

June 23, 2010

Assistant Secretary John T. Morton  
US Immigration and Customs Enforcement  
500 12<sup>th</sup> Street, SW  
Washington, DC 20536

Dear Assistant Secretary Morton:

We are writing to provide our views as Immigration and Customs Enforcement (ICE) develops guidance for its issuance of immigration detainers. ICE's implementation of its own enforcement priorities is receiving well-deserved critical scrutiny. In April 2010 the Department of Homeland Security's (DHS) Inspector General reported that there are serious problems throughout the operation of ICE's 287(g) agreements with state and local law enforcement agencies (LEAs), including ICE's failure to "[d]evelop procedures to ensure that . . . resources are allocated according to ICE's priority framework."<sup>1</sup> Moreover, despite repeated statements by ICE leadership that "criminal aliens" are those convicted of crimes – not individuals arrested or charged – with priority given to the most serious Level 1 offenders, ICE announced in November 2009 that its flagship Secure Communities program had identified more than 111,000 criminal aliens in local custody, of whom only about 11,000 (10%) were *charged with* or convicted of Level 1 crimes. Inextricably linked to the 287(g) and Secure Communities programs' failings is the widespread use by ICE of immigration detainers.

An immigration detainer is an official request from ICE to another LEA, such as a federal, state, or local prison/jail, that the LEA notify ICE prior to releasing an individual from custody. When ICE "issues" a detainer, the detainer is effective until a maximum of 48 hours after the individual's custodial term ends, excluding weekends and holidays. If a person is scheduled to be released from jail on a Tuesday, for example, he or she can be detained until Thursday pursuant to the ICE detainer in anticipation of ICE assuming custody for an immigration violation. A detainer itself does not initiate immigration proceedings or allege that the individual concerned is removable from the United States.

In written answers to the House Appropriations Homeland Security Subcommittee last year, DHS stated that it had not "issued internal or external guidance on detainer issuance."<sup>2</sup> We believe uniformity and due process considerations must inform DHS's long-awaited reform of what is currently an arbitrary and needlessly harmful detainer regime. In the first section of this letter, we emphasize that ICE – and any other DHS officials involved in detainer issuance – should approach each decision whether to issue a detainer with much greater attention to the governing statute and regulations and to individualized analysis of a case's circumstances than currently takes place. Moreover, ICE should provide those who are issued detainers prompt written notice and an immediate opportunity to contest the detainer in a meaningful fashion. In

---

<sup>1</sup> DHS Office of Inspector General Report on the 287(g) Program (Apr. 2010), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf), 45.

<sup>2</sup> ICE answer to question for the record by Chairman Price following Apr. 2, 2009 hearing on "Priorities Enforcing Immigration Law," in *Department of Homeland Security Appropriations 2010*, 1251 (pdf p.1253), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2010\\_happ\\_hom\\_3&docid=f:52999.pdf#page=5](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2010_happ_hom_3&docid=f:52999.pdf#page=5)

the second section of the letter, we ask DHS to reconsider how far detainers have become unmoored from the limited circumstances their authorizing statute and regulations contemplate. Finally, we summarize our recommendations for the guidance and suggest several practical steps ICE should take to curtail state and local facilities' rampant detainer abuses.

## **I. ICE must introduce procedural protections to remedy its haphazard and harmful use of detainers.**

Justice Anthony Kennedy recently exhorted the government to remember that “[t]o a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake.”<sup>3</sup> While detainers may appear innocuous to some, their cumulative impact on length and conditions of custody is enormous. The individuals for whom ICE issues detainers are frequently encountered in state criminal justice proceedings. Detainers affect and interfere with every aspect of an individual’s state criminal case, from bail to eligibility for treatment, social services, and detention alternatives, and even snare prosecution witnesses.

For example, detainers can be an adverse factor in bail determination<sup>4</sup> and they can prevent participation by inmates in substance abuse treatment programs.<sup>5</sup> If ICE assumes custody of an individual after his or her state court bail determination, the individual’s attendance at state court hearings and fidelity to bail conditions is often jeopardized through no choice of his or her own. The state court may issue a bench warrant and order bail to be forfeited for persons in this situation who are found to be flouting state court bail conditions. All these barriers lead to much longer jail stays for inmates with detainers, at state and local expense: A four-year study in Travis County, Texas found that detainers led to jail terms three times longer than those for comparable inmates without a detainer.<sup>6</sup>

Problems with detainers abound. To list a few: (1) When ICE issues but then fails to act on a detainer, the additional 48 or more hours of detention before an individual’s release have been for naught, in spite of Fourth and Fifth Amendment protections against warrantless arrests and unlawful detention. (2) State and local penal authorities frequently violate the 48-hour rule by continuing to hold an individual beyond the period allowed by regulation, *see* 8 C.F.R. § 287.7(d), as litigation in several states has brought to the fore.<sup>7</sup> (3) In no small numbers, American citizens and lawful permanent residents who are not removable have been issued detainers. With a 5% Secure Communities false positive “hit rate” for U.S. citizens whose fingerprints were scanned before November 2009, the burden is on ICE to show that these 5,880 U.S. citizens were not issued detainers.<sup>8</sup>

---

<sup>3</sup> *Barber v. Thomas* (opinion filed June 7, 2010) (Kennedy, J., dissenting).

<sup>4</sup> *See, e.g., State v. Fajardo-Santos*, 973 A.2d 933 (N.J. 2009).

<sup>5</sup> *See, e.g., Association of the Bar of the City of New York*, “Immigration Detainers Need Not Bar Access to Jail Diversion Programs.” (June 2009).

<sup>6</sup> Andrea Guttin, “The Criminal Alien Program: Immigration Enforcement in Travis County, Texas.” Immigration Policy Center (Feb. 2010), 12.

<sup>7</sup> *See, e.g., Quezada v. Mink*, No. 10-879 (D. Col.) (filed Apr. 21, 2010); *Urbina v. Rustin*, No. 08-0979 (W.D. Pa. 2008) (dismissed as moot); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009) (\$145,000 settlement).

<sup>8</sup> Julia Preston, “U.S. Identifies 111,000 Immigrants with Criminal Records.” *New York Times* (Nov. 13, 2009).

ICE's current method of issuing detainers has not only imposed unwarranted detention on thousands of people, it has also built up considerable ill-will among state criminal justice stakeholders whose jurisdiction and pending proceedings are given short shrift by ICE. To ameliorate these failings, ICE must be far more selective about the detainers it issues. Indeed, if ICE fails to hew to a clear and publicized evidentiary standard to guide the decision whether to issue a detainer, ICE will continue to disrupt state prosecutions and never dispel the idea that it uses insufficient and invidious grounds – such as a person's last name – to justify removability.<sup>9</sup> In a nation full of immigrants, shortcuts like place of birth are equally unacceptable evidence for the additional deprivations of liberty a detainer permits.

**a. ICE must implement the evidentiary standard for removability contained in its regulations for warrantless arrests, as well as the regulations' exigency requirement.**

The first step DHS should take to remedy its unacceptable current practice is to apply to detainers the evidentiary standard contained in its own regulations for warrantless arrests. The regulations provide the following definition: "A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, *for the purpose of arresting and removing the alien.*" 8 C.F.R. § 287.7(a) (emphasis added). Because detainers are a means to communicate ICE's intent to arrest an alleged non-citizen, they should be used only when ICE has sufficient *objective* evidence that would justify an arrest, evidence which is defined as a "reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States." *Id.* § 287.8(c)(2)(i); *see also* 8 U.S.C. § 1357(d)(1) (requiring referring law enforcement officials to have "reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States").

Moreover, ICE is obliged to follow the regulations' requirement that "[a] warrant of arrest shall be obtained *except* when the designated immigration officer has *reason to believe that the person is likely to escape* before a warrant can be obtained." 8 C.F.R. § 287.8(c)(2)(ii) (emphasis added). In the absence of exigent circumstances suggesting a flight risk, as described in this regulatory exception, ICE may not use detainers to avoid complying with the statutory and regulatory standards governing warrants. *See* 8 U.S.C. § 1226; 8 C.F.R. § 236.1(b). Yet ICE issues detainers without requiring bona fide evidence of removability and the exigency necessary for ICE to avoid obtaining an arrest warrant. The statutory and regulatory detainer framework is offended by ICE's current illegal practice, which also operates without any due process protections.

**b. ICE must abide by the regulations' requirement that a detainer be issued only if the individual concerned is in the requesting agency's custody on an independent basis.**

The regulations require that detainers be issued only for individuals otherwise lawfully in custody: "A detainer serves to advise another law enforcement agency that the Department seeks

---

<sup>9</sup> *See, e.g.,* Vic Vela, "Santa Fe Jail Shields Its Prisoners from ICE." Albuquerque Journal (May 26, 2010) (Santa Fe County jail director Annabelle Romero "claims the feds use such factors as Mexican-sounding names to decide which inmates they want to interview. 'The individuals they do select to interview are mostly Hispanic and have hyphenated names,' Romero said. 'The way it was conducted I thought was unfair.' Romero also says ICE officials don't properly identify themselves when interviewing prisoners, and prisoners are left confused as to whom they are talking to.").

custody of an alien *presently in the custody of that agency . . .*” 8 C.F.R. § 287.7(a) (emphasis added). By issuing detainers without requiring that state and local law enforcement agencies have an independent lawful basis for custody, DHS violates this regulatory language and thereby encourages and abets pre-textual law enforcement practices, including racial profiling.

DHS’s predecessor agency, the Immigration and Naturalization Service (INS), understood when it promulgated 8 C.F.R § 287.7 that detainers apply only to persons in the custody of another law enforcement agency for an independent reason. The INS commentary regarding § 287.7 stated:

The term “arrested by a federal, state, or local law enforcement official” has been defined [by Congress] to require that an alien must have been (1) physically taken into custody, and (2) officially booked or charged, or (3) accorded an initial appearance before a judicial officer where the alien has been informed of the charges and the right to counsel. The term has been defined in this manner to *ensure that the Service is not required to react to situations involving assumption of custody, and possible removal, of an alien whose civil rights may have been violated through illegal or unconstitutional detention by law enforcement officials*. Requiring that the alien(s) be officially processed minimizes such concerns.

53 Fed. Reg. 9281-01 (Mar. 22, 1988) (emphasis added). In 1990, the INS noted that a “detainer is merely a notice to an alien’s custodian that the Service is interested in assuming custody of the alien *when he is released from his incarceration.*” 55 Fed. Reg. 43326 (Oct. 29, 1990) (emphasis added). Four years later, the INS cited commentary that “[a] detainer is the mechanism by which the Service requests that the detaining agency notify the Service of the date, time, or place of release of an alien *who has been arrested or convicted under federal, state, or local law.*” 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994) (emphasis added). ICE’s current detainer practice conflicts with the agency’s consistent and correct interpretation that the Immigration and Nationality Act requires detainers to be issued only when the requesting agency has an independent basis for custody.

**c. ICE must provide detainees who are issued detainers after convictions with full advisories based on the regulatory requirements for warrantless arrests, and a meaningful procedure to contest the detainers.**

Only alleged non-citizens who have been *convicted* of crimes should be issued detainers, consistent with ICE’s definition of “criminal aliens” as excluding those arrested or charged with offenses. As the Assistant Secretary for ICE stated in his March 30, 2010 letter to advocacy groups, “let there be no doubt, when I say ‘criminal aliens’ I am referring to aliens convicted of crimes. . . . [O]nly those aliens convicted of crimes are regarded as ‘criminal aliens’ for purposes of our enforcement priorities and removal metrics.” Secure Communities Executive Director David Venturella testified last year that “the highest risk category includes those individuals who have been *convicted* of violent crimes such as murder, manslaughter, rape, robbery, and kidnapping or major drug offenses. This category is our highest priority and *the main focus of our efforts.*”<sup>10</sup> (Emphasis added.) ICE must align its detainer issuance policy with its stated

---

<sup>10</sup> [http://www.dhs.gov/ynews/testimony/testimony\\_1239800126329.shtm](http://www.dhs.gov/ynews/testimony/testimony_1239800126329.shtm)

enforcement priorities, including respect for ICE’s commitment “to exercise discretion through its field offices in taking enforcement action in cases of aliens convicted of [less serious] offenses as each situation demands.”<sup>11</sup> At present detainers are not concentrated on ICE priorities; for example in Travis County, Texas a majority of those issued detainers were arrested for a misdemeanor.<sup>12</sup>

In cases where ICE determines that a detainer is appropriate to issue consistent with its enforcement priorities, a DHS official should notify the detainee immediately, in writing in a language the detainee is known to understand. The notification should detail a procedure for contesting the detainer, with prompt adjudication of claims and a written decision. ICE should also include the advisories required in 8 C.F.R. § 287.3 for alleged non-citizens arrested without warrants, namely: (i) explaining the reasons for the detainer; (ii) communicating the alleged non-citizen’s right to be represented in immigration proceedings at no cost to the government; (iii) providing a list of available local free legal services with accurate contact information; and (iv) advising the alleged non-citizen that any statement made to DHS or jail authorities may be used against him or her in a subsequent proceeding. The detainee should acknowledge receipt and understanding of the advisories in writing. No questioning of an alleged non-citizen, prior to or after the issuance of a detainer, should take place without these advisories.

The detainer notification should state what information the detainee can provide to establish that the detainer is not applicable in his or her case, with specific instructions on how to submit that information. In addition, ICE should immediately provide all individuals issued detainers written instructions in a language they are known to understand on how to file telephonic complaints with DHS’s Office of Civil Rights and Civil Liberties regarding breaches of the 48-hour maximum additional detention period permitted by a detainer.

## **II. DHS must reevaluate whether detainers are being used as intended in the authorizing statute and regulations.**

In the previous section we detailed why ICE’s current detainer practice is both contrary to law and unjust. There is also ample indication in the governing statute and regulations that ICE issues detainers far more expansively than the uses for which they are authorized. While the ACLU of Northern California is currently litigating this overbreadth in the Northern District of California,<sup>13</sup> regardless of ICE’s perception of the scope of its detainer authority, the statute and regulations specifically addressing detainers clearly do not envision their profligate and scattershot deployment.

8 U.S.C. § 1357, the fount of detainer authority, is expressly limited to “[d]etainer of aliens for violation of controlled substances laws.” *See also* 8 C.F.R. § 287.1(d) (defining “arrested” in the statute as referring to controlled substances violations that have been charged). A further limitation is found in the regulations’ definition of a detainer as “a request that [a law enforcement] agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical

---

<sup>11</sup> ICE Model Secure Communities Memorandum of Agreement, available at [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf), 3.

<sup>12</sup> *See Criminal Alien Program*, supra, 9.

<sup>13</sup> *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, No. 08-4220 (N.D. Cal.).

custody is either impracticable or impossible.” *Id.* § 287.7(a). ICE has not demonstrated how the vast number of detainers it issues meets this requirement of impracticability or impossibility.

ICE practice is therefore at odds both with the mandatory prerequisites for detainers contained in the agency’s regulations, as well as the statutory framework for detainer issuance. Without reform, ICE will continue to impose hardship illegally on those subject to detainers and expose itself and its law enforcement partners to liability.

### **III. DHS should implement the following changes immediately.**

- ICE must cease issuing detainers to persons arrested or charged with crimes and prioritize serious convicted offenders who threaten public safety and/or national security.
- ICE must apply the evidentiary standard for removability contained in its regulations for warrantless arrests, as well as the regulations’ exigency requirement.
- ICE must abide by the regulations’ requirement that a detainer be issued only if the individual concerned is in the requesting agency’s custody on an independent basis.
- ICE must provide detainees who are issued detainers with full advisories based on the regulatory requirements for warrantless arrests, and a meaningful procedure to contest the detainers. ICE should also immediately provide each detainee with written instructions on how to file telephonic complaints with DHS’s Office of Civil Rights and Civil Liberties regarding breaches of the 48-hour rule.

In addition, we urge DHS to take these practical steps to improve state and local facilities’ performance with respect to detainers:

- Communicate in writing to all facilities in which detainers have been issued that the 48-hour rule is mandatory and that DHS will suspend its issuance of detainers in facilities that do not comply.
- Amend Form I-247 “Immigration Detainer – Notice of Action” to require a jailer specifically to acknowledge in each case that he or she understands the 48-hour rule and must release the detainee after that period.
- Ensure that all state and local facilities in which detainers are issued have staff trained by DHS on an ongoing basis in detainer law and procedures, and provide their staff with accurate written detainer policies that have been reviewed by DHS.
- Perform annual reviews of all state and local facilities in which detainers are issued to ensure they are complying with all applicable regulations, including the 48-hour rule and the requirement that an independent basis for custody exist before a detainer is requested.

-----

While we are heartened that ICE is working to produce detainer guidance and bring some order to this troublingly unregulated aspect of immigration enforcement, we are disappointed at ICE’s lack of consultation with affected stakeholders despite their repeated requests for an opportunity to offer input. The issues raised in this letter are vital for DHS to address before ICE

finalizes detainer guidance so that consistency, legality, and fairness are introduced to the process of issuing detainers. It is a dangerous illusion to believe that detainers are a costless boon to ICE. State and local criminal justice interlocutors deserve more respect from DHS for their legal obligations. Detainees must be accorded procedural protections and individualized consideration before a detainer is issued to avoid needless imprisonment and other hardship. Detainers have departed so drastically from their statutory and regulatory descriptions as to become unrecognizable. It is past time for DHS to rectify this deplorable situation.

Thank you for your consideration of these matters. If you have any questions, please don't hesitate to contact Joanne Lin, Legislative Counsel at the ACLU, at [jlin@dcacclu.org](mailto:jlin@dcacclu.org) or (202) 675-2317. We look forward to a response and further discussions.

Sincerely,

American Civil Liberties Union  
American Immigration Council  
American Immigration Lawyers Association  
National Immigration Forum  
National Immigrant Justice Center  
National Immigration Law Center  
National Immigration Project  
Rights Working Group

CC.

David Martin, DHS Office of General Counsel  
Esther Olavarria, DHS Office of Policy  
Melissa Crow, DHS Office of Policy  
Margo Schlanger, DHS Office for Civil Rights and Liberties  
Beth Gibson, ICE Office of the Assistant Secretary  
Andrew Lorenzen-Strait, ICE Office of Policy  
Phyllis Coven, ICE Office of Detention Policy and Planning  
Felicia Escobar, White House Domestic Policy Council  
Cecilia Muñoz, White House Office of Intergovernmental Affairs  
Stephanie Valencia, White House Office of Public Engagement  
Tino Cuellar, White House Domestic Policy Council