ICE Detainers: Be Proactive, Don't Just Roll Over

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Secure Communities

- Started in 2008 by DHS/ICE
- Primary goals to *identify*, *locate*, and *detain* immigrants with serious criminal convictions
- Local LEA's share fingerprint data w/ICE
- In reality, program has ensnared many low-level, *non-criminal* non-citizens
- Some U.S. citizens have been detained

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What is a Detainer?

- A *request* by ICE to state/local jails to detain an individual to enable ICE to take custody (i.e., voluntary)
- A *notification* from ICE to state/local jails that:
  - ICE is investigating whether an individual is removable,
  - ICE has issued Notice to Appear (Form I-862)
  - There is an arrest warrant for the person, or
  - The person has been ordered removed

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What a Detainer is Not

- An *arrest* warrant
- A determination that an individual is in deportable/inadmissible
- The equivalent of ICE custody over an individual. *See Matter of Sanchez*, 20 I&N Dec. 223 (BIA 1990)
- The equivalent of a criminal detainer. *See State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009)

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Legal authority for Detainer

- Congressional Authority, INA§287(d), 8 U.S.C.§1357(d)
  - Requires ICE to consider issuing detainer upon request by local, state, or federal agency for persons held on a controlled substances violation
  - Holding agency initiates process, provides information and details
  - No standard of proof in statute for lodging a detainer
  - ICE to "expeditiously" take custody upon release from other law enforcement agency

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Legal authority for Detainer

- Regulatory authority 8 CFR §287.7
  - Not limited to controlled substances arrests
  - Extends local custody for up to 48 hours (excluding weekends and holidays)
  - Law enforcement required to provide all relevant criminal documents
  - Is regulation expressly *ultra vires* to the statute?

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How is a Detainer Issued?

- Immigration Detainer – Notice of Action (Form I-247)
- Completed by ICE and sent to state/local law enforcement agency
- Verbal Holds

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IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

- ☐ Initiated an investigation to determine whether this person is subject to removal from the United States.
- ☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____ (Date)
- ☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____ (Date)
- ☐ Obtained an order of deportation or removal from the United States for this person.

This action does not limit your discretion to make decisions related to this person's custody classification, work, quarter assignments, or other matters. DHS discourages dismissing criminal charges based on the existence of a detainer.

IT IS REQUESTED THAT YOU:

- ☐ Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when he/she would be released from your custody in order to allow U.S. Immigration and Customs Enforcement to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7 which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.
- ☐ Provide a copy to the subject of this detainer.
- ☐ 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, hospitalization or transfer to another institution.
- ☐ Consider this request for a detainer operative only upon the subject's conviction.
- ☐ Cancel the detainer previously placed by this Office on _____ (Date)

_____ (Name and title of Immigration Officer) _____ (Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to _____. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # _____ Date of latest criminal charge/conviction: _____

Last criminal charge/conviction: _____

Estimated release date: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

_____ (Name and title of Officer) _____ (Signature of Officer)

DHS Form I-247 (12/11) Page 1 of 3

Sample Form Only

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The "48-Hour" Rule

- The "48-hour" rule begins:
  - If criminal case pending, the court orders release and bail is posted;
  - If the case is dismissed;
  - If the individual completes his sentence;
  - The 48-hour rule does not begin when ICE says it does (e.g., when ICE finds out, when ICE notifies the jail, when processing is completed 24 hours later)

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Legal Challenges to Detainers

- BIA and other courts have held that the lodging of an immigration detainer is a "mere expression of ICE's intention to seek future custody"
- Not equivalent to more traditional criminal "detainers" *See State of Kansas v. Montes-Mata, 208 P.3d 770 (Kan. App. 2009)*

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Legal Challenges to Detainers

- *Committee for Immigrants Rights of Sonoma v. Sonoma County* (2009)
- *Brizuela v. Feliciano* (class action, Connecticut) (filed Feb. 13, 2012)
- *Jimenez et al v. Napolitano et al.* (Illinois, filed August 2011)
- 48 hour challenges: h*ttp://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers*

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Practice Pointers

- U.S. citizens or legal permanent residents: Call ICE hotline number (855) 448-6903 to lift the detainer
- Ask the Assistant Field Office Director to cancel the detainer (June 2011 Morton)
- File a lawsuit: constitutional violations and damages or file a habeas action

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Detainer Policies

- Cook County, IL
- Santa Clara, CA
- Taos County, NM
- New York City, NY
- Pending legislation/policy in:
  - Washington, DC
  - Kings County, WA

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Questions & Answers

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