



# Understanding Immigration Detainers: An Overview for State Defense Counsel<sup>1</sup>

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# Introduction: How Detainers Support Immigration Enforcement in our Local Criminal Justice Systems

Immigration detainers, also called ICE holds or immigration holds, are the primary immigration enforcement tool that Immigration and Customs Enforcement<sup>2</sup> (ICE) uses to apprehend suspected noncitizens in the criminal justice system (CJS), transfer them into immigration custody, where they will face removal (a.k.a. deportation) proceedings.<sup>3</sup> A noncitizen's exposure to the immigration system begins at the point when ICE places the detainer with the local arm of the CJS.

Congress' 2009 appropriation of \$2.5 billion dollars for ICE enforcement programs that operate within federal, state and local police departments, jails and prisons are expected to result in record-high numbers of detainers that are lodged within hours after arrest.<sup>4</sup> The goal of these initiatives is to obtain final orders for suspected noncitizens while they are incarcerated to quickly effectuate their deportations.<sup>5</sup>

Often improperly used as an instrument of warrantless arrest, detainers directly impact an individual's due process rights and can have severe collateral consequences in a person's criminal proceedings. In many cases, detainers affect whether or not an individual is granted bail, as well as the amount of bail set. In some cases, detainers determine whether a person is willing to appear at their criminal proceedings for fear of arrest by immigration authorities. Detainers also prevent access to diversion programs or alternate sentencing. As immigration enforcement increases through the criminal justice system, consideration of immigration detainers must be part of a defense strategy.<sup>6</sup>

## I. Immigration Detainers Generally

### A. What is a Detainer?

The immigration detainer serves to advise the agency holding the person that the Department of Homeland Security (DHS) "seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien."<sup>7</sup> An immigration detainer is a request by ICE to state or local jails to detain an individual after he or she is eligible for release to enable ICE to assume custody.

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<sup>2</sup> ICE is the agency within the Department of Homeland Security (DHS) responsible for immigration enforcement within U.S. borders. For additional information on the federal immigration system and the agencies who participate in it please see Appendix D.

<sup>3</sup> A suspected noncitizen also faces possible prosecution for immigration-related crimes (e.g. illegal entry 8 U.S.C § 1325 or illegal reentry (8 U.S.C. § 1326).

<sup>4</sup> ICE Secure Communities: Standard Operating Procedures (SOP, available at: [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesops93009.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf). See also Report, "County Jail Survey Report," Texas Association of Counties, May 20, 2008 stating that over 45% of counties report suspected aliens to ICE at the time of booking. [http://www.county.org/resources/countydata/products/2008\\_CountyJailSurveyReport\\_Final.pdf](http://www.county.org/resources/countydata/products/2008_CountyJailSurveyReport_Final.pdf)

<sup>5</sup> See Secure Communities Field Training, ICE Electronic FOIA Reading Room, [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesfieldtraining.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesfieldtraining.pdf).

<sup>6</sup> See "Protocol for the Development of a Public Defender Immigration Service Plan," by the New York State Defenders Association and the Immigrant Defense Project (author: Peter Markowitz)(working draft 2009)[http://www.pretrial.org/Docs/Documents/095\\_Protocol\\_PD\\_Immigration\\_Plan.pdf](http://www.pretrial.org/Docs/Documents/095_Protocol_PD_Immigration_Plan.pdf) (last visited March 2011)

<sup>7</sup> 8 CFR §287.7(a).

“The detainer is a *request* that such agency *advise* the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate custody is either impracticable or impossible.” 8 C.F.R. § 287.7(a) (emphasis added)

There are many common misconceptions about immigration detainers. For example, an immigration detainer is not a warrant of arrest, is not authorization for ICE custody, does not mean that a person is presently in ICE custody, is not evidence that a person is deportable from the United States, and it is not a criminal detainer.<sup>8</sup> Detainers permit state and local jails to maintain custody of individuals for not more than 48 hours after the time the criminal justice authorities would otherwise release a person, excluding weekends and holidays. 8 C.F.R. § 287.7(g). The moment a person in custody posts bail is one illustration of when the 48 hour period would begin because the authorities would otherwise release someone who posts bail.

## **B. Legal Authority and Policy**

### **1. Statute**

The immigration statute contains express authority for issuing detainers. Notably, the statute limits the issuance of detainers to cases of noncitizens charged with controlled substance violations. (However, ICE detainers are lodged for any or all reasons, in violation of the statute.) The statute also requires the local agency to generate the detainer inquiry, not ICE.

### **2. Regulations**

The federal regulations that purport to implement this statutory language are located at 8 C.F.R. § 287.7.<sup>9</sup> Under these regulations, the statutory requirement that law enforcement agency initiate the request is unclear.<sup>10</sup> The regulations expand the issuance of detainers to all criminal offenses, not just controlled substances. Furthermore, it does so based upon its own actions, generally with routine (and often with the misinformed) agreement of state and local officials.<sup>11</sup> There have been very few cases challenging this widespread practice to date.<sup>12</sup> Moreover, the regulations do not articulate a standard of proof for issuing detainers.

### **3. Immigration Case Law**

The Board of Immigration Appeals (BIA), the appeals court in the immigration administrative court system, has characterized a detainer as “merely an administrative mechanism to assure that a

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<sup>8</sup> Criminal detainers generally refer to pending charges in another jurisdiction that are sanctioned by a judge or may be governed by the Interstate Agreement on Detainers Act.

<sup>9</sup> ICE also maintains that, in addition to 8 U.S.C. § 1357(d), detainers are issued pursuant to its general authority to detain noncitizens pursuant to 8 U.S.C. 1226, as well as its general powers to enforce and administer immigration laws under 8 U.S.C. § 1103.

<sup>10</sup> See 8 C.F.R. § 287.7(a) and (c).

<sup>11</sup> For a detailed analysis of immigration detainers generally and arguments articulating the ultra vires nature of current regulations and practice see Lasch, Christopher’s “*Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*,” 35 Wm. Mitchell L.Rev. 164 (2008).

<sup>12</sup> See *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F.Supp.2d 1177, 1196, 2009 WL 2382689 (N.D.Cal.).

person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act.”<sup>13</sup>

#### 4. Forms and ICE Detainer Policy Guidance

According to the regulation, the detainer should be issued through Form I-247.<sup>14</sup> (See *Appendix B*) Advocates, however, report that ICE may use other forms, such as a Warrant of Arrest Form I-203, have also been used. The detainer Form I-247 makes no mention of the person’s specific immigration status. ICE lists four actions on the Detainer Form I-247 indicating ICE’s interest in the alleged noncitizen. In August 2010, ICE released a *new* detainer form that characterizes the detainer as a “request to detain.” This is a change from the previous I-247 form (rev. 4-1-97) that stated that the law enforcement authority was “required” to detain.<sup>15</sup>

ICE recently issued an interim detainer policy guidance that mirrors the language in the ICE regulation, stating that the detainer is a “notice that ICE issues to Federal, State and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA’s custody.”<sup>16</sup> By filing a detainer on an individual, ICE is requesting that the jail notify them upon the individual’s release from criminal custody.<sup>17</sup>

Advocates reported that ICE improperly used detainers to “arrest” people at roadside stops.<sup>18</sup> The detainer policy guidance adds that detainers should only be issued for persons in custody of the local police or jail on an independent criminal charge.

Also, detainers should not be issued during *Terry* or roadside stops (unless ICE officers are on their way to the scene). A *Terry* stop, which is a brief detention of a person by police on reasonable suspicion of involvement in *criminal activity* but short of probable cause to arrest.<sup>19</sup> Because immigration violations are civil actions - not criminal- law enforcement cannot use an administrative civil tool such as an immigration detainer to detain someone on reasonable suspicion that the person is involved with criminal activity.

Additionally, the guidance asks that “additional care” be taken for legal permanent residents. However, the guidance does not specify what that care entails.

#### 5. Other Court Decisions

Several courts have held that the lodging of an immigration detainer is a “mere expression of ICE’s intention to seek future custody” of defendant and that it is not equivalent to more traditional criminal “detainers” or “holds” since it provides no concurrent criminal basis for continued custody

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<sup>13</sup> See *Matter of Sanchez*, 20 I&N Dec. 223, 225 (BIA 1990), citing *Moody v. Daggett*, 429 U.S. 78, 80 n. 2 (1976).

<sup>14</sup> See Appendix B for sample Forms I-247 (dated August 10, 2010) and I-247 (rev. 4-1-97)

<sup>15</sup> See Appendix B.

<sup>16</sup> See Appendix E for ICE Interim Policy, effective August 2, 2010, Interim Policy Number 10074.1: Detainers.

<sup>17</sup> See 8 C.F.R. 287.7. Note that the form requests the jail authorities to notify ICE upon release or provide 30 days or “as far in advance as possible” advance notice of release.

<sup>18</sup> See *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F.Supp.2d 1177, 1196, 2009 WL 2382689 (N.D.Cal.).

<sup>19</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968).

(such as the existence of pending criminal charges in another jurisdiction).<sup>20</sup> Most courts have specifically held that detainers do not constitute custody.<sup>21</sup> In 2009, the ACLU of Northern California filed suit against the Sonoma County Sheriff and ICE for racial profiling, unlawful detention and other violations during roadside arrests where the primary instrument used to effect arrest was an immigration detainer. They challenged the detainer regulation as being *ultra vires* because it was being used in cases other than controlled substances convictions. Although the case remains on appeal and pending, the judge dismissed the *ultra vires* claim finding that the regulation was a permissible construction of the statute and entitled to deference.<sup>22</sup>

### **C. Who Can Issue the Immigration Detainer?**

The immigration regulations state which officials can issue detainers. 8 CFR § 287.7. ICE extends this power to any other law enforcement officer who is delegated to perform certain immigration enforcement functions through an agreement called a Memoranda of Agreement (MOA). 8 USC §1357(g)<sup>23</sup> The MOA should identify what enforcement functions, such as issuing detainers, the LEA is authorized to execute.

To find out whether your local police or jail officers have such an agreement, go to the Electronic FOIA Reading Room of the ICE website at <http://www.ice.gov/foia/readingroom.htm>.

It is worth checking whether the state or county laws vest general law enforcement authority to the sheriff or jail that has signed an MOA because it may not have authority to lodge detainers. For example, in Davidson County, Tennessee, attorneys moved for a preliminary injunction preventing the Davidson County Sheriff's Office from carrying out federal immigration law enforcement functions delegated to the sheriff deputies by a §287(g) MOA on grounds that it violates mandatory provisions of the county Charter and the Tennessee Supreme Court's decision divesting the sheriff's office of performing enforcement actions.<sup>24</sup>

### **D. How ICE Identifies Noncitizens and Issues Detainers Against Them**

Immigration officers must have a "reason to believe" that the individual is not a citizen of the United States to lodge a detainer, but the statute and regulations do not include an evidentiary standard nor is it limited to individuals who are removable.<sup>25</sup> In practice, anyone whom the federal government *believes* to be a noncitizen and is *suspected* of being in violation of immigration laws can have a detainer

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<sup>20</sup> See *State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009) (holding presence of ICE detainer did not toll defendant's speedy trial clock); *State v. Sanchez*, 110 Ohio St. 3d 274 (2006)(same).

<sup>21</sup> The majority of circuits hold that the immigration detainer alone does not place the petitioner in immigration custody. See *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538 (5th Cir.2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v. United States Immigration and Naturalization Service*, 911 F.2d 539, 541 (11th Cir. 1990); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir.1988), cert. denied,490 U.S. 1082 (1989).

<sup>22</sup> See *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F.Supp.2d 1177, 1196, 2009 WL 2382689 (N.D.Cal.).

<sup>23</sup> Also known as INA §287(g)

<sup>24</sup> *Renteria-Villegas, Daniel et.al v. Metropolitan Government of Nashville Davidson County et.al.* Case No. 3:11-cv-218 (M.D.Tenn 2011)(March 16, 2011).

<sup>25</sup> 8 USC §1357(a). Interestingly, a 1993 Immigration and Naturalization Service manual "The Law of Arrest, Search and Seizure for Immigration Officers," requires that "[a]detainer placed under this subsection is an arrest which must be supported by probable cause."

placed on them, even if the evidence is unreliable or insupportable. Although legally questionable, it is now common practice for 287(g) police/jail officers and ICE agents to simply place detainers on anyone in criminal custody who has admitted to being foreign-born either at booking or under subsequent ICE interrogation.

In many instances, ICE issues the detainer prior to conducting any reliable investigation as to whether the person is, in fact, subject to deportation/removal. Typically, this information is collected during arrest, booking, detention classification, or while the person is incarcerated, pre- or post-trial.<sup>26</sup> Also, ICE coordinates with parole and probation offices to facilitate the transfer to ICE. This information is then used to lodge detainers against foreign born persons. In many instances, either before or after the issuance of the detainer, ICE will also target these inmates for jail “interviews,” during which time ICE obtains information about the person’s immigration history. The admission of alienage at arrest or booking, along with information obtained during the jail “interview,” is then used by the government to establish their case for removal/deportation of the individual.

Several ICE initiatives facilitate the collection of this information – namely the Criminal Alien Program, Secure Communities and the INA §287(g) program.<sup>27</sup> These programs are bundled under the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) programs. For example, the Secure Communities fingerprinting initiative<sup>28</sup> will give ICE the technological capacity to electronically issue a detainer for noncitizens who may match fingerprints held in immigration databases.

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<sup>26</sup> “U.S. Immigration and Customs Enforcement Identification of Criminal Aliens in Federal and State Custody Eligible for Removal from the United States,” Office of the Inspector General, Department of Homeland Security, OIG-11-26 (January 2011) [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_11-26\\_Jan11.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_11-26_Jan11.pdf) (last visited March 18, 2011)

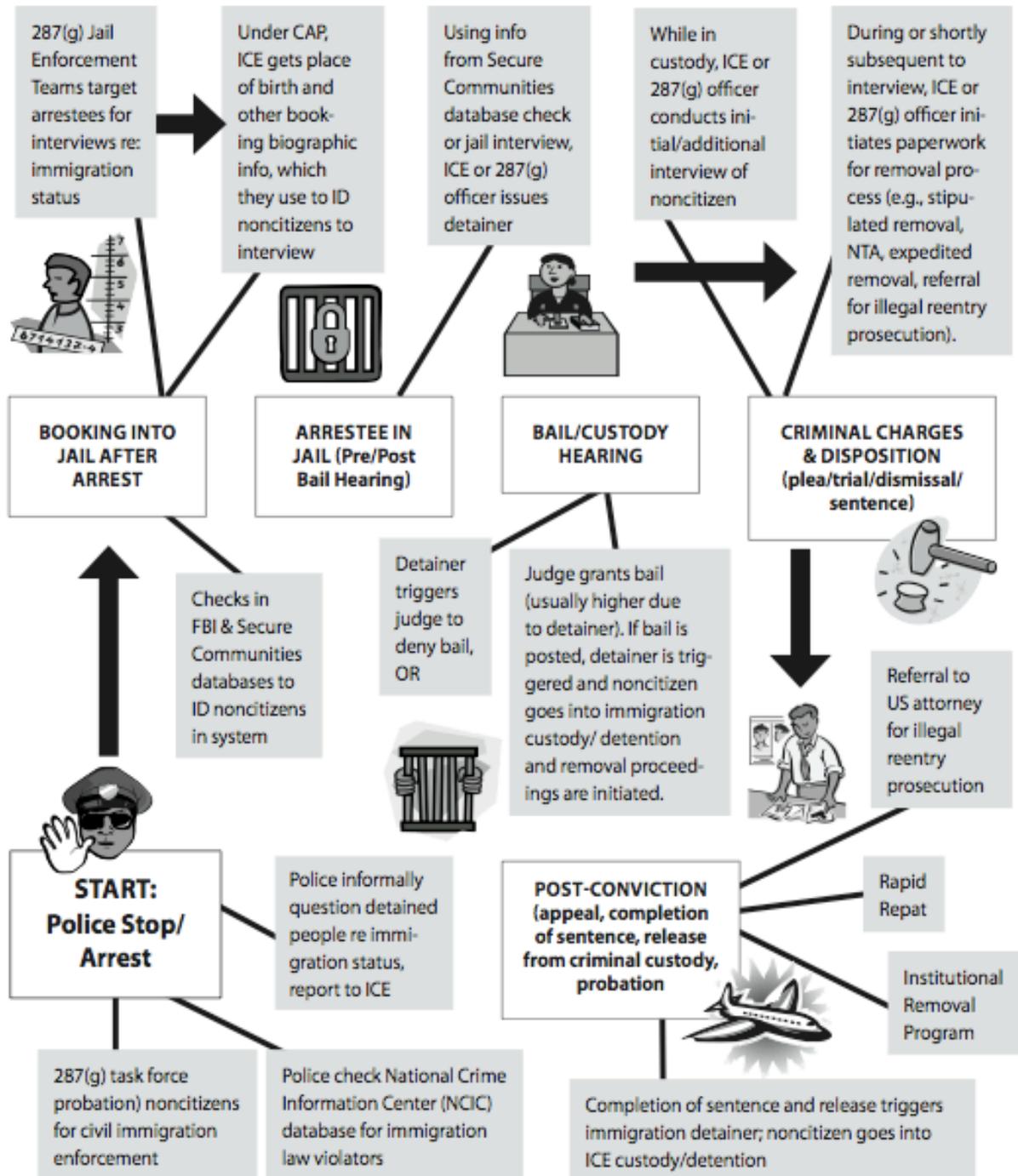
<sup>27</sup> *Overview of ICE ACCESS Programs: 287(g), the Criminal Alien Program, and Secure Communities*. By Melissa Kearney and Joan Friedland, National Immigration Law Center (2009) available at <http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf>

<sup>28</sup> For detailed discussion of the Secure Communities initiative see *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, Report of the Immigration Policy Center, Nov. 2009, available at: <http://www.immigrationpolicy.org/special-reports/secure-communities-program-unanswered-questions-and-continuing-concerns>. Additionally, FOIA documents are available at [www.uncoverthetruth.org](http://www.uncoverthetruth.org).

A flowchart illustrating how ICE ACCESS programs operate within the Criminal Justice System. (Excerpt from the *Deportation 101* curriculum created by Families for Freedom, Immigrant Defense Project, National Immigration Project of the National Lawyers Guild, and Detention Watch Network).

## HOW ICE ACCESS PROGRAMS INTERACT WITH THE CRIMINAL JUSTICE SYSTEM

(adapted from Washington State Defender Association Immigration Project, National Immigration Project, National Immigration Project of the NLG, and Immigrant Legal Resource Center, Dec. 2009)



In some instances, advocates report that ICE agents have engaged in racial profiling by issuing detainers on persons based upon a Latino (or “foreign-sounding”) last name or by singling out jail inmates based upon appearance.<sup>29</sup> One report showed an increase in racial profiling after the CAP program was launched.<sup>30</sup>

In reality, the procedures for how ICE agents from local ICE offices identify and decide to place a detainer on an individual are disturbingly dubious. There are no additional governing regulations other than 8 C.F.R. § 287.7

**Practice Point:** It is critical for defense counsel to establish a procedure for being able to determine what local jail practices are regarding how and when ICE detainers are issued against defendants. Additionally, defense counsel must be able to be alerted to the presence of an ICE detainer on individual defendants as soon as possible, and certainly prior to any custody hearing.

### ***E. ICE Detainers Are Not Reliable Indicators of a Person’s Immigration Status or Whether S/he Will Be Deported***

As the detainer Form I-247<sup>31</sup> indicates, the presence of an ICE detainer only means that ICE believes that the person is a noncitizen. Neither the statute nor the regulations require ICE to establish probable cause, reasonable suspicion or any other legal standard prior to issuance of a detainer.<sup>32</sup> The detainer is issued before the person is placed in deportation proceedings. This means that a legal determination of the individual’s deportability is *not* made at the time that the detainer is issued.<sup>33</sup> In practice, ICE routinely places detainers on individuals who are not deportable, sometimes even on U.S. citizens.

There are several reasons why the detainer form is not evidence of a person’s deportability, nor is it evidence that he or she will be placed in ICE custody.

- The detainer Form I-247 makes no mention of the person’s specific immigration status;
- Among the four actions listed on the Detainer Form I-247 indicating ICE’s interest in the alleged noncitizen, ICE typically checks the box on the detainer form I-247 indicating that, “[i]nvestigation has been initiated into whether this person is subject to removal from the United States.”<sup>34</sup> Because an investigation does not mean that the person is deportable, the I-247 form itself demonstrates that the person’s removability is undetermined.
- The presence of a detainer does not mean that ICE will assume custody. In many some cases ICE does not pick up the person upon release from criminal custody and the expiration of the detainer.

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<sup>29</sup> See “Immigration Detainers: Practice Advisory Overview,” Washington State Defenders Association (2009)(available at <http://www.defensenet.org/immigration-project/immigration-resources/immigration-detainers-and-ice-enforcement-actions>)

<sup>30</sup> “The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program,” by Trevor Gardiner II and Aarti Kohli, Sept. 2009. [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf) (last visited 3/22/10)

<sup>31</sup> See Appendix C for a sample I-247 detainer form.

<sup>32</sup> 8 U.S.C. § 1357(d); 8 CFR § 287(d). Interesting, a 1993 ICE Search and Seizure manual,

<sup>33</sup> Some noncitizens may have outstanding orders of removal that were previously issued.

<sup>34</sup> See Appendix C for a sample I-247 detainer form.

- An immigration detainer is not equivalent to a judicial order mandating an individual be sent to immigration/ICE custody.

Unless the person has a previously issued order of deportation, it is unlikely that ICE has assessed the individual's deportability at the time the detainer is issued. A person's deportability is assessed when immigration charges are prepared against the individual, something that typically happens when ICE assumes custody.

The 287(g) delegated LEA officers or immigration officers authorized to lodge a detainer are not responsible for identifying charges that will be brought against a suspected noncitizen nor do they evaluate defenses to deportation. Officers are merely concerned with identifying anyone whom it is interested in investigating for possible placement in removal proceedings or federal criminal proceedings (primarily for prosecution under 8 U.S.C. § 1326 – illegal reentry after deportation). Additionally, ICE agents often pressure noncitizens during jail interviews to waive their right to a hearing before the immigration judge and agree to “administrative voluntary departure” or, a “stipulated order of removal.”

Noncitizens may not be removable at all or they may have a basis to contest their removal and request relief in immigration court. In many cases, they will re-enter their community. *It is important not to equate an ICE hold with the assumption that the person is deportable and will be deported or even that the case is active with ICE.* ICE holds are merely allegations that must be vetted by several bodies, including the Notice to Appear Unit within ICE<sup>35</sup> and, in many cases, a federal immigration court.

**Practice Point:** Request a copy of the immigration detainer Form I-247 or Form I-203 from the jail or prison.

**Practice Point:** Advise your client not to agree to waive their right to a hearing before an immigration judge (essentially do not sign papers from ICE) without first consulting an immigration attorney about whether they have avenues for discretionary relief (i.e., to remain lawfully in the U.S.). Find out whether your client has a prior order of deportation since that will affect their ability to see an immigration judge.

## **F. Limitations on Detainers: The 48 Hour Rule**

Federal regulation provides that a law enforcement agency can hold a noncitizen on a detainer **no more than 48 hours** past the time when he or she otherwise would have been released, excluding weekends and holidays.<sup>36</sup> This 48 hour period begins when the detainer is triggered. The immigration detainer is triggered when the jail's lawful authority to detain the individual expires. The following events *trigger* the detainer 48 hour period:

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<sup>35</sup> A Notice to Appear is the charging document used by ICE to initiate formal removal proceedings under 8 U.S.C. 1229a. Although ICE is required to serve the NTA on the noncitizen, these removal proceedings do not commence until ICE files the NTA with the immigration court having jurisdiction over the noncitizen's case.

<sup>36</sup> 8 CFR § 287.7(d). Form I-247 indicates that “holidays” means Federal holidays.

*Pretrial:*

- The defendant satisfies release conditions by posting bail or getting an order of release on personal recognizance;
- The court dismisses the case (nolle prossed, dismissal, etc.).

*Post-trial*

- The defendant serves his or her maximum sentence for the conviction.

(Sometimes, ICE agents will argue that the detainer is triggered when the jail actually contacts ICE to notify them of impending release. However, there is no authority to support this position, and this position is likely illegal.)

**The 48 Hour Rule.** Once the jail’s lawful authority to detain the person expires, ICE must assume custody of him or her within 48 hours. Once the 48 hour period has lapsed, the immigration detainer has expired and the jail lacks authority to hold someone if ICE has not assumed custody. State and local law enforcement officers lack independent authority to detain an alleged noncitizen beyond the 48 hour period after release.<sup>37</sup> This means that ICE cannot lodge successive detainers to “extend” the 48 hour rule. Additionally, a detainee in a facility authorized to hold immigrant detainees is not in immigration custody unless ICE has “officially” transferred them to immigration custody.

For strategies to challenge violations of the 48 hour limitation, see **Remedies for Violations of the 48 Hour Rule**, later in this advisory.

*ICE detainers & immigration detention in state & local jails.* In recent years, ICE has expanded its detention capacity exponentially by contracting with local jails to house noncitizen detainees facing removal. ICE generally does this by entering into what are known as “Intergovernmental Service Agreements” (IGSAs). Under these agreements the noncitizen is technically in ICE custody but is housed for various periods of time in a local jail that receives a per diem dollar amount per detainee. IGSAs have, unfortunately, become a lucrative source of incomes for local jails as the ICE enforcement machinery has expanded. This is common in places like Georgia, Virginia and Texas.

If your local jail has an IGSA with ICE, this may mean that the defendant will be transferred from criminal custody into ICE custody and subsequently face removal proceedings *without ever leaving the jail*. Although this arrangement does not alter the requirement that the ICE transfer occur within a 48 hour period (even though it is a paper transfer), jail officials often mistakenly construe the IGSA contract as a way to hold the individual beyond the detainer’s expiration date. In addition, just because your jail is an IGSA facility does not mean that your client is in ICE custody.

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<sup>37</sup> 8 C.F.R. § 287.7(d).

## II. Pre-conviction Strategies to Challenge the ICE Detainer in a Criminal Case

### A. *Limit Information Provided to ICE Officials to Prevent Detainer*

Because immigration databases often contain inconclusive evidence of alienage or removability, ICE will attempt to interrogate your client to obtain evidence of alienage to lodge the detainer. Usually, this consists of interviews with the suspected noncitizen or consultations with jail or police officials about the person's immigration status. ICE often interviews defendants without informing defense counsel under the theory that the Sixth Amendment does not provide a right to counsel in administrative cases. You can, however, assert your client's right against self-incrimination under the Fifth Amendment (to prevent the possibility of prosecution for other immigration related crimes) and take steps to ensure that your client does not speak to ICE agents without counsel.

Under the regulations, criminal defense attorneys meet qualifications to represent individuals who are in criminal custody and are being investigated by ICE.<sup>38</sup>

When you meet your client, consider taking the following steps:

- Advise your client to refuse to answer any ICE questions if you are not present, especially providing any information related to place of birth or immigration status.<sup>39</sup>
- Consider giving a letter to your client that will inform law enforcement personnel and ICE officers that your client declines to consent to any examination or interview by ICE.
- Consider entering a Notice of Appearance (Form G-28) with ICE on behalf of your client. This notice of representation should be filed with your local ICE field office. You can find the location of your local ICE field office at [www.ice.gov](http://www.ice.gov). The form is available at <http://www.uscis.gov/files/form/g-28.pdf>. Include in the Form G-28 that your representation is limited to ICE interviews of your client during the pendency of his criminal proceedings. Filing the Form G-28 will not obligate you to represent your client in any subsequent removal proceedings. A separate entry of appearance is required to appear before the immigration court. It may help to examine your state constitution to determine whether a defendant's right to appointed counsel includes representation for matters unrelated to the charged offense. Bronx Defenders have used this strategy with some success.
- In accordance with the Vienna Convention, invoke on behalf of your client, the right to consular assistance.<sup>40</sup> The defendant must invoke the statute before the Vienna protections activate. For example, you can request in writing that the defendant must be allowed access to the consulate before they are interviewed by ICE.

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<sup>38</sup> See 8 C.F.R. §292.1.

<sup>39</sup> Under 8 C.F.R. §292.5(b) you can request that you be present for any examination conducted by ICE.

<sup>40</sup> UN Doc. A/ Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969). Also 8 C.F.R. §236.1 supports the availability of the Vienna Convention. Even though suppression is not available for denial of consular assistance, "[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police." See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

## **B. Challenge the Immigration Detainer**

The immigration statute authorizing detainers does not include a mechanism to lift the detainer. In general, courts have held they lack jurisdiction to adjudicate a habeas or mandamus actions to remove unexpired detainers because the immigration detainer does not constitute custody.<sup>41</sup> Another obstacle to challenging detainers against defendants in state and local custody is that any attempt to lift the detainer would be through a federal action, not state action.

Generally, the most expeditious way to seek release is to request that ICE agents lift the detainer.<sup>42</sup> However, ICE is not likely to respond without some evidence that the ICE detainer has been lodged incorrectly (e.g., against a U.S. citizen or against a lawful permanent resident who is not deportable).

**If you suspect the person is a US citizen:** You can submit US citizen birth certificates, a copy of a U.S. passport, or naturalization certificates to the Field Director of the local ICE office who has jurisdiction over your client's case. If it is not apparent whether the person is a US citizen, consult an immigration attorney about derivative or acquired citizenship i.e. citizenship through naturalized or US born parents or grandparents. Some individuals born in the U.S. may not have evidence of their U.S. birth because they were not born in a hospital<sup>43</sup>. An ICE memorandum titled "Superseding Guidance on Reporting and Investigating Claims of US Citizenship," ("Morton US citizen memo") lays out ICE protocols on encounters with U.S. citizens. (See *Appendix F*) The Morton US citizen memo requires that ICE officials respond quickly, consult with DHS attorneys, and initiate an examination of the suspected defendant/respondent to determine his or her nationality.<sup>44</sup> On the other hand, the Morton memo also asks that ICE officers and agents work with U.S. Attorneys to investigate whether defendants can be prosecuted for making a false claim to citizenship under 18 U.S.C. § 911. To protect clients from future prosecution, defense counsel should urge defendants not to speak with ICE or U.S. Attorneys without counsel present.

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<sup>41</sup> A Florida defendant brought a state habeas action challenging the authority of the Sheriff to detain arrestees on immigration detainers. The trial court held it lacked jurisdiction to grant relief to arrestee held pursuant to federal Immigration and Customs Enforcement (ICE) detainer. See *Ricketts v. Palm Beach County Sheriff*, 998 So.2d 1146, 2008 WL 5195292 (Fla.) See also *Cuomo v. Barr*, 7 F.3d 17 (2nd Cir. 1993)(court denied mandamus, declaratory and injunctive relief to State on action to compel INS to pick up defendants from state jails) The majority of circuits hold that the immigration detainer alone does not place the petitioner in immigration custody. See *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538 (5th Cir.2003); *Prieto v. Gluch*, 913 F.2d 1159, 1162 (6th Cir. 1990); *Orozco v. United States Immigration and Naturalization Service*, 911 F.2d 539, 541 (11th Cir. 1990); *Campillo v. Sullivan*, 853 F.2d 593, 595 (8th Cir.1988), cert. denied,490 U.S. 1082 (1989). The Second Circuit recognizes custody in a future jailor where "there is a reasonable basis to apprehend that the jurisdiction that obtained the consecutive sentence will seek its enforcement." See *Simmonds v. I.N.S.*, 326 F.3d 351, 355 (2d Cir 2003) (quoting *Frazier v. Wilkinson*, 842 F.2d 42, 45 (2d Cir.1988)). *Galaviz-Medina v. Wooten*, 27 F.3d 487 (10th Cir.1994)(finding that former INS as a future custodian has a heightened interest in custody after a final removal order). Citing to *Simmonds*, a federal district court in *Gillies v. Strange*, 2005 WL 3307349 (D.Conn. 2005), articulated five reasons for holding that the presence of an immigration detainer on petitioner, a Jamaican national with a final order of removal, was sufficient to determine that he was in ICE's custody. The court found, but for the ICE detainer, the prisoner would have been released to early parole. In this case, the prisoner desired early parole so that he could be released to immigration custody and deported to Jamaica.

<sup>42</sup> Federal defendants can utilize the Federal Bail Reform Act (8 USC§3142(d)) to challenge immigration detainers. For more information, please contact the National Immigration Project/NLG.

<sup>43</sup> A class action was filed on behalf of several US citizens delivered by midwives near the US border, whose applications for a US passport were denied by the Department of State. The Department of State settled the action by creating and implementing proper passport procedures that did not discriminate against US citizens whose births were attended by midwives. See *Castelano v. Clinton*, (S.D. Tex 2009)(Settled 6/26/2009)available at [http://www.aclu.org/files/pdfs/racialjustice/castelanovclinton\\_agreement.pdf](http://www.aclu.org/files/pdfs/racialjustice/castelanovclinton_agreement.pdf) (last visited March 18, 2011)

<sup>44</sup> See "Superseding Guidance on Reporting and Investigating Claims of US Citizenship," Morton memorandum, November 19, 2009. (*Appendix F*).

**If the person is a legal permanent resident or in refugee status:** Check to see if the person is deportable if convicted of the criminal charge. According to the interim detainer guidance (*Appendix E*), ICE is required to take “special care” in lodging detainees against legal permanent residents.

**If the person is undocumented:** ICE can exercise prosecutorial discretion and lift the immigration detainer on an individual eligible for immigration relief with substantial equities or in cases where the person does not fit within ICE’s enforcement priorities, which allegedly guide how ICE targets people for removal.<sup>45</sup> **Note:** It will be helpful if you know if your client is interested in pursuing a suppression case in immigration court. Because this entails suppressing evidence of alienage, disclosing alienage or place of birth could be harmful to that person’s case. For example, a request to ICE for prosecutorial discretion can be treated as evidence that the person is a noncitizen.

**Practice Point:** If you wish to pursue having your client’s immigration detainer lifted by ICE, please contact the Field Officer Director (FOD) of the Enforcement and Removal Office having jurisdiction over your location. The contact numbers can be found at: <http://www.ice.gov/contact/ero/>

### **C. Immigration Detainers & Speedy Trial Rights**

The Sixth Amendment guarantees all defendants the right to a speedy trial. Various states have adopted rules for how to calculate the time period. These statutes include specific exceptions, which toll or stop the running of the speedy trial clock. In general, the mere presence of an immigration detainer does not impact calculations of speedy trial time periods. The presence of an immigration detainer should not qualify for any of the exceptions for tolling the relevant time period because it neither constitutes an additional “charge”; nor does it constitute “custody.” If the public defender seeks to dismiss charges because the state failed to comply with the speedy trial rule, the prosecutor should not be able to claim that the immigration detainer tolled the speedy trial clock.

Two state courts have upheld violations of speedy-trial rule that resulted in dismissals of criminal charges. These courts reasoned that the immigration detainer did not fit within statutory exceptions for tolling speedy trial time limits.<sup>46</sup> At best, the immigration detainer simply “notified” the state that ICE may seek custody of the defendant in the near future.<sup>47</sup>

The Kansas appellate court in *Montes-Mata* identified similarities between the Ohio and Kansas statutes that persuaded them to adopt the analysis laid out in *Sanchez*. Furthermore, the Kansas court noted the detainer form itself demonstrated that the individual was not in ICE custody because the form showed that ICE was only “investigating” removability. In a subsequent case, an Ohio defendant was held on an immigration detainer for several months after he posted bail because the state mistakenly

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<sup>45</sup> An article examining the intersection of ICE’s exercise of prosecutorial discretion and ICE’s enforcement priorities, see “*Reading the Morton Memo: Federal Priorities and Prosecutorial Discretion*,” by Shoba Sivaprasad-Wadhia, for the Immigration Policy Center, December 2010.

<sup>46</sup> *State v. Montes- Mata*, 41 Kan.App.2d 1078, 208 P.3d 770 (Kan. App. 2009); *State v. Sanchez*, 110 Ohio St. 3d 274, 853 N.E.2d 283 (2006)

<sup>47</sup> *State v. Montes- Mata*, 41 Kan.App.2d at 1083.

believed the ICE detainer constituted “custody.”<sup>48</sup> The Ohio Appeals Court granted the defendant’s motion to dismiss the indictment on grounds that the state’s misreading of the law did not count as one of “the tolling events set forth by the statute.”<sup>49</sup>

When a defendant with pending charges is released, the detainer is triggered and ICE may immediately take him or her into ICE custody. The prosecutor may attempt to assert that the fact that the defendant is in ICE custody tolls the speedy trial clock. Defense counsel should guard against prosecutors colluding with ICE to use the immigration detainer and transfer to ICE custody to avoid speedy trial requirements.

Making this argument would be consistent with the federal rule on the Speedy Trial Act. The majority of federal courts hold that an immigration detainer or civil immigration detention does not normally trigger the federal Speedy Trial Act’s (STA) thirty-day arrest-to-indictment time limit.<sup>50</sup> However, most circuits recognize an exception to this interpretation for “cases of collusion between [immigration] officials and criminal authorities, where the civil detention is merely a ruse to avoid the requirements of the Speedy Trial Act.”<sup>51</sup> What constitutes a ruse is unclear. The Second and Ninth Circuits have ruled that cooperation between U.S. Attorneys and immigration authorities to investigate charging an immigration detainee with illegal re-entry was not collusion.<sup>52</sup> In cases where the facts support it, defenders should allege acts to support a case of collusion. For example, the prosecutor may agree to the release of a defendant with an ICE detainer knowing that ICE will assume custody, thus, stopping the speedy trial clock.

Unless your state statute provides for an automatic dismissal of charges that violate the speedy trial rule, defenders should proactively seek dismissal of the charges where an ICE detainer has been inappropriately used to circumvent a defendant’s speedy trial rights.<sup>53</sup>

## **D. ICE Detainers and Custody Determinations**

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<sup>48</sup> *State v. Houng*, 2009 WL 1743934 (Ohio App. 11 Dist.). But see *State v. Kingen*, 39 Wash.App. 124 (1984) holding that illegal detainment could not count as a tolling event of the speedy trial statute.

<sup>49</sup> *State v. Houng*, 2009 WL 1743934 (Ohio App. 11 Dist.).

<sup>50</sup> *United States v. Cepeda-Luna*, 989 F.2d 353, 355-56 (9th Cir.1993). See also *United States v. Rodriguez-Amaya*, 521 F.3d 437, 441 (4th Cir.2008); *United States v. Dyer*, 325 F.3d 464, 468-70 (3d Cir.), cert. denied, 540 U.S. 977, 124 S.Ct. 457, 157 L.Ed.2d 330 (2003) (explaining the “ruse” exception, but declining to adopt it because the defendant would not have qualified for the exception); *United States v. Drummond*, 240 F.3d 1333, 1335-36 (11th Cir.2001); *United States v. Garcia-Martinez*, 254 F.3d 16, 19-20 (1st Cir.2001); *United States v. De La Pena-Juarez*, 214 F.3d 594, 597-99 (5th Cir.), cert. denied, 531 U.S. 983, 121 S.Ct. 437, 148 L.Ed.2d 443 (2000); *United States v. Grajales-Montoya*, 117 F.3d 356, 366-67 (8th Cir.) (explaining the “ruse” exception, but declining to adopt it because the defendant would not have qualified for the exception), cert. denied, 522 U.S. 1007, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997); *United States v. Pena-Carrillo*, 46 F.3d 879, 883 (9th Cir.), cert. denied, 514 U.S. 1122, 115 S.Ct. 1990, 131 L.Ed.2d 876 (1995). *U.S. v. Guevara-Umana*, 538 F.3d 139 (2nd Cir. 2008); *U.S. v. Garcia-Echaverria*, 374 F.3d 440 (6th Cir 2004).

<sup>51</sup> *Cepeda-Luna*, 989 F.2d at 354.

<sup>52</sup> *Guevara-Umana* at 142; *Grajales-Montoya* at 366-367.

<sup>53</sup> For a list of speedy trial provisions in the 50 states, see [http://www.courts.wa.gov/programs\\_orgs/pos\\_tft/index.cfm?fa=pos\\_tft.reportDisplay&fileName=appendixF](http://www.courts.wa.gov/programs_orgs/pos_tft/index.cfm?fa=pos_tft.reportDisplay&fileName=appendixF). This chart contains the relevant provision, the remedy and exclusions from the speedy trial provisions. As the list shows, not all states have speedy trial statutes – only 23 do. Moreover, many speedy trial provisions do not contain explicit time limitations or apply to certain offenses. The Ohio and Kansas cases suggest that motions to dismiss may fare better where a statute is violated as opposed to a rule of criminal procedure relating to speedy trial.

## 1. In most cases, the immigration detainer should not impact state bail determinations.

All states require that every arrestee—including suspected noncitizens—is entitled to an individualized bail determination.<sup>54</sup> Bail laws primarily consider flight risk and danger to society.

Generally, if conditions must be imposed in order to assure the defendant's appearance at trial, the trial court must release the accused on the "least restrictive" of conditions that will reasonably assure his presence at future hearings. Traditional rules governing bail determinations do not include considerations of citizenship, nationality or immigration status; they do not permit an unbounded inquiry. State defense attorneys can use the reasoning laid out in several federal bail cases which have held that the ICE detainer should not be a primary factor in bail determinations—or even excluded from a bail calculus.<sup>55</sup> Because the overwhelming majority of states generally follow the factors enumerated in the federal Bail Reform Act (18 U.S.C. § 3142), state defense counsel can argue that individuals who are not deportable or who may have relief should be treated under traditional bail criteria.

In *Fajardo-Santos*, the New Jersey Supreme Court held that it was lawful to increase bail fourfold after it became known that defendant was undocumented.<sup>56</sup> The court did not address whether the amount was excessive.<sup>57</sup> This case is a worrisome indicator of the elevation of immigration status or the ICE detainer as the determining detention factor.

Additionally, disclosure of immigration status implicates the Fifth Amendment's right against self-incrimination because alienage is an element of several federal crimes.<sup>58</sup> Counsel should remind courts not to equate immigration detainers with flight risk. Some flight-risk factors may implicitly overlap with immigration status, including length of residence within the community and/or ties to the community. A person's ties to her community are not dependent on her nationality or even on the lawfulness or unlawfulness of her immigration status. For example, countless undocumented people have resided in their communities for many years, are married and raising families, gainfully employed and are otherwise engaged members of their communities.

If ICE lodges a detainer, it is possible that ICE has pre-set an amount for an immigration bond. Defenders should attempt to determine if this has occurred. Although ICE must make a preliminary

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<sup>54</sup> The right to bail determination is distinct from an affirmative right to bail. The Federal Constitution does not contain such an affirmative right. See *United States v. Salerno*, 481 U.S. 739, 752 (1987) ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all."). See also *Segura v. Cunanan*, 219 Ariz. 228 (App. 2008) (holding that defendants, "who requested hearings on determinations that they were not eligible for bail under the state constitution, had a due-process right to full hearings.")

<sup>55</sup> While most federal courts include immigration status or an immigration detainer in their bail calculus, some federal courts have held that the ICE detainer should not be the primary factor in determining bail. *U.S. v. Montoya.S. v. Montoya-Vasquez* ( 2009 WL 103596 (D.Neb. Jan 13, 2009)(finding risk of removal by ICE is one of many factors). One court has gone so far to say that it should be excluded from bail decision determinations. See *U.S. v. Barrera-Omana*, 2009 WL 2219080, (D.Minn., July 23, 2009)(Congress has not, of course, told a court to consider the existence of an ICE detainer among these factors. In this sense, the Court finds the ICE detainer is an externality not under defendant's control. As such, it must be excluded from the detention analytic.") One court found a prior deportation order to be a significant factor in determining the risk of nonappearance. *U.S. v. Lozano*, 2009 WL 3052279, (M.D.Ala., Sept 21, 2009).

<sup>56</sup> *State v. Fajardo-Santos*, 973 A.2d 933 (N.J. 2009)

<sup>57</sup> Typically, excessive state bail amounts are considered to be \$500,000 or above. 7 A.L.R.6th 487

<sup>58</sup> See 8 U.S.C. 1325 (illegal entry) and 8 U.S.C. 1326 (illegal reentry after deportation), both of which are now two of the most prosecuted federal offenses in federal court.

custody determination, bond in immigration proceedings is discretionary, not mandatory.<sup>59</sup> If ICE officials have already set immigration bond in your client’s case, then ICE does not deem the client to present a high risk of flight.<sup>60</sup> The immigration bond demonstrates that another agency has determined your client is not a flight risk.

In short, citizenship, immigration status or immigration detainers should not be overly weighted over other factors when release on personal recognizance or reasonable bail conditions would otherwise be appropriate. Every bail context presents an inherent flight risk, a fact of which legislators were aware when they drafted state bail provisions. The presence of an ICE detainer should merely be one factor into the normal bail analysis.

**Practice Point:** If you suspect your client is a noncitizen, volunteering her/his immigration status on the record (or anywhere, if possible) confers little benefit. Clients with lawful immigration status (e.g. lawful permanent residents, also known as greencard holders) and refugees should disclose their immigration status on the record only where doing so would further establish their community ties.

**Practice Point:** Counsel should confine bail determinations to traditional bail factors. Counsel should also consult with immigration experts to ascertain relief from deportation that defendant will be able to pursue, as well as the likelihood of release on bond from immigration custody during deportation proceedings. For example, an undocumented defendant with a spouse, children, employment and significant residence in the U.S. may be eligible for bond in immigration proceedings and be able to petition the immigration court for lawful status to remain in the U.S.

## **2. Arizona, Oklahoma, Missouri & Illinois statutes specifically factor immigration status in bond determinations.**

- **Arizona:** Arizona precludes bail for those charged with felony offenses and who are unlawfully present or unlawfully entered the United States. Under the statute, the presence of an immigration detainer supports the inference of unlawful presence or entry. A.R.S. § 13-3961.
- **Oklahoma:** A presumption against release exists for “persons accused of or detained for...” immigration charges. 22 Okl.St.Ann. § 1105.3.
- **Missouri:** A presumption against release exists if the judge “reasonably believes that the person is unlawfully present in the United States.” The arrestee must furnish verification of his or her lawful presence to rebut the presumption. RSMo §544.045.
- **Illinois:** The Illinois pre-release statute references immigration status, immigration charges, and extradition treaties as a factor in bail determinations. 725 ILCS 5/110-5. These factors are one of dozens in Illinois’ bail statute, and should not be given any undue weight than any other factor. See next section B.

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<sup>59</sup> 8 U.S.C. § 1226(a)(2).

<sup>60</sup> Before making this argument, make sure that the client has not failed to appear for previous immigration matters, or this argument will backfire.

**Practice Point:** If the court or the prosecutor asserts that an “immigration charge” exists, counsel should investigate discrepancies between the ICE detainer form and the basis for the “immigration charge.” For example, if the I-247 detainer form only shows that ICE is investigating removability, ICE has not selected immigration charges to lodge or that it wants to bring charges at all. Therefore, the person may not be a noncitizen, may not be deportable or the person has a defense to deportation.

### **3. State bail determination factors do not focus on third party (ICE) actions.**

Bail determination factors focus on the *defendant’s* personal characteristics, not ICE actions. The flight-risk factors ask about the defendant’s family ties, employment history, criminal record, and connection to the community. When a court refuses to set bail, or sets it unreasonably high, based on the possibility of future ICE action, it curtails the defendant’s constitutional right based on what ICE may do in the future.

If the court is concerned that the individual will not be able to appear because he or she is in ICE custody or removed, explain the (a) factual and (b) legal reasons why this concern is misplaced. For example, there is no way to quantify the risk that ICE will assume custody of a defendant based on an ICE detainer. No factor in the bail rule contemplates this kind of speculative, attenuated inquiry, particularly where the defendant otherwise merits release. It contravenes the intent of the bail statute for the court to impose a high bail based on what a third party may later do.<sup>61</sup> For example, the equities in his or her criminal case will support the rationale for a grant of immigration bond; an immigration bond supports the likelihood of an appearance in the criminal matter.

As explained previously, immigration detainers are classified as notification requests and are distinct from criminal detainers.<sup>62</sup> Just as the presence of an ICE detainer is not determinative of a person’s immigration status or whether her or she will be deported, the ICE detainer is also not determinative of whether ICE will respond to the jail notification upon release within the required 48 hours and take the individual into ICE custody.

**Practice Point:** It is critical to ascertain (generally from the jail authorities) what current local practice is in your jail to determine the likelihood that ICE will take your client into custody. Where ICE is only randomly responding to detainers and assuming custody of noncitizens within the requisite 48 hours, counsel should emphasize that ICE is less likely to assume custody of the individual. This may minimize the impact of the presence of an ICE detainer on the court’s custody determination.

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<sup>61</sup> See *State v. Greenwood*, 120 Wn.2d 585, 592 (1993) (holding that court rules should be interpreted like statutes, giving effect to the intent of the drafters).

<sup>62</sup> A state seeking to bring charges against a prisoner in another state's custody begins process under Interstate Agreement on Detainers (IAD) by filing a “detainer,” which is a request by the State's criminal justice agency that the institution in which the prisoner is housed hold the prisoner for the agency or notify the agency when release is imminent. Additionally, the Uniform Mandatory Disposition of Detainers Act, adopted in several states, governs only intrastate detainers, that is, those arising from criminal charges brought in the same state as that in which a prisoner is incarcerated. Even though both detainers are requests, their statutory limitations are very different.

#### 4. A departure-control order may preclude immediate transfer to immigration custody of defendant or defense witness in state court.

A prosecutor may argue that ICE is likely to remove a noncitizen defendant before she or he can stand trial for the charges. There is a mechanism to respond to prosecutor's bond argument concerns regarding ICE's attempts to remove the defendant while criminal case is pending. Federal regulations provide a specific mechanism whereby ICE officials can (and arguably are required to) issue a "departure-control" order to prevent the removal (deportation) of any noncitizen defendant or noncitizen witness whose presence is essential to the criminal proceedings.<sup>63</sup>

Pursuant to 8 C.F.R. § 215.3,<sup>64</sup> a non-citizen is not permitted to "depart" the U.S. when doing so would be "prejudicial to the interests of the [U.S.]..."<sup>65</sup> A federal departure-control agent must issue an order preventing any individual's departure if it would result in prejudice.<sup>66</sup> Importantly, a "departure" is not limited to international travel. Instead, the term includes departing "from one geographical part of the United States for a separate geographical part of the United States."<sup>67</sup>

Departures that result in prejudice are specifically identified by regulation.<sup>68</sup> Examples of prejudice include "the case of "any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court of the United States." or a noncitizen who is a "fugitive" or will be involved in actions that could be construed as being contrary to U.S. foreign policy interests."<sup>69</sup> This means that if the individual's testimony could affect or alter the outcome of the criminal case, a proffer of the harm that could result is helpful.

The authors are not aware of any cases where a prosecutor invoked 8 C.F.R. § 215.3, but there may be ways for defenders to use the regulation. Both state and federal courts have recognized the availability of departure-control orders as a means of suspending deportation proceedings for a defendant or defense witness during the pendency of criminal proceedings.<sup>70</sup> But in a recent California Supreme Court case, the court did not find any violation of state or federal constitutional rights when ICE deported the defendant's sole witness, an alleged non-citizen, after he was served with a subpoena requiring his personal appearance.<sup>71</sup> In that case, the California Supreme Court held that the burden was on the defendant to take an "active role" in securing witnesses who have ICE detainers, which, in this case, meant issuing subpoenas and invoking the regulation 8 CFR § 215.3.

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<sup>63</sup> 8 C.F.R. § 215.2.

<sup>64</sup> See Appendix D for a copy of the relevant provisions of the regulation governing departure control orders.

<sup>65</sup> 8 C.F.R. § 215.2(a).

<sup>66</sup> *Id.* ("Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of § 215.3 shall temporarily prevent the departure of such alien...") (emphasis added). The temporary departure prohibition becomes final 15 days later. 8 C.F.R. § 215.2(b).

<sup>67</sup> 8 C.F.R. § 215.1(h).

<sup>68</sup> 8 C.F.R. § 215.3.

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g., U.S. v. Lozano-Miranda*, 2009 WL 113407 at \*3 & n.13 (D. Kan. Jan. 15, 2009); *U.S. v. Garcia-Gallardo*, 2009 WL 113412 at \*2 & n.13 (D. Kan. Jan. 15, 2009); *U.S. v. Perez*, 2008 WL 4950992 at \*2 (D. Kan. Nov. 18, 2008); *U.S. v. Lopez-Aguilar*, 1996 WL 370160 at \*3 (E.D.N.Y. June 28, 1995); *People v. Rodriguez*, 2004 WL 2397261 at 9; *People v. Armando Monter Jacinto*, 2010 Cal. LEXIS 5031 (Cal., May 27, 2010)

<sup>71</sup> *People v. Armando Monter Jacinto*, 2010 Cal. LEXIS 5031, 5041 (Cal., May 27, 2010)

Also, in New Jersey, ICE has advised state prosecutors that departure-control orders only apply to voluntary departures by the noncitizen (not deportation), thus supporting the prosecutor's argument in support of an unreasonably high bail that the court expressly set to prevent removal prior to the conclusion of the criminal case.<sup>72</sup>

**Practice Point:** Where the defendant's continued presence is essential to the resolution of the criminal proceedings and such resolution requires additional time, and where court has or is willing to set a bail amount that defendant is prepared to post, or ordered release on personal recognizance, counsel should alert the court to the availability of a departure-control order and request that the court order the prosecution to communicate with ICE officials to secure the issuance of a departure control order to permit the defendant to pursue defense of his case while out of criminal and immigration custody.

## 5. Advantages and Disadvantages to Pleading Guilty at Arraignment or Being Released on Personal Recognizance

It is common practice for courts to order release of first time and/or low level offenders on personal recognizance (PR). Normally, this is advantageous to the defendant. Additionally, it may be common practice for defendants to regularly plead guilty at arraignment to resolve their case and get out of jail as quickly as possible.

These common practices may present immigration pitfalls to noncitizen defendants. A defendant ordered release on PR with an ICE detainer may trigger the ICE detainer and likely transfer into ICE custody to face removal proceedings. Such an outcome will make it unlikely that the defendant will be available to appear for future hearings or meaningfully participate in her defense of the charges. Moreover, transfer to ICE custody can mean detention far from family and community. For example, New York defendants are often transferred to an immigration facility in El Paso, Texas.

On the one hand, pleading guilty at arraignment before ICE has lodged a detainer can be an effective strategy if defense counsel considers immigration consequences as required under *Padilla v. Kentucky* and can fashion a plea to a nondeportable offense is available. On the other hand, a plea that does take immigration consequences into account can saddle a noncitizen defendant with a conviction that will trigger virtually automatic deportation, even for longtime lawful permanent residents. For example, despite the state classification as misdemeanor offenses, theft convictions where a sentence of 365 days is imposed (regardless of time suspended) will be classified by ICE as aggravated felonies under immigration law, triggering the harshest immigration consequences, including mandatory immigration detention, virtually certain deportation and significant sentence enhancements for future criminal prosecution if the person returns to the U.S.<sup>73</sup>

**Practice Point:** Make sure that where there is an ICE detainer present, defendant knows that release on PR means likely transfer into ICE custody and initiation of removal proceedings. It may be in client's

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<sup>72</sup> See *State v. Fajardo-Santos*, 199 N.J. 520, 528-29 (2009).

<sup>73</sup> See 8 U.S.C. 1101(a)(43)(F)&(G). See also *United States v. Graham*, 169 F.3d 787, 788 (3<sup>rd</sup> Cir. 1999); *United States v. Pacheco*, 225 F.3d 148 (2<sup>d</sup> Cir. 2000); *Lopez-Elias v. Reno*, 209 F.3d 788 (5<sup>th</sup> Cir. 2000); *Moosa v. INS*, 171 F.3d 994, 1006 (5<sup>th</sup> Cir. 1999); *United States v. Gonzalez-Tamariz*, 310 F.3d 1168 (9<sup>th</sup> Cir. 2003).

best interest to request that the judge post a minimal criminal bond that will give defendant (and her family) time to prepare for impending removal proceedings.

**Practice Point:** Do not plead defendant guilty at arraignment unless you are clear about any potential immigration consequences and have advised defendant accordingly. Always request 364 days (or less) for assault and theft offenses to avoid mandatory detention and deportation consequences.

**Practice Point:** File a notice to appeal (and provide defendant with a copy to show ICE/Immigration Judge where the court refuses to impose anything but 365 days or there are other appeal issues. This will prevent use of a conviction as a basis for deportation.

**Practice Point:** Where defendant is undocumented and does not yet have an ICE detainer employ whatever strategies are available if avoiding ICE apprehension is defendant's highest priority. If this includes pleading guilty at arraignment to secure release, consider filing an appeal where sentence imposed is 365 days in a theft or assault case.

## 6. Posting Bail During a Pending State Proceeding: Pragmatic Considerations

A more common occurrence is that a defendant with an ICE detainer faces the prospect of forfeiting bail when he attempts to post a court-ordered bail because ICE may assume custody during a pending State proceeding. The surety forfeits the bail because the defendant, who is now in ICE custody, failed to appear. Defendant's detention by ICE at the time of a future failure to appear could, but not necessarily, constitute grounds for setting aside any forfeiture of the bond depending on the remission factors in the state statute. One common factor is whether the ICE detention could be characterized as an "uncontrollable circumstance."<sup>74</sup> Additionally, mitigating factors include inconvenience to the prosecution, the expense, length of delay, the likelihood of re-appearance of the defendant,<sup>75</sup> and efforts of the State, surety and defendant to return defendant to the jurisdiction.<sup>76</sup>

If your jail is refusing to accept bonds posted by noncitizen defendants due to the presence of an ICE detainer, this is a clear violation of the court's order and interference with defendant's constitutional right to release. Jail officials have no legal authority to override a judicial bail determination. Counsel must immediately bring such a circumstance to the attention of the court and request a mandate that the jail accept the posting of bail monies regardless of the presence of immigration detainers. In 2009, Florida advocates filed an action against the Palm Beach County Sheriff for "wrongful confinement of pre-trial detainees for lengthy periods of time without allowing them to post the bond already determined by a state court judge, purportedly in reliance of federal immigration detainers..."<sup>77</sup>

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<sup>74</sup> *Allegheny Cas. Co v. State*, 163 S.W.3d 220, Tex.App.-El Paso, April 07, 2005 (NO. 08-03-00226-CV);

<sup>75</sup> *Appearance Bond Surety v. United States*, 622 F.2d 334, 336 (8<sup>th</sup> Cir. 1980).

<sup>76</sup> *State v. Poon*, 244 N.J.Super. 86 (N.J.Super. 1990)

<sup>77</sup> See *Mendez v. Palm Beach County Sheriff*, (S.D. Fl 2009)(09-cv-81280)

## **E. Remedies for Violations of the 48 Hour Rule**

Many jails throughout U.S. appear to be detaining individuals for days and weeks past the 48-hour period until ICE assumes custody. This is a clear violation of the federal regulation.<sup>78</sup> Because state and local governments have authority over detainees subject to immigration detainers for only 48 hours, once this period expires, they must release the individual if ICE has not assumed actual physical custody of the person. Where local officials continue to detain an individual past the 48 hours, they risk liability for civil actions seeking damages for the illegal detention.

### **1. Inform the jail authorities of the 48 hour violation.**

Often jail personnel lack awareness and understanding of the federal regulations governing immigration detainers at 8 C.F.R. § 287.7. In particular, despite the express language on the detainer form, jails are often ignorant of the 48 hour limitation on their authority to detain someone beyond release from criminal custody. Defense counsel's first tactic to secure a client's release should be to present the jail with a copy of the regulation and request that your client be immediately released.

### **2. Federal and State Habeas Petitions**

A petition for writ of habeas corpus may provide the fastest mechanism for the person's immediate release if the jail authorities have refused release upon the expiration of the 48 hour-limit.<sup>79</sup> In most states, a constitutional, statutory, or rule violation that is not harmless would seem to render custody illegal and hence form a basis for habeas relief.

#### ***Practice Point: Emergency After Hours Proceedings - Timing is Everything***

One day—or even a matter of hours—can make the difference in whether your client will be apprehended by ICE on an expired detainer. Generally, every court (where habeas actions are filed) has a designated “after-hours” judge who is required to entertain motions such as this. DO NOT WAIT until the next day, or if on Friday, until Monday for your motion to be calendared. Determine the identity and contact information for the after-hours judge in your court and insist that your habeas motion be heard immediately.

For a sample state habeas petition, please see the memorandum and sample pleadings under the immigration resources section of the Washington State Defenders website: [www.defensenet.org](http://www.defensenet.org).

### **3. Civil Damages Actions**

Individuals held on an expired or erroneously lodged detainer can seek damages for the amount of time he or she was held in unlawful detention under several legal theories, including the Federal Tort Claims Act and unlawful imprisonment statutes.

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<sup>78</sup> *Id.*

<sup>79</sup> Federal habeas actions are an option as well.

Below is a list of lawsuits brought for violation of the detainer regulations, including the 48 hour rule.<sup>80</sup>

### **California (Suit filed September 2008)**

The American Civil Liberties Union (ACLU) of Northern California sued Sonoma County regarding arrests made under joint patrols by the Sonoma County Sheriff's Department and ICE, during which immigration detainees led to local jail bookings without criminal charges. The lawsuit is on behalf of three individuals who were unlawfully detained, as well as on behalf of the Committee for Immigrant Rights of Sonoma County, a local community organization. California law does not permit local sheriffs and police to enforce immigration law. But in Sonoma County, deputy sheriffs have arrested people suspected of violating civil immigration law and placed them in county jail without a warrant or any criminal basis for arrest. The ACLU charges that once they are booked in county jail, arrestees in Sonoma are typically held for more than three days without being told what the charges are against them, or provided with access to legal services, or told that statements they make may be used against them in immigration proceedings, or notified that they have a right to a hearing, including a hearing to determine whether they may be released on bond. *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, No. CV08 4220 RS (N.D. Cal.)

### **Colorado (Suit filed April 2010)**

Colorado resident Luis Quezada was arrested in May 2009 for allegedly failing to appear in court on a traffic charge. When he went to court a few days later, he was sentenced to time served. He would have been released from the Jefferson County Jail, but ICE had issued a detainer. When ICE did not arrive within 48 hours, Mr. Quezada was entitled to be released. Instead, the jail continued to hold Mr. Quezada for an additional 47 days. During that time, Mr. Quezada had no formal accusations against him, no opportunity to see a judge, and no opportunity to post bail. Both Mr. Quezada and his family members protested that he was entitled to release but were told by his jailers that he would remain detained until ICE picked him up. When ICE finally took Mr. Quezada into immigration custody, he was given notice of the immigration charges against him. He posted bail and was immediately released.

In November 2008, the ACLU of Colorado had written Jefferson County Sheriff Ted Mink regarding numerous complaints about ICE detainees. The letter specifically addressed the 48-hour limitation and requested a copy of the Sheriff's written policies and procedures regarding ICE detainees. On February 26, 2009, an attorney from the Jefferson County Attorney's Office responded by telephone and stated that the Sheriff had no such policies or procedures. The ACLU filed suit against Sheriff Mink on Mr. Quezada's behalf in April 2010. *Quezada v. Mink*, No. 10-879 (D. Col.)

### **Florida (Suit filed February 2009)**

A 48-hour detainer did not authorize the Lake County Sheriff's Office (LCSO) to hold Rita Cote in jail for eight days. Ms. Cote was arrested on February 16, 2009 without probable cause that a crime has been committed and placed in LCSO custody. The detainer for Ms. Cote was not issued until two days after the LCSO took custody of her. The ICE detainer was issued on February 18, 2009, proving that Rita was held for two days with no legal authority. In addition, the 48 hours expired, yet the LCSO continued to hold her in jail for three additional days until the ACLU of Florida filed a petition for writ

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<sup>80</sup> This list was taken from comments to the draft detainer guidance submitted to ICE on October 1, 2010. Available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf>. A more recent list of actions are available in a document prepared by the National Immigration Forum at <http://www.immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf>

of habeas corpus demanding Ms. Cote's release. Late that night, or early the next morning, she was shackled and driven to the side of a road where she was transferred to ICE custody. The ACLU of Florida has investigated the LCSO and determined that hundreds of people in the last three years were held in the county jail without being charged, having been detained in order to be picked up by U.S. Border Patrol. *Cote v. Lubins*, No. 5:9-cv-00091 (M.D. Fla. 2009) (dismissed as moot)

### **Indiana (Suit filed June 2010)**

Represented by Mexican American Education and Legal Defense Fund (MALDEF), Wendy Melendez Rivas, a young mother arrested for bouncing a \$10 check and subject to an ICE detainer, filed suit against LaGrange County and two jail administrators after they failed to release her from state custody. She was detained several days after the expiration of the 48 hours local authorities had the authority to detain her, and after she posted bond. *Melendez Rivas v. Martin*, No. 10-197 (N.D. Ind.).

### **New York (Suit filed October 2008)**

Cecil Harvey sued New York City for illegally continuing to detain him on Rikers Island for over a month on an ICE detainer after a New York City criminal court judge ordered him released. His detention set in motion a chain of events that eventually landed him back in jail and ultimately resulted in his deportation from the U.S., where he had lived as a lawful permanent resident for over 35 years.

Mr. Harvey's case began in 2003, when he was arrested on a minor drug possession charge and placed in the Department of Correction's (DOC) custody at Rikers. A New York City judge ordered him released on his own recognizance pending trial on the criminal charges. Instead of releasing him, DOC officials continued to hold Harvey at Rikers under an immigration detainer for 35 days beyond the permitted 48 hours. DOC finally transferred him to ICE custody on the very day that he was supposed to appear in court – causing the City court to issue a bench warrant for his arrest for failing to appear.

In 2006 Harvey finally won release from detention, but just a few months later he was arrested on the outstanding bench warrant that was caused by his transfer on his court date. After more than three additional months at Rikers, Mr. Harvey was eventually able to prove that he had been in ICE custody during the initial court date, and the judge dismissed all criminal charges. By then, however, ICE had lodged yet another detainer to prevent his release, and DOC once again held Mr. Harvey beyond the 48 hours permitted. He was eventually transferred back to ICE – this time to a detention facility in Alabama, thousands of miles from his U.S. citizen wife, daughters, and young grandsons – and in 2007 he was deported. The case settled with substantial monetary compensation. Harvey was represented by the NYU Law School Immigrant Rights Clinic. *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009).

### **Pennsylvania (Suit filed July 2008)**

Wilmer Urbina was arrested following a traffic stop in Wilkinsburg, Pa. on April 3, 2008. All pending charges were dismissed on July 3, 2008. Urbina continued to be confined in the Allegheny County Jail due to an ICE detainer until July 17, 2008. Omar Romero-Villegas was arrested after leaving his place of employment in Ross Township, Pa. on June 11, 2008. All criminal charges against Romero-Villegas were withdrawn on or before June 27, 2008. Yet he also continued to be confined in the Allegheny County Jail due to an ICE detainer until July 15, 2008. At most these detainees provide for no more than 48 hours from the time state-authorized custody has ended. After a habeas action was brought on behalf of Urbina and Villegas by the Community Justice Center, the U.S. Attorney's Office represented to the federal district court that the Allegheny County Jail warden did not notify the agency of the detainees' status until well after the 48-hour period expired. The action was dismissed as moot

because ICE had assumed custody of the two men. *Urbina v. Rustin*, No. 08-0979 (W.D. Pa. 2008) (dismissed as moot).

#### **Tennessee (Suit filed August 2010)**

Carlos Ramos-Macario, arrested for driving on a suspended license, filed a lawsuit against the Rutherford County Sheriff for holding him for over four months after ICE immigration detainer issued against him had expired. The lawsuit was brought as a class action and seeks to represent current and former prisoners of Rutherford County Jail who were unlawfully incarcerated due to ICE detainers. *Ramos-Macario v. Jones*, No. 10-0081 (M.D. Tenn.)

#### **Washington State (Claim filed in June 2010)**

On October 10, 2009, Enoc Arroyo-Estrada was arrested by the Spokane County Sheriff's Office for driving without a license. He was placed in custody at Spokane County Jail. That same day, Mr. Arroyo's family posted the bail for his release. However, Spokane County Jail refused to release Mr. Arroyo based on an ICE detainer. Mr. Arroyo was not turned over to the custody of ICE. Instead, Mr. Arroyo was held in Spokane County Jail for 20 days until the charge (driving without a license) was dismissed on October 30, 2009. Mr. Arroyo was subsequently retained Northwest Immigrant Rights Project and the Center for Justice to represent him in filing a claim against Spokane County for his unlawful imprisonment. This case settled with substantial monetary compensation on June 3, 2010. *Arroyo v. Spokane County Sheriff's Office*, Claim No. 10-0046 (June 2010).

#### **Pennsylvania (Suit filed in November 2010)**

In November 2008, Mr. Ernesto Galarza, a New Jersey-born U.S. citizen of Puerto Rican descent, was arrested during a series of drug arrests by the Allentown Police Department. (Having nothing to do with the drug crimes, he was later acquitted of these charges.)

Though he posted bail the next day, Galarza was not released because ICE had issued an immigration detainer against him erroneously believing he was an undocumented immigrant from the Dominican Republic. Even though Galarza's Social Security card and Pennsylvania driver's license were in his wallet at the time of his arrest and in the prison's possession during his detention, Mr. Galarza was held illegally for three days in the Lehigh County Prison. As a result of his detention, he lost his part-time job and wages from his full-time job.

*Galarza v. Szalczyk*, <http://www.aclupa.org/downloads/Galarzacmplnt.pdf>

### **III. Post-conviction Detainer Issues: Detainer Impacts on Security Classifications, In-custody Services, Pre- & Post-trial Detention Options**

The language on the detainer Form I-247 expressly states that the presence of the detainer in no way limits the discretion of local authorities regarding an inmate's classification, eligibility for services or other treatment while incarcerated, and access to pre- and post-trial detention options. In reality, the presence of an ICE detainer often impedes a non-citizen's ability to get treatment and services after conviction.<sup>81</sup> Non-citizens with immigration detainers are prohibited from serving time in minimum-

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<sup>81</sup> The impact of immigration detainers on noncitizen defendants was described in an amicus brief filed by public defender organizations and the National Association of Criminal Defense Lawyers in *Padilla v. Kentucky*, 559 U.S. \_\_\_\_ (2010), available at [http://www.immigrantdefenseproject.org/docs/09\\_Padilla.pdf](http://www.immigrantdefenseproject.org/docs/09_Padilla.pdf)

security prisons and find themselves ineligible for halfway houses, early release programs, out-patient drug rehabilitation programs, work release, literacy programs, or probation.<sup>82</sup>

While policies vary by jurisdiction, non-citizens with immigration detainers or final orders of removal are often given lowest priority for accessing limited treatment and services while in federal, state, or local custody. For example, in New Jersey, non-citizen defendants are eligible for minimum security. Once an immigration detainer is filed, they are automatically relegated to medium security.<sup>83</sup>

Moreover, many jurisdictions have sentencing alternatives that permit a court to order treatment alternatives, participation in a jail diversion program, or participation in community treatment options.<sup>84</sup> In New York, these programs are considered effective in preventing recidivism and lowering costs to the criminal justice system. Immigration detainers interfere with courts' discretion to impose and supervise individualized sentencing alternatives for non-citizens.

***Practice Tips:*** Emphasize that the language on the detainer Form I-247 **expressly** states that the presence of the detainer in no way limits the discretion of local authorities regarding an inmate's classification, eligibility for services or other treatment while incarcerated.<sup>85</sup>

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<sup>82</sup> Norton Tooby & Joseph Justin Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 6.19 (4th ed. 2007).

<sup>83</sup> See, e.g., N.J. Admin. Code § 10A:9-4.6(v) (providing that foreign-born inmates shall be eligible for reduced custody provided ICE has not issued a detainer on the inmate); Wash. Rev. Code § 9.94A.660(1)(g) (drug offender sentencing alternative not available to defendants with "deportation detainer"); *Alanis v. State*, 583 N.W.2d 573 (Minn. 1998) (detainer precluded admission into bootcamp program);

<sup>84</sup> "Immigration Detainers Need Not Bar Access to Jail Diversion Programs," New York City Bar Association, June 2009 (last visited on December 2010). [http://www.nycbar.org/pdf/report/NYCBA\\_Immigration%20Detainers\\_Report\\_Final.pdf](http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf)

<sup>85</sup> See Immigration Detainer Form I-247 at Appendix B.

## **APPENDIX A: Identifying Immigration Status & Defense Goals**

*(Prepared by Washington Defender Association's Immigration Project)*

### **Identifying Your Noncitizen Client's Immigration Status & Determining Defense Goals**

#### **IDENTIFY IMMIGRATION STATUS & CRIMINAL HISTORY**

- **Undocumented Persons (UP):** Note many UP (except those w/prior deportations) have avenues for obtaining lawful status, particularly if they have U.S. citizen spouse or parents and have never left the U.S. Two types of UP: 1. Entered illegally and have never had status; 2. Came lawfully with a temporary visa (e.g. student or tourist) that has since expired.
- **Lawful Permanent Residents (LPR or Greencard holders) & Refugees:**<sup>1</sup> Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status.
- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals = LPRs & refugees. If expired, goals = UPs.
- **Mandatory Immigration Detention.** Domestic violence assault convictions can trigger prolonged detention once person is in deportation proceedings, which can last for months/years if D fights deportation.
- **Deportation is Permanent.** Only a tiny fraction of people will ever obtain or regain lawful status once deported. Illegal re-entry after deportation is now the most-prosecuted federal felony and carries significant sentence enhancements for persons with criminal convictions.

#### **DEFENSE GOALS FOR UNDOCUMENTED PERSONS (UPs):**

1. **Avoid ICE apprehension by getting/staying out of jail.** A UP who goes to jail for even one day is likely to encounter ICE, get a detainer imposed and end up in ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be the highest priority (see #2).
2. **Preserve avenues to obtain lawful status.** Congress currently debating immigration law changes that will provide UP with avenue to get permanent resident status. Many UPs already have avenues to obtain lawful status. Many convictions will render them ineligible to do this. If UP has US citizen or LPR spouse/partner, resolving case per one strategies below to preserve avenue(s) to obtain LPR status through marriage may be a higher priority than immediate release from jail.

#### **DEFENSE GOALS FOR LAWFUL PERMANENT RESIDENTS & REFUGEES**

1. **Avoid a conviction that triggers deportation.** Even where you do, advise clients not to leave the U.S. or apply for LPR status/citizenship without first consulting an immigration attorney.
2. **If #1 is not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge who has the power to grant *discretionary* "relief from removal (deportation)" through one of several legal avenues to qualifying noncitizens. Generally speaking, that means LPRs with 7 years of residency and refugees/asylees who've not yet become LPRs.

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<sup>1</sup> People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum in the U.S. can also apply to be LPRs.

**APPENDIX B – Sample I-247 Immigration Detainer Forms**

File No:

Date:

TO: (Name and title of Institution)

FROM: (Office Address)

Name of Alien: \_\_\_\_\_

Date of Birth: \_\_\_\_\_ Nationality: \_\_\_\_\_ Sex: \_\_\_\_\_

**You are advised that the action noted below has been taken by the U.S. Department of Homeland Security concerning the above-named inmate of your institution:**

- Investigation has been initiated to determine whether this person is subject to removal from the United States.
- A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- A warrant of arrest in removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- Deportation or removal from the United States has been ordered.

**It is requested that you:**

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work, and quarters assignments, or other treatment which he or she would otherwise receive.

- Under Federal regulation 8 CFR § 287.7, DHS requests that you maintain custody of this individual for a period not to exceed 48 hours (excluding Saturdays, Sundays, and Federal holidays) to provide adequate time for DHS to assume custody of the alien. Please notify this Office at least 30 days prior to this inmate's release by calling \_\_\_\_\_ during business hours or \_\_\_\_\_ after hours in an emergency.  
(Area code and phone number) (Area code and phone number)
- Please complete and sign the bottom block of the duplicate of this form and return it to this office.
  - A self-addressed stamped envelope is enclosed for your convenience.
  - Please return a signed copy via facsimile to \_\_\_\_\_  
(Area code and facsimile number)
- Return fax to the attention of \_\_\_\_\_, at \_\_\_\_\_  
(Name of officer handling case) (Area code and phone number)
- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death or transfer to another institution.
- Please cancel the detainer previously placed by this Office on \_\_\_\_\_.

\_\_\_\_\_  
(Signature of DHS Officer)

\_\_\_\_\_  
(Title of DHS Officer)

**Receipt acknowledged:**

Date of last conviction: \_\_\_\_\_ Latest conviction charge: \_\_\_\_\_

Estimated release date: \_\_\_\_\_

Signature and title of official: \_\_\_\_\_

Immigration Detainer - Notice of Action

File No.	
Date:	
To: (Name and title of institution)	From: (INS office address)

Name of alien: \_\_\_\_\_

Date of birth: \_\_\_\_\_ Nationality: \_\_\_\_\_ Sex: \_\_\_\_\_

**You are advised that the action noted below has been taken by the Immigration and Naturalization Service concerning the above-named inmate of your institution:**

- Investigation has been initiated to determine whether this person is subject to removal from the United States.
- A Notice to Appear or other charging document initiating removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- A warrant of arrest in removal proceedings, a copy of which is attached, was served on \_\_\_\_\_  
(Date)
- Deportation or removal from the United States has been ordered.

**It is requested that you:**

Please accept this notice as a detainer. This is for notification purposes only and does not limit your discretion in any decision affecting the offender's classification, work and quarters assignments, or other treatment which he or she would otherwise receive.

Federal regulations (8 CFR 287.7) require that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien. You may notify INS by calling \_\_\_\_\_ during business hours or \_\_\_\_\_ after hours in an emergency.

Please complete and sign the bottom block of the duplicate of this form and return it to this office.  A self-addressed stamped envelope is enclosed for your convenience.  Please return a signed copy via facsimile to \_\_\_\_\_  
(Area code and facsimile number)

Return fax to the attention of \_\_\_\_\_, at \_\_\_\_\_  
(Name of INS officer handling case) (Area code and phone number)

- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death or transfer to another institution.
- Please cancel the detainer previously placed by this Service on \_\_\_\_\_

\_\_\_\_\_  
(Signature of INS official)

\_\_\_\_\_  
(Title of INS official)

**Receipt acknowledged:**

Date of latest conviction: \_\_\_\_\_ Latest conviction charge: \_\_\_\_\_

Estimated release date: \_\_\_\_\_

Signature and title of official: \_\_\_\_\_

## **APPENDIX C: Departure-Control Order Regulations**

### **PART 215 - CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES**

Authority: 8 U.S.C. 1101; 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004); 1365a note. 1379, 1731-32.

Source: 45 FR 65516, Oct. 3, 1980, unless otherwise noted.

#### **215.1 Definitions.**

For the purpose of this part:

- (a) The term *alien* means any person who is not a citizen or national of the United States.
- (b) The term *Commissioner* means the Commissioner of Immigration and Naturalization.
- (c) The term *regional commissioner* means an officer of the Immigration and Naturalization Service duly appointed or designated as a regional commissioner, or an officer who has been designated to act as a regional commissioner.
- (d) The term *district director* means an officer of the Immigration and Naturalization Service duly appointed or designated as a district director, or an officer who has been designated to act as a district director.
- (e) The term *United States* means the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, Swains Island, the Commonwealth of the Northern Mariana Islands (beginning November 28, 2009), and all other territory and waters, continental and insular, subject to the jurisdiction of the United States.
- (f) The term *continental United States* means the District of Columbia and the several States, except Alaska and Hawaii.
- (g) The term *geographical part of the United States* means:
  - (1) The continental United States,
  - (2) Alaska,
  - (3) Hawaii,
  - (4) Puerto Rico,
  - (5) The Virgin Islands,
  - (6) Guam,
  - (7) American Samoa,
  - (8) Swains Island, or
  - (9) The Commonwealth of the Northern Mariana Islands (beginning November 28, 2009).
- (h) The term *depart from the United States* means depart by land, water, or air (1) from the United States for any foreign place, or (2) from one geographical part of the United States for a separate geographical part of the United States: *Provided*, That a trip or journey upon a public ferry, passenger vessel sailing coastwise on a fixed schedule, excursion vessel, or aircraft, having both termini in the continental United States or in any one of the other geographical parts of the United States and not touching any territory or waters under the jurisdiction or control of a foreign power, shall not be deemed a departure from the United States.
- (i) The term *departure-control officer* means any immigration officer as defined in the regulations of the Immigration and Naturalization Service who is designated to supervise the departure of aliens, or any officer or employee of the United States designated by the Governor of the Canal Zone, the High Commissioner of the Trust Territory of the Pacific Islands, or the governor of an outlying possession of the United States, to supervise the departure of aliens.
- (j) The term *port of departure* means a port in the continental United States, Alaska, Guam, Hawaii, Puerto Rico, the Commonwealth of the Northern Mariana Islands (beginning November 28, 2009), or the Virgin Islands, designated as a port of entry by the Secretary, or in exceptional circumstances such other place as the departure-control officer may, in

his discretion, designate in an individual case, or a port in American Samoa, or Swains Island, designated as a port of entry by the chief executive officer thereof.

(k) The term *special inquiry officer* shall have the meaning ascribed thereto in section 101(b)(4) of the Immigration and Nationality Act.

### **Legislative History**

[As amended 74 FR 2824, Jan. 16, 2009; 74 FR 25387, May 28, 2009.]

### **215.2 Authority of departure-control officer to prevent aliens departure from the United States.**

- (a) No alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of 215.3. Any departure-control officer who knows or has reason to believe that the case of an alien in the United States comes within the provisions of 215.3 shall temporarily prevent the departure of such alien from the United States and shall serve him with a written temporary order directing him not to depart, or attempt to depart, from the United States until notified of the revocation of the order.
- (b) The written order temporarily preventing an alien, other than an enemy alien, from departing from the United States shall become final 15 days after the date of service thereof upon the alien, unless prior thereto the alien requests a hearing as hereinafter provided. At such time as the alien is served with an order temporarily preventing his departure from the United States, he shall be notified in writing concerning the provisions of this paragraph, and shall be advised of his right to request a hearing if entitled thereto under 215.4. In the case of an enemy alien, the written order preventing departure shall become final on the date of its service upon the alien.
- (c) Any alien who seeks to depart from the United States may be required, in the discretion of the departure-control officer, to be examined under oath and to submit for official inspection all documents, articles, and other property in his possession which are being removed from the United States upon, or in connection with, the aliens departure. The departure-control officer may permit certain other persons, including officials of the Department of State and interpreters, to participate in such examination or inspection and may exclude from presence at such examination or inspection any person whose presence would not further the objectives of such examination or inspection. The departure-control officer shall temporarily prevent the departure of any alien who refuses to submit to such examination or inspection, and may, if necessary to the enforcement of this requirement, take possession of the aliens' passport or other travel document.

### **215.3 Aliens whose departure is deemed prejudicial to the interests of the United States.**

The departure from the United States of any alien within one or more of the following categories shall be deemed prejudicial to the interests of the United States.

- (a) Any alien who is in possession of, and who is believed likely to disclose to unauthorized persons, information concerning the plans, preparation, equipment, or establishments for the national defense and security of the United States.
- (b) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities of any kind designed to obstruct, impede, retard, delay or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States or the United Nations for the defense of any other country.
- (c) Any alien who seeks to depart from the United States to engage in, or who is likely to engage in, activities which would obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or action taken by any country cooperating with the United States in measures adopted to promote the peace, defense, or safety of the United States or such other country.
- (d) Any alien who seeks to depart from the United States for the purpose of organizing, directing, or participating in any rebellion, insurrection, or violent uprising in or against the United States or a country allied with the United

States, or of waging war against the United States or its allies, or of destroying, or depriving the United States of sources of supplies or materials vital to the national defense of the United States, or to the effectiveness of the measures adopted by the United States for its defense, or for the defense of any other country allied with the United States.

- (e) Any alien who is subject to registration for training and service in the Armed Forces of the United States and who fails to present a Registration Certificate (SSS Form No. 2) showing that he has complied with his obligation to register under the Universal Military Training and Service Act, as amended.
- (f) Any alien who is a fugitive from justice on account of an offense punishable in the United States.
- (g) Any alien who is needed in the United States as a witness in, or as a party to, any criminal case under investigation or pending in a court in the United States: *Provided, That any alien who is a witness in, or a party to, any criminal case pending in any criminal court proceeding may be permitted to depart from the United States with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under the provisions of this part.***
- (h) Any alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local.
- (i) Any alien whose technical or scientific training and knowledge might be utilized by an enemy or a potential enemy of the United States to undermine and defeat the military and defensive operations of the United States or of any nation cooperating with the United States in the interests of collective security.
- (j) Any alien, where doubt exists whether such alien is departing or seeking to depart from the United States voluntarily except an alien who is departing or seeking to depart subject to an order issued in extradition, exclusion, or deportation proceedings.
- (k) Any alien whose case does not fall within any of the categories described in paragraphs (a) to (j), inclusive, of this section, but which involves circumstances of a similar character rendering the aliens' departure prejudicial to the interests of the United States.

## Legislative History

[Added 53 FR 30011, Aug. 10, 1988]

### **215.4 Procedure in case of alien prevented from departing from the United States.**

- (a) Any alien, other than an enemy alien, whose departure has been temporarily prevented under the provisions of 215.2, may, within 15 days of the service upon him of the written order temporarily preventing his departure, request a hearing before a special inquiry officer. The alien's request for a hearing shall be made in writing and shall be addressed to the district director having administrative jurisdiction over the alien's place of residence. If the alien's request for a hearing is timely made, the district director shall schedule a hearing before a special inquiry officer, and notice of such hearing shall be given to the alien. The notice of hearing shall, as specifically as security considerations permit, inform the alien of the nature of the case against him, shall fix the time and place of the hearing, and shall inform the alien of his right to be represented, at no expense to the Government, by counsel of his own choosing.
- (b) Every alien for whom a hearing has been scheduled under paragraph (a) of this section shall be entitled (1) to appear in person before the special inquiry officer, (2) to be represented by counsel of his own choice, (3) to have the opportunity to be heard and to present evidence, (4) to cross-examine the witnesses who appear at the hearing, except that if, in the course of the examination, it appears that further examination may divulge information of a confidential or security nature, the special inquiry officer may, in his discretion, preclude further examination of the witness with respect to such matters, (5) to examine any evidence in possession of the Government which is to be considered in the disposition of the case, provided that such evidence is not of a confidential or security nature the disclosure of which would be prejudicial to the interests of the United States, (6) to have the time and

opportunity to produce evidence and witnesses on his own behalf, and (7) to reasonable continuances, upon request, for good cause shown.

- (c) Any special inquiry officer who is assigned to conduct the hearing provided for in this section shall have the authority to: (1) Administer oaths and affirmations, (2) present and receive evidence, (3) interrogate, examine, and cross examine under oath or affirmation both the alien and witnesses, (4) rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (5) take or cause depositions to be taken, (6) issue subpoenas, and (7) take any further action consistent with applicable provisions of law, Executive orders, proclamations, and regulations.

## Appendix D: GOVERNMENT ACTORS DURING DETENTION AND DEPORTATION

(Excerpt from Deportation 101 manual, available at [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org))

This is a list of people whom immigrants are likely to encounter during the deportation process. This is not a complete list, but rather is a list of people who are often involved in detention or deportation court cases.<sup>2</sup>

### During Arrest, Detention and Removal

<http://www.ice.gov/contact/ero/index.htm>

Who they are	What are they responsible for?
ICE Deportation Officer (DO)  Each person in removal proceedings or detention is assigned a DO	<ul style="list-style-type: none"> <li>• They know whether and when an immigrant will be detained, transferred or deported and may make or be involved in custody determinations.</li> <li>• They can deal with detention conditions, such as medical and mental health issues.</li> </ul>
Special Agents and other Officers from Detention and Removal Office (DRO) and Investigations Office	<ul style="list-style-type: none"> <li>• They arrest and detain immigrants</li> <li>• They begin the deportation process</li> <li>• They gather information and conduct surveillance in preparation for deportations or raids.</li> </ul>
Special Agent-in-Charge	<ul style="list-style-type: none"> <li>• They make custody decisions, and at times are in charge of arrangements for deportation. During specific enforcement actions, a Special Agent-in-Charge may oversee and coordinate with that agency.</li> </ul>
Officer-in-Charge	<ul style="list-style-type: none"> <li>• They are supervisory officers who may be in charge of a specific facility.</li> <li>• They make custody decisions and have the power to respond to abusive detention conditions.</li> </ul>
Field Office Directors (FOD)	<ul style="list-style-type: none"> <li>• They are the head honchos who control the direction of a district office and supervise the operations of his or her region.</li> <li>• They supervise ICE employees' custody determinations</li> <li>• They have the power to exercise prosecutorial discretion, including whether to begin removal proceedings and whether to grant deferred action</li> <li>• They can lift detainers</li> <li>• They work with DHS attorneys in deciding whether to appeal an immigration court decision.</li> <li>• They plan "special projects," including enforcement projects.</li> <li>• They work with Department of Justice attorneys representing the government in federal appeals</li> </ul>

<sup>2</sup> It does not include, for example, personnel at the Department of Homeland Security's Citizenship and Immigration Services (CIS) and Customs and Border Protection (CBP), who serve related functions. For example, CIS reviews naturalization, asylum, and adjustment of status application and can issue Notices to Appear (the immigration charging document).

Fugitive Operations Officers	<ul style="list-style-type: none"> <li>Responsible for arrests of noncitizens with final removal orders, arrests or criminal convictions</li> <li>Fugitive teams used wherever ICE wants to conduct operation</li> </ul>
Behavioral	<ul style="list-style-type: none"> <li>ICE contractor that runs an “Alternative to Detention” Program; primarily</li> </ul>

**ICE HEADQUARTERS**

<http://www.ice.gov/about/leadership/index.htm>

Officials at ICE Headquarters in Washington, D.C.	<ul style="list-style-type: none"> <li>Current ICE Asst Secretary: John Morton</li> <li>I-9 audits and Workplace raids are run by Worksite Enforcement.</li> <li>ICE HQ is also responsible for 287(g) agreements, Secure Communities, and CAP agreements</li> <li>HQ for ICE Trial Attorneys</li> </ul>
Post Order Custody Review (POCR) Unit at ICE Headquarters	<ul style="list-style-type: none"> <li>Post-order custody review for immigrants who have been ordered removed/deported but whom the government cannot deport (for example, because their country of origin will not accept return). This Unit becomes most directly involved in high-profile indefinite detention cases.</li> </ul>

**CUSTOMS AND BORDER PATROL AGENTS**

Customs and Border Patrol Agent	<ul style="list-style-type: none"> <li>Alan Bersin Commissioner, U.S. Customs and Border Protection</li> <li>Ports of entry (airport, border, ship) and 100 miles interior</li> <li>Can detain, initiate removal proceedings, deport</li> <li>Conducts interviews of all noncitizens (including green card holders) at ports of entry for purposes of deportation</li> </ul>
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**OTHER PARTS OF DEPARTMENT OF HOMELAND SECURITY RESPONSIBLE FOR ICE ENFORCEMENT AND TREATMENT**

Office of Refugee and Resettlement (Dept. of Health & Human Services)	<p>Handles detention and custody issues of minors, including custody determinations and arrangements.</p> <p><a href="http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm">http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm</a></p>
Department of Immigrant Health Services  www.icehealth.gov	<p>Provides direct care or arranges for outside health care services to detained aliens under the custody of ICE. DIHS also serves as the medical authority for ICE. DIHS consists of U.S. Public Health Service officers and contract medical professionals who work under their supervision. DIHS provides the primary health care for detainees housed in DIHS-staffed detention centers and oversees the financial authorization and payment for off-site specialty and emergency care for detainees in ICE custody.</p>

Federal and local enforcement agencies	Other federal and local agents, for example from Social security, FBI, U.S. Marshalls, local police, probation, parole, and others often coordinate with ICE.
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### **OFFICIALS INVOLVED IN IMMIGRATION COURT CASES**

Trial Attorney or Office of Chief Counsel (TA or OCC)	DHS/ICE employee who represents the government in a removal case (like a prosecutor).
Immigration Judge (IJ)	DOJ employee appointed by the Attorney General to the Executive Office of Immigration Review, who “runs” an immigration courtroom.  The Immigration Judge decides whether an immigrant is eligible for bond and if yes, whether to grant bond; decides whether an immigrant is removable/deportable and eligible for relief from deportation; takes evidence, including testimony; and orders deportation or grants relief from deportation.
Member of Board of Immigration Appeals (BIA)	DOJ employee appointed by the Attorney General to the Executive Office of Immigration Review

### **DURING FEDERAL COURT APPEALS OF AN IMMIGRATION COURT DECISION**

DOJ’s Office of Immigration Litigation (OIL)	These are the lawyers representing the government in federal appeals of detention or deportation cases. In most federal district court and Court of Appeals cases, OIL represents the government; however, USAs also represent the government in some jurisdictions (like Second Circuit district and appeals courts). When a case goes to the Supreme Court, the Solicitor General usually represents the government.  USAs bring illegal entry, illegal re-entry charges against noncitizens.
US Attorney or Assistant US Attorney (USA or AUSA)	
Solicitor General	
District Court Magistrate or Judge	These judges decide cases in federal district court, including habeas corpus petitions challenging detention.
Court of Appeals Judges	These judges decide cases in federal Courts of Appeals, including petitions for review challenging orders of removal/deportation and appeals from federal district courts, usually in 3-judge panels.
Supreme Court Justices	The nine Justices of the U.S. Supreme Court decide the limited cases that they choose to accept.

**Appendix E: ICE Interim Policy, effective August 2, 2010,  
Interim Policy Number 10074.1: Detainers**

## U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

### INTERIM Policy Number 10074.1: Detainers

**Issue Date:** 08/02/2010

**Effective Date:** 08/02/2010

**Superseded:** LESC LOP 005-09 (September 23, 2009)

**Federal Enterprise Architecture Number:** 111-601-001-a

1. **Purpose/Background.** This directive establishes the interim policy of U.S. Immigration and Customs Enforcement (ICE) regarding the issuance of civil immigration detainers.
2. **Definitions.** The following definitions apply for purposes of this directive only.
  - 2.1. A **detainer** (Form I-247) is a notice that ICE issues to Federal, State, and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA's custody. An immigration detainer may serve three key functions—
    - notify an LEA that ICE intends to arrest or remove an alien in the LEA's custody once the alien is no longer subject to the LEA's detention;
    - request information from an LEA about an alien's impending release so ICE may assume custody before the alien is released from the LEA's custody; and
    - request that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody.
  - 2.2. An **Immigration officer** includes an officer or an agent who is authorized to issue detainers pursuant to 8 C.F.R. § 287.7(b), or who a state, local, or tribal officer or agent who is delegated such authority pursuant to § 287(g) of the Immigration and Nationality Act.
3. **Policy.**
  - 3.1. Only immigration officers may issue detainers.
  - 3.2. Immigration officers shall issue detainers only after an LEA has exercised its independent authority to arrest the alien for a criminal violation.
4. **Procedures.**
  - 4.1. Immigration officers shall not issue a detainer unless an LEA has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e., roadside or *Terry* stops)

but not arrested. This policy, however, does not preclude temporary detention of an alien by the LEA while ICE responds to the scene.

- 4.2. If an immigration officer has reason to believe that an individual arrested by an LEA is subject to ICE detention for removal or removal proceedings, and issuance of the detainer otherwise comports with this policy and appears to advance the priorities of the agency, the immigration officer may issue a detainer (Form I-247) to the LEA.
- 4.3. If the alien is the subject of an administrative arrest warrant, warrant of removal, or removal order, the immigration officer who issues the detainer should attach the warrant or order to the detainer, unless impracticable.
- 4.4. Immigration officers are expected to make arrangements to assume custody of an alien who is the subject of a detainer in a timely manner and without unnecessary delay. Although a detainer serves to request that an LEA temporarily detain an alien for a period not to exceed 48 hours from the time the LEA otherwise would have released the alien (excluding Saturdays, Sundays, and holidays) to permit ICE to assume custody of the alien, immigration officers should avoid relying on that hold period. If at any time after a detainer is issued, ICE determines it will not assume custody of the alien, the detainer should be withdrawn or rescinded and the LEA notified.
- 4.5. ICE shall timely assume custody of the alien if ICE has opted to lodge a detainer against an alien in any of the following categories—
  - aliens who are subject to removal based upon certain criminal or security-related grounds set forth in INA § 236(c);
  - aliens who are within the “removal period,” as defined in INA § 241(a)(2); and
  - aliens who have been arrested for controlled substance offenses under INA § 287(d).
- 4.6. Immigration officers shall take particular care when issuing a detainer against a lawful permanent resident (LPR) as some grounds of removability hinge on a conviction, while others do not [eg. removability pursuant to INA § 237(a)(4) and INA § 237(a)(1)(E).] Although in certain instances ICE may hold LPRs for up to 48 hours to make charging determinations, immigration officers should exercise such authority judiciously and seek advice of counsel for guidance if the LPR has not been convicted of a removable offense.
- 4.7. Immigration officers should consult their supervisors or local chief counsel office with all inquiries, questions, or concerns regarding this policy.

## **5. Authorities/References.**

- 5.1. INA §§ 103(a)(3), 236, 241, 287.
- 5.2. 8 C.F.R. §§ 236.1, 287.3, 287.5, 287.7, 287.8, 1236.1.

**6. Attachments.**

**6.1. Form I-247: Immigration Detainer - Notice of Action.**

**7. No Private Right Statement.** This Directive is an internal policy statement of ICE. It is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States; its departments, agencies, or other entities; its officers or employees; contractors or any other person.

A handwritten signature in black ink, appearing to read "John Morton", written over a horizontal line.

**John Morton  
Director**

**U.S. Immigration and Customs Enforcement**

**Appendix F: Superseding Guidance on Reporting and Investigating Claims of US Citizenship,” Morton memorandum, November 19, 2009.**



U.S. Immigration  
and Customs  
Enforcement

NOV 19 2009

MEMORANDUM FOR: Field Office Directors  
Special Agents in Charge  
Chief Counsels

FROM: John Morton   
Assistant Secretary

SUBJECT: Superseding Guidance on Reporting and Investigating Claims  
to United States Citizenship

This memorandum supersedes the guidance issued on November 6, 2008, entitled "Superseding Guidance on Reporting and Investigating Claims to United States Citizenship." This guidance is intended to ensure claims to U.S. citizenship receive immediate and careful investigation and analysis.

While performing their duties, U.S. Immigration and Customs Enforcement (ICE) officers, agents, and attorneys, may encounter aliens who are not certain of their status or claim to be United States citizens (USC). As the Immigration and Nationality Act (INA) provides numerous avenues for a person to derive or acquire U.S. citizenship, ICE officers, agents, and attorneys, should handle these matters with the utmost care and highest priority. While some cases may be easily resolved, because of the complexity of citizenship and nationality law, many may require additional investigation and substantial legal analysis. As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a USC. Consequently, investigations into an individual's claim to U.S. citizenship should be prioritized and Office of Investigations (OI) and Detention and Removal Operations (DRO) personnel must consult with the Office of the Principal Legal Advisor's (OPLA) local Office of the Chief Counsel (OCC) as discussed below.

#### Claims at the Time of Encounter

When officers and agents encounter an individual who they suspect is without lawful status but claims to be a USC, the situation will fall into one of three categories: 1) evidence indicates the person is a USC; 2) some evidence indicates that the individual may be a USC but is inconclusive; and 3) no probative evidence indicates the individual is a USC. If evidence indicates the individual is a USC, ICE should neither arrest nor place the individual in removal proceedings. Where there is *some* probative evidence that the individual is a USC, officers and agents should consult with their local OCC as soon as practicable. After evaluating the claim, if the evidence of U.S. citizenship outweighs evidence to the contrary, the individual should not be taken into custody. The person may, however, still be placed in removal proceedings if there is reason to believe the

**Subject: Superseding Guidance on Reporting and Investigating Claims to United States Citizenship**

individual is in the United States in violation of law. Finally, where no probative evidence of U.S. citizenship exists and there is reason to believe the individual is in the United States in violation of law, the individual may be arrested and processed for removal. In all cases, any uncertainty about whether the evidence is probative of U.S. citizenship should weigh against detention.

**Claims by Individuals Subject to an NTA**

Agents and officers must fully investigate the merits of any claim to citizenship made by an individual who is subject to a Notice to Appear (NTA), whether the claim was made before or after the NTA was served on the individual. Such investigations should be prioritized and OI and DRO personnel should consult with their local OCC as soon as practicable when investigating such claims. In addition, OI and DRO, along with their local OCC, must jointly prepare a memorandum examining the claim using the attached template. A notation should be made in the Enforce Alien Removal Module (EARM) and a copy of the memorandum should be placed in the alien's A-file. The memorandum should also be saved in the General Counsel Electronic Management System (GEMS) and notated using the designated GEMS barcode.

**Claims by Detained Individuals**

If an individual already in custody claims to be a USC, an officer must immediately examine the merits of the claim and notify and consult with his or her local OCC. If the individual is unrepresented, an officer must immediately provide the individual with the local Executive Office for Immigration Review (EOIR) list of pro bono legal service providers, even if one was previously provided.

DRO and OPLA must also jointly prepare and submit a memorandum examining the claim and recommending a course of action to the HQDRO Assistant Director for Operations at the "USC Claims DRO" e-mailbox and to the HQOPLA Director of Field Operations at the "OPLA Field Legal OPS" e-mailbox. Absent extraordinary circumstances, this memorandum should be submitted no more than 24 hours from the time the individual made the claim. HQDRO and HQOPLA will respond to the field with a decision on the recommendation within 24 hours. A notation should be made in EARM and a copy of the memorandum and resulting decision should be placed in the alien's A-file. The memorandum and resulting decision should also be saved in GEMS and notated using the designated GEMS barcode.

If the individual's claim is credible on its face, or if the investigation results in probative evidence that the detained individual is a USC, the individual should be released from detention. Any significant change in circumstances should be reported to the "USC Claims DRO" e-mailbox and the "OPLA Field Legal Ops" e-mailbox.

**Examination of the Merits**

Interviews with detainees making such claims must be conducted by an officer or agent in the presence of and/or in conjunction with a supervisor. Interviews will be recorded as sworn statements and must include all questions needed to complete all fields on a Record of Deportable

**Subject: Superseding Guidance on Reporting and Investigating Claims to United States  
Citizenship**

Alien, Form I-213. In addition, the sworn statement must include additional probative questions designed to elicit information sufficient to allow a thorough investigation of the person's claim of citizenship. Additional steps to be taken may include vital records searches, family interviews, and other appropriate investigative measures. Officers and agents should also work with their local United States Attorney's Office to ensure that any statement includes information sufficient to use in prosecuting appropriate cases under 18 U.S.C. § 911, should it ultimately come to light that the individual intentionally made a false claim to U.S. citizenship.

**State and Local Officers with Authority under INA § 287(g)**

Field Office Directors (FODs) and Special Agents in Charge (SACs) shall ensure that all state and local officers with delegated immigration authority pursuant to INA § 287(g) within their area of responsibility understand and adhere to this policy. FODs and SACs are expected to thoroughly investigate all USC claims made by individuals encountered by 287(g) designated officers.