

## IMMIGRATION DETAINERS

April 2014

### BACKGROUND

#### **What is an immigration detainer?**

Immigration detainers are a tool used by Immigration and Customs Enforcement (ICE) and other Department of Homeland Security (DHS) officials to request state or local law enforcement agencies (LEAs) to detain an individual for up to 48 hours (excluding weekends and holidays) so that ICE may assume custody. Detainers are not arrest warrants and do not provide probable cause for arrest. ICE does not compensate law enforcement for the additional costs associated with honoring immigration detainers.<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. In the National Immigrant Justice Center's (NIJC) lawsuit, *Jimenez Moreno vs. Napolitano* (No. 11-CV-05452), DHS argued that the detainer form (I-247) does not "impose a requirement upon the LEA to detain the individual on ICE's behalf." Up until the *Jimenez Moreno* class action, DHS had taken ambiguous positions on whether honoring detainers was mandatory.

#### **Do detainers exclusively target undocumented immigrants?**

No. Anyone can be issued a detainer. DHS intends to target undocumented immigrants and removable Lawful Permanent Residents (LPRs); however, in practice, the agency does not have the necessary policies and procedures in place to prevent many mistakes. As a general procedure, LEAs submit an individual's fingerprints and basic information to FBI databases. LEA officers may also independently contact ICE if they suspect someone is undocumented. ICE will then use this information to conduct searches of the DHS database, which often contains incomplete information on individuals, particularly those that have derived U.S. citizenship through a parent. ICE also does not have any set policies or practices for when an interview of an individual is necessary before issuing a detainer. **ICE often issues detainers immediately against individuals without ever interviewing them.**

### CONSEQUENCES OF DETAINERS

Some sheriffs and elected officials claim that detainers and programs facilitating LEA participation in immigration enforcement (e.g. Secure Communities and 287(g)) make communities safer. However, in the first six months of 2013, less than one in nine (10.8%) detainers met ICE's stated goal of pursuing individuals who pose a serious threat to public safety or national security. 62% of individuals had no criminal convictions.<sup>2</sup> Participation in immigration enforcement severely hinders the work of local police and diverts personnel and financial resources from the goal of upholding public safety and addressing real, dangerous crime.

- **LEA participation in immigration enforcement destroys trust with immigrant communities**, thereby discouraging them from reporting criminal activity and making our communities less safe.
- **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 taxpayer dollars are used to cover the costs of participating localities. Individuals with detainers also take up limited jail space that could be devoted to criminal justice matters and protecting the community.
- **Detainers violate the Fourth and Fifth Amendments:** DHS (1) does not have the required procedures in place to make probable cause determinations before issuing detainers; (2) does not require notifying individuals that detainers have been issued against them; and (3) provides no constitutionally sufficient means by which individuals can challenge their extended detention.

- **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.
- **Individuals with detainers are more likely to receive higher criminal bonds, no bonds, or choose not to pay a criminal bond for fear of forfeiting bond money, all of which lead to longer detention at local expense.**<sup>3</sup> Judges may feel that the detainer provides a disincentive to attend court if released from custody, thereby prompting judges to deny bail or set higher bail. This increases the amount of time families are separated and increases the financial strain on families, both due to the efforts to acquire bail as well as the limited income due to an individual’s inability to work while incarcerated. Moreover, many individuals subject to detainers choose not to pay bail because they will be transferred to ICE custody and thus will not be able to attend their next hearing, thus forfeiting their bail money.

## POLICY RECOMMENDATIONS

Immigration enforcement activities must not interfere with the primary job of local LEAs: upholding public safety. DHS and ICE must take steps to ensure that immigration enforcement activities focus on DHS’s stated goal of deporting serious, violent criminals and do not infringe on due process rights.

### Immigration enforcement should focus on those who truly pose a threat to public safety

- **Detainers should be limited to convicted individuals classified as Level 1 offenders who served a sentence of one year or more;** probable cause protections must be followed prior to issuing a detainer.
- ICE must publish clear guidelines to reiterate to LEAs that detainers are not legally mandatory, but rather requests to hold individuals. LEA officers should be trained to understand these protocols.
- Before issuing a detainer, special consideration should be granted to individuals who have pending applications and who belong to vulnerable populations.

### DHS and ICE must ensure due process

- Attorneys and detainees must be notified when a detainer has been issued. Procedures to challenge unlawfully placed detainers before a neutral arbiter must be established.
- **LEAs must honor the 48-hour rule and stop detaining individuals beyond a 48-hour period.**
- ICE should not issue detainers against juveniles.

**DHS and ICE must take steps to prevent racial profiling.** ICE should monitor LEAs for indications of racial profiling and when concerns are detected, stop issuance of detainers to those jurisdictions until the concerns can be resolved. DHS and ICE should report concerns of racial profiling to the Department of Justice’s Civil Rights division for possible further investigation.

**Proper oversight of detainers is necessary to ensure accountability.** In addition to publicly releasing the Six-Month Review of detainers promised in ICE’s December 2012 detainer memorandum, ICE should make the following information public:

- Demographics of individuals subject to immigration detainers, e.g. age, gender, race, religion, etc.
- Number of detainers issued, broken down by the individuals’ most serious criminal offense (e.g. drug trafficking or possession, broken tail light, DUI, illegal reentry, no criminal record, etc.) and DHS-level categorization.
- LEA where detainer sent.
- Number of violations of the 48-hour rule.
- Number of individuals removed after DHS took custody while any criminal matter was pending.
- Number of detainers issued against U.S. citizens, Lawful Permanent Residents (LPRs), juveniles, individuals with no conviction, and individuals identified as a result of a minor traffic violations.

<sup>1</sup> The State Criminal Alien Assistance Program (SCAAP), however, does reimburse a fraction of the cost of detaining some individuals who may be subject to immigration detainers.

<sup>2</sup> Transactional Records Access Clearinghouse. “New ICE Guidelines Have Little Impact.” *Syracuse University*. Oct. 1, 2013. <http://trac.syr.edu/whatsnew/email.130930.html>.

<sup>3</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).