

ACLU's Top Administrative Recommendations on ICE Immigration Detainers

Every year, U.S. Immigration and Customs Enforcement (ICE) issues detainers on a massive scale, causing tens of thousands of people – including U.S. citizens, lawful permanent residents, and people who fall outside ICE's own enforcement priorities – to be imprisoned without a warrant, charges, or other due process protections. Reform of ICE's indiscriminate detainer practices would save taxpayer dollars, strengthen due process protections, reduce family separation resulting from detention, and align detainer practices with ICE's primary enforcement priorities. While the reforms below will not resolve the fundamental constitutional and statutory problems with detainers, they do represent important first steps toward the creation of a more just and transparent detainer policy.

- 1. ICE should adopt a policy requiring each detainer to be co-signed by a supervisory official at DHS Headquarters.** Under current policy, a single ICE enforcement officer – not a neutral magistrate or even a supervisory official – may, without consultation or review, issue a detainer that deprives a person of liberty for up to five days. Such unreviewed, warrantless detention is at odds with basic constitutional principles. Supervisory review would help reduce the numbers of erroneous and unlawful detainers, including those issued against U.S. citizens and lawful permanent residents, and would also enable better oversight and more consistent prioritization at a national level.
- 2. ICE should clarify that “reason to believe” means “probable cause” – as multiple federal courts have held the Fourth Amendment requires¹ – and should provide guidance and training for ICE and 287(g) officers on the meaning of this legal standard.** ICE has stated that detainers may be issued only when there is “reason to believe” that the person is a non-citizen subject to removal,² but it has not provided guidance to the field on what this means. As a result, ICE officers have continued to issue baseless detainers against people who should not, even under ICE's own view of the law, be detained at all. In addition to guidance and training, the detainer form should be modified to include a “narrative” space where the issuing officer must write down a detailed factual basis for finding probable cause to believe that the person is subject to removal.
- 3. ICE should adopt a policy of issuing detainers only against individuals convicted of criminal offenses who are classified as “Level 1” offenders, as defined in ICE's Civil Immigration Enforcement Priorities Memorandum of March 2, 2011,³ and have served a criminal sentence in excess of one year that has not been expunged, set aside, or the equivalent.** In addition, consistent with ICE's Prosecutorial Discretion Memorandum of June 17, 2011,⁴ ICE should issue detainers only against individuals who are deemed ineligible for the exercise of prosecutorial discretion. Finally, before issuing any detainer, ICE should determine whether the initial contact, detention, or arrest was motivated by biased policing and/or an effort by a state or local agency to do immigration enforcement without federal guidance, and, if so, decline to issue the detainer. ICE's current detainer practices are

¹ See, e.g., *Miranda-Olivares v. Clackamas County*, -- F.Supp.2d ---, 2014 WL 1414305, *9-*11 (D. Or. Apr. 11, 2014) (slip op.); *Morales v. Chadbourne*, -- F.Supp.2d ---, 2014 WL 554478, *5 (D.R.I. Feb. 12, 2014) (slip op.); *Uroza v. Salt Lake County*, No. 11-0713, 2013 WL 653968, *4-*5 (D. Ut. Feb. 21, 2013) (unpub.); *Galarza v. Szalczyk*, 2012 WL 1080020, *13 (E.D. Pa. Mar. 30, 2012) (unpub.), *rev'd on other grounds at* -- F.3d ---, 2014 WL 815127 (3d Cir. Mar. 4, 2014) (slip op.); see also *Tejeda-Mata v. INS*, 626 F.2d 721, 725 (9th Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971).

² John Morton, Director of ICE, Civil Immigration Enforcement: Guidance on the Use of Detainers (Dec. 21, 2012), at <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

³ John Morton, Director of ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens at 2 (Mar. 2, 2011), at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

⁴ John Morton, Director of ICE, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (Jun. 17, 2011), at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. This memorandum makes clear that ICE officials should consider the prosecutorial discretion factors when “deciding to issue . . . a notice of detainer[.]” *Id.* at 2.

dramatically out of step with the agency's primary enforcement priorities. The changes recommended here would bring ICE's detainer practices into line with the agency's Civil Immigration Enforcement Priorities, which are based on criminal *convictions*, not charges,⁵ and would better respect the core due process principles of our criminal justice system. These changes would also help protect victims and witnesses of crime from unwarranted detention, and reduce the incidence of detainees serving as invitations for discriminatory or otherwise unlawful arrests.

4. To provide detainees and law enforcement agencies (LEAs) with greater clarity, particularly regarding detainer practices that harm due process, ICE should amend the detainer form as follows, and ensure that all persons subject to a detainer promptly receive a copy.

- a. The detainer form's "notice" provision should advise the detainee of his or her right to be represented by an attorney or representative (at no expense to the government) during any examination, as regulations at 8 C.F.R. § 292.5(b) provide. The form should be accompanied by a list of the pro bono legal services providers in the district where the individual is detained. *See* 8 C.F.R. § 1003.61.
- b. ICE asks LEAs to provide a copy of the detainer to the detainee,⁶ but has no mechanism for ensuring that LEAs actually do so. To remedy this problem, the detainer should state that ICE's request for detention is contingent on the LEA's agreement to provide a copy of the detainer to the detainee (and his or her criminal defense attorney and immigration counsel, if any) as soon as practicable after receiving it. If the LEA does not certify to ICE that it has provided this notice, ICE's request to detain should be withdrawn.
- c. The detainer form should clearly state that (1) the detainer is a voluntary request and not a legally binding order, as courts have found⁷; (2) if DHS does not assume custody within the 48-hour period provided by regulation, the detainer expires, and the LEA has no authority to continue holding the person and must release him or her, as ICE has explained in LEA briefing materials⁸; and (3) the issuance of a detainer, by itself, does not have any effect on the person's eligibility for bail, custody classification, or eligibility for rehabilitation or treatment programs.⁹

5. To strengthen transparency and oversight regarding detainer practices, ICE should take the following steps.

- a. Collect the information identified in the ICE-NGO Working Group's Data Requests (Oct. 2013) for each detainer issued; and make aggregate statistics, by jurisdiction, publicly available on a quarterly basis.
- b. Retain copies of each detainer issued and cancelled.
- c. Regularly update its FOIA Library with Secure Communities statistics (last updated in January 2014) and all Congressional Status Reports (last posted in 2011).
- d. Publicly release results of the Six-Month Review promised in ICE's December 2012 detainer memorandum.

⁵ *See* Civil Immigration Enforcement Priorities Memorandum, *supra* note 4, at 2.

⁶ *See* ICE Detainer Form I-247 (Dec. 2012), at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (directing the LEA to "[p]rovide a copy to the subject of this detainer"); *see also* DHS Office of Civil Rights and Civil Liberties Briefing Video, "What Law Enforcement Needs To Know: Secure Communities Briefings: Immigration Detainers" at 5:09, at http://www.ice.gov/news/galleries/videos/immigration_detainers_ad.htm ("[G]ive a copy of the immigration detainer to the individual. This is very important because it will allow the individual to tell ICE of potential claims of a legal right to be in the United States, or to seek assistance if he or she is a victim of or a witness to a crime.").

⁷ *See, e.g., Galarza v. Szalczyk*, -- F.3d ---, 2014 WL 815127, *7 (3d Cir. Mar. 4, 2014) (slip op.); *Miranda-Olivares v. Clackamas County*, -- F.Supp.2d ---, 2014 WL 1414305, *4-*8 (D. Or. Apr. 11, 2014) (slip op.); *Morales v. Chadbourne*, -- F.Supp.2d ---, 2014 WL 554478, *17 (D.R.I. Feb. 12, 2014) (slip op.); .

⁸ *See* DHS Briefing Video, *supra* note 7, at 3:28 ("Extending detention beyond the 48-hour limit is unlawful. If ICE does not take custody of an individual held under the immigration detainer, you must release him or her, because there is no longer any authority to hold the person."). The current ICE detainer form, *see supra* note 6, states that "you are not authorized to hold the subject beyond these 48 hours," but it does not state that the LEA "must release" the person once the 48-hour period has expired.

⁹ The current ICE detainer form, *see supra* note 7, states that the issuance of a detainer "does not limit [the LEA's] discretion to make decisions related to . . . custody classification, work, quarter assignments, or other matters," but it should also specifically make clear that the issuance of a detainer has no effect on the individual's eligibility for bail, as ICE has elsewhere acknowledged. *See* DHS Briefing Video, *supra* note 7, at 5:50 ("[I]t is not ICE's position that the existence of an immigration detainer should have any particular consequence for bail or bond.").