



July 23, 2015

The Honorable Trey Gowdy  
Chairman  
Immigration and Border Subcommittee  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510

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The Honorable Zoe Lofgren  
Ranking Member  
Immigration and Border Security Subcommittee  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20510

**RE: Subcommittee on Immigration and Border Security of the House Judiciary  
Committee Hearing on “Sanctuary Cities: A Threat to Public Safety”**

Dear Chairman Gowdy and Ranking Member Lofgren:

The American Civil Liberties Union (“ACLU”) submits this statement to the House Immigration and Border Security Subcommittee of the Judiciary Committee for the hearing: “Sanctuary Cities: A Threat to Public Safety.” This hearing raises constitutional questions about the legality of immigration detainees as well as critical policy issues concerning community policing and public safety. The ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin.

The fatal shooting of Kathryn Steinle on July 1, 2015 in San Francisco has focused national attention on the role of local law enforcement in the detention and deportation of immigrants. Details surrounding the shooting are still unfolding, and there are still many unanswered questions about the actions and responsibilities of the federal government and San Francisco laws and policies. One thing is clear: rushing to penalize local law enforcement agencies (“LEAs”) for longstanding policies that limit local officials’ entanglement in federal immigration enforcement would have disastrous effects on community policing efforts across the country.

The ACLU urges members of the Subcommittee to refrain from imposing knee-jerk immigration policy changes potentially affecting over 300 localities. The San Francisco shooting is not representative of the general practices that inform immigration policies adopted by 320 localities across the country—policies designed to protect public safety and promote crime reduction.

**I. Immigration detainers present serious Fourth Amendment problems by causing the extended detention of tens of thousands of people annually without probable cause, without judicial approval, and without due process protections.**

The most predominant policy among localities dubbed as “sanctuary” policies sets limits on when a LEA will hold people beyond their ordinary release, on immigration detainers. Most localities with limited detainer policies do not self-identify as “sanctuary localities” and have adopted these policies to avoid violations of individual constitutional rights. Immigration detainers present a multitude of constitutional and policy problems.

For years the Department of Homeland Security (“DHS”) has routinely used immigration detainers to request extended detention by state and local LEAs of individuals in custody based on mere suspicion of unlawful immigration status, disregarding the Fourth Amendment’s requirement of probable cause. In recent years, multiple federal courts, through litigation brought by the ACLU and others, have found that immigration detainers raise serious constitutional problems and that state or local LEAs and/or officials may be held liable for their role in causing extended detentions in violation of the Fourth Amendment.<sup>1</sup> In 2014, in response to a series of court decisions holding DHS and local LEAs liable for detaining people beyond their release times, hundreds of LEAs across the country limited the circumstances under which they will detain an individual beyond their ordinary release, for immigration enforcement purposes.<sup>2</sup> Many of these localities adopted policies permitting compliance with an immigration detainer request only if it is accompanied by a judicial warrant

In November 2014, DHS Secretary Jeh Johnson acknowledged “the increasing number of federal court decisions that hold that [detention based on DHS requests to] state and local law enforcement agencies violates the Fourth Amendment,”<sup>3</sup> and promised to end the failed Secure Communities (“S-Comm”) program which had drawn sustained criticism from local law enforcement leaders, caused countless unlawful detentions (including of U.S. citizens),<sup>4</sup> invited racial profiling,<sup>5</sup> separated hundreds of thousands of families,<sup>6</sup> and deterred immigrants from calling the police even if

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<sup>1</sup> See, e.g., *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I. 2014), *affirmed*, *Morales v. Chadbourne*, -- F.3d ---, 2015 WL 4385945 (1st Cir. July 17, 2015); *Galarza v. Szalczyk*, No. 10-6815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Mendoza v. Osterberg*, No. 13-65, 2014 WL 3784141 (D. Neb. July 31, 2014); *Villars v. Kubiatowski*, 45 F.Supp.3d 791 (N.D. Ill. 2014); *Miranda-Olivares v. Clackamas Cnty.*, -- F.Supp.2d ---, No. 12-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *Uroza v. Salt Lake County*, No. 11-713, 2013 WL 653968 (D. Ut. Feb. 21, 2013); *Vohra v. United States*, No. 04-0972, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. Feb. 4, 2010), *adopted*, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010).

<sup>2</sup> Jurisdictions that have adopted policies to limit their entanglement with immigration detainers include jurisdictions in California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Minnesota, New York, Nevada, Ohio, Oregon, Rhode Island, and Wisconsin.

<sup>3</sup> Jeh Charles Johnson, Secretary of Department of Homeland Security, “Secure Communities” (Nov. 20, 2014), *available at* [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf).

<sup>4</sup> Julia Preston, “Immigration Crackdown Also Snares Americans,” *New York Times* (Dec. 13, 2011), [http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?\\_r=1](http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?_r=1).

<sup>5</sup> Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, “Secure Communities by the Numbers: An Analysis of Demographics and Due Process” (Oct. 2011), *available at* [https://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

<sup>6</sup> Ginger Thompson and Sarah Cohen, “More Deportations Follow Minor Crimes, Records Show,” *New York Times* (Apr. 6, 2014), [http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?gwh=334656DC850EE9BC311DADF1D154084E&gwt=pay&assetType=nyt\\_now](http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?gwh=334656DC850EE9BC311DADF1D154084E&gwt=pay&assetType=nyt_now).

they had witnessed or been victimized by crime.<sup>7</sup> While the Administration now offers the new Priority Enforcement Program (“PEP”) as a replacement for S-Comm, PEP does not resolve the Fourth Amendment’s problems with immigration detainers that resulted in liability for DHS and local LEAs. Going forward, if LEAs respond to immigration detainers, they will continue to incur liability for illegal arrests, extended detentions, and transfers of custody that do not meet the Fourth Amendment’s requirements.<sup>8</sup> In recognition of the constitutional problems associated with immigration detainers, localities that limit their compliance with detainers should not be penalized for their actions.

## **II. Congress should exercise extreme care not to impose sweeping new requirements that would disrupt long-established, effective community policing policies.**

Rep. Duncan Hunter (R-CA) and other sponsors of the “Enforce the Law for Sanctuary Cities Act” (H.R. 3009) fail to understand the purpose and value of community policing policies adopted by local LEAs. Far from being “sanctuary” zones, these localities recognize that immigrant victims and witnesses will not report crimes if they fear that local police are acting as immigration agents—and thus, in order to solve crimes, local officials need to win the trust of the community. Recognizing this reality, these localities have enacted carefully crafted policies aimed at promoting public safety and have prioritized their police resources to focus on community needs. These policies differ from jurisdiction to jurisdiction, reflecting the careful balancing of interests by local law enforcement leaders who understand the public safety needs in their communities.<sup>9</sup> Importantly, none of these policies shields anyone who is arrested and booked from DHS’s knowledge; through the automatic receipt of fingerprints, DHS is already notified of all individuals booked into jail across the country.

Local police understand that their core mission is to protect public safety, and understandably oppose any federally imposed requirements that would divert them from this goal and force them to comply with immigration detainers—particularly given the constitutional concerns that federal courts have raised with that practice. Law enforcement leaders from the Major Cities Chiefs Association<sup>10</sup> to the President’s Task Force on 21<sup>st</sup> Century Policing<sup>11</sup> have acknowledged that promoting trust between local law enforcement officials and the communities they serve builds cooperation and is central to their core mission of protecting public safety. According to a recent op-ed from Dayton (OH) Police Chief Richard Biehl, adopting a policy that maintains a clear separation between local police and federal immigration enforcement has “produced concrete results, coinciding with significant reductions in crime in Dayton.”<sup>12</sup> When immigrant victims and witnesses can feel confident that their interactions with the police will not lead to their deportation, they are much more likely to report crime.<sup>13</sup>

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<sup>7</sup> Nik Theodore, Department of Urban Planning and Policy at the University of Illinois at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), [http://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF).

<sup>8</sup> Probable cause has always been the required legal standard for extended detention, but DHS’s new 2015 detainer form does not address all the Fourth Amendment problems associated with immigration detainer practices. First, several courts have held that the Fourth Amendment requires probable cause to believe a *crime* has been committed; probable cause of removability (a civil matter) is insufficient. Second, the Fourth Amendment requires a *judicial* determination of probable cause for the arrest, either before or promptly afterward (no later than 48 hours).

<sup>9</sup> These include local policies that limit arrests by local police for federal immigration violations, limit local police inquiries into immigration status, treat as confidential and limit the type of information that may be shared with other agencies, including federal immigration authorities, or decline to hold individuals beyond their ordinary release on the mere basis of an immigration detainer.

<sup>10</sup> Major Cities Chiefs Association, “Immigration Policy” (2013), *available at* [https://www.majorcitieschiefs.com/pdf/news/2013\\_immigration\\_policy.pdf](https://www.majorcitieschiefs.com/pdf/news/2013_immigration_policy.pdf) (recognizing that “trust and cooperation with immigrant communities . . . are essential elements of community oriented policing.”).

<sup>11</sup> President’s Task Force on 21<sup>st</sup> Century Policing Final Report at 18 (May 2015), *available at* [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf) (recognizing that “build[ing] relationships based on trust with immigrant communities . . . is central to overall public safety.”).

<sup>12</sup> Richard S. Biehl, “Here’s How Not to Jump-Start Immigration Reform in the House,” *Roll Call* (Jan. 24, 2014), [http://www.rollcall.com/news/heres\\_how\\_not\\_to\\_jump\\_start\\_immigration\\_reform\\_in\\_house\\_commentary-230343-1.html?zkPrintable=true](http://www.rollcall.com/news/heres_how_not_to_jump_start_immigration_reform_in_house_commentary-230343-1.html?zkPrintable=true).

<sup>13</sup> *Supra* note 7 at 17.


### **III. Conclusion**

The ACLU urges the members of the Subcommittee to refrain from punishing hundreds of localities based on the alleged actions of a single individual. Doing so would divert state and local law enforcement officers from their core mission of promoting public safety and crime reduction. In particular, the Subcommittee should not attempt to coerce localities into complying with immigration detainers. The solution to the constitutional problems with DHS's use of detainers is to fix those problems or end their use. For more information, please contact Legislative Counsel Joanne Lin (202/675-2317; [jlin@aclu.org](mailto:jlin@aclu.org)).

Sincerely,



Michael W. Macleod-Ball  
Acting Director



Joanne Lin  
Legislative Counsel