June 17, 2015

The Honorable Jeh Johnson
Secretary, Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Via U.S. mail and electronic mail

Dear Secretary Johnson:

We write to address serious legal concerns with the implementation of Immigration and Customs Enforcement's (ICE's) new Priority Enforcement Program (PEP), particularly with respect to the continuing use of immigration detainers. The new PEP detainer form (I-247D) and notification form (I-247N), which ICE released to the public on June 12, 2015, raise these principal concerns:

A. The new detainer form gives no indication that ICE will limit detention requests to "special circumstances," as described in your November 2014 memo. Your memo directed ICE to discontinue use of detainers except in "special circumstances," but nothing in the new detainer form appears to give effect to that limiting language.

B. The new detainer form does not cure the legal deficiencies of previous immigration detainer forms, which courts have found violate the Fourth Amendment and expose both ICE and local law enforcement agencies to liability.

C. The new notification form will continue to entangle local police in immigration enforcement, in direct contravention of the recent recommendation of the President's Task Force on 21st Century Policing calling for federal immigration enforcement to be "decoupled" from routine local policing; the form may also expose DHS and local law enforcement agencies to liability for extended detentions and transfers of custody that do not meet the Fourth Amendment's requirements.

We call on you to completely discontinue ICE's use of immigration detainers to request extended detention and to implement the recommendations of the President's Task Force on 21st Century Policing by cancelling plans for the use of routine notification requests. Short of discontinuing detainers and notifications, ICE and the local law enforcement agencies that respond to detainers or notifications will continue to incur liability for making illegal arrests and jeopardize policy-community trust.

A. The New Form Fails to Limit Detainers to "Special Circumstances."

Your November 2014 memo directed ICE officers to issue immigration detainers only in "special circumstances," yet nothing about the new detainer form reflects that limitation. Rather, the new detainer form suggests that an ICE officer may issue it whenever he or she alleges probable cause to believe the subject is removable and determines that the subject falls into one of the Department's enforcement priorities. Neither condition constitutes a "special circumstance" under any reasonable definition of the term. Absent guidance on the meaning of special circumstances and clear delineation on the detainer form itself, we are concerned that ICE agents will continue to issue detainers in *ordinary* circumstances, as if agency policy had not changed.

B. The New Detainer Form Does Not Cure the Legal Problems that Have Resulted in Liability for ICE and Local Law Enforcement.

The U.S. Constitution and the Immigration and Nationality Act ("INA") set forth the circumstances in which a warrantless arrest may be made for immigration purposes.[1] The revised detainer form does not reflect these legal constraints. Instead, the form appears only to reflect ICE's current practices, which fail to comport with fundamental protections under the Fourth Amendment and the limits on warrantless arrests under the INA.

Last year, after a series of federal court decisions holding ICE and local law enforcement agencies liable for detaining people beyond their release times on immigration detainers, hundreds of law enforcement agencies in counties and cities across the country stopped complying with immigration detainers. Many of them, including nearly all of the 58 counties in California, rightly adopted policies that they will comply with an immigration detainer only if it is accompanied by a judicial warrant or a judicial determination of probable cause. ICE's new detainer form, however, does not require a judicial warrant, judicial determination of probable cause, or even an individual, particularized statement of probable cause. Therefore, ICE's new detainer form fails to meet the Fourth Amendment's basic requirements, and it perpetuates the constitutional deficiencies that have drawn just criticism from localities across the country.

First, ICE has not revised the detainer form (or its agents' practices) to satisfy the constitutional requirement of a prompt judicial probable cause hearing following arrest. As a result, ICE detainers continue to violate the Fourth Amendment, and law enforcement agencies may not lawfully comply with them.

The Supreme Court has long held that "the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (emphasis added). "[T]his

[1] Prolonging detention after a person would otherwise be entitled to release based upon an immigration detainer amounts to a warrantless arrest. *See, e.g.*, *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (slip op.) (noting that prolonged detention based on an immigration detainer "constituted a new arrest, and must be analyzed under the Fourth Amendment.").

determination must be made . . . *promptly* after arrest." *Id.* at 125 (emphasis added).[2] However, ICE's new detainer form (like its predecessors) does not contemplate a *prompt* probable cause hearing before a detached, neutral judicial official after arrest on the detainer. In fact, it does not contemplate *any* judicial determination of probable cause at *any* time, in spite of the Constitution's clear requirements. *See* 8 C.F.R. § 287.3 (describing post-arrest procedures and making no provision for a judicial probable cause determination).[3] As a result, unless ICE changes its practices to ensure that a person arrested and detained on an immigration detainer is brought before a judicial official for a probable cause determination within 48 hours of arrest, detention by local law enforcement agencies for any period of time on an immigration detainer is presumptively unconstitutional.[4]

Second, the new detainer form does not establish probable cause as constitutionally required to authorize detention. As an initial matter, several courts have held that the Fourth Amendment does not permit state or local officers—who generally lack civil immigration enforcement authority—to imprison people based on ICE detainers.[5] These decisions rely on the Supreme Court's reminder in *United States v. Arizona*, 132 S. Ct. 2492 (2012), that "it is not a *crime* for a removable alien to remain present in the United States," and that "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *Id.* at 2505 (emphasis added). Moreover, in some jurisdictions, state and local law enforcement officials are constitutionally or statutorily prohibited from enforcing federal civil law; by

[2] It is well settled that civil immigration arrests, like criminal arrests, must comply with the Fourth Amendment. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). In fact, ICE's predecessor, the INS, specifically recognized that *Gerstein* applies to civil immigration arrests: Responding to comments on proposed changes to 8 C.F.R. § 287.8(c) ("Conduct of arrests"), the INS acknowledged that "[t]he Service is clearly bound by . . . [judicial] interpretations [regarding arrest and post-arrest procedures], including those set forth in *Gerstein v. Pugh*[.]" 59 Fed. Reg. 42406-01 (1994).

[3] The only form of post-arrest review that ICE provides is an examination conducted by a non-judicial *enforcement* officer within 48 hours after the subject of the detainer is taken into ICE custody. *See* 8 U.S.C. § 1357; 8 C.F.R. § 287.3. In practice, this means the subject of a detainer may be held for up to four days (48 hours in local law enforcement custody and 48 hours in ICE custody)—or even longer "in the event of an emergency or other extraordinary circumstance," 8 C.F.R. § 287.3(d)—prior to receiving *any* review at all. Moreover, the purpose of ICE's examination is to make a charging and custody determination—not to review the legality of the arrest. *Id.* § 287.3(a)-(b), (d).

[4] *See, e.g.*, Michael Kagan, "Immigration Law's Looming Fourth Amendment Problem," Georgetown Law Journal, Vol. 104, Forthcoming, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568903.

[5] *See, e.g., Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807-08 (N.D. Ill. 2014) (holding that plaintiff stated a Fourth Amendment claim where defendants "lacked probable cause [to believe] that Villars violated federal criminal law"); *People ex rel Swanson v. Ponte*, 46 Misc. 3d 273, 278, 994 N.Y.S.2d 841, 844 (Sup. Ct. 2014) (granting habeas petition because "there is . . . no authority for a local correction commissioner to detain someone based upon a civil determination" of removability); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918 (S.D. Ind. 2011) (preliminarily enjoining section of state law that "authorize[d] state and local law enforcement officers to effect warrantless arrests" based on ICE detainers because permitting arrests "for matters that are not crimes" would contravene the Fourth Amendment), *permanent injunction granted*, 2013 WL 1332158, at *8, *10 (S.D. Ind. Mar. 28, 2013) (unpub.) (concluding that an ICE detainer, "without more, does not provide the usual predicate for an arrest," and that "authoriz[ing] state and local law enforcement officers to effect warrantless arrests for matters that are not crimes . . . runs afoul of the Fourth Amendment").

issuing detainers to these jurisdictions, ICE may be asking those officials to violate state law.[6]

Even setting these issues aside, the new detainer form does not establish that ICE has made an *individualized* determination of probable cause, based on the facts and circumstances of a particular case, as the Fourth Amendment requires. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, . . . and . . . the belief of guilt must be particularized with respect to the person to be searched or seized.") (internal quotation marks and citations omitted). Therefore, local law enforcement agencies may not rely on an ICE detainer to hold individuals in their custody for any period of time.

The revised detainer form, unlike a judicial warrant or affidavit of probable cause, contains a boilerplate series of check-boxes:

> DHS HAS PROBABLE CAUSE THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:
>
> - ☐ a final order of removal against the subject;
> - ☐ the pendency of ongoing removal proceedings against the subject;
> - ☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
> - ☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

DHS revised I-247D form. Thus, instead of providing for the individualized, fact-based determination that the Fourth Amendment requires, the new detainer form—particularly with respect to checkboxes three and four—offers only boilerplate assertions describing generic investigative steps or the possession of "reliable evidence" without describing what evidence forms the basis of the agent's conclusion. This conclusory, check-a-box approach to probable cause is the antithesis of the individualized, fact-based determination required by the Constitution.

Further, the third and fourth boxes appear to describe the same biometric-based investigatory practices used by ICE agents under Secure Communities, which rightly been the focus of sustained criticism from community groups, local leaders, and law enforcement officials across the country. Under Secure Communities, ICE routinely issued detainers based on cursory or inconclusive database searches, using the detainer as "a stop gap measure. . . to give ICE time to investigate and determine whether somebody's an alien . . . ." Oral Argument Transcript, ECF #79, *Galarza v. Szalczyk*,

[6] *See, e.g.*, *Swanson*, 46 Misc. 3d at 276-77 (holding that Commissioner of Corrections violated the New York City administrative code by holding petitioner on an ICE detainer).

No. 10-06815 (E.D. Pa. Jan. 10, 2012).[7] And, despite the new detainer form's incorporation of the term "probable cause," ICE still takes the position in litigation that probable cause is not legally required. The detainer form does not reflect that ICE has in fact changed its investigatory practices and trained its agents in the minimum evidentiary basis required prior to issuing a detainer.

ICE's failure to ensure that its agents have made a constitutionally adequate probable cause determination before issuing a detainer continues to subject the agency to liability and casts serious doubt on whether local law enforcement agencies can rely on ICE's bald assertions that the new detainer forms are supported by probable cause.

Third, because ICE still does not require its agents to obtain a judicial warrant or probable cause determination before issuing a detainer, the detainer request is lawful only if it complies with statutory limitations on ICE's *warrantless* arrest authority. *See Arizona*, 132 S. Ct. at 2506 ("If no federal warrant has been issued, . . . [ICE] officers have more limited authority."). Under the INA, ICE may *only* make warrantless arrests when (1) it has probable cause for the arrest and (2) it has determined the subject "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2).[8]

The detainer form does not establish—or even attempt to establish—that ICE has satisfied the statutory requirement that the subject is "likely to escape." *Id.* As with probable cause, ICE is required to make an individualized determination of flight risk prior to making a warrantless arrest or requesting that another agency make such arrest on its behalf. *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995). Yet ICE makes no such individualized determination before issuing detainers. Nor could it. Because ICE uses detainers *only* against subjects in law enforcement custody, *see* 8 C.F.R. § 287.7(a), they are by definition *unlikely* to escape. In issuing detainers without making a flight risk determination—and thereby asking local correctional officials to make warrantless immigration arrests where ICE agents themselves could not legally do so—ICE exceeds the limits of its statutory authority. Simply put, ICE agents cannot delegate arrest powers to local law enforcement agencies that Congress never gave ICE in the first place.

In conclusion, because the new detainer form is not predicated on a *judicial* probable cause determination, fails to provide an individualized probable cause assessment in each case, and ignores the limitations on ICE's own warrantless arrest authority, it does not comply with minimal constitutional requirements and is legally insufficient to authorize detention.

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[7] *See also* Brief of Federal Defendants, *Ortega v. ICE*, No. 12-6608 (6th Cir. filed Apr. 10, 2013) (stating, in a case involving a U.S. citizen held on a detainer, "the *purpose* of issuing the detainer was to allow [ICE] time to conduct an investigation that could have discovered whether Plaintiff-Appellant was removable or was, in fact, a U.S. citizen.") (emphasis in original).

[8] These are the minimum statutory requirements for *ICE* to make a warrantless arrest. As described above, state and local law enforcement agencies may be subject to additional constraints in making immigration-related arrests.

Under PEP, compliance with immigration detainers remains voluntary. *Galarza v. Szalczyk*, 745 F.3d 634, 639-45 (3d Cir. 2014). Accordingly, any unlawful detention pursuant to a detainer exposes both DHS and local law enforcement agencies to liability.[9] Because, as described above, the new detainer form perpetuates many of the legal deficiencies of the current detainer form, it will continue to subject local law enforcement agencies to liability.

C. The New Notification Form Undercuts Community Policing and May Lead to Unlawful Detentions and Transfers.

DHS's new notification form also raises serious concerns. Routine use of notification requests will perpetuate the entanglement of local police in immigration enforcement, which created such controversy under the Secure Communities program. Many of the concerns raised by state and local officials and advocates regarding Secure Communities—including concerns about destroying police-community trust and making crime victims unwilling to contact police—remain the same whether police facilitate deportation by detaining people on immigration detainers or by notifying ICE about their release dates and home addresses. These concerns led the President's Task Force on 21st Century Policing to recommend that federal immigration enforcement be "decouple[d]" from local policing.[10] ICE's use of notification requests through PEP directly contradicts the Task Force's recommendation.

Further, DHS's notification requests also raise legal concerns. To the extent that local law enforcement agencies comply with notification requests in a way that extends an individual's detention for any period—including extending the time required to process someone for release from custody while awaiting pick-up from ICE—such policies will raise the same Fourth Amendment concerns as immigration detainers. *See Rodriguez v. United States*, 575 U.S. ---, 135 S. Ct. 1609, 1614, 1616 (2015) (seven- or eight-minute prolongation of detention without new constitutionally adequate justification violates the Fourth Amendment). Moreover, to the extent local law enforcement agencies facilitate transfers to ICE based on notification requests, such

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[9] *See Galarza*, 745 F.3d at 645 (county could be held liable for violating plaintiff's Fourth Amendment and due process rights when it kept him in jail on an ICE detainer for 3 days after he posted bail); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39-40 (D.R.I. 2014) (Director of the Rhode Island Department of Corrections could be held liable for violating plaintiff's Fourth Amendment and due process rights by keeping her in jail on an ICE detainer for 24 hours after she was ordered released on recognizance); *Miranda-Olivares*, 2014 WL 554478, *9-*11 (county violated the Fourth Amendment by detaining plaintiff on an ICE detainer after she became eligible for release from criminal custody); *Villars*, 45 F. Supp. 3d 791, 802, 808 (denying motion to dismiss claims that county and village defendants violated plaintiff's Fourth Amendment and due process rights by detaining him on an ICE detainer); *see also* Defendant ICE's Motion to Dismiss, *Gonzalez v. ICE*, No. 13-4416 at 10, 14-17, 23-24 n.9 (C.D. Cal. filed Mar. 10, 2014), *available at* https://www.aclu.org/sites/default/files/field_document/gonzalez_v._ice-defendants_notice_of_motion_to_dismiss.pdf (stating that it is the responsibility of a local law enforcement official to "decide, in his or her discretion, [whether] to comply with ICE's immigration detainer," and arguing that it was the county sheriff, not ICE, who bore ultimate responsibility for plaintiffs' detention on ICE detainers).

[10] *See* President's Task Force on 21st Century Policing, Final Report at 18 (May 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

transfers are arrests that must be supported by probable cause—a standard clearly not met by the new notification form, which simply states that DHS "suspects" that the subject is deportable.

Given these ongoing deficiencies, we ask that you abandon the I-247D and I-247N forms and discontinue the use of detainers and notification requests immediately.

Sincerely,

Advancing Justice – AAJC
Advancing Justice - Asian Law Caucus
American Civil Liberties Union, Immigrants' Rights Project
Immigrant Defense Project
Immigrant Legal Resource Center
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
National Day Laborer Organizing Network
New Orleans Workers' Center for Racial Justice
Southern Poverty Law Center
Washington Defender Association's Immigration Project

CC: Alejandro Mayorkas, Deputy Secretary, Department of Homeland Security
Sarah Saldaña, Director, Immigration and Customs Enforcement