



June 27, 2017

The Honorable Paul D. Ryan
Speaker
U.S. House of Representatives
H-232 The Capitol
Washington, D.C. 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204 The Capitol
Washington, D.C. 20515

**Re: ACLU Opposes H.R. 3003 (No Sanctuary for Criminals Act)
and H.R. 3004 (Kate's Law)**

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Dear Speaker Ryan and Minority Leader Pelosi:

On behalf of the American Civil Liberties Union ("ACLU"), we submit this letter to the House of Representatives to express our strong opposition to H.R. 3003, the No Sanctuary for Criminals Act, and H.R. 3004, Kate's Law.

No Sanctuary for Criminals Act (H.R. 3003)

H.R. 3003 conflicts with the principles of the Fourth Amendment.

H.R. 3003 defies the Fourth Amendment by amending 8 USC Section 1373 of the Immigration and Nationality Act ("INA") to force localities to comply with unlawful detainer requests or risk losing federal funding. This is despite the fact that an "increasing number of federal court decisions" have held that "detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment,"¹ as recognized by former Department of Homeland Security Secretary Jeh Johnson in 2014.²

¹ See *Miranda-Olivares*, 2014 WL 1414305, at *11 (D. Ore. Apr. 11, 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"). See also *Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Gonzalez v. ICE*, Case No. 2:13-cv-0441- BRO-FFM, at 12-13 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiakowski*, ---F. Supp. 2d ---, 2014 WL 1795631, at *10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, Civ. Action No. 10-cv-068 15, 201 2 WL 1080020, at *14 (E.D. Penn. March 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable cause).

Disturbingly, H.R. 3003 seeks to penalize the 600+ localities that abide by the Fourth Amendment. These jurisdictions have recognized that by entangling local authorities and federal immigration enforcement, immigration detainers erode trust between immigrant communities and local law enforcement. In this way, immigration detainers ultimately undermine public safety, as entire communities become wary of seeking assistance from police and other government authorities that are supposed to provide help in times of need. Thus, by forcing jurisdictions to comply with unlawful detainer requests, H.R. 3003 will only make communities less safe, not more.

H.R. 3003 would also amend Section 287 of the INA to allow the Department of Homeland Security (“DHS”) to take custody of a person being held under a detainer within 48 hours (excluding weekends and holidays) “but in no instance more than 96 hours” following the date that the individual would otherwise be released from criminal custody. This, again, raises serious Fourth Amendment concerns, as the Supreme Court has stated that the Constitution requires a judicial finding of probable cause within 48 hours of arrest.³ This provision would disregard the Court’s ruling entirely and allow a local law enforcement agency to hold a person for up to 7 days before requiring DHS intervention--and never requiring the person be brought before a judge for a probable cause hearing.

Protection against unreasonable detention by the government is the bedrock of the Constitution's Fourth Amendment, which provides that the government cannot hold anyone in jail without getting a warrant or approval from a neutral magistrate. This constitutional protection applies to everyone in the United States – citizen and immigrant alike.

Immigration detainers, however, do not abide by these standards. Detainers are one of the key tools that DHS uses to apprehend individuals who come in contact with local and state law enforcement agencies. An immigration detainer is a written request from DHS to that local law enforcement agency, requesting that they detain an individual for an additional 48 hours after the person’s release date, in order to allow immigration agents extra time to decide whether to take that person into custody for deportation purposes.

DHS’ use of detainers to imprison people without due process, without any charges pending, and without probable cause of a criminal violation flies in the face of our Fourth Amendment protections. Policies that allow DHS to detain people at-will are ripe for civil and human rights violations and have resulted in widespread wrongful detentions, including detentions of U.S. citizens.⁴ That is why many

rev’d and remanded on other grounds, 745 F.3d 634 (reversing district court's finding of no municipal liability); *Uroza v. Salt Lake City*, No. 2: 11 CV713DAK, 2013

WL 653968, at *6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). Cf *Makowski v. United States*, ---F. Supp. 2d ---, 2014 WL 1089119, at *IO (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

² Memorandum from DHS Secretary Jeh Charles Johnson for Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, (Nov. 20, 2014)(Secure Communities), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

³ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

⁴ See, e.g., *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D. Pa. 2012), rev’d on other grounds, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), available at https://www.aclu.org/sites/default/files/field_document/123991p.pdf; and, *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014), affirmed, *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015), affirmed, *Morales v. Chadbourne*, No. CV 12-301-M-LDA, 2017 WL 354292 (D.R.I. Jan. 24, 2017), available at <https://www.aclu.org/legal-document/morales-v-chadbourne-memorandum-and-order>.

of the 600+ localities targeted by H.R. 3003 have decided not to execute a DHS immigration detainer request unless it is accompanied by additional evidence, a determination of probable cause, or a judicial warrant.

Unfortunately, H.R. 3003 does nothing to address the fundamental constitutional problems plaguing DHS's use of immigration detainers. Rather than fix the constitutional problems by requiring a judicial warrant, the bill perpetuates the unconstitutional detainer practices and forces the federal government to absorb legal liability for the constitutional violations which will inevitably result. This is irresponsible lawmaking. Instead of saddling taxpayers with the liability the federal government will incur from Fourth Amendment violations, Congress should end the use of DHS's unconstitutional detainer requests.

H.R. 3003 violates the Due Process Clause by allowing DHS to detain people indefinitely without a bond hearing.

Section 4 of H.R. 3003 radically expands our immigration detention system by amending Section 236(c) of the INA to authorize mandatory detention “without time limitation.” This empowers DHS to detain countless immigrants for as long as it takes to conclude removal proceedings—even if that takes years—without the basic due process of a bond hearing to determine if their imprisonment is even justified. This is a clear constitutional violation, as the federal courts have overwhelmingly held that jailing immigrants for months and years without bond hearings raises serious problems under the Due Process Clause.⁵

Although the bill claims to provide for the “detention of criminal aliens,” it massively expands mandatory detention to people with no criminal record whatsoever, including immigrants who lack legal papers or who overstay a tourist visa. The “lock ‘em up” approach to immigration enforcement is cruel, irrational, and unconstitutional. The Supreme Court has permitted brief periods of mandatory detention only in cases where individuals are charged with deportation based on certain criminal convictions.⁶ The Court has not endorsed the mandatory lock-up of people who have never committed a crime.

Kate's Law (H.R. 3004)

H.R. 3004 is piecemeal immigration enforcement that expands America's federal prison population and lines the coffers of private prison companies.

Increasing the maximum sentences for illegal reentrants is unnecessary, wasteful, and inhumane. H.R. 3004 envisions a federal criminal justice system that prosecutes asylum-seekers, persons providing humanitarian assistance to migrants in distress, and parents who pose no threat to public safety in returning to the U.S. to reunite with children who need their care (individuals with children in the United States are 50 percent of those convicted of illegal reentry).

⁵ See, e.g., *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003); *Rodriguez v. Robbins*, 806 F.3d 1060 (9th Cir. 2015), cert. granted *Jennings v. Rodriguez*, No. 15-1204 (2016); *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016).

⁶ *Demore v. Kim*, 538 U.S. 510 (2003).

Current law already imposes a sentence of up to 20 years on anyone convicted of illegally reentering the country who has committed an aggravated felony. U.S. Attorneys' Offices aggressively enforce these provisions. According to the U.S. Sentencing Commission, immigration prosecutions account for 52 percent of all federal prosecutions—surpassing drugs, weapons, fraud and thousands of other crimes. Nearly 99 percent of illegal reentry defendants are sentenced to federal prison time.

H.R. 3004 would drastically expand America's prison population of nonviolent prisoners at a time when there is bipartisan support to reduce the federal prison population. It offends due process by cutting off all collateral attacks on unjust prior deportation orders, despite the Supreme Court's contrary ruling in *United States v. Mendoza-Lopez*⁷. Profiteering by private prison companies has been the main consequence of border-crossing prosecutions, which the Government Accountability Office and the DHS Office of Inspector General have criticized as lacking sound deterrent support.

H.R. 3004 is an integral part of this administration's mass deportation and mass incarceration agenda. Longer sentences for illegal reentry are not recommended by any informed federal criminal-justice stakeholders; rather they represent this administration's anti-immigrant obsession and would expensively expand substandard private jail contracting despite the life-threatening conditions in these facilities.

In conclusion, H.R. 3003 and H.R. 3004 are fraught with constitutional problems that threaten the civil and human rights of our immigrant communities, undercut law enforcement's ability to keep our communities safe, and would balloon our federal prison population by financing private prison corporations. Rather than taking a punitive approach to local law enforcement agencies that are working hard to balance their duties to uphold the Constitution and to keep their communities safe, Congress should end DHS's unconstitutional detainer practices or fix the constitutional deficiencies by requiring judicial warrants for all detainer requests. Congress should also repeal mandatory detention so that all immigrants receive the basic due process of a bond hearing and reject any attempt to unfairly imprison individuals who are not a threat to public safety.

For more information, please contact ACLU Director of Immigration Policy and Campaigns, Lorella Praeli (202-675-2328; lpraeli@aclu.org).

Sincerely,



Faiz Shakir
National Political Director



Lorella Praeli
Director of Immigration Policy and Campaigns

⁷ 481 U.S. 828 (1987).