



New York City Enforcement of Immigration Detainers PRELIMINARY FINDINGS

By Aarti Shahani, Justice Strategies
October 2010

Executive Summary

Justice Strategies is conducting research for a forthcoming report on the combined impact of drug laws and immigration enforcement on jailers, prisoners and taxpayers. The following preliminary findings relate to New York City.

The New York City Department of Corrections provided Justice Strategies with a database of all discharges in 2008. We analyzed the dataset of noncitizen prisoners whose top charge is a drug-related offense;¹ and interviewed dozens of corrections officials, former prisoners, prosecutors, defense attorneys, and immigration attorneys. The Department of Homeland Security did not respond to written and telephonic requests for an interview.

Analyzing noncitizens whose top charge is a drug-related offense, Justice Strategies found that:

- While Homeland Security purports to target the most dangerous offenders, there appears to be no correlation between offense level and identification for deportation.
- In New York City, Homeland Security detainers are enforced in such a fashion as to effectively terminate the bail rights of certain pre-trial noncitizen prisoners.
- Controlling for race and offense level, noncitizens with an ICE detainer spend 73 days longer in jail before being discharged, on average, than those without an ICE detainer.

Following is a detailed explanation.

Preliminary Findings

The immigration detainer is a non-binding hold request, issued by an administrative officer rather than a judge.

An immigration detainer is a hold issued on a suspected noncitizen by the Bureau of Immigration and Customs Enforcement (ICE), the interior deportation police of Homeland Security. The term “detainer” may be misleading. In the criminal context, a detainer is issued by a law enforcement agency after pending charges have been approved by a judge. In the immigration context, a detainer is not a warrant issued or approved by a judge. It is a non-binding request, issued by an administrative ICE officer.² It was legislated for the first and only time in 1996, to apply to noncitizens charged with drug offenses [See Appendix A].

In a 2006 report co-authored by New York City Police Chief Raymond Kelly, the Major Cities Chiefs write: “civil detainers do not fall within the clear criminal enforcement authority of local police agencies and in fact lay[] a trap for unwary officers who believe them to be valid criminal warrants or detainers.”³ The police chiefs posit that the entry of civil immigration detainers in N.C.I.C. – the database for outstanding criminal warrants – has jeopardized “the integrity of the system has a notice system for criminal warrants.”⁴

While the New York City Police Department does not apprehend individuals solely on the basis of an immigration detainer, the Department of Corrections enforces the detainer similarly to a criminal

warrant. This practice has evolved organically. New York City has not yet issued a policy on the local enforcement of federal immigration detainers.

There is no correlation between ICE detainer issuance and severity of top charge.

Among the 1215 noncitizens whose top charge is a drug crime, 552 (45%) received ICE detainers. The issuance of an ICE detainer is not associated with the severity of the top charge. While 34 percent of those noncitizens charged with an A1 felony (most serious) received an ICE detainer, over half of those with an A misdemeanor received an ICE detainer. Although more non-citizens detained in DOC had a B non-violent felony top charge than an A misdemeanor, ICE issued an equal number of immigration detainers to each group.

Distribution of Immigration Detainers						
Charge Type	Charge Level	Total non- USC	% non-USC	Non-USC with ICE detainer #	Non-USC with ICE detainer %	% of total ICE detainers
Violation	1	5	0.4	2	40.0	0.4
B misdemeanor	2	71	5.8	28	39.4	5.1
A misdemeanor	3	312	25.7	159	51.0	28.8
E non-violent felony	4	24	2.0	8	33.3	1.5
D non-violent felony	5	112	9.2	56	50.0	10.1
C non-violent felony	7	132	10.9	74	56.1	13.4
B non-violent felony	9	401	33.0	159	39.7	28.8
A2 felony	11	68	5.6	35	51.5	6.3
A1 felony	12	90	7.4	31	34.4	5.6
	Total	1215	100.0	552	45.4	100.0

ICE representatives assert that they prioritize apprehension of the most serious offenders. These trends contradict that claim.⁵ It may be that ICE agents issue detainers against those charged with A1 drug felonies at a rate far below the average because they assume that these defendants can be apprehended down the line, during a prison sentence. But the above average rate of detainers on A2 drug felonies, with defendants also likely to receive a prison term, weakens that explanation.

It may be that noncitizens were released on bail before ICE could identify them. This is unlikely. ICE issued half of all immigration detainers within one day of admission, and 90 percent within one week. Of the noncitizens with an A1 top charge, only 20 percent were discharged from jail within one week of admission; as compared to 46 percent of those with an A misdemeanor top charge.

Over half of ICE detainers are issued within one day, indicating that the screening process is not investigative.

The speed with which ICE detainers are issued suggests another explanation: the detainer is neither related to risk level nor the product of investigation. ICE may prioritize those people with already well-developed case files, as they are easiest to deport. It is unclear to what extent ICE relies on its own databases or those of DOC to obtain the information needed to issue a detainer so speedily.

While going for the low hanging fruit is not consistent with ICE’s stated priorities, it may be that these priorities are not institutionalized. This pattern indicates that law enforcement officers are incentivized to work for maximum numbers, not risk levels of those charged with drug offenses.

Days to Immigration Detainer			
Days	Freq.	%	Cum %
< 1	75	13.6	13.6
1	272	49.3	62.9
2	83	15.0	77.9
3	30	5.4	83.3
4	13	2.4	85.7
5	8	1.4	87.1
6	10	1.8	88.9
7	6	1.1	90.0
> 8	55	10.0	100.0
	552	100.0	

Controlling for race and offense level, noncitizens with a drug-related top charge and an ICE detainer spend 73 days longer in jail before being discharged, on average, than those without an ICE detainer.

The issuance of an immigration detainer is strongly associated with prolonged jail stay. The citizen and noncitizen population without an immigration detainer spend, on average, the same amount of time in city jails before being discharged. But noncitizens charged with drug crimes and with an ICE detainer spend 73 days longer in jail before being discharged, on average, than those without an ICE detainer. These figures control for race and offense level. They include the detention of prisoners who are pre-trial (charged with, but not convicted of, an offense), as well as those convicted of misdemeanors and other low-level offenses. They also include undocumented immigrants, as well as lawful permanent residents and those with valid claims to remain here.

Noncitizen Days to Discharge, Controlling for Race and Charge Level				
Charge Type	Charge Level	Noncitizens Average stay		Difference (in days), controlling for race
		With ICE detainer	Without	
All charges	All	134.3	59.4	73*
Violation	1	25.5	2.7	22*
B misdemeanor	2	22.1	7.4	15*
A misdemeanor	3	54.8	21.4	33*
E non-violent felony	4	94.5	26.9	60*
D non-violent felony	5	155.0	78.7	76*
C non-violent felony	7	238.1	83.2	154*
B non-violent felony	9	144.5	62.2	81*
A2 felony	11	260.2	155.5	97*
A1 felony	12	180.1	100.5	84*

** Difference significant at the 1% significance level.*

Noncitizens with an ICE detainer are effectively barred from pre-trial release on bail, no matter the offense level.

Arizona was America’s first state to pass a law summarily denying bail to immigrants facing criminal charges.⁶ While New York has no such *de jure* prohibition on bail for non-citizens, the immigration detainer acts as a *de facto* one. Noncitizens otherwise eligible for bail do not post it. They must negotiate a plea bargain while in DOC custody.⁷

Half of noncitizens with a drug-related top charge and without an ICE detainer are discharged from DOC through bail or [un]supervised release. Only 2 percent of those with an ICE detainer are discharged pre-trial. Over half are discharged into ICE custody, and a quarter into state prison to serve a criminal sentence first. They will presumably be deported upon completion of it, through the New York State Institutional Removal Program⁸ and/or subsequent transfer into ICE custody.

Of those noncitizens receiving an immigration detainer, 7 were released on bail. It is unclear whether these individuals were transferred directly into ICE custody, or were released pursuant to completion of their criminal case. It is likely that another set of noncitizens with immigration detainers who paid \$1 bail are counted in the data as discharges to ICE.

Discharge Types: Noncitizens With Immigration Detainer v. Without				
Discharge	With ICE Detainer	%	Without ICE Detainer	%
Adjournment in Contemplation of Dismissal			1	0.2
Bail Paid	7	1.3	237	35.8
Conditional Discharge			6	0.9
Case dismissed			11	1.7
Sentenced Expired	8	1.5	66	10.0
ICE	281	50.9	40	6.0
Intermittent Sentence (weekend jail stays)	1	0.2	5	0.8
Transfer to Nassau County			1	0.2
Transfer to law enforcement (unspecified)	10	1.8	5	0.8
Transfer to NYPD			1	0.2
Paroled	3	0.5	47	7.1
Released on Recognizance	1	0.2	57	8.6
Time Served	1	0.2	55	8.3
Transfer to US Marshall	5	0.9	5	0.8
Detainer Lifted	7	1.3		
State Hospital			5	0.8
Transfer to State Prison	144	26.1	102	15.4
Turnaround on another charge	84	15.2	19	2.9
<i>Total</i>	552	100.0	663	100.0

¹ We categorized each entry as a noncitizen if the prisoner has an immigration warrant, and/or is released into ICE custody, and/or self-reports as a noncitizen. While there is incentive to lie about being a citizen, there is no incentive to lie about being a noncitizen.

² ICE issues two types of internal administrative hold: the “arrest warrant” (Form I-200, Warrant of Arrest) and the “detainer” (Form I-247, Immigration Detainer – Notice of Action).

³ M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws By Local Police Agencies. June 2006. Page 6. Accessed on July 18, 2010 at

http://www.majorcitieschiefs.org/pdfpublic/MCC_Position_Statement_REVISED_CEF_2009.pdf.

⁴ MCC Report, page 10

⁵ See Immigration and Customs Enforcement. “Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens is a Department of Homeland.” Online at http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

⁶ Bailable offenses. Ariz. Const. Art. 2 § 22. The Arizona Constitution designates that criminal defendants facing certain charges, while innocent until proven guilty, do not have the right to seek bail because they are categorically a flight risk or threat to society.

⁷ The plea is an integral part of the US criminal justice system. At the federal and state levels, only 5 percent of criminal prosecutions are the result of a trial conviction. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17)(only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); id., at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

⁸ The New York State Institutional Removal Program (IRP) is a partnership between state corrections and Homeland Security designed to process noncitizen prisoners for deportation during a prison sentence. See David D. Clark. “The Foreign-Born Under Custody Population & The IRP.” New York State Department of Correctional Services. December 31, 2009. Accessed at <http://www.docs.state.ny.us/Research/annotate.asp#foreign> on July 16, 2010.

Appendix A: Immigration Detainer Statute

8 USC 1357 (d)

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

About Justice Strategies

JUSTICE STRATEGIES, a project of the Tides Center, Inc., is a nonpartisan, nonprofit research organization. Justice Strategies' work is focused on sentencing and correctional policy, the political economy of incarceration, and the detention and imprisonment of immigrants. Our mission is to provide high quality policy research to advocates and policymakers pursuing more humane and cost-effective approaches to public safety.

AARTI SHAHANI is a Research Associate with Justice Strategies. She was lead author of JS report "Local Democracy on ICE," which was cited in the Congressional Record and outlets including *The Wall Street Journal*, *The New York Times*, *The Los Angeles Times* and *The Arizona Republic*. Shahani has been a freelance journalist, a community organizer, non-profit founder and director, strategic consultant, and adjunct faculty member at the Gallatin School of New York University, where she taught a course on immigration and organizing. She has contributed to *The Washington Post*, *Salon.com*, *New America Media*, *Alternet*, and *ColorLines*. Her work as a practitioner has been recognized by institutions including the Revson Foundation at Columbia University, the Union Square Awards Foundation, the Academy for Educational Development, and the Legal Aid Society of New York. As a Paul & Daisy Soros New American Fellow, she is currently a candidate for a masters degree in public policy at Harvard's Kennedy School of Government. Shahani was born in Casablanca to Indian parents and grew up in Flushing, Queens.