April 28, 2014

Hon. Judge Samuel T. Biscoe
Commissioner Ron Davis, Precinct One
Commissioner Bruce Todd, Precinct Two
Commissioner Gerald Daugherty, Precinct Three
Commissioner Margaret Gomez, Precinct Four
P.O. Box 1748
Austin, Texas 78767

Re: End Participation in Immigration Customs and Enforcement (ICE) Detainer Program under Secure Communities

Dear Judge Biscoe and County Commissioners:

We the undersigned law school professors and Travis County lawyers write to request termination of the county's participation in the ICE detainer program under Secure Communities. Despite its devastating impact on our community, Sheriff Greg Hamilton has refused to review his office's involvement in this program. For many years, Sheriff Hamilton insisted that participating in all aspects of Secure Communities, including honoring ICE detainers, is required by law. After both the Department of Homeland Security (DHS)[1] and the U.S. Third Circuit Court of Appeals[2] made clear that compliance with the detainer program is voluntary, Sheriff Hamilton recently announced that he will still continue to fully cooperate with ICE detainers. Secure Communities is an unfunded federal program that burdens our county and wastes taxpayers' money. As discussed below, the program results in unnecessary separation of families, discourages immigrants' cooperation with law enforcement and most importantly, violates constitutional standards.

How Secure Communities Works

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[1] Feb.25, 2014 communication from Daniel H. Ragsdale, acting ICE Director, to U.S. Representative Mike Thompson. http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf

[2] *Galarza v._Szalczyk*, ___F.3d ____ (3rd Cir. 2014), 2014 WL 815127 at 4-7. Any other interpretation would violate the Tenth Amendment of the Constitution which prevents a federal agency, such as DHS, from requiring state and local law enforcement officials to use state resources to achieve federal enforcement goals. *See, e.g., Printz v. U.S.,* 521 U.S. 898 (1997).

When a person is arrested in Travis County, his or her fingerprints are automatically sent to the FBI, which then forwards them to DHS's database. Through the sharing of this biometric data, ICE issues a detainer in order to investigate the circumstances of anyone whom the agency believes may be deportable. Issuance of a detainer is not based on probable cause or even reasonable suspicion of deportability. A detainer is not a warrant, is not issued by a judge and is not judicially reviewed. Instead, it is an unsworn document issued by an immigration agent.[3]

Because ICE detainers are triggered at the booking stage, the program does not differentiate between persons accused or convicted of serious crimes and those arrested, for example, for unpaid traffic tickets or driving without a license (which is not available to immigrants in Texas without status).

The detainer requests that the Sheriff's Office notify ICE when the individual is scheduled to be released from criminal custody and to continue to detain him or her for an additional 48 hours in order to allow ICE to take the individual into immigration custody. This extended incarceration does not include holidays and weekends and, therefore, individuals frequently remain in the Travis County Jail for longer than 48 hours.

Costs to Our Community

Broad compliance with all ICE detainers is a significant expense for Travis County. ICE is not required to reimburse counties for the costs of continued custody, which in Travis County reaches $105.16 a day per detainee.[4] In most cases, ICE provides no reimbursement, leaving counties to foot the bill for detainer compliance. Given the budgetary limitations facing our community, there are better ways for the county to spend taxpayers' money. Moreover, participation in the detainer program does not further legitimate law enforcement goals. Rather, the program generates fear in the immigrant community and discourages cooperation with law enforcement and reporting of crime.[5] Detainers sweep up Travis County residents who live, work and raise families in our community.

According to a recent study by the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, nationally, 47.7% of non-citizens placed in deportation

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[3] 8 C.F.R. §287.7(b).

[4] This figure comes from the data the Travis County Sheriff's Office reports to the Texas Commission on Jail Standards, and it is the Sheriff's Office's most recent estimate of how much it costs to detain one person per day in the Travis County Jail.

[5] Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf

proceedings because of a detainer request had no criminal record. Without including traffic violations and marijuana possession, that percentage rises to two-thirds of those referred to ICE through Secure Communities. The numbers are even more startling for Travis County. TRAC data reveals that Travis County has one of the highest rates of honored ICE detainers. In the last two years, Travis County complied with 5,507 detainers, of which only 3% involved Level 1 offenders, ICE's classification those convicted of the most serious crimes.[6] Seventy-three percent of the Travis County detainers were issued against persons who were ultimately not convicted of any crime. In the last four years, approximately 4,600 people were deported from our community as a result of Secure Communities.

In response to criticism of the detainer program, Sheriff Hamilton recently provided his own statistics. He claimed that 70.19% of ICE detainers in the Travis County Jail were issued against persons charged with felonies. This data is unreliable. First, Sheriff Hamilton's data contradicts the TRAC statistics, compiled by a reputable university-affiliated organization that has analyzed DHS data for many years. Second, the analysis is based on information from a very short time frame, from February 26, 2014 to April 1, 2014, and only includes data for persons who were in the jail between 6:00 AM and 7:00 AM each day. Third, the Sheriff's statistics are not based on actual convictions but rather on initial criminal charges. Finally, the manner in which Sheriff Hamilton chose to collect and compile his data inherently yields results unrepresentative of the actual jail population with ICE detainers. His data selection method is biased toward the inclusion of more Level 1 offenders and the exclusion of detainees charged with minor crimes and traffic violations. Detainees who are held for longer periods of time in the jail have much higher odds of being included in the sheriff's data than those held for short periods of time. For example, individuals not present in the jail between 6:00 AM and 7:00 AM or not in custody for an entire day are not counted, while individuals who are held for longer, generally those with more serious charges which carry higher, more restrictive bonds or no bonds at all, are included in the data. Therefore, reliance on Sheriff Hamilton's skewed statistics, which do not correctly represent the actual population of Travis County detainees transferred to ICE, misconstrues how detainers actually operate in Travis County, the people they affect, and the consequences they have.

In sum, the ICE detainer program thwarts legitimate law enforcement goals and community policing in our county. Secure Communities is not making our county and neighborhoods safer; in fact, it is doing the opposite.

Compliance with ICE Detainers Violates the Constitution

Travis County's full participation in the detainer program exposes the county to legal liability. The continued detention of an individual in the Travis County Jail based

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[6] http://trac.syr.edu/immigration/reports/343/include/table3.html.

on an ICE detainer violates the Fourth Amendment prohibition against unreasonable search and seizure. A person cannot be held in custody absent probable cause that he or she has committed a crime. Even if probable cause exists, such person has a right to a prompt hearing before a neutral magistrate. Unlike a criminal warrant, an ICE detainer is not issued nor reviewed by a judge and is not based on probable cause. Likewise, an affected person may not judicially challenge the issuance of the detainer or his or her resulting detention. Therefore, holding an individual in jail at ICE's request after legal authority for criminal custody has expired does not comport with Fourth Amendment protections.

The Supreme Court's decision in *U.S. v. Arizona*[7] makes clear that prolonged immigration detention in local jails implicates the Fourth Amendment. The *Arizona* decision supports the proposition that the ICE detainer program is unconstitutional. Although *U.S. v. Arizona* involved a challenge to Arizona's restrictive state law, the Supreme Court held that local officials cannot enforce immigration laws. In interpreting the Arizona law, the Supreme Court concluded that the extended detention of an individual to ascertain his or her immigration status, without proof of a violation of law, would violate the Fourth Amendment.[8] The Supreme Court further noted that local law enforcement cannot arrest or seize persons solely on suspected civil immigration violations.[9] The reasoning of the Court logically extends to ICE detainers, by which Travis County law enforcement officers prolong the detention of otherwise releasable persons and hold them without probable cause of the commission of a crime.[10]

Litigants across the country have begun to challenge their extended incarceration based on an ICE detainer.[11] Both the federal district court in Rhode Island[12] and the Third Circuit Court of Appeals [13] have recently found that the ICE detainer program raises significant constitutional questions because individuals are detained without probable cause. The Rhode Island court also noted that a detainer is triggered by a person's birth outside the United States, leading to additional potential liability based on national origin

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[7] *U.S. v. Arizona*, 132 S. Ct. 2492 (2012).

[8] *Id.* at 2508.

[9] *Id. at* 2505-2506.

[10] *See,* Christopher N. Lasch, *Federal Immigration Detainers after Arizona v. United States,* 46 Loyola L.A. L. Review 629 (2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524

[11] For a list of twenty filed cases, *see,* http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers and https://immigrantjustice.org/sites/immigrantjustice.org/files/NIF--Detainer%20Report.pdf at 6-7/

[12] *Morales v. Chadbourne*, ___F.Supp.2d ___, 2014 WL 554478, (D.R.I, 2014).

[13] *Galarza v. Szalczyk*, ___F.3d ____, 2014 WL 815127 (3rd Cir. 2014).

discrimination.[14] Finally, ICE detainers may implicate the Fourteenth Amendment guarantees of substantive and procedural due process. Local law enforcement does not have a compelling state interest to infringe on liberty interests, a substantive due process right, by prolonging detention, particularly without affording the individual notice and a right to be heard, a basic procedural due process right.[15]

A recent decision by a U.S. magistrate judge in Oregon declaring that the detainer program violated the Fourth Amendment has prompted twenty-one sheriffs in the state so far to end their participation.[16] As one Oregon sheriff stated, "We will no longer violate anybody's constitutional rights, I can guarantee that."[17]

The court decisions make clear that when constitutional abuses such as these arise from localities' compliance with ICE detainers, the counties themselves, not just federal immigration authorities, are legally liable for such violations. [18] Thus, by participating in the detainer program, Travis County exposes itself to lawsuits for wrongful detention under state and federal law.

More than 30 jurisdictions, including Cook County, Illinois, King County, Washington, New York City, New Orleans, Washington, D.C., Miami-Dade County, Florida, and the states of California and Connecticut, have limited their compliance with ICE detainers.[19] Just last month, the cities of Philadelphia and Baltimore ended their across-the-board participation in the program.[20] Some of these communities have opted out completely while others honor detainers only for serious and violent criminal offenders. Travis County should follow these examples to modify, restrict or nuance its participation in the ICE detainer program.

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[14] *Morales* at 12. ("Using Ms. Morales' nation of birth as a sole permissible basis for her loss of liberty does not pass constitutional muster.")

[15] S*ee* complaint, *Brizuela v. Feliciano*, No. 12-0226, (D. Conn., filed Feb.13, 2012) (case closed due to settlement), available at http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers.

[16] *Miranda-Olivares v. Clackamas County*, No.12-02317, 2014 WL 1414305(D. Oregon, April 14, 2014).

[17] http://www.nytimes.com/2014/04/19/us/politic s/sheriffs-limit-detention-of-immigrants.html?_r=0

[18] *Galarza v. Szalczyk, id;* Miranda-Olivares, *id.* (recognizing that plaintiff is entitled to damages from the county); *see also,* footnote 11 herein.

[19] http://www.immigrantjustice.org/detainers#.Uzy7zq1dXpi. This list does not include the most recent jurisdictions, such as Baltimore, Philadelphia and parts of Oregon discussed herein.

[20] http://articles.philly.com/2014-03-14/news/48193936_1_detainers-ice-agent-new-draft; http://touch.baltimoresun.com/#section/-1/article/p2p-79955731/

We look forward to hearing from you on this important issue.

Sincerely,

Barbara Hines
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