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Immigration and Customs Enforcement's Detainer Program Operates Unlawfully Despite Nominal Changes

This document summarizes the legal and constitutional requirements governing Immigration and Customs Enforcement's (ICE) use of detainers and the ways in which ICE's current practice routinely violates these constraints. A federal court in Illinois has ruled that ICE's detainer program violates federal law, resulting in systematic illegal arrests. ICE issues more than 5,000 detainers in violation of federal law and the Constitution *every month*. Federal court decisions challenging the legality of the Priorities Enforcement Program (PEP), the most recent iteration of ICE's detainer program, are accumulating. The American Immigration Lawyers Association (AILA) and the National Immigrant Justice Center (NIJC) demand that ICE be held accountable to its governing statute and the Constitution in the design and implementation of its detainer program.



The Role of Detainers in PEP

The Department of Homeland Security (DHS) announced PEP in November 2014 as its primary enforcement program for identifying removable individuals held in the custody of state and local jails. PEP replaced Secure Communities, DHS's former flagship interior enforcement program. In announcing PEP, DHS Secretary Jeh Johnson stated his intention to remedy the serious legal problems that plagued Secure Communities, a program whose "very name has become a symbol for general hostility toward enforcement of our immigration laws."¹

DHS launched PEP primarily "to replace requests for detention (i.e., requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification (i.e., requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority.)"² DHS assured the public that notification requests would be the norm, with requests for detention issued only under "special circumstances,"³ in compliance with PEP's enumerated priority categories, and when "ICE has probable cause that the individual is removable."⁴

Yet data and ICE officials' own testimony in federal litigation reveals that PEP is nothing more than Secure Communities operating under a different name. ICE continues to issue detainers at a rate far exceeding notification requests – contrary to Secretary Johnson's intentions for the program. A recent report revealed that **four out of five PEP requests made by ICE officers are detainer requests**, rather than the notification requests that were supposed to replace them.⁵ Additionally, ICE officials continue to request detainers in a broad set of circumstances, giving little if any meaning to the "special circumstances" required by the Secretary's memo. In contrast to the carefully delineated PEP priority categories, **ICE uses PEP to request the detention of individuals with no criminal record at even higher rates than under Secure Communities.**⁶ ICE officials have testified that the "actual process for issuing detainers" has not changed from Secure Communities to PEP.⁷

By the numbers:

- Four out of every five detainers issued by ICE requests detention rather than just notification.⁸
- Based on these numbers, ICE is issuing approximately 5,600 illegal detainers *every month*, more than 67,000 every year.
- Under its detainer program, ICE has requested law enforcement to make nearly 2 million illegal arrests in the past decade.

¹ Department of Homeland Security, Secure Communities Memo, Nov. 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

² *Id.*

³ *Id.*

⁴ U.S. Immigration and Customs Enforcement, Office of Enforcement and Removal Operations, Priority Enforcement Program, Brochure (2015), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf.

⁵ Reforms of ICE Detainer Program Largely Ignored by Field Officers, TRAC Immigration, <http://trac.syr.edu/immigration/reports/432/>.

⁶ *Id.* (showing that 51% of detainer forms issued during the first two months of FY 2016 – the year PEP was fully phased in – targeted noncitizens with no criminal record, compared to 43% in the year prior to PEP's announcement).

⁷ *Jimenez Moreno v. Napolitano*, --F. Supp. 3d --, 2016 WL 5720465, at *3-4 (N.D.Ill. Sept. 30, 2016); *Gonzalez v. Immigration and Customs Enforcement*, Case No 13-4416 (C.D. Cal.), Dkt. No. 152-1, Plaintiffs' Mem. in Support of Class Certification, at 8-10.

⁸ Reforms of ICE Detainer Program Largely Ignored by Field Officers, TRAC Immigration, (Aug. 9, 2016), <http://trac.syr.edu/immigration/reports/432/>.

ICE's Detainer Practice Routinely Violates the Constitution and Federal Immigration Law

ICE, like any law enforcement agency, must respect federal law and the Constitution of the United States. Yet for years ICE's detainer practice has operated in violation of both. PEP's enactment has done nothing to remedy the violations of federal law and the Constitution.

ICE's detainer practice violates federal immigration law:

In September 2016, a federal district court in the Northern District of Illinois found ICE's detainer practice to routinely violate federal immigration law, holding that, "ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 USC §1357(a)(2)."⁹ The court found that nearly all ICE detainers issued by ICE's Chicago Field Office were invalid.

ICE acknowledges that when an individual's detention in state or local custody is prolonged due to an ICE detainer, that individual is the subject of a warrantless arrest.¹⁰ The Immigration and Nationality Act (INA) limits immigration officials' ability to effect a warrantless arrest to narrow circumstances, including if the officer determines the subject of the arrest "is likely to escape before a warrant can be obtained..."¹¹ ICE also acknowledges that its policies and practices do not require any individualized determination of such imminent risk of escape.¹² This sweeping admission confirms that ICE detainers that request an extension of local or state custody are unlawful under the terms of the INA. Notably, ICE has requested nearly two million illegal arrests over the past decade.¹³

Fourth Amendment violations:

It is well-settled law that when a person is kept in custody after he or she should have been released, the new reason for the continued detention must be justified under the Fourth Amendment.¹⁴ The Fourth Amendment requires the issuance of a warrant by a neutral magistrate on a finding of probable cause or, in the case of a warrantless arrest, review by a neutral magistrate within 48 hours of arrest.¹⁵ Although the U.S. Supreme Court articulated these requirements in *Gerstein v. Pugh*, a criminal case, the ruling was framed to extend Fourth Amendment protections to "any significant pretrial restraint of liberty."¹⁶ Civil immigration arrests, like criminal arrests, must comply with the Fourth Amendment.¹⁷ When ICE effectuates an arrest via detainer, it is "subject to the same Fourth Amendment requirements that apply to other ... arrests."¹⁸

⁹ *Jimenez-Moreno* at *8.

¹⁰ *Id.* at *6.

¹¹ 8 U.S.C. §1357(a)(2).

¹² *Jimenez Moreno* at *6.

¹³ TRAC, "Detainer Usage October 2002-October 2015" Table 1 (Jan. 21, 2016), available at <http://trac.syr.edu/immigration/reports/413/include/table1.html> (last visited Nov. 8, 2016).

¹⁴ *Illinois v. Caballes*, 543 U.S. 405, 407-08 (2005).

¹⁵ *Gerstein v. Pugh*, 420 U.S. 103, 116 (1975).

¹⁶ *Id.* at *125.

¹⁷ See *Arizona v. US*, 132 S. Ct. 2492, 2509 (2012) (stating that, "Detaining individuals solely to verify their immigration status would raise constitutional concerns.") (citing *Arizona v. Johnson*, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)). See also *Olivia-Ramos v. Atty Gen of U.S.*, 694 F.3d 259, 284-85 (3d Cir. 2012) (noting that immigration officials can conduct immigration enforcement actions so long as the actions are "consistent with the limitations imposed by the Fourth Amendment."); *Mendoza v. Osterberg*, --- F. Supp. 3d ---, 2016 WL 6238605, at *10 (D. Nebraska, Mar. 3, 2016) (It was clearly established well before 2010 that "immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests.).

¹⁸ *Morales v. Chadbourne*, 793 F.3d 208, 215-16 (1st Cir. 2015). See also *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (holding that plaintiff's "continued detention [on an ICE detainer] exceeded the scope of the Jail's lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment.").

One federal district court noted that at a minimum, there must be “probable cause to believe that the subject of the detainer is (1) an ‘alien’ who (2) ‘may not have been lawfully admitted to the United States’ or (3) ‘otherwise is not lawfully present in the United States.’”¹⁹

Since *Galarza* was decided, ICE added the words “probable cause” to its new detainer forms without changing its actual practice in any meaningful way.²⁰ ICE officials, the same officials who issue the detainers, make the determination of whether probable cause exists.²¹ The absence of a finding of probable cause by a neutral magistrate flies in the face of the Fourth Amendment. “[T]he detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.”²²

In the ordinary course of their duties, ICE officers routinely issue detainers requesting extended detention without any sworn, particularized statement of probable cause or review by a neutral magistrate. In his November 2014 memo announcing the creation of PEP, Secretary Johnson referred publicly to the “increasing number of federal court decisions that hold detainer-based-detention by state and local law enforcement agencies violates the Fourth Amendment.”²³ Yet, DHS has not implemented any meaningful change to comply with due process and the Constitution. In fact, in newly released PEP training materials, ICE instructs its officers that a detainer does not cause an arrest, erroneously suggesting that *the Fourth Amendment does not even apply*.²⁴

What are “administrative warrants”?

ICE uses and has proposed expansion of an “administrative warrant” program. This will not in any way remedy the current illegalities that plague ICE’s detainer program. Like detainers, administrative warrants are issued and approved by immigration enforcement officials. A system in which ICE’s own officials are signing off on probable cause determinations that allow enforcement officers of that very same agency to undertake arrest and detention flies in the face of due process.²⁵ The Fourth Amendment requires that a probable cause determination be made by a “neutral magistrate,” an officer who must be “neutral and detached” from the activities of law enforcement.²⁶

¹⁹ *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev’d in part on other grounds*, 745 F.3d 634 (3d Cir. 2013).

²⁰ See *supra* note 7.

²¹ *Gerstein* noted the importance of a neutral magistrate: “The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” *Gerstein* at *112-13.

²² *Gerstein* at *114.

²³ Department of Homeland Security, Secure Communities Memo, Nov. 20, 2014, at p. 2 & n.1 (collecting seven different federal district court decisions finding as much). See *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918-919 (S.D. Ind. 2011) (enjoining Indiana law permitting local law enforcement agencies to arrest/detain based on issuance of an immigration detainer because the law did not ensure basic Fourth Amendment protections), *permanently enjoined*, *Buquer v. City of Indianapolis*, 2013 WL 1332158, at *10 (S.D. Ind. Mar. 28, 2013) (same legal conclusion); *Morales*, 793 F.3d at 215 (“It was [] clearly established well before [plaintiff] was detained in 2009 [on an immigration detainer] that immigration stops and arrests were subject to the same Fourth Amendment requirements that apply to other stops and arrests”); *Miranda-Oliveras v. Clackamas County*, No. 12-cv-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (holding that “continued detention” of an individual pursuant to an ICE detainer “exceeded the scope of the Jail’s lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment”); *Uroza v. Salt Lake Cnty.*, No. 11-cv-713, 2013 WL 653968, at *6 (D. Utah Feb. 21, 2013) (“The proposition that immigration enforcement agents need probable cause to arrest pursuant to 8 U.S.C. § 1357(a)(2) and in accordance with the Fourth Amendment has been established in the Tenth Circuit since 1969.”).

²⁴ See *Jimenez Moreno v. Napolitano, et al.*, Case No 11-5452 (N.D. Ill), Dkt. No. 235, Plfs’ Local Rule 56.1 Statement of Facts, Ex. J, at DHS2681 & Ex. II, at DHS2794.

²⁵ As with detainers, there is no legal standard set forth for the issuance of ICE administrative warrants. See 8 U.S.C. § 1226(a) and 8 CFR § 287.5(e).

²⁶ *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

Due Process violations:

The due process clause of the Fifth and Fourteenth Amendments require that any deprivation of liberty be accompanied by notice and an opportunity to contest the validity of the detention. Yet, ICE still has no policy or practice of ensuring that individuals are even served with a copy of an immigration detainer.²⁷ Noncitizens frequently face extended detention without receiving adequate notice of the basis for their detention. There is also no adequate procedure by which an individual can appeal the issuance of a detainer or challenge the basis for its issuance before a neutral adjudicator.

States and Localities Should Not Be Punished for Limiting Cooperation with Unlawful Practices

Multiple federal courts have found that state or local law enforcement agencies and/or officials may be held liable for their role in accomplishing the prolonged detention requested by ICE's detainer practice, in violation of the Fourth Amendment.²⁸ States and localities that have restricted or are considering restricting their cooperation with these unlawful practices are well within their rights to question participation in unlawful enforcement actions. Yet these programs find themselves under scrutiny and investigation.²⁹ This pattern persists even in light of congressional testimony by the Principal Deputy Assistant Attorney General affirming the legality of policies limiting participation in PEP.³⁰ Localities seeking to minimize their own involvement in unconstitutional and illegal practices should not be condemned for following the rule of law.

ICE's illegal detainer practices put families at risk: the story of Maria Jose Lopez

When Maria Jose Lopez was only four years old her parents were forced to flee the bloody Guatemalan Civil War, finding safety in the United States. At 29 years of age, a lawful permanent resident, Maria labored to provide for her three U.S. citizen children as a single mother. ICE issued a detainer against Maria in 2011 as she was completing a sentence for a conviction that arose in the context of domestic violence she suffered for years. All parties agree her conviction – Maria's only involvement with the criminal justice system – did not give ICE the authority to subject her to deportation. Nonetheless, ICE issued a detainer without once interviewing or speaking with Maria. ICE only agreed to cancel the detainer when Maria became a named plaintiff in the *Jimenez Moreno* case. Had she not been involved in a high profile case, her family would have been torn apart. Due process and liberty should never be compromised because of government error.

²⁷ See *Jimenez Moreno v. Napolitano, et al.*, Case No. 11-5452 (N.D. Ill), Dkt. No. 219, Gov't Resp. to Plf's Local Rule 56.1 Statement of Facts, at ¶¶ 53-66.

²⁸ See *supra* note 23.

²⁹ See, e.g., Memorandum from Michael E. Horowitz, Inspector General, to Karol V. Mason, Assistant Attorney General for the Office of Justice Programs (May 31, 2016), <https://oig.justice.gov/reports/2016/1607.pdf>.

³⁰ On September 27, 2016, the Principal Deputy Assistant Attorney General, Vanita Gupta, stated her opinion before a congressional subcommittee that the New Orleans Police Department's controversial policy limiting involvement in PEP, and its successor policy, was lawful. *New Orleans: How the Crescent City Became a Sanctuary City* (Sept. 27, 2016), video testimony at 1:28:18 – 1:29:37, <https://judiciary.house.gov/hearing/new-orleans-crescent-city-became-sanctuary-city/>.



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The American Immigration Lawyers Association (AILA) is the national association of more than 14,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace. AILA members also represent foreign students, entertainers, athletes, and asylum seekers, often on a pro bono basis. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 39 chapters and over 50 national committees.

Greg Chen, Director of Advocacy
American Immigration Lawyers Association
gchen@aila.org, (202) 507-7615

Alyson Sincavage, Legislative Associate,
American Immigration Lawyers Association
asincavage@aila.org, (202) 507-7657

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Heartland Alliance's National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. NIJC engages in litigation and policy work to safeguard the rights of individuals subjected to unlawful detainers. Currently NIJC is litigating *Jimenez Moreno et al v. Napolitano*, a federal class action lawsuit challenging the unlawful detention of immigrants and U.S. citizens identified through local law enforcement agencies.

Heidi Altman, Director of Policy
National Immigrant Justice Center
haltman@heartlandalliance.org, (312) 718-5021

Mark Fleming, National Litigation Coordinator
National Immigrant Justice Center
mfleming@heartlandalliance.org, (312) 660-1628