

## **CERD Shadow Report: Immigration Detainers Encourage Racial Profiling**

Submitted by the National Immigrant Justice Center

Heartland Alliance's National Immigrant Justice Center (NIJC) is a non-governmental organization (NGO) dedicated to safeguarding the rights of noncitizens. With offices in Chicago, Indiana, and Washington, D.C., NIJC advocates for immigrants, refugees, asylum seekers, and victims of human trafficking through direct legal representation, policy reform, impact litigation, and public education. NIJC and its network of 1,500 *pro bono* attorneys provide legal counsel to approximately 10,000 noncitizens annually. NIJC has been a leader in local, state, and federal initiatives challenging the legality of immigration detainers. In addition, NIJC filed the first ever federal class action lawsuit, *Jimenez Moreno et. al. v. Napolitano et. al.*,<sup>1</sup> against the U.S. Department of Homeland Security (DHS) to challenge the practice of detaining immigrants and U.S. citizens identified through local law enforcement agencies.

## I. Background

The U.S. Department of Homeland Security (DHS) increasingly relies on partnerships with state and local law enforcement agencies (LEAs) to enforce immigration law in the interior of the United States. These partnerships raise significant concerns in regards to the United States' obligations to end racial profiling under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In particular, U.S. immigration enforcement policies:

- 1) Encourage local LEAs to discriminate against people based on race;
- 2) Incite fear of the police among immigrant communities;
- 3) Limit immigrants' access to police protections and other services;
- 4) Fail to target immigration enforcement priorities, at a cost to women and families; and
- 5) Deny due process rights to individuals held under an immigration detainer

DHS's interior enforcement agency, Immigration and Customs Enforcement (ICE) uses immigration detainers as a tool to facilitate this process. Detainers are a written request from Immigration and Customs Enforcement (ICE) instructing LEAs to hold an individual for up to 48 hours (excluding weekends and holidays) past his or her release date so that ICE can investigate whether the individual is subject to removal.<sup>2</sup> ICE issues immigration detainers within the context of larger enforcement initiatives that encourage data sharing and cooperation with local law enforcement agencies. These initiatives include Secure Communities, the Criminal Alien Program, and Section 287(g):

- **Secure Communities** is a data sharing program between the Federal Bureau of Investigation (FBI) and DHS. When an individual is arrested, or otherwise has his or her fingerprints taken, LEAs send their fingerprints to the FBI, who automatically sends the fingerprints to DHS to be checked against federal immigration databases. If the individual appears to be removable, ICE issues a detainer.
- The **Criminal Alien Program** (CAP) allows ICE to interact with local and state jail detainees to identify, screen, and interview individuals for possible deportation.<sup>3</sup> Under CAP, ICE officers come into the jails to interview detainees suspected of being removable. This often includes agreements to share booking information with ICE officers, and allows ICE access to local jail computers and databases. Based on information that ICE gathers from these investigations, ICE may issue detainers against individuals suspected of being removable.
- **Section 287(g)** programs allow state and local law enforcement entities to enter into partnerships with ICE. Local law enforcement agencies receive immigration enforcement authority through a training and certification process,<sup>4</sup> essentially deputizing local police as immigration officers. Certified officers can check an individual's immigration status and initiate immigration proceedings.

NIJC urges the CERD Committee to question the United States on the steps they are taking to monitor and eliminate racial profiling.

## II. Issue Summary: Why are Detainers Harmful?

### ***Immigration detainers encourage racial profiling***

Immigration detainers, as well as the associated enforcement policies, increase the likelihood of racial profiling by both local law enforcement and ICE officials. Although they are intended to target undocumented immigrants and removable lawful permanent residents, in practice they frequently ensnare U.S. citizens and noncitizens eligible for relief from removal. From fiscal year 2008 through the start of fiscal year 2012, ICE issued detainers for at least 834 U.S. citizens and 28,489 legal permanent residents.<sup>5</sup> Officers often use “foreign-sounding” last names, place of birth, or racial appearance as a reason for reporting someone for an immigration investigation.<sup>6</sup> In addition, some police officers often will make pretextual traffic stops in order to investigate an individual’s immigration status.

*Rafael has lived in the United States for almost nine years and is married to a U.S. citizen. After his car broke down, Rafael was ticketed for not having a valid license. He paid the majority of his fine, but was unable to afford the full amount. He was later stopped by local police for not having a headlight on his bicycle helmet, and since he hadn’t paid the rest of the fine from his previous ticket, he was taken to jail for four days. He went to court and gathered up some money to pay the balance, and although this resolved the police matter, he was transferred to immigration custody and placed in removal proceedings. Rafael has no criminal record aside from these traffic violations.*

Studies have found that these law enforcement initiatives overwhelmingly identify Latinos for deportation, and that officers are using race as an indicator of immigration status.<sup>7</sup> Secure Communities, CAP, and 287(g) can mask a law enforcement agency’s practice of racial profiling, where immigrants are targeted for minor violations and pre-textual arrests with the actual goal of initiating immigration checks.<sup>8</sup> In addition, the 287(g) program has been plagued by patterns of racial-profiling by local law enforcement, who participated in the program.<sup>9</sup>

### ***Immigration enforcement practices destroy trust with immigrant communities***

Law enforcement participation in immigration enforcement destroys trust with immigrant communities. These policies discourage immigrant crime victims and witnesses from reporting criminal activity, or cooperating in the investigation and prosecution of crimes.<sup>10</sup> According to a 2013 University of Illinois at Chicago study, 44 percent of Latinos surveyed—regardless of legal status—would not contact the police if they were a victim of crime out of fear that the police would use the opportunity to investigate the legal status of themselves or family.<sup>11</sup> This presents a particular problem for victims of domestic violence who may fear being deported after calling the police for help. Domestic violence victims are often arrested along with the perpetrator when police respond.<sup>12</sup> They also may be deterred from contacting police if they do not want the perpetrator to be deported, even if they do want relief from their immediate circumstances.<sup>13</sup> In sum, this policy severely hinders immigrants from accessing police protections, making it difficult for the police to maintain public safety.

### ***Immigration detainers prevent individuals from accessing alternatives to incarceration***

Individuals with detainers are less likely to be allowed to participate in rehabilitation assistance, such as drug or alcohol treatment programs.<sup>14</sup> These programs may lessen jail time or reduce or eliminate certain criminal charges. In addition, immigration detainers can also lead to longer

detention. Judges may institute a higher bail, or revoke bail, based on the belief that the detainer provides a disincentive to attend criminal court if released from custody. Individuals subject to detainers also may choose not to pay bail because they will be transferred to ICE custody, and will not be able to attend their next hearing, thus forfeiting their bail money.<sup>15</sup> This increases the amount of time that families are separated. Since men are frequently targets for immigration enforcement, this puts a strain on the women who are left behind to lead single-parent households at great financial and emotional costs to the entire family.<sup>16</sup>

*David has been in the United States since 2007. He is the father of two U.S. citizen sons. Both have serious developmental issues and cannot walk on their own. One of his sons requires constant care and access to hospitals and cardiologists in the United States. His son cannot communicate his needs and cannot feed himself. In 2011, while driving his son to the hospital, David was stopped for speeding. Police arrested him and left his wife and two children on the curb with no means to get to the hospital. David was detained for 51 days before NIJC secured his release.*

Moreover, in the immigration context, lengthy jail times or overly punitive convictions may unfairly make individuals deportable. Recent studies in Travis County, Texas, and New York City have found that individuals with immigration detainer issued against them spend, on average, an extra 43 to 72 days in pre-trial custody than those without detainers.<sup>17</sup>

***Immigration detainers fail to target enforcement priorities and hurt families***

As a result of these practices, many individuals with no criminal record are detained. Between January and June 2013, 62 percent of individuals held under immigration detainers had never committed any crime.<sup>18</sup> An additional 12 percent had minor convictions for traffic violations or marijuana possession, meaning that only 26 percent of individuals subject to detainers had been found guilty of any criminal offense.<sup>19</sup> Because these initiatives disproportionately target men,<sup>20</sup> women increasingly bear the burden of these policies.<sup>21</sup> When immigrant fathers are detained, the entire family faces significant financial and emotional costs. Women must lead single-parent households, which are more vulnerable to poverty. Nationally, children in single-parent households are 4.2 times more likely to live in poverty than children with married parents.<sup>22</sup>

***Immigration detainers deny individuals due process rights***

Immigration detainers violate the Fourth and Fifth Amendments to the U.S. Constitution.<sup>23</sup> Holding an individual after the time when he or she should have been released requires renewed compliance with constitutional protections. First, ICE officers do not obtain a judicial determination of probable cause before issuing an immigration detainer, and thus the continued detention on the detainer violates the Fourth Amendment. Second, under the Fifth Amendment due process of law requires procedural protections against a deprivation of liberty. Yet, ICE officials do not notify individuals when detainers are issued against them, and no process exists for individual who have been issued detainers to challenge the extended detention.

### **III. 2008 CERD Concluding Observations Recognize Need to Address Racial Profiling**

The 2008 Concluding Observations of the Committee on the Elimination of Racial Discrimination briefly highlighted the problem of racial profiling in the United States. Specifically, Paragraph 14 of the Concluding Observations noted that the problem continues to be widespread despite measures adopted at the federal and state levels to combat racial profiling. Although the Committee focused its attention on the discrimination faced by Arabs, Muslims, and South Asians, particularly in regards to the National Security Entry-Exit Registration System (NSEERS), which ended in 2011, racial profiling continues to be a problem in the United States.

### **IV. U.S. 2013 Periodic Report by the United States Recognizes Need to Implement Policies to Prevent Racial Profiling**

The 2013 Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination (“Report”) specifically mentions the problem of racial profiling in immigration enforcement. The U.S. claims that it is engaged in efforts to ensure that immigration enforcement initiatives do not become conduits for discriminatory policing.<sup>24</sup> It also claims that “DHS acts to ensure that its programs and activities are free of invidious racial or ethnic profiling.”<sup>25</sup> The Report cites clear prohibitions against racial and ethnic profiling in DHS initiatives with state and local police, as well as the specialized training that state and local law enforcement receives under the 287(g) program.

### **V. Legal Framework**

Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention”) provides that “Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.” The Convention further defines “racial discrimination” to mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of life.”<sup>26</sup>

General Recommendation No. 13 on the training of law enforcement officials in the protection of human rights reaffirms that the protections against racial discrimination in the Convention include the protection against racial profiling on behalf of public authorities, especially law enforcement officials. In addition, General Recommendation No. 30 on discrimination against non-citizens compels states to ensure that immigration laws and policies, including those concerning deportation or other forms of removal, do not discriminate against persons on the basis of race, color, descent, or national or ethnic origin.

### **VI. Recommended Questions**

- 1) What is the status of DHS’s review of enforcement policies? What are DHS’s objectives in reforming its enforcement policies?
- 2) How does DHS monitor federal, state, and local law enforcement agencies to ensure that they do not engage in racial profiling when cooperating with immigration enforcement?

- 3) What steps does DHS take when it has identified federal, state, and local agencies engaging in racial profiling in relation to their cooperation with immigration enforcement?

## VII. Suggested Recommendations

- 1) The United States must establish mechanisms for identifying racial profiling in its immigration enforcement initiatives and suspend operation of initiatives and collaborations with local law enforcement when racial profiling is evident.
- 2) The United States Congress should pass the End Racial Profiling Act or similar legislation to eliminate racial profiling.
- 3) The federal government must enforce laws and policies to eliminate racial profiling among law enforcement agencies and hold them accountable for failure to abide by these policies.

## Endnotes

<sup>1</sup> See [http://www.immigrantjustice.org/court\\_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al](http://www.immigrantjustice.org/court_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al).

<sup>2</sup> 8 C.F.R. 287.7(a); see generally National Immigrant Justice Center, *Immigration Detainers* (2014), <http://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers.pdf>.

<sup>3</sup> See generally, American Immigration Council, *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails* (2013), [http://www.immigrationpolicy.org/sites/default/files/docs/cap\\_fact\\_sheet\\_8-1\\_fin\\_0.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/cap_fact_sheet_8-1_fin_0.pdf).

<sup>4</sup> INA §287(g).

<sup>5</sup> Transactional Records Access Clearinghouse (TRAC), “ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents,” *Syracuse University*, Feb. 2013, <http://trac.syr.edu/immigration/reports/311/>.

<sup>6</sup> *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Morales v. Chadbourne*, --F.Supp.2d --, 2014 WL 554478 (D. R.I. Feb. 12, 2014).

<sup>7</sup> See generally Aarti Kohli et al., *Secure Communities By the Numbers: An Analysis of Demographics and Due Process*, Chief Justice Earl Warren Institute on Law & Social Policy (2011), [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf); Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, Chief Justice Earl Warren Institute on Law & Social Policy (2009), [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

<sup>8</sup> *Secure Communities by the Numbers*, *supra* note 7 at 6.

<sup>9</sup> U.S. Dept. of Justice, *United States’ Investigation of the Maricopa County Sheriff’s Office* (2011), [http://www.justice.gov/crt/about/spl/documents/mcso\\_findletter\\_12-15-11.pdf](http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf); U.S. Dept. of Justice, *United States’ Investigation of the Alamance County Sheriff’s Office* (2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>.

<sup>10</sup> See generally, Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (2013), [http://www.uic.edu/cuppa/gci/documents/1213/Insecure\\_Communities\\_Report\\_FINAL.pdf](http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf) (citing survey results that “indicate that the increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities”).

<sup>11</sup> *Id.*

<sup>12</sup> ACLU of Colorado, *Claudia’s Story: How a Domestic Violence Victim’s Call for Help Resulted in Three Days in Jail and Deportation Proceedings* (June, 2014), <http://aclu-co.org/blog/claudias-story-domestic-violence-victims-call-help-resulted-three-days-jail-deportation-proceedings/>.

<sup>13</sup> American Civil Liberties Union of Maryland, *Restoring Trust: How Immigration Detainers in Maryland Undermine Public Safety Through Unnecessary Enforcement* (2013), 18, <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland--Detainer%20Report.pdf>.

<sup>14</sup> Committee on Criminal Justice Operations, *Immigration Detainers Need Not Bar Access to Jail Diversion Programs*, New York City Bar, Jun. 2009, available at: [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>15</sup> See National Immigration Forum, *Immigrants Behind Bars: How, Why and How Much?* (2011), [http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigrants\\_in\\_Local\\_Jails%202011.pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/Immigrants_in_Local_Jails%202011.pdf).

<sup>16</sup> Satinsky, S., A. Hu, et. al. *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, Human Impact Partners, June 2013, <http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

<sup>17</sup> Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, Immigration Policy Center (2010), <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Travis%20County%20Texas%20report.pdf>; Aarti Shahani, *New York City Enforcement of Immigration Detainers*, Justice Strategies (2010) <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NYC%20Detainer%20Report.pdf>.

<sup>18</sup> Transactional Records Access Clearinghouse (TRAC), “New ICE Guidelines Have Little Impact,” *Syracuse University*, Oct. 2013, <http://trac.syr.edu/whatsnew/email.130930.html>.

<sup>19</sup> *Id.*

<sup>20</sup> Over a 50-month period covering FY 2008 through the beginning of FY 2012, 95 percent of individuals held under an immigration detainer were male. See Transactional Records Access Clearinghouse (TRAC). “Who are the Targets of ICE Detainers?” *Syracuse University*, Feb. 2013, <http://trac.syr.edu/immigration/reports/310/>.

<sup>21</sup> Dreby, J. *How Today’s Immigration Enforcement Policies Impact Children, Families, and Communities*. Center for American Progress. Aug. 2012. <http://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamiliesFINAL.pdf>, p. 9.

<sup>22</sup> Dreby, 2012, p. 9.

<sup>23</sup> U.S.CONST., amend. IV (requires probable cause for warrants) & amend. V (provides due process of the law); see *Jimenez Moreno et al v. Napolitano et al*, 11-cv-05452 (N.D. Ill) (a federal class action lawsuit against the U.S. Department of Homeland Security (DHS) for unlawfully detaining immigrants and U.S. citizens identified through local law enforcement agencies, case information available at [http://www.immigrantjustice.org/court\\_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al](http://www.immigrantjustice.org/court_cases/detainer-class-action-litigation-jimenez-moreno-et-al-v-napolitano-et-al)).

<sup>24</sup> Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination (2013) at Paragraph 28.

<sup>25</sup> *Id.* at Paragraph 83.

<sup>26</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 at Article 1.