



October 19, 2015

Re: Oppose the “Stop Sanctuary Policies and Protect Americans Act” (S. 2146)

Dear Senator:

The American Civil Liberties Union strongly urges you to oppose the “Stop Sanctuary Policies and Protect Americans Act” (S. 2146). A cloture vote on the motion to proceed is scheduled to take place on Tuesday, October 20, 2015 at 2:15 p.m. **The ACLU urges you to vote NO on the cloture vote on the motion to proceed, and, if a vote is scheduled for final passage of the bill, to vote NO on S. 2146.** The ACLU will score this vote.

The bill is fraught with constitutional and policy problems, and is both legally and fiscally irresponsible. First, the bill undermines current efforts to reduce the federal prison population. Second, the bill perpetuates the myth that there are “sanctuary” zones free from immigration enforcement. Third, the bill exposes the federal government to broad liability for Constitutional violations that occur when localities imprison individuals on the basis of Department of Homeland Security (“DHS”) immigration detainers, while doing nothing whatsoever to address the core Fourth Amendment problem of detaining individuals without a judicial determination of probable cause. Finally, the bill threatens to penalize financially over 350 localities across the country all of which adhere to Fourth Amendment constitutional protections and promote public safety by adopting community trust policies that distinguish their own criminal law enforcement role from DHS’s immigration enforcement functions.

Fiscal impact of S. 2146: This bill has not gone through regular order, as it bypassed the Judiciary Committee. To date, the Congressional Budget Office has not scored S. 2146. The ACLU urges you to consider the fiscal impact of S. 2146, with special attention to: (1) newly proposed mandatory minimum sentences;¹ and (2) provisions requiring DHS to absorb all liability in lawsuits brought by individuals unlawfully detained in violation of the Fourth Amendment.²

I. S. 2146 would undermine efforts to reduce the federal prison population.

In direct contradiction to current efforts by many senators from both parties to reform sentencing and reduce the federal prison population, S. 2146 would create a new mandatory minimum sentence of five years for illegal reentry (8 U.S.C. 1326)

¹ Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (1st Sess. 2015) (Sec. 5 creates a new mandatory minimum sentence of five years for illegal reentry by individuals with a prior “aggravated felony” conviction or at least two prior illegal reentry convictions. It would also raise the maximum sentence for illegal reentry across the board.)

² *Id.*, Sec. 4(b).

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by individuals with a prior “aggravated felony” conviction or at least two prior illegal reentry convictions, and would raise the maximum penalty for illegal reentry across the board. Estimated conservatively, this new sentencing regime would cost taxpayers \$3.7 billion over the next ten years just for people with a prior “aggravated felony” conviction – and require the construction of 12 new federal prisons at even additional cost.³ The American justice system operates on a bedrock principle that the punishment should fit the crime and the person who committed it. Mandatory minimum sentences are a “one size fits all” approach to justice which produces irrational and excessive punishments – the relic of a bygone era of fear-mongering politics, not thoughtful, evidence-driven policy-making. At a time when Koch Industries and Americans for Tax Reform, as well as the ACLU, are pushing to reduce incarceration levels, it makes no sense to create new mandatory minimums for existing federal crimes that would inevitably require prison construction or illegal overcrowding in the current prison system.

II. There are NO “sanctuary” zones free from immigration enforcement.

The bill title’s reference to “sanctuary” policies perpetuates the myth that some areas in the country are free from immigration enforcement. That is simply not true. DHS conducts immigration enforcement throughout the country.

State and local law enforcement agencies immediately notify DHS of every single individual who is taken into state or local custody through the automatic sharing of fingerprints obtained at booking.

While S. 2146 is often described as punishing San Francisco and other so-called “sanctuary” cities, the bill’s broad sweep would target over 350 localities – most of which expressly do not identify as “sanctuary” cities. Far from being sanctuary zones, these localities have adopted common-sense policing policies which reflect the careful balancing of interests by local officials who uniquely understand the particular needs and priorities of their communities.

These localities have chosen to limit the amount of scarce local law-enforcement resources they commit to controversial DHS immigration enforcement practices that have caused countless unconstitutional detentions,⁴ invited racial profiling,⁵ torn apart hundreds of thousands of

³ Calculations by the ACLU and the Center for American Progress, based on U.S. Sentencing Commission and Bureau of Prisons data and assuming steady annual illegal reentry convictions at FY2013 levels. In FY13, a total of 7,706 individuals with illegal reentry convictions had a prior “aggravated felony” conviction, i.e. all those individuals who received 8-level, 12-level, and 16-level enhancements under the sentencing guidelines. 1,828 people received an 8-level enhancement; their average sentence was 21 months. 1,526 people received a 12-level enhancement; their average sentence length was 20 months. 4,352 people received a 16-level enhancement; their average sentence length was 40 months. See *Illegal Reentry Offenses*, UNITED STATES SENTENCING COMMISSION (April 2015) available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf. The impact of the proposed 5-year mandatory minimum for illegal reentry with a prior “aggravated felony” conviction was calculated by adopting the conservative assumption that the new sentence length for each of the 7,706 individuals above would increase to exactly 5 years. Assuming otherwise steady incarceration levels, the increased annual cost within five years, and every year thereafter, would be \$534 million. The total increased cost for the first 5 years would be \$996 million, and the total increased cost for the second 5 years would be \$2.7 billion, for a total cost to taxpayers over 10 years of approximately \$3.7 billion. Additionally, within five years, the increased illegal reentry sentence lengths for people with prior “aggravated felonies” would require an increase of 18,228 new prison beds, or about 12 new prisons (at 1,500 beds/prison). The cost of this prison population increase was calculated using BOP’s FY13 cost calculation of \$80.25 per person, per day. See *Federal Prison System Per Capita Costs*, BUREAU OF PRISONS, available at http://www.bop.gov/foia/fy13_per_capita_costs.pdf.

⁴ Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?_r=1.

⁵ Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, “Secure Communities by the Numbers: An Analysis of Demographics and Due Process” (Oct. 2011), available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

families,⁶ and deterred immigrants from calling police when they witness or are victimized by crime.⁷

The 350 localities that stand to lose federal law enforcement funding and housing assistance due to S. 2146 include cities, large and small, across the country. Half of all 50 states have at least one locality that would be affected -- Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, and the District of Columbia.⁸

III. DHS immigration detainers present serious Fourth Amendment problems by causing the extended detention of tens of thousands of people annually without probable cause, without judicial approval, and without due process protections.

Protection against unreasonable detention by the government is the bedrock of the Fourth Amendment of the Constitution. The Fourth Amendment provides that the government cannot hold anyone in jail without getting a warrant or the approval of a judge. This constitutional protection applies to everyone in the United States – citizen and immigrant alike. In the case of immigration detainer requests, DHS is asking a locality to lock up a person without a warrant or judicial approval, merely based on the say-so of one DHS agent. DHS immigration detainers have caused widespread wrongful detentions, including detentions of U.S. citizens.⁹

A growing number of courts have recognized the constitutional problems with DHS's immigration detainer practices and have consistently concluded that DHS, state, and local officials may be held liable for causing wrongful detentions in violation of the Fourth Amendment.¹⁰ Even DHS Secretary Jeh Johnson has acknowledged the “increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment.”¹¹ That is why 350 localities have decided not to execute a DHS immigration detainer request unless it is accompanied by additional evidence, most typically a judicial warrant.

Even though both DHS and the federal courts recognize that immigration detainers are simply requests, not orders, the Senate bill sponsors now seek to make detainer requests effectively mandatory by forcing all localities to execute them. Those localities that decline to execute

⁶ Ginger Thompson and Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?gwh=334656DC850EE9BC311DADF1D154084E&gwt=pay&assetType=nyt_now.

⁷ Nik Theodore, Department of Urban Planning and Policy at the University of Illinois at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

⁸ Angie Junck and Grisel Ruiz, *Detainer Map*, Immigrant Legal Resource Center, Aug. 17, 2015, <http://www.ilrc.org/enforcement>.

⁹ See, e.g., *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D. Pa. 2012), *rev'd on other grounds*, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014), available at https://www.aclu.org/sites/default/files/field_document/123991p.pdf; and *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014), *affirmed*, *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015), available at https://www.aclu.org/sites/default/files/field_document/morales.pdf.

¹⁰ See, *Miranda-Olivares v. Clackamas Cnty.*, -- F.Supp.2d ----, No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (slip op.) (holding that plaintiff's detention on an ICE detainer after she would otherwise have been released “constituted a new arrest, and must be analyzed under the Fourth Amendment”), available at [http://immigrantjustice.org/sites/immigrantjustice.org/files/Miranda-Olivares%20v%20Clackamas%20County%20\(D%20Or.%20detainer%20SJ%20decision\).pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/Miranda-Olivares%20v%20Clackamas%20County%20(D%20Or.%20detainer%20SJ%20decision).pdf).

¹¹ Memorandum from DHS Secretary Jeh Charles Johnson for Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, “Secure Communities” (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

DHS detainer requests will lose federal law enforcement funding and community development block grants.

S. 2146, however, does nothing to address the fundamental constitutional problems plaguing DHS's use of immigration detainers. Rather than fix the constitutional problems by requiring a judicial warrant, the bill sponsors perpetuate the unconstitutional detainer practices and force the federal government to absorb legal liability for the constitutional violations which will inevitably result. This is irresponsible lawmaking, from both a legal and fiscal perspective. Instead of attempting to shift liability for Fourth Amendment violations from localities to the federal government, the Senate should end the use of DHS's unconstitutional detainer requests. Alternatively, the Senate should fix the constitutional defects and require DHS to present a judicial warrant with every detainer request. This would not be an extraordinary measure, as every law enforcement agency in the country, save DHS by its own made-up practices, is required to produce a judicial warrant in order to lock up a person.

IV. S. 2146 would overturn 350 community trust policies designed to promote public safety and to combat crime.

S. 2146 seeks to penalize over 350 cities and counties whose local leaders have adopted community trust policies in order to promote public safety and combat crime. Numerous law enforcement community members support community trust policies:

- The Law Enforcement Immigration Task Force: “When state and local law enforcement agencies are required to enforce federal immigration laws, undocumented residents may fear that they, or people they know or depend upon, risk deportation by working with law enforcement. This fear undermines trust between law enforcement and the communities we serve.”¹²
- The President’s Task Force on 21st Century Policing: “Law enforcement agencies should build relationships based on trust with immigrant communities. This is central to overall public safety....Decouple federal immigration enforcement from routing local policing for civil enforcement and nonserious crime.”¹³
- Dayton (OH) Police Chief Richard Biehl: “Since Dayton adopted these policies and innovative ways of addressing crime problems, our crime rates have significantly declined. In the past three years, serious violent crime has dropped nearly 22 percent while serious property crime has gone down almost 15 percent.”¹⁴

V. Conclusion

S. 2146 expands controversial mandatory minimum penalties, perpetuates unconstitutional immigration detainer practices, and upends 350 community trust policies. Rather than taking a punitive approach to local law enforcement agencies that are working hard to balance their duties to uphold the constitution and to keep their communities safe, the Senate should end DHS's unconstitutional detainer practices, or fix the constitutional deficiencies by requiring judicial warrants for all detainer requests.

¹² Law Enforcement Immigration Task Force Letter to Senate Judiciary Chairman Chuck Grassley and Ranking Member Patrick Leahy at 2 (July 20, 2015), available at http://immigrationforum.org/wp-content/uploads/2015/07/7_20_2015-LEITF-Letter-re-sanctuary-proposals-Senate.pdf.

¹³ President’s Task Force on 21st Century Policing Final Report at 18 (May 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

¹⁴ Richard S. Biehl, *Here’s How Not to Jump-Start Immigration Reform in House*, ROLL CALL (Jan. 24, 2014), http://www.rollcall.com/news/heres_how_not_to_jump_start_immigration_reform_in_house_commentary-230343-1.html.

The ACLU urges the Senate to vote NO on the cloture vote on the motion to proceed, and, if cloture is invoked, to vote NO on S. 2146. For more information, please contact ACLU Legislative Counsel Joanne Lin (202-675-2317; jlin@aclu.org).

Sincerely,



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