Issue Brief

Immigration Detainers and Local Discretion

State and local law enforcement agencies throughout California regularly receive immigration detainers (also known as "immigration holds" or "ICE holds") from the Department of Homeland Security (DHS), Immigration and Customs Enforcement Agency (ICE). An immigration detainer is a form sent to a local law enforcement agency (LLEA), which advises the LLEA that ICE intends to investigate an individual in the LLEA's custody for possible deportation. The detainer requests that the LLEA notify ICE when the individual is due to be released, and that the LLEA continue holding the individual beyond the scheduled time of release for up to 48 hours, excluding weekends and holidays, to give ICE extra time to decide whether to take the person into immigration custody. Many local law enforcement agencies (LLEAs) throughout the state believe immigration detainers are mandatory, a perception that has been encouraged by ICE through its use of vague and conflicting language. In fact, however, immigration detainers are merely requests, enforceable at the discretion of the local jail. Unlike warrants and criminal detainers, immigration detainers may be issued by individual ICE agents without the review of a judicial officer, and without meeting any evidentiary standard. As a result, they are frequently issued in error against non-deportable lawful immigrants and U.S. citizens. Further, the federal government neither reimburses nor indemnifies LLEAs for complying with immigration detainers.[1] Because immigration detainers raise serious policy and legal concerns, as discussed in greater detail below, it is important that LLEAs understand the degree of discretion available to them in determining how to handle an immigration detainer.

LEGAL FRAMEWORK

▪ Legal Authority

ICE's statutory authority to issue detainers for individuals in local or state criminal custody is found in 8 USC § 1357(d). Section 1357(d), entitled "Detainer of Aliens for Violation of Controlled Substances Laws," provides that ICE may issue a detainer upon request from a LLEA if an individual has been arrested for a violation of any law relating to controlled substances and the LLEA has a reason to believe that he/she does not have lawful status in the United States.

Purportedly acting pursuant to Section 1357(d), ICE has issued a regulation governing ICE detainers found at 8 CFR § 287.7. Section (a) of § 287.7 provides:

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[1] In a 2010 letter to Santa Clara County, ICE stated: "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 …." Letter from David Venturella, Assistant Director, U.S. Immigration and Customs Enforcement, to Miguel Márquez, County Counsel, County of Santa Clara [hereinafter "Venturella Letter"]. A copy of this letter is attached as Exhibit A for ease of reference.

> Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. 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. The detainer is a *request* that such 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 custody is either impracticable or impossible. 8 C.F.R. § 287.7(a) (emphasis added).

Section (d) of 8 CFR 287.7 further provides that once a detainer is lodged, LLEAs may detain the subject of the detainer for a period of time not to exceed 48 hours, excluding weekends and federal holidays.[2] 8 CFR § 287.7 is much broader than what Congress authorized in 8 USC § 1357(d) in that it provides for issuance of a detainer by ICE without a request from an LLEA and in any criminal matter (not merely cases involving an arrest for a controlled substances violation). There are no additional regulations governing ICE detainers other than § 8 CFR 287.7.

- Immigration Detainers are Requests

Although detainers are merely *requests*, enforceable at the discretion of local jails, ICE has encouraged the perception among LLEAs that immigration detainers may be mandatory by using vague and conflicting language.[3] For example, until very recently, ICE's I-247 form contained language that implied that state or local compliance was mandatory. It provided, "Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours…" (attached as Exh. B). In 2010, Santa Clara County Counsel wrote a letter to ICE asking whether detainers are "mandatory orders" or "mere requests that counties have discretion to enforce." In ICE's response letter, ICE Assistant Director, David Venturella stated that "ICE views an immigration detainer as a request..."[4]

After repeated requests from advocates to correct the language on the I-247 form to reflect the fact that local agencies have discretion when determining how to treat an immigration detainer, DHS released a new interim policy on detainers (attached as Exh. C) and a new I-247 form in August 2010 (attached as Exh. D). The interim policy describes detainers as "requests" and does not include any language to suggest that LLEAs are required to prolong an inmate or arrestee's detention based on the request. The new I-247 form also

[2] 8 C.F.R. § 287.7(d). Although the language of Section 287.7(d) can be read to imply that holding an individual for 48 hours pursuant to a detainer is mandatory, such a reading directly conflicts with the regulation's characterization of detainers as "requests" in § 287.7(a). Moreover, as is discussed in greater detail in this brief, ICE's most recent statements and basic Tenth Amendment, anti-commandeering principles make clear detainers are requests, exercised at the discretion of the local jail.

[3] ICE has benefited from this confusion by issuing immigration detainers as a matter of course and relying on state and local agencies to foot the bill associated with the extended detention and staff resources required to effectuate detainers. *See* Venturella Letter, *supra* fn. 1, Exh. A ("ICE does not reimburse localities for detaining any individual until ICE has assumed actual custody of the individual."); *see also* ACLU OF NOR. CAL., THE COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 25-26 (Feb. 2011) *available at:* http://www.aclunc.org/issues/criminal_justice/police_practices/costs_and_consequences_the_high_price_of_policing_immigrant_communities.shtml [hereinafter "COSTS AND CONSEQUENCES"].

[4] Venturella Letter, *supra.* fn. 1, Exh. A.

correctly characterizes the detainer as a "request," but it is unclear whether all ICE Enforcement and Removal officers as well as local officials deputized to issue immigration detainers pursuant to 8 U.S.C. 1357(g) are in fact using this updated form. Also, because of the long history of confusion and misunderstanding produced by the mandatory language of the older form, LLEAs may still be under the impression that compliance is mandatory.

The Tenth Amendment and constitutional commandeering principles make clear that immigration detainers can only be requests, not commands. The Tenth Amendment prohibits the federal government from coercing any state or local agency into utilizing its own resources for the purpose of enforcing a federal regulatory scheme, such as immigration.[5] Were the federal government to *require* state or local agencies to detain individuals at their own expense for federal civil immigration purposes, such a mandate would clearly run afoul of the Tenth Amendment.

Although immigration detainers are requests, there is widespread confusion by LLEAs about the legal basis of immigration detainers and their attendant legal obligations. In fact, in jurisdictions that are informed about the discretionary nature of detainers, local governments can – and do – refuse to enforce them. In New Mexico, San Miguel County and Taos County have adopted detainer policies which limit honoring immigration detainers to cases where federal reimbursement is available.[6]

[5] *See Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).
[6] Copies of the San Miguel and Taos policies are attached as Exhibits E and F, respectively.

- ## Distinguishing Immigration Detainers from Arrest Warrants and Criminal Detainers

An immigration detainer is not an arrest warrant. It does not purport to authorize the arrest or detention beyond 48 hours of an individual by a local law enforcement agency. Unlike criminal arrest warrants, immigration detainers are issued by the prosecuting agency itself[7] – not by a neutral, third-party adjudicator – and, unlike arrest warrants, they are not required to meet any standard of proof.[8] Unlike criminal detainers—which, pursuant to the Interstate Agreement on Detainers, are a means of seeking the transfer of an inmate serving a sentence in one jurisdiction to be brought to criminal trial in another jurisdiction, after the filing of a criminal complaint, information, or indictment—immigration detainers may be issued based solely on the civil immigration agency's interest in "investigating" a pre-trial detainee's immigration status, even if no formal proceeding has been initiated.[9]

[7] Any "immigration officer" can issue a detainer, including officers deputized to perform certain immigration functions under 8 U.S.C. 1357(g). *See* 8 C.F.R. 287.7(a).
[8] *See* 8 C.F.R. § 287.7 (failing to establish any probable cause requirement); Form I-274 Immigration Detainer – Notice of Action (providing that a detainer may be issued upon the "initiat[ion]" of an "investigation" into an individual's deportability).
[9] Cal. Penal Code § 1389 (codifying California's participation in Interstate Agreement on Detainers). As used in the Interstate Agreement on Detainers, a detainer is "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." *People v. Lavin*, 88 Cal. App. 4th 609, 613 (2001) (quoting *United States v. Mauro*, 436 U.S. 340, 359 (1978)); *People v. Garner*, 224 Cal. App. 3d 1363, 1369 (1990) (agreement does not apply to prisoners in pretrial

ICE's current practice is to issue detainers without making a finding of probable cause that an individual is deportable. As a result, detainers are routinely issued in error – for example, against U.S. citizens or legal permanent residents whose criminal history would not render them deportable.[10] Moreover, an immigration detainer does not indicate whether ICE will actually initiate removal proceedings against an individual, and in the event ICE does initiate removal proceedings, issuance of an immigration detainer does not in any way preclude a finding that the person in fact possesses valid immigration status or is eligible for immigration relief.

COST OF DETAINERS TO LOCAL AGENCIES

- Direct Costs of Detention

Local agencies expend significant resources to comply with the requests in an immigration detainer, including the cost of detaining individuals an additional 48 hours plus weekends and holidays after they would otherwise be released, administrative resources involved in receiving, maintaining, and effectuating these requests, and staff time in responding to ICE's requests for notification. The majority of the costs associated with immigration detainers are never reimbursed by the federal government.[11] State and local correctional agencies 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 of enforcing detainers. SCAAP provides partial federal reimbursement to local and state jails that detain non-citizens who (1) are undocumented, (2) are convicted of a felony or two misdemeanors, and (3) are detained four or more consecutive days.[12]

Thus 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 defendants.[13] While extended incarceration following an inmate's criminal sentence may be reimbursed to a limited degree through SCAAP, the

custody). *Cf. U.S. v. Ford*, 550 F. 2d 732, 737-40 (2nd Cir. 1977) (explaining uncertainty about future prosecution in other jurisdiction one of issues Interstate Agreement on Detainers was meant to address).

[10] Federal law provides that immigration detainers may only be issued "[i]n the case of an alien," however often ICE mistakenly places detainers on U.S. citizens. See 8 U.S.C. § 1357(d). The California Department of Corrections and Rehabilitation reported as of December 31, 2009 that 827 of the inmates with an actual or potential immigration hold in their custody reported they were born in the United States. Go to: http://blogs.sacbee.com/capitolalertlatest/2010/01/corrections-sta.html *See also* Associated Press, *Some citizens being held as illegal immigrants*, MSNBC, Apr. 13, 2009, http://www.msnbc.msn.com/id/30180729/ns/us_news-life/ (discussing the case of U.S. citizen, Pedro Guzman who was held on an immigration detainer in Los Angeles Sheriff's custody and subsequently deported).

[11] *See* Memo from Deputy County Counsel Anjali Bhargava, County of Santa Clara, to Supervisor George Shirakawa, Santa Clara County Board of Supervisors, "U.S. Immigration and Customs Enforcement's Secure Communities Program," Dec. 2, 2010, *available at* http://www.sccgov.org/portal/site/scc/boardagenda?contentId=c7facc4b3fe7c210VgnVCM10000048dc4a92____&agendaType=Committee%20Agenda (follow link to Agenda Item # 9).

[12] *See* U.S. Dept. of Justice, "Bureau of Justice Assistance: State Criminal Alien Program," http://www.ojp.usdoj.gov/BJA/grant/scaap.html.

[13] According to federal statistics, in Ventura County, non-citizens served 78,376 days in their jails in 2009.[13] At $126 a day, this cost Ventura County alone $9,875,376. In 2009, Ventura County received only $1,173,128 in SCAAP funding, covering only 12% of the total cost. Kevin Clerici, *Jail Funds Fall Short of County Expenses*, VENTURA COUNTY STAR, June 4, 2010, *available at* http://m.vcstar.com/news/2010/jun/04/federal-money-county-receives-for-housing-in/.

greatest concerns raised here are with detainers issued at the arrest stage, before any criminal conviction. Arrest-stage detainers are increasing through the Secure Communities program which is designed to identify arrestees for possible placement of an immigration detainer based on booking fingerprints. Other jail screening programs such as the informal jail practice of referring individuals to ICE based on country of birth information collected at booking also increase the potential for arrest-stage detainers.

- Indirect Costs Related to Immigration Detainers

In addition to direct costs LLEAs incur to house individuals pursuant to civil immigration-based detainers, detainers increase local costs by impacting bail and post-conviction housing decisions as well. Reports have shown that the average incarceration period for individuals with a detainer is significantly longer: the average length of incarceration in Travis County, Texas in 2007 was 21.7 days; for those with an ICE detainer, it was 64.6 days.[14] In New York City, controlling for race and offense level, noncitizens with an ICE detainer spend 73 days longer in jail before being discharged, on average, than those without an ICE detainer.[15] The presence of an immigration detainer also often prevents individuals from being able to post bail and having access to certain rehabilitative programs and other alternatives to detention. Thus, the presence of an immigration detainer directly impacts incarceration periods and diverts precious jail resources and bed space.

Another indirect cost comes to some LLEAs through an impact on police practices in the field. Research indicates that the existence of immigration screening programs in local jails can lead to racial profiling and increased arrests of persons perceived to be immigrants by field officers.[16] Field officers' knowledge of detainer practices may similarly lead to increased arrests for infractions, such as driving without a license, where discretion exists to issue a citation or make an arrest for identification purposes.[17] If LLEAs better understood their own discretion to enforce detainers in accordance with their own public safety priorities, they could also better control costs related to unnecessary stops and arrests.[18]

- Legal Liability

The widespread misinformation and confusion amongst law enforcement officials regarding detainers has also resulted in legal costs where local agencies knowingly or unknowingly violate federal laws governing detainers.[19] For example, litigation

[14] Andrea Guttin, *Criminals, Immigrants, or Victims? Rethinking the "Criminal Alien Program"* (May 2009) (unpublished thesis; on file with author).
[15] Aarti Shahani, Justice Strategies, *New York City Enforcement of Immigration Detainers Preliminary Findings* (October 2010), *available at* www.justicestrategies.org.

[16] Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (The Warren Institute on Race, Ethnicity and Diversity, Sept. 2009), www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.
[17] Cal. Veh. Code § 40302.
[18] *See* COSTS AND CONSEQUENCES, *supra* fn. 3, at 25-26.
[19] *See also* ACLU of Nor. Cal., et al., "Comment on ICE Draft Policy on Detainers," Sept. 30, 2010 (attached as Exh. G) (describing in detail issues specific to California

alleging Equal Protection, Due Process and Fourth Amendment violations is currently ongoing against ICE and the Sonoma County Sheriff's Office with respect to the Sheriff's acceptance of local custody based solely on immigration detainers, without any underlying criminal charges.[20] Throughout the state, advocates also report instances of jails holding individuals beyond the 48 hour period allowed under the regulations. When pressed about the basis for the continued detention, jail officials often reveal a lack of awareness of any limitation on the period of detention pursuant to an immigration detainer. This raises serious Fourth Amendment and Due Process concerns that have provided the basis for a number of lawsuits against local law enforcement agencies across the country. Currently, over half a dozen cases have been decided or are pending against local agencies that unlawfully detained individuals in excess of 48 hours.[21]

Additionally, because immigration detainers are merely requests, when a LLEA gives effect to a detainer, it is *electing* to hold the person, thereby potentially opening the agency up to liability if the detainer was wrongfully issued. Moreover, in electing to exercise the authority to detain based solely on an immigration detainer, local agencies are detaining individuals for up to four or five days on less than probable cause. In addition to the Fourth Amendment concerns raised by the lack of standards for prolonged detention for suspected civil violations, individuals whose detentions are prolonged based on immigration detainers are not given notice of the charges purportedly justifying the detention or an opportunity to be heard, raising serious Due Process concerns. In response to questions from local agencies about legal liability, ICE has very clearly said that it will not indemnify local agencies for costs or liability incurred as a result of wrongful detainers.[22]

- Public Safety Costs

Additionally, because immigration detainers provide a clear link between ICE and local law enforcement agencies, giving effect to immigration detainers can impose dangerous and unnecessary public safety costs. When local police participate in immigration enforcement, it harms public safety by discouraging immigrant witnesses and victims of crime from coming forward.[23] Community policing

relating to local law enforcement misuse or misunderstanding of detainers).

[20] *Committee for Immigrant Rights v. Sonoma County*, 2010 WL 841372, fn. 3 (N.D.Cal.) (March 10, 2010) (denying motions to dismiss constitutional and statutory challenges to enforcement of immigration detainers).

[21] *Harvey v. City of New York*, 07 Civ. 0343 (NG) (LB) (Oct. 30, 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); *Cacho et al. v. Gusman*, No. 11 Civ. 225 (E.D. La. filed Feb. 2, 2011) (civil rights action for damages based on violation of the 48-hour time period); *Quezeda v. Mink et al*., No. 10 Civ. 879 (D. Colo. Dec. 12, 2010) (same); *Florida Immigrant Coalition et al. v. Bradshaw*, No. 9 Civ. 81280 (S.D. Fla. filed Sept. 3, 2009) (same); *Ramos-Macario v. Jones et al.*, No. 10 Civ. 813 (M.D. Tenn. filed Sept. 28, 2010) (same); *Rivas v. Martin et al.*, No. 10 Civ. 197 (N.D. Ind. filed June 16, 2010) (same).

[22] Venturella Letter, *supra* fn. 3, Exh. A.

[23] *See, e.g.*, Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, Police Foundation, 11, Apr. 2009, http://www.policefoundation.org/strikingabalance/strikingabalance.html; Former Chief Bratton of Los Angeles

models that depend on fostering relationships of trust between immigrant groups and law enforcement agencies, are undercut by the underreporting of crimes by immigrant victims and witnesses who fear their interactions with police officers may lead to deportation. Also, as explained above, immigration screening programs in jails can lead to racial profiling, wasting scarce public safety resources on stops and arrests that do not further public safety goals.[24] Local agencies need to know that they can decline to enforce immigration detainers as a way to discourage pretextual stops and unnecessary arrests by officers who may otherwise target people who "look" undocumented.

CONCLUSION

LLEAs need guidance about the limited authority purportedly created by immigration detainers, guidance to prevent immigration-based detention beyond the 48-hour period and limiting the impact of immigration detainers on inmates' access to bail and jail services. In addition, given the various costs and liabilities of enforcing immigration detainers to LLEAs throughout the state, nearly if not all of which go unreimbursed by the federal government, many LLEAs might consider adopting internal policies regarding when immigration detainers will be given effect. Although a few agencies in the state are currently considering policies that limit enforcement of detainers, the widespread misunderstanding of the legal basis and nature of detainers prevents many other agencies that have otherwise adopted positive community policing measures from considering detainer policies. Guidance from the Attorney General would go a long way in educating LLEAs and ensuring that LLEAs are both following the law and making informed decisions about how best to align detainer policies with public safety and community policing priorities.

Police Department's comments explaining LAPD's decision not to participate in a 287(g) agreement, http://www.lapdonline.org/newsroom/content_basic_view/43388 (by "[b]reeding fear and distrust of authorities among some of our children could increase rates of crime, violence and disorder as those children grow up to become fearful and distrustful adolescents and adults"); National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070*, June 2010, http://www.nilc.org/immlawpolicy/locallaw/police-chiefs-oppose-sb1070-2010-06.pdf.

[24] Gardner & Kohli, *supra* fn.17.

Exhibit A

Secure Communities

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

Mr. Miguel Márquez
County Counsel
County of Santa Clara
70 West Hedding Street, Ninth Floor
San Jose, CA 95110-1770

Dear Mr. Márquez:

Thank you for your August 16, 2010, letter regarding U.S. Immigration and Customs Enforcement's (ICE) Secure Communities initiative. I appreciate the opportunity to discuss ICE's immigration enforcement policies with you and to respond to your questions.

As an overview, Secure Communities is ICE's comprehensive strategy to improve and modernize the identification and removal of criminal aliens from the United States. As part of the strategy, ICE uses a federal biometric information sharing capability to more quickly and accurately identify aliens when they are booked into local law enforcement custody. ICE uses a risk-based approach that prioritizes immigration enforcement actions against criminal aliens based on the severity of their crimes, focusing first on criminal aliens convicted of serious crimes like murder, rape, drug trafficking, national security crimes, and other "aggravated felonies," as defined in § 101(a)(43) of the Immigration and Nationality Act (INA). Under this strategy, ICE maintains the authority to enforce immigration law. The activation of biometric information-sharing capability in new jurisdictions enables ICE to identify criminal aliens before they are released from law enforcement custody into our communities, which strengthens public safety. ICE works with state identification bureaus to develop deployment plans for activating the biometric information sharing capability in their jurisdictions. Your specific questions about Secure Communities are answered below.

1. **Is there a mechanism by which localities can opt out?**

   As part of the Secure Communities activation process, ICE conducts outreach to local jurisdictions, which includes providing information about the biometric information sharing capability, explaining the benefits of this capability, explaining when the jurisdiction is scheduled for activation, and addressing any concerns the jurisdiction may have. If a jurisdiction does not wish to activate on the scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing by email, letter, or facsimile. Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date or removing the jurisdiction from the deployment plan.

a) Can you provide information on the Statement of Intent referenced in the cover letter accompanying the 2009 MOA?

ICE does not require local jurisdictions to sign Statements of Intent or any other document to participate in Secure Communities. The reference to the Statement of Intent in the cover letter to the MOA was an oversight. The MOA signed by the state of California makes no mention of a Statement of Intent, and ICE has advised the California Department of Justice that it will not be utilizing Statements of Intent.

b) Do you view the State of California as having the ability to exempt certain counties from the program under the 2009 MOA signed by ICE and the California Department of Justice?

ICE recognizes the California Department of Justice as the agency having the responsibility for the management and administration of the state's criminal data repositories, which includes development of and adherence to policies and procedures that govern their use and how information is shared with other state and federal agencies. Therefore, ICE defers to the California State Attorney General on how state, county, and local law enforcement agencies within the state of California will share biometric data under the MOA.

c) Have you allowed other localities of law enforcement agencies, either inside or outside California, to opt out or modify their participation in the program?

The Washington, D.C. Metropolitan Police Department is the only jurisdiction to date that has terminated its signed Memorandum of Agreement. As referenced by your letter, activated jurisdictions do not have to receive the "match responses" and Secure Communities, in coordination with the state identification bureaus and the FBI's Criminal Justice Information Services (CJIS) Division, has accommodated jurisdictions that requested not to receive that information.

d) What is the purpose of receiving the "match messages"? Do they require or authorize counties to take action with respect to arrested individuals?

The purpose of local law enforcement receiving a 'match message' is to provide any additional identity information about the subject, including aliases, from the DHS biometric database storing over 100 million records that may not have been available based only on a criminal history check. Additional identity information may further a law enforcement officer's open investigations and lead to improved officer safety. Receiving a 'match message' does **not** authorize or require any action by local law enforcement.

2. **Once Secure Communities is deployed in a locality, is the locality required to comply with detainers, and will you provide reimbursement and identification?**

    a) **Is it ICE's position that localities are required to hold individuals pursuant to Form I-247 or are detainers merely requests with which a county could legally decline to comply?**

ICE views an immigration detainer as a request that a law enforcement agency maintain custody of an alien who may otherwise be released for up to 48 hours (excluding Saturdays, Sundays, and holidays). This provides ICE time to assume custody of the alien.

    b) **Who bears the costs related to detaining individuals at ICE's request?**

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." The exception provided in section 287.7(e) stating that ICE shall not incur "fiscal obligation…except as provided in paragraph (d) of this section" only serves to authorize payment but does not require it. To the extent a payment is considered, it should only be made pursuant to a written agreement because, under INA § 103(a)(11), ICE pays detention costs when aliens are in its custody pursuant to "an agreement with a State or political subdivision of a State."

    c) **Will ICE reimburse localities for the cost of detaining individuals pursuant to Form I-247 beyond their scheduled release times? Will ICE indemnify localities for any liability incurred because of that detention?**

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 because the Anti-Deficiency Act prohibits such indemnity agreements by federal agencies.

3. **Is it ICE's position that localities where Secure Communities is deployed are legally required to:**

        i. **Inform ICE if a subject is to be transferred or released thirty days in advance of any release or transfer? If so, what is the legal basis for such a requirement?**

The notification to ICE of inmate transfer or release within thirty days is pursuant to ICE's request for that information. It is not a statutory requirement.

ii. Allow ICE agents and officers access to detainees to conduct interviews and serve documents? If so, what is the legal basis for such a requirement?

INA § 238, 8 U.S.C. 1228, provides for the availability of special removal proceedings at federal, state, and local correctional facilities for aliens convicted of certain criminal offenses. Such programs require ICE officers to conduct inmate interviews to determine alienage and any possibilities for relief or protection from removal. The statute does not require state or local jurisdictions to participate in such programs.

iii. Assist ICE in acquiring information about detainees? If so, what is the legal basis for such a requirement?

Assisting ICE in acquiring detainee information is not a legal requirement.

Thank you again for your letter. If you have any additional questions, please feel free to contact me at (202) 732-3900.

Sincerely yours,

David J. Venturella

David Venturella
Assistant Director

Exhibit B

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: _____

Exhibit C

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.

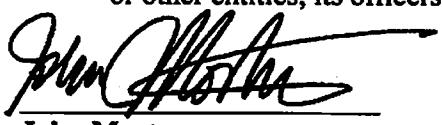
5.1. INA §§ 103(a)(3), 236, 241, 287.

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

Exhibit D

U.S. Department of Homeland Security

Immigration Detainer - Notice of Action

File No:

Date:

TO: (Name and title of Institution)

FROM: (Office Address)

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

You are advised that the action noted below has been taken by the U.S. Department of Homeland Security 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.

☐ Under Federal regulation 8 CFR § 287.7, DHS requests that you maintain custody of this individual for a period not to exceed 48 hours (excluding Saturdays, Sundays, and Federal holidays) to provide adequate time for DHS to assume custody of the alien. Please notify this Office at least 30 days prior to this inmate's release by calling _____ during business hours or (Area code and phone number) _____ after hours in an emergency. (Area code and phone number)

☐ 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 _____, at _____. (Name of officer handling case) (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 Office on _____.

_____ (Signature of DHS Officer)

_____ (Title of DHS Officer)

Receipt acknowledged:

Date of last conviction: _____ Latest conviction charge: _____

Estimated release date: _____

Signature and title of official: _____

Exhibit E

San Miguel County Detention Center Policies and Procedures

SMCDC: 022301
ISSUED: 12/26/2000
EFF: 01/01/2001
REVISED: 12/10/2010

INMATE ADMISSION PROCESS

I. AUTHORITY:

Policy SMCDC 022300

II. PROCEDURE:

A. All inmates admitted to the custody of the San Miguel County Detention Center are admitted initially through the Booking Area.

1. Admissions of inmates to the Detention Center include, but are not limited to:

   a. Determining that the individual is legally committed to the institution.

   b. Conducting thorough search of the individual and his possessions.

   c. Packing and storing of clothing and personal possessions.

   d. Showering within 24 hours of reception.

   e. Issuing of clean laundered clothing.

   f. Photographing, fingerprinting, notation of tattoos and identifying marks, or other unusual physical characteristics.

   g. Medical, dental and mental health screening.

1. The purpose of the policy is to ensure that a receiving screening is performed on all inmates immediately upon arrival at the facility.

2. The purpose of the policy is that all inmates will be triaged for inclusion into the health care system and

to identify medical or psychiatric needs to ensure continuity of care for the inmate.

3. It is the purpose of the policy to identify and meet any urgent health needs of those being admitted; identify and meet any known or easily identifiable health needs that require medical intervention prior to the health assessment; to identify and isolate inmates who appear potentially contagious and to appropriately obtain a medical clearance when necessary.

4. It is the purpose of the policy that whenever possible the health care professional will do the receiving screening; if medical staff is not available health-trained detention personnel will perform a receiving screening.

5. It is the policy of the San Miguel County Detention Center, that inmates who are unconscious, semi-conscious, bleeding, mentally unstable, or other possible needs that may require medical attention are referred to a local hospital for medical assessment and/or emergency care. If they are referred to a hospital, their admission or return to the facility is predicated upon written medical clearance.

6. It is the policy of the San Miguel County Detention Center that all inmates that are arrested and are under the influence Of intoxicating liquor or drugs; inmates must have a written medical release from a hospital prior to admission to the facility.

h. Housing assignment.

i. Recording basic personal data and information to be used for mail and visiting list.

j. Explanation of mail and visiting procedures.

k. Assisting inmates in notifying next of kin and families of admission.

l. Assigning inmates a registration number.

m. Issue written orientation material to the inmate.

n. Documentation of any reception and orientation procedures completed at the Detention Center.

B. Admission Summary:

During an inmate's stay in the Detention Center, an Admission Summary shall be prepared. The Admission summary will include, but will not be limited to:

1. Legal Aspects of the Case

2. Summary of criminal History

3. Social History

4. Medical, Dental and Mental Health History

5. Occupational experience and interests

6. Educational status and interest

7. Vocational status and interests

8. Recreational preference and needs assessment

9. Psychological Evaluation

10. Staff Recommendations

11. Pre-institutional Assessment Information

12. Religious Background and Interests

C. The Shift Supervisor shall accept approved new Inmate(s) or approved transfers from another institution. The Shift Supervisor will conduct an initial intake interview on all inmates arriving at the Detention Center.

1. Classification /Programs personnel will also ensure that all inmates receive a copy of the visiting rules intake information:

    a. Days and hours of visitation

    b. Approved dress code and identification requirements for visitors.

    c. Special rules for children

    d. Authorized items

    e Special Visits

    f. Initial Visitation List

2. All inmates shall be thoroughly searched upon admittance. (Frisk Search) All searches are conducted in accordance with SMCDC Policy/Procedure #22400/022401, Search of Inmates. Shower and clothing processes, shall be completed within the designated

reception area(s) of the facility, and shall assure privacy. The facility does not condone the practice of automatic (Blankets) strip-searching, showering, or clothing change-outs, of every arrestee held in this facility.

3. Allowable personal property shall be inventoried, and itemized in accordance with policy.

4. Inmates will go through medical, mental health, dental screening, upon receipt.

5. All inmates will be issued personal hygiene items necessary for maintaining proper personal hygiene.
6. The inmates will sign for the above items, which will be placed in the Inmate Record.

7. Inmates records and medical records will be placed for proper safekeeping in accordance with Policy/Procedure governing inmate records.

D. Immigration and Customs Enforcement Intake Process

1. Accept the Detainee from the arresting officer and initiate the booking process.

2. Do not ask the detainee about his/her immigration status or place of birth.

3. If the detainee has charges that are bondable, they may do so at this time.

4. If an ICE Detainer is received for the detainee, either from ICE or from the arresting officer, a determination should be made whether the detainee meets the minimum statutory standard for obtaining reimbursement from ICE for the cost of the additional 48-hour period of detention requested in the Detainer. The governing federal statute (8 U.S. Code S1231(i)) provides that reimbursement will only be available for detainees who have a record of conviction of at least one prior felony or two prior misdemeanors.

5. If the detainee does not meet the minimum standard for obtaining reimbursement from ICE for his/her additional detention (i.e., does not have a record of at least one felony or two misdemeanor convictions), the ICE Detainer shall not be honored.

6. If the detainee does meet the minimum standard for obtaining reimbursement from ICE for his/her additional detention (i.e., has a record of at least one felony or two misdemeanor convictions), receipt of the Detainer shall be noted on the detainee's charge sheet the next business day. ICE officers will have up to 48 hours from the time the

detainee would otherwise be entitled to release to pick up the detainee. If the detainee is not picked up by ICE within the 48-hour period, he/she shall be released.

7. There being no legal basis for the county to obtain reimbursement for the cost of providing additional forms of assistance to ICE in enforcing the civil immigration laws, no county resources shall be expended for this purpose. Unless ICE agents have a criminal warrant or are engaged in a criminal investigation, they shall not be given access to detainees or allowed to use county facilities for detainee interviews or other purposes; and county personnel shall not expend their time responding to ICE inquires or communicating with ICE regarding detainees' incarceration status or release dates.

E. Return from Court Admission: Inmate(s) returning from court shall be processed as follows:

1. Inmates will be strip-searched.

2. Inmate(s) who have been absent from the facility shall be provided the opportunity to shower.

3. Inmate(s) will change into San Miguel County Detention Center Uniform.

4. Classification/Programs Personnel shall review inmate(s) for return to the original program assignment to which they were assigned prior to going to court.

F. Inmate Transfer from Other Institutions:

When an inmate is transferred to SMCDC from another institution, he/she must have a medical/mental health clearance, for transfer.

1. Be escorted to Medical area for an intake screening and review of medical files, follow-up of medication, identification of special needs and work clearance.

2. Mental health evaluation shall include:

   a. Review of records.

   b. Make a determination of suicidal tendencies and follow up with appropriate recommendations.

   c. Explain mental health services available for inmates.

   d. Complete an initial evaluation that contains at least all of the above.

G. Classification and Orientation will include:

1. Review of all pertinent data to include but not limited to:

   a. Program prescription

   b. Classification Material

   c. Custody designation

2. The making of an initial program assignment.

3. The inmate shall be afforded maximum involvement in his initial classification review.

4. Except in unusual circumstances, initial reception and orientation of inmates is completes within (1) one week after admission.

THIS PROCEDURE WILL BE REVIEWED AT LEAST ANNUALLY AND UPDATED AS NEEDED.

Approved:

Les Montoya, County Manager — Date: 12/13/10

Patrick W. Snedeker, Warden — Date: 12/10/2010

Exhibit F

IMMIGRATION AND CUSTOMS ENFORCEMENT:

It is the policy of the TCADC to cooperate with the United States Immigration and Customs Enforcement (ICE) in accordance with the following procedures:

1. No inmate shall be asked about his place of birth or country of origin upon admission to the TCADC.

2. TCADC staff shall not facilitate or allow any telephone communication between an inmate and any ICE official without a court order requiring it.

3. Any detainee who has bondable charges upon admission shall be allowed to post bond to secure his or her release unless there is a documented detainer placed on the inmate for which the TCADC must hold the inmate as provided herein.

4. If TCADC has received a documented detainer for an inmate in its custody, the Administrator shall determine whether the inmate is an "undocumented criminal alien" so that he or she meets the minimum statutory criteria to obtain reimbursement for the cost of detaining the inmate for up to 48 hours beyond his or her release to allow ICE to take custody of the inmate. Under this section, an "undocumented criminal alien" means an alien who has been convicted of at least one felony or two or more misdemeanors.

5. If the inmate is not an "undocumented criminal alien" pursuant to the definition set forth above, the inmate shall not be detained at the TCADC pursuant to an ICE detainer beyond the date and time of his or her otherwise authorized release.

6. If the inmate is an "undocumented criminal alien" pursuant to the definition set forth above, the inmate shall be detained for a period of 48 hours beyond the date and time of his or her otherwise authorized release, including weekends and legal holidays, to allow ICE Officials to take custody of the inmate.

7. There being no legal authority upon which the United States may compel an expenditure of county resources to cooperate and enforce its immigration laws, there shall be no expenditure of any county resources or effort by on-duty staff for this purpose except as expressly provided herein.

8. Any person who alleges a violation of the ICE policy set forth herein may file a written complaint for investigation with the Administrator.

JAIL POPULATION REPORTS:

The Administrator shall submit daily reports to the County Manager and other agencies who request receipt of such reports indicating the name, date of birth, date of arrest, arresting agency, offense(s) on which the inmate is being held and the court for each inmate confined in TCADC and other facilities housing Taos County inmates.

INITIATION OF INMATE FILE:

The admitting staff member is responsible for initiation and development of the inmate file. Inmate files must comply with the following general requirements:

1. Files will be assembled in individual folders for each inmate.
2. Format and organization of files will be standardized.
3. Files will be assigned identifying numbers, color codes and other means of easy identification.
4. Files will be maintained in alphabetical or numerical order for ease of reference.

FILE STORAGE AND ISSUE:

Inmate file material must be maintained in a confidential manner. All files shall be prepared using a system that identifies the staff member(s) who prepared or filed the information in the inmate file. Active inmate files must be supervised and controlled by staff members only. No unauthorized person shall have access to any inmate files.

Exhibit G

DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT
Comment on ICE Draft Policy on Detainers
September 30, 2010

We are writing to comment on the U.S. Immigration and Customs Enforcement (ICE) Draft Policy on Detainers, which supersedes the agency's prior policy on detainers, policy # LESC LOP 005-09 of September 23, 2009. California's immigrant population is the largest and most diverse in the nation, and is integral to the economic, social, and cultural richness of our great state. We work with a broad coalition of immigrant rights advocates and criminal defense bar members, who daily witness and benefit from the many contributions of immigrants, yet see the struggles they face under a broken immigration system. The current use of detainers undermines not only the strength of our communities and families, but threatens our most cherished liberties of due process and equal protection under the law.

Immigrants in California increasingly live in fear of their local law enforcement agencies (LEAs).[1] Due to ICE's use of detainers, and its impact on local police, children are being separated from their parents in violation of their rights and workers whisked into an incarceration pipeline while waiting for a bus to work. Our experience in California is that ICE too often issues wrongful detainers and ignores constitutionally required due process protections. Furthermore, current detainer practice encourages local LEAs to misunderstand or outright abuse their authority to detain residents, and once issued, there is virtually no process to challenge the detainer.

As the stories described in this report illustrate, we need a clear and uniform policy governing detainers for both ICE personnel and local LEAs. We appreciate the agency's effort to revise and clarify its policy and practices. However, this effort will be meaningless if ICE fails 1) to provide clear and stringent standards for the issuance of detainers, 2) train LEAs on the limits of their authority with respect to immigration detainers, and 3) provide notice to affected individuals regarding their rights both with respect to detainers and in any subsequent immigration proceedings.

We respectfully ask the agency to revise its draft policy to more adequately address the harms described in this letter.

A. The Standards for Issuing Detainers Are Unclear and Lead to Overuse of Detainers

The proposed detainer guidance states that an immigration officer may issue a detainer where he or she has "reason to believe that an individual in the custody of an LEA is subject to ICE detention for removal or removal proceedings." However, it does not provide sufficient guidance to ensure that people are not subjected to extended detention without a strong basis to believe they are removable. In many counties in California, advocates and defenders have witnessed that the lack of a clear standard has resulted in detainers often being improperly and haphazardly placed on individuals based solely on foreign birth – or worse, based on an assumption of foreign

[1] Isaac Menashe & Deepa Varma, " 'We're Not Feeling Any Safer': Survey Results Show Negative Impacts From ICE Involvement With Local Police," Cal. Immigrant Policy Center and Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity (Summer 2010), available at http://caimmigrant.org/document.html?id=322.

birth due to Hispanic surname, accented speech, or other invidious criteria. As a result, detainers are far too often placed on both U.S. born and naturalized U.S. citizens, as well as Lawful Permanent Residents (LPRs) who are not removable.

- In Sacramento County, a 22-year-old U.S. naturalized citizen and university student was stopped for making an incomplete stop, asked where she was born, and then arrested for driving under the influence of alcohol. An ICE hold prevented her release, after local officers indicated she was would be released from county custody. Her sister presented her U.S. passport to Sacramento County Jail officers two times that weekend, but the officers said it was not sufficient proof of her citizenship. Finally, her sister spoke to an ICE officer who said he had no evidence she had received a green card and that the system showed her status as "pending." She was released about 30 minutes after speaking with the ICE officer; nearly three days after she would have been released from the traffic-related arrest.
- In San Francisco County, a U.S.-born citizen was held in the local jail and had an ICE hold placed on her, which prevented her from posting bail and participating in a drug program. She wrote the Sheriff about the issue and at this time it is unclear whether the hold was lifted.
- In Kern County, Guillermo Olivares, a U.S.-born citizen, had a detainer placed on him while he served a sentence in state prison. ICE officers visited him twice while he served his sentence and he explained both times that he was born and raised in Los Angeles, California. The officers chose neither to believe him nor investigate his claim to citizenship. As a result, after he served his sentence he was deported to Mexico. It took him an entire year to regain entry to the United States and establish his citizenship.
- In Sonoma County, an ICE hold was placed on a young, Guatemalan LPR who was convicted of a charge that did not subject him to removal. In the Sonoma County jail, persons with ICE holds are held in a higher-security part of the facility and have access to fewer privileges, so he was prejudiced by the mistaken hold. The hold was finally released after his attorney sent faxes to ICE demonstrating his status and criminal record.

These stories could have been prevented if there were 1) clearer and more stringent standards for issuance of immigration detainers, and 2) a simple and effective procedure whereby detainees could challenge the propriety of immigration detainers in an expeditious manner. Because immigration detainers extend an individual's detention by the government without a criminal basis for detention, ICE should adopt a stringent standard to support reliable outcomes that persons issued immigration detainers are in fact subject to removal.[2] To that end, the guidance should make clear that **immigration detainers may not be issued based on the following**

[2] Probable cause to believe a person is unlawful present has been adopted as the statutory standard "reason to believe" for purposes of warrantless arrests under 8 U.S.C. § 1357(a)(2), and would therefore be easy for ICE agents to apply in the detainer context. *Pearl Meadows Mushroom Farm, Inc. v. Nelson*, 723 F. Supp. 432, 450 (N.D. Cal. 1989); *Tejada-Mata v. INS*, 626 F.2d 721, 724-25 (9th Cir. 1980) ("The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause.") *Contreras v. U.S.*, 672 F.2d. 307, 308 (2d Cir. 1982). However, because immigration detainees are not provided a hearing before a judge within 48 hours of arrest, the standard for detention should be even higher than the probable cause standard required in the criminal context. *Cf. County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) and 8 C.F.R. § 287.3.

factors, alone or in combination, absent additional facts supporting a conclusion of removability: foreign birth, lack of U.S.-issued identification, lack of a database entry, or an inconclusive or outdated database entry, such as a pending or past application for immigration benefits.

In addition, the clear lack of recourse to challenge a detainer imposes a significant and difficult burden on individuals who are in custody. In the San Francisco example, noted above, the Sheriff himself was unsure of the law governing detainers and how to respond to the woman's request and therefore asked local advocates for their assistance. In order to provide these U.S. citizens and lawful permanent residents an opportunity to end their improper detentions pursuant to immigration detainers, **the guidance should set forth a clear process through which persons for whom detainers are issued receive 1) a copy of the detainer, 2) an explanation of the basis for the detainer, and (3) contact information for a ICE official who is available both during weekends and business hours to receive information from detainees regarding the propriety of their detainers.**[3]

B. Current Detainer Practices Conflict with ICE Enforcement Priorities and Encourage Local Law Enforcement Abuses

ICE leadership has repeatedly reiterated that its enforcement efforts prioritize immigrants who pose a national security risk or a threat to public safety.[4] Yet the most current data released by ICE reveals that ICE's use of detainers often runs at counter-purposes to ICE's stated enforcement priorities by targeting non-criminals and low level offenders. In California, only a quarter (26%) of detainers issued pursuant to the immigration enforcement program Secure Communities were for individuals *charged or convicted* for the most serious level of offenses.[5] In fact, as several reports have found, ICE's enforcement practices actually create perverse incentives for law enforcement officials to arrest anyone who appears "foreign" in order to check immigration history.[6]

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[3] In order to protect immigrants' due process rights in immigration proceedings, this notice should also inform the subject of the detainer about his rights in any subsequent immigration proceedings, such as the right to counsel, available local free immigration legal services, the fact that any statement made to Department of Homeland Security (DHS) or jail authorities can be used against the detainee in a subsequent proceeding, and that unless previously deported, the person has a right to a hearing prior to removal.

[4] Memo from DHS Assistant Secretary John Morton regarding policy number 10072.1, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" (June 30, 2010).

[5] Secure Communities, IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2010 (May 10, 2010), at 6, *available at* http://www.ice.gov/doclib/foia/secure_communities/nationwideinteroperabilitystatsapr10.pdf.

[6] *See, e.g.,* Trevor Gardner II & Aarti Kohli, "The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program," The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity at The Univ. of Cal. Berkeley Law School, at 7, *available at* http://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf.

1. Detainers Regularly Target Persons Innocent of Any Crime

- In San Bernardino County, Eleanor* has worked in the U.S. for 16 years, has no criminal history, and lives with her three citizen children. Eleanor is a survivor of domestic violence and has full custody of her children and a restraining order against her husband. When her husband's new girlfriend tried to take the children, Eleanor called the police to uphold her custody. Upon arriving, the police questioned Eleanor and then arrested her because she did not have identification. She was taken to the county jail and a detainer was immediately placed – despite her clear eligibility for U-Visa relief (which she is now pursuing). If not for the efforts of advocates, she would have been transferred immediately into ICE custody and deported.
- In Santa Barbara County, Samuel is a 30 year-old small business owner who had lived in the U.S. since arriving as a child. He was pulled over, ostensibly for having an expired registration, though his registration was up-to-date, and was booked under an erroneous outstanding warrant. Samuel ultimately had the warrants dismissed, but because a detainer was placed on him within an hour of booking, he was never able to post bail, and was deported within days of proving his innocence of any wrongdoing for which he was arrested. His U.S. citizen wife and child have joined him abroad because they could not endure the hardship of having their family separated. In Samuel's case, the detainer (or possibility thereof) appears to have motivated the police officer - who was subsequently fired as result of this incident - to make the arrest instead of merely give a citation.
- In San Bernardino County, Carlos has worked as a janitor for 12 years. He has a U.S. citizen wife and two young U.S.-citizen daughters. On August 20, 2010, he was waiting at a bus stop when there was an incident nearby. Police stopped and questioned Carlos because he "looked suspicious." When unable to present identification, he was arrested. A detainer was immediately issued and he was placed in removal proceedings.
- In Sonoma County, G.P. was arrested based on a claim of domestic violence, booked into the Sonoma County Jail, and issued an ICE hold. The claim was made by his wife, who has a diagnosis of schizophrenia, after he put his hands on her head to calm her down. When he went to his first appearance in court, the District Attorney elected not to charge him, and the judge released G.P. from local custody. He remained in jail for another two nights on the immigration detainer before he was placed in immigration proceedings. He was never criminally charged.
- M.F. parked his car in a Sebastopol shopping center lot, and started walking to meet his boss to go to work when he was stopped by two Sebastopol Police Department officers. The sergeant asked him how much he paid to get across the border and then arrested him for driving without a license. At the station, the sergeant told M.F. that he was going to see that M.F. got deported, and that if he returned illegally, he better not return to Sebastopol, because the sergeant knew his face. Once booked into jail, a detainer was placed and M.F. is now in removal proceedings.

ICE's current detainer practices do not take into account the circumstances of the underlying arrest in determining whether to pursue enforcement action. Thus, even when an individual's criminal case is dismissed because of constitutional violations by the LEA, an ICE detainer placed immediately upon arrest still funnels this individual into removal proceedings.

* In the examples throughout this comment, names have been changed to protect confidentiality.

- Alex C. was stopped, subjected to a pat down search, and subsequently arrested on for possession of sharp *pen* deemed to be weapon by a Sonoma County Sheriff's Deputy on gang enforcement duty. Despite Alex's sworn testimony that he never made any admission to alienage, a detainer was issued and bail denied. Alex remained in jail for 25 days until a hearing on suppression of evidence, at which time his case was duly dismissed. Alex was held for one more night on ICE hold, then transferred to ICE custody and placed into removal proceedings.

As these cases demonstrate, current detainer practice not only conflicts with ICE's stated policy of prioritizing immigrants who pose a risk to national security and community safety, but effectively encourages racial profiling by local police and sheriff's deputies, and leads to local policing of immigrants similar to the type objected to by the Department of Justice in its challenge to Arizona's SB 1070.[7] This problem is not adequately addressed by draft policy section 3.3's attempts to limit issuance of detainers for traffic infractions absent a conviction. First, the broad list of exceptions set forth in section 3.3 swallows the general rule. In addition, where, as in California, an officer has discretion to deem an incident of driving without a license (violation of Vehicle Code 12500) an infraction and merely give a citation, or a misdemeanor and arrest, a detainer policy which allows proceedings against individuals convicted of only minor traffic offenses continues to provides a perverse incentive for LEAs to racially profile.

In the § 287(g) context, the Office of the Inspector General has noted that immigration proceedings are to be "in connection with a *conviction* of a state or federal offense."[8] To further ICE's stated priority of focusing resources on immigrants convicted of serious crimes and to dissuade LEAs from racially profiling community members to funnel them toward immigration enforcement, **the detainer guidance should limit issuance of detainer to persons who have been *convicted* of – not merely charged with or arrested for – a crime.**

2. Detainers Should Not Be Issued Against Juveniles

In the last few years, there has been an alarming increase in the issuance of detainers against juveniles in the California juvenile justice system. The Office of Refugee Resettlement (ORR), the federal agency charged with the care and custody of unaccompanied minors in removal proceedings, confirms that youth from California account for a significant number of their nationwide referrals from the juvenile justice system and that that there has been a spike in such referrals in recent years.

This practice undermines both state and federal protections for youth. Federal immigration regulations as well as the Flores Settlement Agreement provide that juveniles must be provided a notice of their rights – in particular, Form I-770 (Notice of Rights and Disposition) – upon apprehension by DHS. 8 CFR §§ 236.3(h) and 1236.3(h), Stipulated Settlement Agreement, *Flores v. Reno*, Case No. cv-85- 4544-RJK (C.D. Cal. 1996). California law restricts disclosure of information about minors in the state juvenile justice system and provides no exception of

[7] *United States v. State of Ariz.*, No. 10-cv-1413-SRB (D. Ariz. 2010).
[8] *See IMMIGRATION ENFORCEMENT: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, United States Government Accountability Office (January 2009) at p. 13 (emphasis added), *available at* http://www.gao.gov/new.items/d09109.pdf.

disclosure for federal immigration authorities. Cal. Welfare & Institutions Code § 827. Despite these protections, youth are not provided a notice of their rights when immigration-related information is taken by LEAs for the purpose of turning it over to ICE, nor is ICE providing this notice when it conducts detainer interviews. ICE officials also have been known to ask for confidential information and LEAs, who are unclear about the limits of their authority to enforce immigration law, hand over this information upon request.

In California, detainers are routinely issued in a wide range of delinquency cases including for young teens (as young as 12 and 13), for abused and neglected children in state foster care, for youth with minor delinquency offenses, or for detained youth against whom delinquency charges were never brought or were dismissed altogether. Some examples of these practices include:

- A 13-year-old boy was issued a detainer for allegedly taking 46 cents from another youth in a first-time school yard bullying incident.
- A 15-year-old girl was issued a detainer and placed in immigration detention in Florida for allegedly getting into a minor fight with her younger sister.
- A 14-year-old boy was issued a detainer and is currently in removal proceedings for allegedly bringing a BB gun to school, though not threatening or using the gun against anyone.
- A 17-year-old boy was reported to ICE by the San Francisco Juvenile Probation Department and deported to Mexico even though the charges were soon dropped by the District Attorney.

Despite the unique treatment of juveniles under both state and federal law, ICE has not distinguished between juveniles and adults in the application of its detainer process. Youth, due to their age and lack of sophistication, often do not understand that they have any rights, including the right not to share particular information with juvenile probation officers, or that such information will be shared with ICE. The coercive setting of these interviews within locked juvenile facilities combined with these youth's special vulnerabilities mean that it is all the more important that their rights are explained and respected. By jointly violating state confidentiality laws governing juveniles, local officials provide and ICE gains information that prejudices the youth in subsequent proceedings and undermines any notice of rights later provided in federal custody.

California juvenile LEAs lack accurate information not only on the detainer process, but also on the special procedures that apply to juveniles in immigration proceedings. Many juvenile LEAs believe that youth with detainers will be deported promptly and therefore will not return to the local community where they were apprehended. ICE gives these LEAs little to no information about the likely right of reunification and community return these youth have as "unaccompanied minors," or gives the LEAs the erroneous impression that the youth certainly will be deported. This frustrates ORR's federal reunification process.

The proposed policy fails to address the growing misuse of detainers against youth in California. It does not provide any information about what juveniles, if any, should be prioritized for the issuance of detainers, it fails to outline procedures governing how such detainers would be issued given juveniles' unique status under law, and it does not explain how federal and state laws protecting youth would be respected in this process. Given the conflicting state and federal priorities, policies, and protections for youth, the **detainer policy should be revised to state that**

detainers will not be issued for minors in state or county custody, and all local agencies that participate in their state juvenile justice system should be notified of this change.

3. Detainers are Regularly Misunderstood or Abused by State and Local Law Enforcement and Criminal Justice Officials

Many of the due process and related concerns regarding the use of detainers occur because state and local law enforcement officials and other actors within the criminal justice system regularly misunderstand or abuse detainers. There is a general lack of clarity regarding the legal status of an immigration detainer, which is often confused with a criminal arrest warrant or detainer, and the legal obligations an immigration detainer creates for LEAs.

One of the most egregious examples of misunderstanding and abuse came out of Sonoma County, California, where sheriffs' deputies arrested and detained individuals based solely on the supposed legal authority of an immigration detainer.[9] In Sonoma County it was common practice for the Sheriff's Department to conduct joint operations with ICE, targeting areas with high Latino populations and questioning individuals about their immigration status. Sheriff's deputies would then arrest large numbers of Latino residents and place them in the county jail without criminal charges, solely on the basis of an immigration detainer issued after the arrest. On other occasions, sheriff's deputies would conduct these immigration sweeps without the assistance of ICE. While in the field, deputies would phone ICE requesting a detainer and would then arrest residents citing the immigration detainer as their only authority.[10]

The interim policy on detainers dated August 2, 2010 clarified that the Sonoma County Sheriff and ICE were misusing immigration detainers as arrest warrants and it is, therefore, essential that the relevant provisions in the draft policy remain in place. However, limiting dissemination of these clarifications to an internal policy memo will be insufficient to address the problem. ICE must distribute its revised policy to LEAs throughout the country and include detailed information regarding the limits on immigration detainers to every jail or other agency to which it issues detainers. **The draft detainer guidance should be amended to include provisions for training of LEAs on the limited scope of and authority provided by immigration detainers.**

Additionally, although the policy attempts to clarify that immigration detainers do not satisfy the constitutionally required warrant or probable cause for an arrest (see section 4.1), it goes on to carve out such a broad exception as to actually invite the kinds of abuses seen in Sonoma County. Section 4.1 of the draft policy states that law enforcement officials must first exercise independent authority to arrest an individual before a detainer may be issued. However, it continues, "this policy … does not preclude temporary detention of the alien by the LEA while ICE responds to the scene." Such a broad exception, without defining the parameters of what is an acceptably "temporary" detention, does little to aid the confusion and in fact encourages local LEAs to do precisely what the Sonoma County Sheriff's Department adopted as its regular practice. Under the Fourth Amendment to the United States Constitution, a local law enforcement agent may ***not*** prolong detention beyond the purpose of the original stop without

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[9] *See Comm. for Immigrant's Rights of Sonoma County v. County of Sonoma*, Case No. CV08 4220 RS (N.D. Cal. 2008).

[10] A similar practice was reported in Florida. *See, e.g.,* Letter from American Civil Liberties Union of Florida, to U.S. Immigration and Customs Enforcement, (July 16, 2009), *available at* http://www.aclufl.org/pdfs/DetainersLetter.pdf (last visited Sept. 8, 2010).

new grounds for suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968). For this reason, **the language quoted above from section 4.1 of the draft policy should be deleted.**

a. Confusion about LEAs Responsibilities with Regard to Detainers

In California, there is rampant confusion and misunderstanding among LEAs about the law governing ICE's detainer requests. While the proposed policy appropriately clarifies to ICE agents that detainers are "a *request*" to LEAs, the policy alone takes no steps to correct misunderstanding by LEAs that they have no discretion in responding to ICE detainer requests. Notably, the official detainer form submitted to LEAs (Form I-247) purports to require the receiving agency to comply with the terms of the detainer.[11] Thus, even where law enforcement agencies find it not in their best interest to comply with a detainer request and hold an individual for ICE, they often do because of their sense that compliance is mandatory.

- In meetings with advocates in Northern California, the Sheriff of San Francisco pointed to the I-247 form and emphasized that the form reads "shall hold" to justify his understanding that his officers are required to hold individuals for whom they receive an immigration detainer.

Although the draft detainer policy attempts to provide clarity on this issue, it fails to meaningfully address law enforcement's confusion because it is not addressed to the proper audience. The policy serves very little purpose if only directed to ICE officials and not the law enforcement agents receiving the detainer. Moreover, so long as the official detainer form (I-247) transmitted to law enforcement agencies uses language which implies that compliance is mandatory, law enforcement agencies will continue to misunderstand their responsibilities.[12] Therefore, in addition to providing notice and training to LEAs regarding the limited application and scope of detainers, **we recommend that all mandatory language be omitted from Form I-247.**

b. Abuse of 48-Hour Rule

LEAs can hold a noncitizen on a detainer no more than 48 hours past the time when he or she would have otherwise been released from custody, excluding weekends and holidays. While this is one of the few rules governing detainers, it is still routinely violated by LEAs throughout California. Some examples include:

- In San Mateo County, a long time undocumented resident who is married to a U.S. citizen and with U.S. citizen children, finished his sentence in the local county jail on a Tuesday and was ordered by the court to be released that evening. He was still in custody, however, 48 hours later. When his attorney called the Sergeant at the County jail and presented the detainer regulation, the Sergeant explained that his intepretation of the regulation was that the 48 hour rule is not triggered until ICE is given notice. Because the jail still had not given ICE the 48 hours notice it would continue to hold him for ICE despite having no independent authority to detain him. Consequently, the person was held four days past the expiration of the 48 hour period.

[12] The form reads in relevant part, "Federal regulations (8 CFR 287.7) *require* that you detain the alien …". Immigration and Customs Enforcement, "Immigration Detainer – Notice of Action" (Form I-247).

- In Monterey County in August 2010, José was approached by a police officer, asked for identification, and arrested on an outstanding parking violation. After his employer – in whose service he received the parking ticket – paid his fine, José was told he would be released for time served. However, he was held on an immigration detainer in the Monterey County jail for 10 days before the county responded to José's attorney's request that he be released.
- In San Bernardino County, Laura was held for 5 days after being arrested by the police because of altercation with her boyfriend. When advocates questioned an officer about the authority to detain past the 48-hour period, the officer justified the continued detention by noting his understanding that the 48 hour period does not begin to run until after ICE has decided whether or not to pursue any action against the individual. Essentially, according to this officer's understanding, the LEA can hold the person for as long as it takes for ICE to make this determination.

Nothing in the proposed detainer guidance ensures that LEAs are properly educated about the 48-hour rule and informed of the consequences of failure to follow it to ensure that these violations do not occur. The guidance also does not provide a process for individuals held in custody to submit complaints about a 48-hour rule violation.

c. Detainers Interfere with the California Criminal Justice Process

The lack of education of LEAs, prosecutors, and criminal court judges as to what detainers are and are not, and what their roles and responsibilities are in regard to detainers, has led to widespread abuses against noncitizens during the criminal justice process. The proposed detainer guidance does nothing to remedy these issues. In particular, LEAs and others often form erroneous assumptions about individuals with detainers, leading to adverse actions against the detainee which significantly infringes on their due process rights during the criminal justice process. Some of the assumptions and adverse actions that have occurred in the California criminal justice system include:

- **Denial of or Refusal to Accept Bail.** Judges and prosecutors often assume that the presence of an ICE detainer means that the person is undocumented, will be deported, and thus, poses a serious flight risk. This in turn affects bail determinations. Some judges have imposed prohibitively high bail amounts in low level misdemeanor cases and in other cases they have automatically denied bail solely based on the presence of a hold. Even where bail is given, Sheriffs may refuse to accept bail when it is posted.
    - In San Francisco County, CL, a lawful permanent resident married to a U.S. citizen and with U.S citizen parents and sisters, was arrested and detained on theft charges. CL's family posted $30,000 in bail at a San Francisco bail bonds office the following evening. G, who worked at the bail bonds office, said she posted the bail immediately to the Sheriff's office at 3 am. The Sheriff's deputy called G that evening and repeatedly during the week to ask to withdraw the bail and repay the family because an ICE hold had been placed. As result, CL stayed in criminal custody far longer than necessary.
    - Gloria L was stopped for tailpipe emission problems in Sonoma County. A Sheriff's deputy called in her name and date of birth and found another GL wanted for marijuana possession. Gloria L was mistakenly arrested and an ICE detainer was issued within 3-4 hours. When church friends attempted to post

bail, they were advised it was not possible. Gloria L brought a petition for habeas to challenge the detainer; however, the judge held that petition was premature until she had posted bail. Gloria L's friends again attempted to post bail, but were told that individuals with ICE detainers are often taken into custody and prevented from attending their court hearing, making them too high a risk for a bail bonds person to assist.

- **Longer Periods in Pre-Detention.** Because of the denial of bail, the inability to post bail, and/or the inability of individuals with detainers to be released from criminal custody without being transferred immediately to immigration custody, more noncitizen defendants are being held significantly longer than their U.S. citizen counterparts during criminal proceedings. This interferes with detainees' ability to effectively defend against the criminal charges and results in higher rates of conviction since many decide to plead to get out of jail as soon as possible.
- **Tougher Plea Negotiations.** Prosecutors are unwilling to negotiate and accept reasonable plea deals because they believe a person is undocumented and going to be deported based on an ICE hold.
- **Interference with Effective Defense Representation.** Criminal defenders are increasingly unable to effectively represent their noncitizen clients because immigration issues resulting from the detainer override various criminal aspects of a case including bail and plea negotiations. In some instances, representation has become impossible since clients with ICE holds have been taken by immigration authorities while criminal proceedings are still pending.
    - Fred G was free on bail pending trial in criminal case when a Sheriff's deputy went with ICE agents to his house in January 2007 and effected a new arrest based solely on civil immigration violation of unlawful presence. He spent 2 full months shuffling (3 times) between ICE and Sheriff's custody under detainers and was unable to proceed with criminal defense until an Immigration Judge administratively closed the removal proceedings. Though Fred G was eventually acquitted after jury trial in criminal case, attempts to secure release were frustrated at each turn by the use of detainers.
- **Denial of Services and Programs.** Effective criminal justice programs that are used to rehabilitate individuals and save taxpayer money, such as drug and domestic violence diversion and other community service programs, are blanketly denied to those with ICE holds.[13]
- **Interference with Assistance of Counsel.** There is currently no mechanism to ensure that noncitizens and their attorney representatives are notified that a detainer has been lodged, despite the tremendous impact that a detainer can cause on a noncitizen's due process rights. Often noncitizens are only informed that a detainer has been lodged against them during criminal court hearings when the detainer is used adversely against them at key decision making points. Similarly, defense counsel is not informed that ICE has spoken to their client while in detention, that key information has been shared, and that consequently, a detainer has been lodged. Defenders also frequently complain that they have no way of finding out whether a client has a detainer lodged against them

[13] California's Administrative Office of the Courts estimated in a 2006 report that California taxpayers saved over $90,000,000 per year of operation of the State's approximately 90 drug courts while keeping individuals from re-offending.

without calling the Sheriff, which often compromises the outcome of their client's case. **Where noncitizens are critically impacted by the lodging of a detainer, they and their attorney representatives should have firsthand notice of the detainer**—to provide them constitutionally required due process in their criminal proceedings as well as any subsequent immigration proceedings.

Many of the problems detailed above would be partially addressed by ICE providing clear information about the scope, meaning, and limits of immigration detainers to LEAs and other actors in the state criminal justice system. In addition, all of these problems are exacerbated by both the lack of standards for issuing detainers and the lack of notice and a process for challenging detainers that are issued. Finally, limiting issuance of detainers to persons with criminal convictions (offenses subjecting them to removal, for LPRs) would greatly decrease the interference with constitutional rights in the criminal justice system, including the rights of many people who will not ultimately be subject to removal under the immigration laws.

C. Conclusion

California's experience with ICE detainers clearly illustrates an urgent need to bring clarity, uniformity, and probity to this instrument of immigration enforcement. Our trust in law enforcement, our communities' integrity, the vibrancy of our economies and the vitality of our liberties are at stake.

We, the undersigned, ask ICE to reconsider its draft policy on detainers in light of the concerns raised in this letter and by advocates from immigrant communities in other states. We ask that any detainer policy adopted by ICE take into account and address the serious harms detainers pose for individuals in the criminal justice system and restore our most fundamental American values of due process and equal protection.

A revised policy should:

- Clarify the grounds for issuing detainers to ensure that citizens and residents with lawful status or plausible claims for relief are not improperly and impermissibly detained or put in removal proceedings, and in particular:
    - Provide that, foreign birth, lack of U.S.-issued identification, the lack of a matching database entry, or an inconclusive database entry—alone or in combination—are not sufficient to issue a detainer;
- Ensure that youth are accorded the treatment they deserve and which the law requires given their unique status and vulnerabilities by excluding juveniles from the reach of immigration detainers;
- Provide clear instruction to local, state, and federal law enforcement agencies (LEAs) to whom detainers are issued on the scope and limitations of immigration detainers, specifically including:
    - ICE's standards for issuance of detainers (to discourage pretextual arrests for immigration screening purposes),
    - That detainers are requests and compliance is discretionary, and

  - That LEAs are not authorized to hold individuals pursuant to detainers beyond 48 hours (excluding weekends and holidays) under any circumstances, and that to do so may subject them to civil liability;
- Provide notice of the limits on immigration detainers to LEAs with each detainer issued;
- Provide to persons issued detainers at the time the detainer is issued:
  - A copy of the detainer,
  - An explanation of the basis for the detainer,
  - An explanation that the detainer cannot be used to extend their custody beyond 48 hours (excluding weekends and holidays),
  - A clear and *practical* mechanism for individuals to challenge their detainers (including during weekends and holidays), and
  - Notice of rights related to any subsequent immigration proceedings such as the right to counsel, a list of available local free immigration legal services, notice that any statement made to DHS or jail authorities can be used against the detainee in a subsequent proceeding, and that unless previously deported, the person has a right to a hearing prior to removal;
- Require that copies of immigration detainers be provided to detainees' criminal and immigration counsel to facilitate the protection and exercise of constitutional rights; and
- Include oversight, tracking, and reporting measures to ensure use of detainers is consistent with policy priorities and to prevent racial profiling.

Please direct any questions about or responses to this comment to Melissa Keaney at the National Immigration Law Center in Los Angeles (keaney@nilc.org or 213.674.2820) and Isaac Menashe at the California Immigrant Policy Center in Oakland (imenashe@caimmigrant.org or 510.451.4882 x303).

Thank you for your consideration of this critical matter.

Sincerely,

American Civil Liberties Union of Northern California
American Civil Liberties Union of Southern California
American Civil Liberties Union of San Diego and Imperial Counties
California Immigrant Policy Center
Coalition for Humane Immigrant Rights of Los Angeles
Committee for Immigrant Rights of Sonoma County
Immigrant Legal Resource Center
National Immigration Law Center

Cc: Senator Dianne Feinstein
Senator Barbara Boxer
Members of the California Congressional Delegation
U.S. Attorney General Eric Holder, Jr.
California Attorney General Edmund G. Brown, Jr.
Ms. Cecilia Munoz, Director of Intergovernmental Affairs, The White House