

**NIJC'S DETAINER LITIGATION  
JIMENEZ MORENO ET AL V. NAPOLITANO ET AL**

April 2014

**BACKGROUND**

**Jimenez Moreno et al v. Napolitano et al**, 11-cv-05452 (N.D. Ill) is a federal class action lawsuit against the Department of Homeland Security (DHS) for unlawfully detaining immigrants and U.S. citizens identified through law enforcement agencies (LEAs). The lawsuit challenges Immigration and Customs Enforcement's (ICE) authority to instruct federal, state, and local LEAs to continue to detain individuals in LEAs' jails after no other basis for custody exists other than to facilitate ICE's investigation of an individual's immigration status and possibly assume direct physical custody. NIJC and its *pro bono* partner Winston & Strawn LLP filed this case in August 2011. Access case documents at: [http://www.immigrantjustice.org/court\\_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al](http://www.immigrantjustice.org/court_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al).

**What is an immigration detainer?**

Immigration detainers are a tool used by ICE and other DHS officials to request state or local LEAs to detain an individual for up to 48 hours so that ICE may assume custody. Detainers are not arrest warrants and do not provide probable cause for arrest. Moreover, there is no mechanism for judicial review. In Fiscal Year (FY) 2012, 273, 982 individuals subject to immigration detainers—approximately 57% of ICE's FY 2012 detention population—were first stopped, arrested, or criminally convicted by LEAs.<sup>1</sup>

**Are detainers mandatory?**

No. As a matter of law, detainers are requests that LEAs may choose to disregard. As a matter of constitutional law, the federal government cannot require LEAs to participate in immigration enforcement and detention. DHS argued in *Jimenez Moreno* that the detainer form (I-247) does not "impose a requirement upon the LEA to detain the individual on ICE's behalf." Until this litigation, DHS had taken ambiguous positions on whether honoring detainers was mandatory.

**KEY ISSUES: IMMIGRATION DETAINERS VIOLATE THE U.S. CONSTITUTION**

**Detainers violate the Fourth Amendment because ICE fails to show probable cause before issuing detainers**

- Immigration detainers instruct LEAs to hold individuals for 48 hours when they would otherwise be released from law enforcement custody.
- ICE issues detainers based on a preliminary investigation to determine whether an individual is subject to removal. To date, ICE has not followed procedural protections required by the Fourth Amendment to make a showing of probable cause when issuing immigration detainers.

**Detainers violate the Fourth and Fifth Amendment, because ICE fails to provide notice of the detainer and an opportunity to challenge**

- ICE does not ensure individuals or their attorneys are notified that detainers have been issued against them.
- ICE provides no constitutionally sufficient means by which individuals can challenge their extended detention.

**Detainers violate the Tenth Amendment, which contains separation of powers limits that prevent ICE from coercing state and local governments into enforcing federal immigration law**

- Through implementing regulations, immigration detainers purport to compel state and local governments to enforce federal immigration law, violating separation of powers limits under the Tenth Amendment.
- Due to their voluntary nature, state and local LEAs may be held liable for any legal errors in ICE's issuance of immigration detainers.

<sup>1</sup> Transactional Records Access Clearinghouse, available at <http://trac.syr.edu/immigration/reports/325/> (last visited March 4, 2014).

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## WHO ARE THE PLAINTIFFS?

When NIJC filed this complaint in August 2011, the named plaintiffs were being held by LEAs due to detainers placed by ICE, despite being a U.S. citizen and a non-removable lawful permanent resident (LPR).

**Jose Jimenez Moreno** is a U.S. citizen who was detained in Winnebago County, IL. Mr. Jimenez was arrested on March 21, 2011, in Rockford, IL. DHS issued an immigration detainer against Mr. Jimenez on March 22, 2011, despite never investigating his U.S. citizenship. As a U.S. citizen, Mr. Jimenez cannot be deported. DHS canceled the detainer against Mr. Jimenez after the lawsuit was filed.

**Marie Jose Lopez** is an LPR who was detained at a federal correctional institution in Tallahassee, FL (FCI-Tallahassee), and was subject to an immigration detainer on February 1, 2011. The conviction leading to Ms. Lopez's incarceration is not grounds for deportation under immigration law. Ms. Lopez came to the U.S. when she was four years old and today is the primary caregiver of her three U.S. citizen children. Although the facility notified ICE that Ms. Lopez was convicted of a non-removable offense, ICE maintained the detainer on Ms. Lopez. Because of the detainer, Ms. Lopez did not qualify for placement in a halfway house and thus had to serve a longer prison sentence. DHS canceled the detainer against Ms. Lopez soon after the lawsuit was filed.

In both cases, ICE justified the detainer placed on each individual based on its initiation of an investigation to determine whether they are subject to removal from the United States. ICE did not accompany either detainer with an administrative arrest warrant, a Notice to Appear or other charging document, or a final removal order. ICE did not inform either individual of the detainer or a means to challenge the detainer placed against them.

## CONSEQUENCES OF IMMIGRATION DETAINERS

- **LEA participation in immigration enforcement destroys trust with immigrant communities**, thereby discouraging them from reporting criminal activity and making our communities less safe.
- **Detainers increase the likelihood of racial profiling**, as officers may use “foreign-sounding” last names, place of birth, or racial appearance as reasons to report an individual for investigation.
- **Detainers saddle LEAs with significant costs.** Although the Department of Justice's State Criminal Alien Assistance Program (SCAPP) reimburses a tiny fraction of the cost to local jails for holding some individuals, the funds are not sufficient, meaning that local taxpayer dollars are used to cover the costs.
- **Individuals with detainers are more likely to have longer jail sentences or higher bonds, which drain local resources.**<sup>2</sup> Without fully understanding the role of immigration detainers, judges may feel that the detainer provides a disincentive to attend court, thereby prompting them to deny bail or set higher bail—leading to significant additional detention costs on the locality. This increases the amount of time families are separated and increases the financial strain on families.

## IMPACT OF LITIGATION

Immigration detainers violate due process rights granted under the U.S. Constitution. As a result of litigation, DHS must resolve the following issues:

- **Follow procedural requirements in order to be in compliance with Fourth Amendment protections.** ICE must make a showing of probable cause in order to issue immigration detainers on individuals. These decisions must be approved by a neutral magistrate or the individual subject to a detainer be brought before a judge within 48-hours for a probable cause hearing.
- **ICE must issue administrative warrants.** Based on *Arizona v. United States*, ICE must issue and serve administrative arrest warrants along with the immigration detainer on the individual.
- **ICE must provide notice of the detainer and provide a constitutionally sufficient means to challenge the lawfulness of a detainer.**
- **ICE must amend the detainer form and regulations to clarify that detainers are voluntary.**

## NEXT STEPS

NIJC is awaiting court decisions on class certification and its Tenth Amendment and Administrative Procedures Act (APA) claims. These decisions should be issued by July 2014.

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<sup>2</sup> Immigration Policy Center. “Immigration Detainers: A Comprehensive Look.” Feb. 17, 2010.  
[http://immigrationpolicy.org/sites/default/files/docs/Immigration\\_Detainers\\_021710\\_0.pdf](http://immigrationpolicy.org/sites/default/files/docs/Immigration_Detainers_021710_0.pdf).