



May 18, 2017

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: ACLU Opposes H.R. 2406

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Dear Chairman Goodlatte and Ranking Member Conyers:

On behalf of the American Civil Liberties Union (“ACLU”), we submit this letter to the House of Representatives Judiciary Committee to express our opposition to H.R. 2406, Immigration and Customs Enforcement (“ICE”) Authorization Act. H.R. 2406 is the fifth of five bills scheduled for markup by the House of Representatives Judiciary Committee on May 18, 2017.

Although ICE was established in 2003 as part of the creation of the Department of Homeland Security (“DHS”), Congress has never passed legislation authorizing ICE. H.R. 2406 would authorize ICE as the principal DHS agency charged with enforcing federal immigration laws. This authorization power is one of Congress’s greatest powers, as it gives agencies and programs the legal power to operate and exist. As such, any legislation authorizing ICE must comply with current immigration statutes and abide by the Constitution.

H.R. 2406 is fraught with constitutional problems and seeks to expand general ICE enforcement powers beyond what is authorized in the immigration statutes.

ICE detainers or holds: Section 101(d)(7) of H.R. 2406 authorizes immigration detainers without defining what a detainer is and what the limits are to detainers. The existing statutes do not authorize immigration detainers. H.R. 2406, section 101(d)(7), aims to authorize a lawless and constitutionally suspect practice that ICE has long engaged in.

An ICE detainer – or immigration hold – is one of the key tools that ICE uses to apprehend individuals who come in contact with local and state law enforcement agencies and to place them into the ICE deportation system. An immigration detainer is an ICE written request that a local jail or other law enforcement agency detain an individual for an additional 48 hours (excluding weekends and holidays) after the person’s release date, in order

to allow ICE agents extra time to decide whether to take that person into custody for deportation purposes.

ICE's use of detainers to imprison people without due process, without any charges pending or probable cause of any violation, has raised serious constitutional concerns. An "increasing number of federal court decisions"¹ have held "that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment," as recognized by former DHS Secretary Jeh Johnson in 2014.²

In authorizing immigration detainers, the sponsors of H.R. 2406 aim to codify a lawless and constitutional suspect practice that has been called into question by an increasing number of federal courts. Congress, and the Judiciary Committee in particular, should not bless the codification of detainers and thereby ignore the serious constitutional concerns raised by multiple courts.

Warrantless arrests for civil immigration violations: Section 201(b) of H.R. 2406 would eliminate the provision of 8 U.S.C. section 1357(a)(2) that conditions warrantless arrest for civil immigration violations on the conclusion that the noncitizen "is likely to escape before a warrant can be obtained for his arrest." The effect of section 201(b) would be to authorize warrantless arrest for civil violations under all circumstances, effectively writing out the administrative warrant requirement of the statute.

Section 201(b) would be a major expansion of ICE's warrantless authority, although importantly the provision cannot override the Fourth Amendment probable cause requirement.

¹ See, e.g., *Miranda-Olivares*, 2014 WL 1414305, at *11 (D. Ore. Apr. 11, 2014) (holding that county violated the Fourth Amendment by relying on an ICE detainer that did not provide probable cause regarding removability); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"). See also *Moreno v. Napolitano*, Case No. 11 C 5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Gonzalez v. ICE*, Case No. 2:13-cv-0441-BRO-FFM, at 12-13 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatoski*, ---F. Supp. 2d ---, 2014 WL 1795631, at* 10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, Civ. Action No. 10-cv-068 15, 201 2 WL 1080020, at * 14 (E.D. Penn. March 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration detainer issued without probable cause), rev'd and remanded on other grounds, 745 F.3d 634 (reversing district court's finding of no municipal liability); *Uroza v. Salt Lake City*, No. 2: 11 CV713DAK, 2013 WL 653968, at *6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration detainer issued without probable cause). Cf *Makowski v. United States*, ---F. Supp. 2d ---, 2014 WL 1089119, at *10 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a detainer without probable cause).

² Memorandum from Jeh Charles Johnson, Department of Homeland Security Secretary, re Secure Communities (Nov. 20, 2014), page 2, FN 1.

H.R. 2406 would create and arm the mass deportation force promised by President Trump.

The sponsors of H.R. 2406 now seek to authorize an additional 10,000 deportation officers, 2500 ICE detention officers, and 60 ICE prosecutors (sections 206, 207). All told, this dramatic increase of 12,560 ICE personnel would ramp up the overall ICE workforce to over 32,500 – at a time when DHS is boasting of a 40 percent drop in illegal crossings across the southern border.³

In addition, section 203(b) of H.R. 2406 would arm deportation officers with M-4 (or equivalent) rifles, tasers, and handguns. The M-4 carbine is the primary infantry weapon used by the Army and Marine Corps.

There is no justification for placing combat rifles designed for warfare into the hands of deportation officers who are charged with enforcing civil immigration laws against people arrested for civil immigration violations. ICE deportation officers are not charged with engaging in lethal combat against military forces.

Immigrants detained in ICE custody are held under civil administrative authority, not criminal authority. Many immigrants taken into ICE custody have no criminal record or only minor records. ICE officers work directly with many vulnerable populations including children, families, asylum seekers, human trafficking victims, and survivors of torture and violence.

Moreover, arming ICE officers with M-4 rifles and other combat weapons would endanger public safety. In 2017 ICE agents have pursued markedly aggressive enforcement tactics in community settings, arresting immigrants at or near courthouses,⁴ churches,⁵ and other sensitive community sites with heavy public traffic. A growing chorus of state supreme court chief justices,⁶ state prosecutors, and district attorneys⁷ have urged DHS to halt immigration arrests at state courthouses, explaining that such arrests deter immigrants from appearing in court as crime victims and as witnesses, thereby jeopardizing effective prosecution of criminals. Arming ICE officers with M-4 rifles would greatly increase fear in immigrant communities and would endanger public safety.

³ Statement by Secretary of Homeland Security John Kelly on Southwest Border Security (Mar. 8, 2017) at <https://www.dhs.gov/news/2017/03/08/statement-secretary-homeland-security-john-kelly-southwest-border-security>

⁴ Joanne Lin, “Immigration Arrests at State Courthouses Are on the Rise in 2017: Here’s Why That’s Dangerous – for All of Us,” (Apr, 6, 2017) at <https://www.aclu.org/blog/speak-freely/immigration-arrests-state-courthouses-are-rise-2017-heres-why-thats-dangerous-all>

⁵ ICE Agents Arrest Men Leaving Fairfax County Church Shelter (Feb. 15, 2017) at <http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html>

⁶ Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses” (Mar. 16, 2017) at <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>; Washington State Supreme Court Chief Justice Mary Fairhurst letter to DHS Secretary Kelly (Mar. 22, 2017) at

<https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf>

⁷ Bob Egelko, “California Prosecutors Protest Immigration Arrests at Courthouses,” SFGATE (Apr, 6, 2017) at <http://m.sfgate.com/news/article/California-prosecutors-protest-immigration-11053682.php>

H.R. 2406 would institutionalize a mass deportation machinery with programs designed to ensure deportation to the maximum extent.

H.R. 2406 would codify the Victims of Immigration Crime Engagement Office while prohibiting ICE from operating any Office of Public Engagement. H.R. 2406 would grant ICE Enforcement and Removal Operations officers unfettered access to any DHS database, which could be interpreted to give ICE access to records concerning Deferred Action for Childhood Arrival recipients, Violence Against Women Act beneficiaries, and other vulnerable populations. Finally, section 204 of H.R. 2406 would establish a seven-member ICE Advisory Council, with four members appointed by ICE unions, thereby guaranteeing the ICE unions dominant control over the Council.

Beyond these measures, H.R. 2406 fails to codify the ICE Office of Detention Policy and Planning (“ODPP”) which operated between 2009 and March 2017. DHS has recently closed ODPP,⁸ and there is no longer any program or office within ICE charged with reforming the detention system and implementing improvements to the care of detainees. DHS has opted to dissolve ODPP at a time when eight detainees have died in ICE custody this fiscal year, Human Rights Watch⁹ has issued a new report on dangerously subpar medical care in ICE detention, and the DHS Office of the Inspector General is investigating less than one percent of complaints received for sexual and physical abuse.¹⁰

Conclusion

We urge the Committee to oppose H.R. 2406. For more information, please contact ACLU senior legislative counsel Joanne Lin (202/253-8135; jlin@aclu.org).

Sincerely,



Faiz Shakir
National Political Director



Joanne Lin
Senior Legislative Counsel

⁸ Caitlin Dickerson, “Trump Plan Would Curtail Protections for Detained Immigrants,” NEW YORK TIMES (Apr. 13, 2017) at <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html>

⁹ Human Rights Watch, “Systemic Indifference: Dangerous and Substandard Medical Care in US Immigration Detention” (May 8, 2017) at <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>

¹⁰ Safia Samee Ali, “Sexual Assaults in Immigration Detention Centers Rarely Get Investigated, Group Charges,” NBC NEWS (Apr. 12, 2017) at <http://www.nbcnews.com/news/us-news/sexual-assaults-immigration-detention-centers-don-t-get-investigated-says-n745616>