainer.[4] The unreimbursed cost to the City of this prolonged detention, if the cost of DOC personnel and facilities necessary to hold these thousands of immigrant New Yorkers each year is included, surely runs to the tens of millions of dollars.[5] The unreimbursed

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[2] The City Bar, through its Civil Rights Committee, is urging New York State to rescind its May 10, 2010 memorandum of agreement with ICE to participate in the federal Secure Communities program. This June Governor Andrew Cuomo announced that New York would suspend its participation in this program, which would permit ICE to access the fingerprints of individuals in local law enforcement custody and compare those prints with ICE's own database. The federal government, however, more recently announced that state and local officials cannot opt out of the Secure Communities program.

[3] *See, e.g.*, Human Rights Watch. *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (Nov. 2009); *Report on the Right to Counsel for Detained Individuals in Removal Proceedings*, New York City Bar Association (August 2009).

[4] Justice Strategies, *New York City Enforcement of Immigration Detainers, Preliminary Findings* (October 2010).

[5] *See* City of New York, Office of the Mayor, *Mayor's Management Report* (September 2010) at 150, which indicates average cost per inmate per year to be more than $76,229 in FY 2010. Based on that figure, the average cost per inmate per day is $208, which multiplied by 73 days comes to a cost of more than $15,000 per each of the 3,000-4,000 New Yorkers transferred from DOC to ICE custody every year.

cost to the City is millions of dollars more if the costs of delayed justice are factored into the equation. Because the immigration detainer complicates a plea bargaining resolution that would otherwise be straightforward, practical, and just, these costs of delayed justice include the costs to the City for transportation of detainees to and from court, as well as extended case processing costs for the District Attorneys' offices, the public defense providers, and the courts. By creating a category of individuals who shall not be held under ICE detainers, this bill would reduce the amount of wasted and unreimbursed City resources.

The City Has Authority to Pass this Legislation

As ICE publicly recognizes, its civil detainers are *requests* - not mandates - to local law enforcement agencies to detain named individuals for up to forty-eight hours after they would otherwise be released from criminal custody, to allow ICE the opportunity to take these individuals into immigration custody.[6] New York City and DOC, therefore, are not legally obligated to collaborate with federal immigration detention requests.

Nevertheless, DOC currently collaborates extensively with ICE toward its enforcement policy. DOC (i) allows ICE agents to maintain a presence at DOC's facilities; (ii) allows ICE agents to interview DOC detainees and sentenced inmates at DOC's facilities; (iii) shares DOC inmate database information with ICE, including whether or not a DOC inmate is foreign-born; and (iv) detains people at DOC facilities on civil immigration detainers issued by ICE for up to 48 hours after they would otherwise been released from DOC facilities.[7] DOC engages in this collaboration with ICE as a matter of course without any apparent exercise of discretion, against immigrant New Yorkers *before* they have been convicted of any crime, and whether or not they have been in the United States for many years. Current DOC practice even allows for immigration detainers to issue against teenagers and other young people under 21 years old, victims of trafficking and other crimes, the physically and mentally disabled, primary caretakers of children, and people with U.S. citizen immediate relatives.

This bill imposes some limits on the scope and nature of DOC's collaboration with ICE, and creates a framework for the collaboration that would allow some immigrant New Yorkers to face

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DOC receives some federal money every year under the State Criminal Alien Assistance Program ("SCAAP"), a program that provides federal payments to localities to cover a fraction of the costs incurred for incarcerating certain pre-trial, undocumented immigrants (those with one felony or two misdemeanor convictions and who have been incarcerated for at least four consecutive days). This SCAAP funding is not, however, dependent on DOC's holding people under ICE detainers. DOC's receipt of SCAAP funding should therefore remain unaffected by anything proposed in this letter. In any event, any possible reduction in SCAAP funding as a result of legislation proposed in this letter (to the extent such legislation reduces pre-trial incarceration of qualified immigrants) would be offset by a much greater reduction in DOC's overall costs of holding immigrants under ICE detainers.

[6] *See, e.g.*, Letter from David Venturella, Assistant Director of ICE, to Miguel Martinez, County Counsel, County of Santa Clara, California, in or about September 2010.

[7] NYC Council FY 2011 Preliminary Budget Hearing, March 10, 2010; NYC Council FY 2011 Executive Budget Hearing, June 1, 2010.

deportation charges here in New York, rather than in remote places far away from supportive family members and available *pro bono* or otherwise affordable legal counsel.

Current DOC Collaboration with ICE Undermines Public Safety for All New Yorkers

The perception that a criminal arrest will automatically lead to immigration detention and deportation undermines the trust of the immigrant and ethnic communities in local law enforcement. This perception, and DOC's contribution to it through its extensive collaboration with ICE, can have a chilling effect on immigrant New Yorkers who may wish to report a crime for fear that any interaction with police and the courts will result in the deportation of their immigrant family member or loved one. As a matter of public safety, the City's police and prosecutors have cultivated a relationship of trust with the immigrant communities.[8] Immigrant fear of coming forward to report a crime will result in a less safe New York. One example of this is in the domestic violence context where victims of domestic violence may be reluctant to come forward to report abuse or to press charges if they fear that doing so will lead to their abuser's deportation, particularly if the abuser is the family's primary or sole provider or if there are children involved. Indeed, in other criminal contexts as well, if someone in a position to report a crime knows that DOC collaboration with ICE will result in an immigration detainer against the perpetrator, there is a good chance that he or she will not want to get the police involved. This directly contravenes efforts by the City to encourage its residents to report crime and work with law enforcement officers to make communities safer.

Conclusion

We support this bill. In the ways described above, the City would save valuable resources for which it is not reimbursed by the federal government, while ensuring that there are at least some restraints in place that protect immigrant New Yorkers from a federal immigration enforcement policy that does not serve the ends of justice.

Robert Dean, Chair Criminal Courts Committee Committee	Mark Von Sternberg, Chair Immigration & Nationality Committee	Sara Manaugh, Chair Corrections

September 2011

[8] As part of this effort, for example, District Attorney offices make no distinction between crime victims who are citizens and those who are not (except when they may assist undocumented crime victims to achieve certain immigration protections).

SANTA CLARA COUNTY ORDINANCE

1. It is the policy of Santa Clara County (County) to honor civil detainer requests from the United States Immigration and Customs Enforcement (ICE) by holding adult inmates for an additional 24-hour period after they would otherwise be released in accordance with the following policy, so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed:

This provision doesn't mean no one goes to jail, it means once their criminal matter is done, they will be released, not turned over to ICE. This policy will result in release of everyone regardless of what they are convicted of.

This language was added because of the costs incurred by ICE holds, including the cost of detaining an individual an additional 48 hours and potential child welfare costs as a result of the deportation of parents, the possibility that implementation of the detainer taskforce's recommendation would cost the County money in additional staffing, and the Board of Supervisors passage of a resolution in June 2010 not to expend County resources on civil immigration enforcement.

2. Upon written request by an Immigration Customs and Enforcement (ICE) agent to detain a County inmate for suspected violations of federal civil immigration law, the County will exercise its discretion to honor the request if one or more of the following apply:

This is a second safeguard against ICE enforcement. If there was an agreement with ICE to be reimbursed, Santa Clara would still exercise local discretion only to hold a certain subset of people for ICE—those people who have been convicted of serious or violent crimes, as specifically defined in CA law. This provision is in line with S-Comm's original goal of only targeting the most serious offenders and protecting local public safety. Notably, those persons with serious and violent felonies does not encompass all felonies under California law, but only those that are considered the most serious and violent.

a) The individual is convicted of a serious or violent felony offense for which he or she is currently in custody. For purposes of the policy, a serious felony is any felony listed in subdivision (c) of Section 1192.7 of the Penal Code and a violent felony is any felony listed in subdivision (c) of Section 667.5 of the Penal Code.

b) The individual has been convicted of a serious or violent felony within 10 years of the request, or was released after having served a sentence for a serious or violent felony within 5 years of the request, whichever is later.

i. If the individual has been convicted of a homicide crime, an immigration detainer request will be honored regardless of when the conviction occurred.

ii. This subsection also applies if the Santa Clara County Department of Corrections has been informed by a law enforcement agency, either directly or through a criminal justice database, that the individual has been convicted of a serious or violent offense which, if committed in this state, would have been punishable as a serious or violent felony.

In line with the County's longstanding practice of never cooperating with ICE in the juvenile justice system, the County wanted to document this practice in case there was a future change in leadership.

3. In the case of individuals younger than 18 years of age, the County shall not apply a detainer hold.

4. Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.

In line with the County's resolution of June 2010 not to expend County resources on immigration enforcement, the County did not want County officials spending time working with ICE officials. It also wanted to limit access to County facilities and inmates.

<DATE>

Captain <NAME>
<LAW ENFORCEMENT AGENCY>
<FACILITY NAME>
<ADDRESS>
<FAX>

Dear <NAME>:

This letter is to inform you that my client, <CLIENT>, <BOOKING #>, is currently being unlawfully detained at your facility. This is a request that you immediately release <NAME> as the Constitution and federal regulations require.

On <DATE>, <CLIENT> was ordered released by <JUDGE>, after which time, the only plausible legal authority for <HIS/HER> continued detention at <FACILITY> was the immigration detainer issued on <DATE>. For the reasons set forth below, authority to hold <CLIENT> based on the immigration detainer expired on <DATE> and <HE/SHE> are currently being unlawfully detained at <FACILITY>.

An immigration detainer (also known as an "immigration hold" or "ICE hold") is a request that a local law enforcement agency briefly continue to detain a prisoner, when he or she is otherwise entitled to be released, for the purpose of permitting Immigration and Customs Enforcement (ICE) to investigate that person's citizenship or immigration status and determine whether or not ICE will assume custody of that person from the local law enforcement agency. An immigration detainer is not an arrest warrant and does not purport to authorize the arrest or detention beyond 48-hours of an individual by a local law enforcement agency.

When a valid detainer is lodged against a prison, the local law enforcement agency is directed to detain the prisoner for up to 48-hours, excluding weekends and federal holidays, after the person is otherwise entitled to be released ("the 48-hour time period"). If ICE has not assumed custody of a person upon the expiration of the 48-hour period, the prisoner must be immediately released from custody. As stated in the Code of Federal Regulations:

> Upon determination by the Department 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 not to exceed 48 hours*, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.[1]

There are no exceptions to the requirement that a prisoner must be released promptly if the 48-hour time period has expired without ICE assuming custody of the prisoner. Failure to release a prisoner promptly upon the expiration of the 48-hour time period could lead to a *habeas corpus* petition in federal court seeking the individual's release from confinement, and a civil action for false imprisonment and violation of the prisoner's constitutional rights.[2]

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[1] 8 C.F.R. 287.7(d) (emphasis added). We also note that while the detainer form, Form I-247, includes the mandatory language, "shall," ICE's detainer policy has made clear that the decision to hold an individual for any period of time on an immigration detainer is entirely discretionary and no federal regulations have ever been cited as authority for the proposition that compliance is mandatory. *See* U.S. Immigration and Customs Enforcement, INTERIM Policy #10074.1 (Aug. 2, 2010).

[2] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (affirming that detention without due process or legal authority is a constitutional violation). *See also Harvey v. City of New York*, 07 Civ. 0343 (NG) (LB) (Oct. 30,

Although federal immigration law is exceedingly complex, the legal standards governing the right to release and 48-hour detainers are clear. Because the 48-hour time period has passed and therefore the immigration detainer against the aforementioned individuals has expired, any continued detention of is unlawful. Accordingly, we ask that these women be released from L.A. Sheriff's Department custody immediately.

Please contact me by <DATE> at <TIME>, at <NUMBER>, to confirm that <CLIENT> has been released.

Sincerely,

<NAME>
<TITLE>
<CONTACT>

Cc: Sheriff Lee Baca

2008) (plaintiff awarded $145,000 in damages from the City of New York for violation of the 48-hour time limit); *Ocampo v. Gusman*, 2:10-cv-04309-SSV-ALC (Nov. 15, 2010) (minute order granting writ of habeas petition of petitioner Antonio Ocampo, held 95 days on an expired immigration detainer).

287(g) Agreement A Memorandum of Agreement (MOA) between a local government and the Department of Homeland Security under Section 287(g) of the Immigration and Nationality Act. Under this agreement, ICE briefly trains local enforcement agents, who are then granted limited immigration enforcement authority to investigate, apprehend, and/or detain deportable immigrants. The scope of authority that a 287(g) agreement gives to local governments depends on the specific agreement and is not supposed to override constitutional protections. According to ICE, more than 1,075 officers have been trained through the program under 67 MOAs as of January 2010.

Aggravated Felony A federal immigration category that includes more than 50 classes of offenses, some of which are neither "aggravated" nor a "felony" (for example, misdemeanor shoplifting with a one-year sentence, even if suspended). This term was first created by the 1988 Anti- Drug Abuse Act to include murder, rape, drug trafficking, and trafficking in firearms or destructive devices. Congress expanded this term numerous times over the years, and most extensively in 1996. This is one of the government's most powerful tools for deportation because it strips an immigrant of most choices in the deportation process. An immigrant – including a lawful permanent resident – who is convicted of an offense categorized as an "aggravated felony" is subject to mandatory detention (no bond) and virtually mandatory deportation (no possibility of applying for cancellation of removal, or any other pardons.

"Conviction" (for immigration purposes) Immigration courts define "conviction" broadly to include dispositions where: (1) a formal judgment of guilt was entered by a court, or (2) (a) a judge or jury has found the defendant guilty, the defendant has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt and (b) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. This broad definition has been held to even include some dispositions not considered a "conviction" by the criminal court, such as low-level violations and convictions that are vacated after successful completion of rehabilitation programs.

Crime Involving Moral Turpitude Conviction or sometimes simple admission of one or more crimes involving moral turpitude may trigger deportation for some immigrants. This immigration law term-of-art has not been defined by Congress. It has been interpreted by courts to include offenses which are "inherently" evil, immoral, vile, or base. For example, crimes which require an intent to steal or defraud (such as theft and forgery offenses); crimes in which bodily harm is caused by an intentional act or serious bodily harm is caused by a reckless act (such as murder and certain manslaughter and assault offenses); and most sex offenses.

Criminal Alien A term used by the Department of Homeland Security (DHS) to refer to any noncitizen apprehended by ICE through the criminal justice system, regardless of how minor or how long ago the alleged offense occurred or whether the noncitizen was ever convicted of a crime. A "criminal alien" can be someone who is undocumented, someone who is applying for a green card, or a green card holder with U.S. citizen family. So-called "criminal aliens" are aggressively targeted for deportation after they have served their sentence. Deportation is not part of the criminal sentence, and oftentimes immigrant defendants do not realize that a guilty plea may result in deportation.

Criminal Alien Program (CAP) This is ICE's primary enforcement program. Through CAP – which has existed since the 1980s – ICE agents identify and screen inmates in jails and prisons to initiate removal proceedings while people are still in criminal custody OR transfer people directly from jail or prison to ICE custody for removal proceedings. CAP agents rely on informal relationships with jails and prisons to gain access to and conduct interviews with noncitizens in criminal custody. These interviews can occur before or after a detainer has been issued to facilitate transfer to the detention and deportation system.

Nearly half (48%) of all noncitizens in ICE custody are apprehended through CAP. In Irving, TX, 98% of detainers lodged through CAP were against persons charged with misdemeanor offenses.

Deportation/Removal Expulsion of a noncitizen from the United States. People who can be deported include noncitizens (including green card holders) with past criminal convictions; visa overstays; refugee/asylum seekers; and those who entered without inspection (for example, by crossing the border unlawfully). Once removed, a noncitizen faces legal bars that prevent his or her return or sometimes they are permanently barred.

Department of Homeland Security (DHS) The federal Cabinet department charged with "protecting" the United States. Through the Department of Homeland Security Act, DHS absorbed most of the former Immigration and Naturalization Service and took on its duties in 2003. DHS split immigration-related duties between three separate agencies under its control: services (Citizenship and Immigration Services), enforcement (Immigration and Customs Enforcement), and border patrol (Customs and Border Protection).

Detainer ICE's most effective tool to seal the pipeline from the criminal justice system to the deportation system. A detainer serves as a request to a jail or prison to hold a suspected noncitizen for ICE to pick up or to notify ICE when the jail or prison intends to release the person (for example, after criminal bail is paid the case is disposed of, or the criminal sentence has been served). Federal regulations provide that a jail or prison can hold someone for only 48 additional hours (not including weekends or holidays) based on an ICE detainer. However, jails and prisons frequently violate this 48-hour rule.

Detention Basically – jail. People are detained at every step of the immigration "process:" (1) awaiting adjudication of asylum or adjustment applications; (2) picked up and jailed without charges; (3) pending immigration proceedings; (4) after being ordered deported, while ICE is actively trying to remove them; and (5) sometimes indefinitely, where ICE knows it may not be able to deport someone with an order of deportation. Mandatory detention (incarceration without the chance to apply for bond) applies to most people with past criminal convictions, asylum seekers, and all noncitizens considered "inadmissible" (people physically in the US, but never admitted legally at a port of entry). Detainees are housed in over 250 county jails, private prisons, and federal facilities nationwide, and are often held with the general criminal population. Immigration detention is supposed to conform with Detention Standards but they are not binding. Detention transfers occur often from one part of the country to another, without regard for access to family and counsel.

ICE Agreements of Cooperation with Communities to Enhance Safety and Security (ICE ACCESS) Umbrella program through which ICE partners with local law enforcement agencies to target immigrants for deportation. Through its 14 programs (including the Criminal Alien Program, Secure Communities, and 287g), ICE ACCESS tries to ensure immigration enforcement at every point of the criminal justice system, including at arrest, the criminal court, jail, and probation/parole.

ICE Hold Request Also called an ICE detainer or immigration hold, an ICE hold request is a notice from ICE to a local law enforcement agency, asking

Illegal Reentry A federal offense criminalizing anyone who enters, attempts to enter, or is found in the U.S. after having been deported or denied admission. People who illegally reenter after having been ordered removed for an aggravated felony can face a criminal sentence of up to 20 years in prison.

Immigration and Customs Enforcement (ICE) The largest investigative arm of the Department of Homeland Security. ICE's Office of Detention and Removal (DRO) is in charge of identifying, detaining, and deporting noncitizens in the US. ICE deportation officers also prosecute illegal reentry cases, monitor immigrants who are on supervised release, and search for and deport absconders. In 2008, ICE physically deported 385,886 immigrants. In 2009, ICE detained around 380,000 people in about 350 facilities across the country at a cost of more than $1.7 billion.

Institutional Removal Program (IRP) Established in 1988 as the Institutional Hearing Program and renamed the Institutional Removal Program in 1996. Under the IRP, immigration agents initiate and complete removal hearings while an immigrant is serving a criminal sentence, so that the person can be deported more quickly upon completion of the sentence. Under the IRP, hearings happen before an immigration judge either in person at a courtroom set up within the jail, or by a video linkup, where the person facing deportation, judge, attorney(s), and witnesses may be in different locations. IRP in theory lessens the amount of time a noncitizen spends in immigration detention. In practice, IRP hearings make it even more difficult for immigrants to assert their rights and defenses.

LEA A common acronym for law enforcement agency, which could be a municipal police department, county sheriff's department, campus police, state troopers, or any local or state agency with law enforcement responsibilities.

Lawful Permanent Resident (Green Card Holder) A noncitizen who has been lawfully admitted to the United States to live and work permanently, but still subject to deportation upon violation of the immigration laws. A "green card" is the identification card for lawful permanent residents, but this status is not lost just because the physical card expires or gets misplaced.

National Crime Information Center (NCIC) Database Nationwide FBI-operated computerized database, which was originally created to enable federal, state, and local law enforcement to identify suspected criminals with outstanding warrants. In 2002, Attorney General Ashcroft authorized using this criminal tool for civil immigration purposes, by entering the names of absconders and individuals who did not comply with special registration into the NCIC system; the legality of this practice is being challenged.

Noncitizen An individual who was born outside of the US unless the person acquired or derived US citizenship or naturalized. Noncitizens include green card holders, refugees, asylees, temporary visitors, and the undocumented. Acquisition of US citizenship occurs when a person is born outside of the US but has a US parent(s) at birth and thus automatically acquires citizenship. Derivation of US citizenship occurs when a person is born outside of the US to noncitizen parent(s) but automatically becomes a citizen when the person's parent(s) became US citizen(s) while the person is still a minor. Naturalization occurs when a person is born outside of the US but lawfully immigrated to the US and later goes through the process of applying for citizenship, passing a civics test, and being sworn in.

Post-Conviction Relief Noncitizens convicted of crimes that affect their immigration status may seek post-conviction relief, ways to remove or alter your criminal conviction so that it does not affect your immigration status.

Prosecutorial Discretion The authority of the Departments of Justice and Homeland Security to refrain from placing a potentially deportable person in deportation proceedings; suspend or even terminate a deportation proceeding; postpone a deportation; release someone from detention; or de-prioritize the enforcement of immigration laws against someone because it does not serve enforcement interests.

Raids An informal term used to describe operations in which the Department of Homeland Security questions and/ or arrests people whom they suspect may be deportable en masse. Typically, DHS claims to be looking for particular people and then arrests many more that agents happen to encounter. Raids have resulted in local crises as children have been left waiting for their detained parents and families have been permanently separated. Reports abound of ICE picking up U.S. citizens and non-deportable people. In several cases, local governments – including at least one which cooperated with DHS during a raid – have complained about misinformation and sloppy and indiscriminate work by DHS agents.

Secure Communities An ICE ACCESS program that checks a person's fingerprints against both immigration and criminal databases at the time of arrest or booking. If a person is matched to a record indicating some immigration history, ICE and the jail are automatically notified. ICE then decides what enforcement action will be taken, including whether a detainer will be issued. The process from fingerprint submission to issuance of a detainer takes approximately 4 hours. ICE enters into agreements with the State Identification Bureaus, which process fingerprints and then provides Standard Operating Procedures to the police and jail. By January 2010, this program was active in 116 jurisdictions in 16 states. ICE plans to have Secure Communities implemented in every state by 2013.

Undocumented An informal term to describe noncitizens who have no government authorization to be in this country. Undocumented people include people who crossed the border without permission, people who came on valid visas but then remained past their authorized period of stay, and former green card holders who were ordered deported. An "undocumented" person might have received work authorization (for example, upon filing an application for asylum or other status), but that does not necessarily mean s/he is considered "documented" for immigration purposes.