CHAPTER TWO

Immigration Enforcement and the Criminal Justice System

Table of Contents

2.1 THE U.S. SUPREME COURT'S DECISION IN *ARIZONA V. U.S.* 1

2.2 A SNAPSHOT OF IMMIGRATION ENFORCEMENT AND THE CRIMINAL JUSTICE SYSTEM 3
A. ICE Priorities for Apprehension of Noncitizens 3
B. The Criminal Alien Program 5
C. The Secure Communities Initiative 7
D. Administrative Warrants for Deportation & NCIC Data Base Information 8
E. Washington Law & Immigration Enforcement 9
F. Communicating With Immigration & Customs Enforcement (ICE) 10
G. Access Issues Raised by Current Immigration Enforcement Practices 10

2.3 ICE HOLD REQUESTS ("IMMIGRATION DETAINERS") 10
A. Immigration Holds/Detainers: Key Concepts 10
B. The New ICE Detainer Form and Guidance 12
C. Limitations on Detainers: The 48 Hour Rule 14
D. ICE Detainers Are Enforced at the Discretion of Local Jurisdictions 14
E. Controversy Surrounding Immigration Detainers 15
F. Immigration Detainers Are Not Reliable Indicators of a Person's Immigration Status or Whether They Will Be Removed 16
G. Immigration Detainers & Speedy Trial Issues 16
H. Immigration Detainers and Custody Determinations…........................…… 17

2.1 THE U.S. SUPREME COURT'S DECISION IN *ARIZONA V. U.S.* [1]

There are many unresolved issues raised by the recent expansion of immigration enforcement operations. However, in *Arizona v. U.S.*[2], the Supreme Court addressed the state's authority to enforce immigration laws:

> As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a

[1] Portions of this analysis were adapted from materials provided by the Immigration Policy Center (www.ipc.org) and the National Immigration Forum (www.immigrationforum.org).
[2] 132 S.Ct. 2492 (2012).

> Notice to Appear. The form does not authorize arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing…
>
> …The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention 'pending a decision on whether the alien is to be removed from the United States'…And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. In both instances the warrants are executed by federal officers who have received training…If no federal warrant has been issued, those officers have more limited authority. They may arrest an alien for being 'in the United States in violation of any [immigration] law or regulation', for example, but only where the alien 'is likely to escape before a warrant can be obtained."[3]

In *Arizona v. United States,* the federal government challenged four provisions of the Arizona law, "SB 1070", on preemption grounds. The Supreme Court ruled three of the four provisions were preempted by federal law:

- Section 3, which created a state misdemeanor criminal offense for "willful failure to complete or carry an alien registration document." The Court ruled that, with respect to alien registration, Congress intended to preclude states from enacting or enforcing their own complementary or auxiliary immigration enforcement regulations.

- Section 5(C), which created a state misdemeanor criminal offense for an "unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." The Court ruled that the 1986 Immigration Reform and Control Act (IRCA) provided a comprehensive framework for regulating employment by immigrants not authorized to work. IRCA did not impose criminal penalties on unauthorized immigrants seeking work or engaging in work, and the imposition of such penalties by Arizona is thus preempted by federal law.

- Section 6, which gave state officers authority to arrest, without a warrant, any person the officer had "probable cause" to believe that the person "had committed any public offense that makes [that person] removable" from the U.S. The Court ruled that this section would give state officers greater authority to arrest noncitizens than authority given by Congress to trained federal immigration officers, and therefore this provision was also preempted.

The court ruled that SB 1070 **S**ection 2(B) was not preempted by federal law. Section 2(B) requires Arizona law enforcement officers to make a "reasonable attempt" to determine the immigration status of persons they stop, detain, or arrest if they have a "reasonable suspicion" that the person is unlawfully present in the U.S. Section 2(B) also requires authorities to determine the immigration status of anyone who is arrested before the person is released.

[3] *Arizona*, 132 S.Ct. at 2508. (internal citations omitted).

A chief concern is that Section 2(B) will lead to racial profiling: that persons of color will be stopped, detained, or arrested on some pretext, to check immigration status. However, because the law was not challenged on the grounds of equal protection, or violation of the 4th Amendment, the Court concluded that it was premature to determine whether this section "will be construed in a way that creates conflict with federal law." [4]

The Court made clear that, " [C]onsultation between federal and state officials is an important feature of the immigration system…[and] Congress has made clear that no formal agreement or special training needs to be in place for state officers to communicate with the federal government regarding the immigration status of any individual…"[5] But, the Court notes that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."[6] The Court also states that the decision "does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."

2.2 A SNAPSHOT OF IMMIGRATION ENFORCEMENT AND THE CRIMINAL JUSTICE SYSTEM

A. ICE Priorities for Apprehension of Noncitizens

Since 2006, Immigration and Customs Enforcement (ICE) has expanded efforts to apprehend noncitizens[7] through state and local criminal justice systems.[8]

- **Designating a Noncitizen as a "Criminal Alien."**

In 2012, over 400,000 individuals were removed. More than half of these individuals were designated as "criminal aliens."[9] ICE defines a "criminal alien" as any noncitizen who has been convicted of a crime in a court of law regardless of the type or severity of the crime.[10] Government statistics show that noncitizens in the criminal justice system risk apprehension by ICE and subsequent removal proceedings.[11]

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[4] *Arizona*, 132 S.Ct.at 2516.
[5] *Arizona*, 132 S.Ct. at 2512.
[6] *Arizona*, 132 S.Ct. at 2514.
[7] Christopher N. Lasch, *Enforcing The Limits of the Executive's Authority To Issue Immigration Detainers*, 35 WM. MITCHELL L.REV. 164, 167-73 (2008).
[8] Because Washington is a border state, in some counties some of the collaborative functions outlined here are carried out by Customs and Border Protection (CBP) agents as well as ICE.
[9] *Removal Statistics*, IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/removal-statistics/ (last visited Mar. 28, 2013).
[10] *See Detention of Criminal Aliens: What Has Congress Bought?*, TRAC IMMIGRATION (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224/ ("For ICE, the term 'criminal alien' includes the relatively small number of individuals convicted of serious offenses like armed robbery, drug smuggling, and human trafficking. But the term also includes those found guilty of minor violations of the law such as traffic offenses and disorderly conduct. Immigration violations such as illegal entry into the United States, which the law defines as a petty offense, are included as well.")
[11] *See Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CENTER, *available at* http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet#_edn1 (Nov. 29, 2011) (although ICE states that it prioritizes the most dangerous and violent offenders, "in Fiscal Year (FY) 2011, 26% of all Secure Communities deportations were immigrants with Level 1 convictions; 19% of those deported had Level 2

- **Civil Immigration Enforcement Priorities**

<u>This section is subject to change if Congress adopts new immigration policies.</u>

On June 30, 2010, the ICE Director issued a memorandum entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, setting forth new immigration enforcement prioritization objectives.[12] **See Appendix A to view the ICE Civil Immigration Enforcement memo.**

The memo outlines civil immigration enforcement priorities as they relate to the apprehension, detention, and removal of noncitizens.

- **Priority 1.** Noncitizens who pose a danger to national security or a risk to public safety, including those suspected of terrorism, convicted of violent crimes, and gang members.
- **Priority 2.** Noncitizens who recently crossed the border or a port of entry illegally, or through the knowing abuse of a visa or the visa waiver program.
- **Priority 3.** Noncitizens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls.

The Memorandum further prioritizes immigration enforcement actions within Priority 1 with regard to criminal convictions:

- **Level 1:** "aggravated felonies as defined in [the immigration statute], or two or more crimes each punishable by more than one year" in prison.
- **Level 2:** "any felony or three or more crimes punishable by less than one year" in prison.
- **Level 3:** "crimes punishable by less than one year" in prison.

The Memorandum also specifically states that ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States. Thus, while ICE's enforcement efforts prioritize convicted "criminal aliens", ICE maintains the discretion to take action on any noncitizen it encounters.

Prosecutorial Discretion. On June 17, 2011, the ICE Director issued a memorandum providing guidance for ICE law enforcement personnel and attorneys on their authority to exercise prosecutorial discretion.[13] **See Appendix B to view the Prosecutorial Discretion to Not Remove Memo.** This memorandum is intended to help the agency use its limited resources to target criminals and those who pose a risk to public safety or national security. The Memorandum includes a list of factors that are to be taken into account when making an enforcement related decision. A separate memorandum provides policy and guidance regarding the use of discretion intended for protecting victims and witnesses of domestic violence and

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convictions; and 29% were individuals convicted of Level 3 crimes (minor crimes resulting in sentences of less than one year). Twenty-six percent of those deported had immigration violations and no criminal convictions").

[12] *See* John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun. 30, 2010) *available at* http://www.immilaw.com/FAQ/ICE%20prosecution%20priorities%202010.pdf.

[13] *See* John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (Jun. 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

other crimes.[14] **See Appendix C to view the Prosecutorial Discretion Regarding Victims and Witnesses Memo**.

B. The Criminal Alien Program[15]

Traditionally, immigration enforcement has been a function of the federal government. Since 2006, however, ICE has worked with local law enforcement agencies (LLEA) to "prioritize the removal of dangerous criminal aliens."[16] ICE works with the states through the Criminal Alien Program (CAP) program, the Secure Communities initiative and the "287(g)" program.[17] A brief overview of CAP and Secure Communities is provided below.

The expansion of the CAP program and the implementation of the Secure Communities program have been the subject of significant controversy. In 2011, DHS appointed a Task Force comprised of law enforcement and other government officials, as well as civil and immigrant rights advocates, to make recommendations regarding Secure Communities.[18] To a large extent, the findings and recommendations in the task force's final report track the findings and criticisms included in reports issued by civil rights and immigrants' rights organizations regarding the Secure Communities initiative as well as the CAP Program.[19] These concerns include:

- the broad scope of the programs apprehend more than "dangerous criminals";
- the programs undermine community trust which is the linchpin to effective community policing and the criminal justice process;

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[14] *See* John Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," (Jun. 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[15] Information contained in this section was excerpted from: the Immigration and Customs Enforcement website, http://www.ice.gov/criminal-alien-program/; *see also* Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* (Feb. 17, 2010) *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf; Trevor Gardner II and Aarti Kohli, *The CAP Effect: Racial Profiling in the ICE Criminal Alien Program*, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY AT UC BERKELEY SCHOOL OF LAW (Sept. 16, 2009).

[16] *Securing the Borders and America's Points of Entry, What Remains to be Done: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the Comm. on the Judiciary*, 111th Cong. 1st session (2009) (statement of John P. Torres, Deputy Assistant Secretary for Operations, U.S. Immigration and Customs Enforcement) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55033/pdf/CHRG-111shrg55033.pdf

[17] These programs are three of thirteen federal-local immigration enforcement programs that are included in ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). *See* Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/access.htm. The 287(g) program deputizes local law enforcement officers to carry out immigration-related enforcement activities in the course of their law enforcement duties. The state of Washington has not agreed to participate in the 287(g) program.

[18] Members of the Task Force met for two months, took expert testimony, and convened information-gathering sessions in Dallas, TX; Los Angeles, CA; Chicago, IL; and Arlington, VA to hear from individuals and organizations about their experiences with the Secure Communities program.

[19] Homeland Security Advisory Council, *Task Force on Secure Communities: Findings and Recommendations* (2011), http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf. *See also* ACLU of Northern California, *Costs and Consequences: The High Price of Policing Immigrant Communities* (2011), https://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf; NDLON, et al., *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities" Program* (2011), *available at* http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf.

- the programs lack clear complaint and grievance processes; and
- the programs lack sufficient oversight and meaningful transparency.

- **What is the Criminal Alien Program (CAP)?**

The Criminal Alien Program (CAP) is an expansive immigration-enforcement program responsible for the majority of noncitizens apprehended and placed in removal proceedings. While CAP has existed in one form or another for decades, much remains unknown about how it is organized, and how it works. What is known is that CAP extends to every area of the country and intersects with most state and local law-enforcement agencies.

The primary duties of ICE agents acting under the auspices of CAP include identifying noncitizens booked and detained in municipal, county and state jails, facilitating their transfer into immigration custody, and initiating removal proceedings against them. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country. It is one of several so-called "jail status check" programs intended to screen individuals in federal, state, or local prisons and jails for removability. While other such jail status check programs, like Secure Communities, have garnered much more attention, CAP is by far the oldest and largest such interface between the criminal-justice system and federal immigration authorities.[20]

ICE agents performing CAP-related duties are actively operating in Washington Department of Corrections (DOC) facilities, as well as in all county jails throughout Washington State, and in most municipal jails.

The majority of ICE removals each year are a result of the CAP program. According to DHS, CAP is the program responsible for the largest number of noncitizen apprehensions. In 2012 over 50 % of all noncitizens removed (over 200,000) were designated as "criminal aliens" and more than half of these individuals were apprehended through the CAP program.[21] Data from the most comprehensive review of CAP statistics, in Travis County, Texas, indicated that 58 % of noncitizens apprehended through the CAP program had been charged with misdemeanor offenses. An October 2009 DHS report found that 57 % of immigrants identified through the CAP program had no criminal convictions.[22] Because Congress did not enact legislation authorizing it, DHS and ICE operate CAP through interpretations of congressional appropriations and administrative initiatives. For 2013, ICE requested $216 million in congressional appropriations for CAP, a $50 million increase since 2006.

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[20] *See The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, IMMIGRATION POLICY CENTER (January 2013), *available at* www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails.

[21] *See generally* information on CAP and removal statistics at http://www.ice.gov/removal-statistics/.

[22] Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CENTER (Feb. 17, 2010) *available at* http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas.

- **How does CAP work?**

All Washington State county jails, many municipal jails and the Department of Corrections (DOC) participate in the CAP program and allow ICE agents to access the booking information for those arrested and booked into jail. After ICE acquires information regarding arrested persons whom they believe to be noncitizens, ICE decides whether to issue an immigration hold request, known as an ICE hold or immigration "detainer," on those suspected of being removable. A detainer lets the jail officials know that ICE requests custody of an individual once the facility releases him either because charges have been dropped, bail has been secured, or a convicted individual has served the sentence. Once the ICE detainer is triggered by the individual's release, the detainer authority lasts 48 hours, excluding weekends and holidays. **See §2.3 for more information on ICE detainers.**

Local law enforcement collaborate with ICE in a variety of ways. For instance, some jurisdictions have ICE agents in the jails. Other jurisdictions allow telephone or video-conference, rather than in-person interviews with ICE. Some counties give ICE 24/7 access to the jail. Some local jurisdictions communicate to ICE daily, while others report less frequently. Under CAP, ICE also operates a statewide 24/7 call-in center in Seattle where local law enforcement can contact ICE agents regardless of whether the person is arrested or booked into jail.

- **Are state and local jurisdictions required to participate in the CAP program?**

Collaboration and cooperation with ICE enforcement actions pursuant to CAP is voluntary and at the discretion of the local jurisdiction.[23] Congress has not passed any law that mandates participation in CAP or any other ICE enforcement initiative.

C. The Secure Communities Initiative[24]

- **How does Secure Communities work?**

Secure Communities is a DHS technology-based program used to enhance efforts of the Criminal Alien Program to identify and apprehend immigrants in U.S. jails. When an individual is booked into a jail, his or her fingerprints are regularly sent to the Federal Bureau of Investigation (FBI) to be checked against criminal databases. Under Secure Communities, the FBI then sends the fingerprints to ICE, where they are checked against immigration-related databases.[25] This fingerprint check allows state and local law enforcement and ICE to automatically and immediately search the databases for an individual's criminal and immigration history.

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[23] *See* § 2.2(D), *infra*.
[24] Portions of this section were excerpted and adapted, with permission, from Michelle Waslin, *The Secure Communities Program: Unanswered Questions and Ongoing Concerns*, IMMIGRATION POLICY CENTER (Nov. 2011) *available at* http://www.immigrationpolicy.org/special-reports/secure-communities-program-unanswered-questions-and-continuing-concerns. Information is also available on the ICE website at http://www.ice.gov/secure_communities/.
[25] Specifically, fingerprints are checked against the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT) and the Automated Biometric Identification System (IDENT).

If there is a database "hit," meaning that the arrested person is matched to a record indicating a potential immigration violation, local ICE agents are notified. The case is evaluated to determine the individual's immigration status and whether to pursue apprehension based on ICE's enforcement priorities. In most cases, ICE will file with the jail an immigration detainer request against the individual. Note that undocumented persons who have no immigration record will not be identified through the Secure Communities screening.

- **Is Washington State participating in the Secure Communities Program?**

When ICE began implementation of the Secure Communities program in 2008, it stated that participation in the program was voluntary and it negotiated memorandums of agreement (MOAs) with participating states and local jurisdictions. The Washington State Patrol, the state agency with authority over transmission of fingerprints to the FBI, declined to enter into a state-wide MOA and instead opted to permit individual counties to determine whether they wanted to participate in the Secure Communities program.

However, in August 2011, ICE declared that participation was no longer voluntary. ICE withdrew all prior MOAs and began routing fingerprint data received by the FBI through the Secure Communities program regardless of state and local decisions.[26] As of April 3, 2012, all fingerprint data from Washington counties is now routed through the Secure Communities program.

D. Administrative Warrants for Deportation & NCIC Data Base Information

ICE has the authority to issue an administrative warrant for any noncitizen with an outstanding order of deportation or removal that has become final.[27] Issued on Form I-205, this document authorizes ICE officers[28] to take into custody and remove the designated noncitizen. It does not authorize state or local law enforcement officials to arrest the designated noncitizen. **See Appendix D for a sample Form I-205**.

If consistent with state law, federal law permits state and local law enforcement officers to arrest an undocumented noncitizen for the purpose of facilitating their removal only where the individual has previously been convicted of a felony in the U.S. and departed or left (either voluntarily or under an order of removal/deportation) after such conviction.[29] A Washington law enforcement officer is permitted to arrest under those circumstances under Washington law since illegal re-entry after removal or deportation is a felony.[30]

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[26] *See* Kirk Semple and Julia Preston, *Deal to Share Fingerprints is Dropped, Not Program*, N.Y. TIMES (Aug. 6, 2011), *available at* http://www.nytimes.com/2011/08/06/us/06immig.html.
[27] 8 C.F.R. § 1241.32.
[28] Form I-205 authorizes officers of the Immigration and Naturalization Service ("INS"). .INS's enforcement division was transformed into ICE, a division of DHS, in 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).
[29] 8 U.S.C. § 1252c.
[30] R.C.W. 10.31.100 (permitting warrantless arrest where probable cause exists to believe individual has committed a felony); 8 U.S.C. § 1326 (designating illegal re-entry after deportation as a felony offense).

Information about noncitizens with final orders of removal is entered into the National Crime Information Center (NCIC) database under one of several categories, the two most relevant of which are:

(1) Outstanding order of removal; and
(2) Convicted felons suspected of illegally re-entering the U.S. after deportation.

Local law enforcement officers do not have the authority to arrest based only upon the NCIC database indicating an outstanding order of removal. However, they do have arrest authority for individuals identified as convicted felons suspected of illegally re-entering the U.S. after removal.

E. Washington Law & Immigration Enforcement

- **State and Local Collaboration with ICE and Customs and Border Protection (CBP)**

With the exception of the two Washington statutes outlined below, no state or federal law requires local law enforcement officers or courts to participate in immigration enforcement activities. The anti-commandeering doctrine in the Tenth Amendment precludes Congress from mandating such participation. The anti-commandeering doctrine constrains the federal government's authority to enforce immigration (or any other) law by stating that state and local officials may not be commandeered for federal policies and programs.[31]

Thus, with the exception of having fingerprints routed through the immigration databases under the Secure Communities program, and subject to the current reporting and notification requirements under state law outlined below, any efforts to assist ICE (or CBP) to apprehend noncitizens suspected of being removable are voluntary on the part of local jurisdictions. ICE relies on the voluntary cooperation of state and local jurisdictions to carry out its apprehension of noncitizens through the CAP and Secure Communities programs.

Two Washington State statutes address mandated cooperation with immigration enforcement efforts:

- R.C.W. 10.70.140 requires that once a person is committed to a Washington penal facility, the jail must identify whether she is a noncitizen and, if she is, notify immigration officials.

- R.C.W. 70.150 mandates that upon official request, the Clerk of the Court where the noncitizen was sentenced shall provide immigration officials with copies of records relating to the criminal proceedings.

[31] *Printz v. United States*, 521 U.S. 898, 927-35 (1996) (holding that Congress is without the authority to "compel the States to enact or enforce a federal regulatory program" or circumvent that prohibition by conscripting the State's officers directly).

F. Communicating With Immigration & Customs Enforcement (ICE)

Federal law does not require state and local jurisdictions to identify or communicate with ICE regarding suspected noncitizens that come into their custody. However, federal law does prohibit states and localities from implementing policies that directly prohibit individual employees from communicating with ICE regarding suspected noncitizens.[32] Both Seattle and King County have passed ordinances that preclude law enforcement officers from questioning individuals whom they encounter regarding their citizenship and/or immigration status.[33]

G. Access Issues Raised by Current Immigration Enforcement Practices

ICE and CBP agents regularly conduct enforcement activities in and around courthouses throughout Washington State. Numerous jurisdictions report that ICE and/or CBP agents are in courtrooms and the courthouse, both in uniform and plain clothes, for the purposes of identifying noncitizens whom they wish to investigate, apprehend and/or remove.

Significant concerns have been raised that these practices may interfere with noncitizens' equal access to justice in Washington courts. Immigrant communities express fear that contact with law enforcement, the courts and other government officials will lead to either their apprehension and removal or the apprehension and removal of their family members.

In 2008, the King County Superior Court responded to these concerns by implementing a policy that prohibited immigration enforcement arrests inside its courtrooms. **See Appendix E: King County Superior Court Policy Limiting Ice Enforcement in Courtrooms.** Other court personnel have engaged in communications with ICE and CBP directly to address these concerns.

2.3 ICE HOLD REQUESTS ("IMMIGRATION DETAINERS")

A. Immigration Holds/Detainers: Key Concepts

The expansion of the CAP and the implementation of the Secure Communities program have dramatically increased the number of ICE hold requests (also referred to as "immigration detainers" or "ICE detainers") issued against defendants being held in local jails. This has raised a host of important questions that courts, communities and other government officials must grapple with, such as whether localities are required to honor ICE hold requests, what is the authority under which ICE issues detainers, who has custody of noncitizens subject to detainers and whether detainer practices violate non-citizens' Constitutional rights. These and many of the other issues raised remain both controversial and in flux.[34]

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[32] 8 U.S.C. 1373.
[33] SMC 4.18.051; King County Code 2.15.010.
[34] For more information on the current state of these and other immigration detainer issues see Kate M. Manuel, *Immigration Detainers: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE R42690 (Aug. 31, 2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf.

Once arrested individuals have been identified through the CAP and/or Secure Communities programs outlined above, ICE hold requests are the primary tool used to transfer those noncitizens from a state or local jail facility into ICE custody and, usually, immigration detention. While the specific procedures for how local law enforcement agencies ("LLEA") communicate with ICE (and CBP) under the CAP and Secure Communities programs vary, ICE customarily files the hold request in-person, telephonically (followed by fax) or electronically.[35]

- **Immigration Hold Requests Are Distinct From Criminal Detainers.**

ICE's Form I-247 explicitly states that it is a notification request whereby ICE requests that the jail notify them upon the individual's release from criminal custody.[36] **See Appendix F for a Sample Form I-247.** An ICE hold request is in most circumstances not an immigration arrest warrant nor is it the equivalent of a criminal arrest warrant. Unlike criminal arrest warrants, ICE hold requests are issued by the prosecuting agency itself - not by a neutral, third-party adjudicator. Unlike criminal detainers - which pursuant to the Interstate Agreement on Detainers, are a means of seeking the transfer of an inmate serving a sentence in one jurisdiction to another jurisdiction, after the filing of a criminal complaint, information, or indictment - ICE hold requests can be issued without any formal proceeding having been initiated.

Criminal courts have held that the lodging of an immigration detainer is a "mere expression of ICE's intention to seek future custody" of defendant and that it is not equivalent to more traditional criminal "detainers" or "holds" since it provides no concurrent criminal basis for continued custody (such as the existence of pending criminal charges in another jurisdiction).[37] Additionally, unlike criminal detainers, there is no mechanism for judicial review: issuance of an ICE hold request is an unreviewable administrative action taken by ICE agents. Neither the immigration statute nor regulations proscribe a legal standard that must be met in order to issue an immigration detainer.

- **Legal Authority To Issue An ICE Detainer**

Express statutory authority for issuance of ICE detainers is contained in the immigration statute at 8 U.S.C. § 1357(d).[38] The language of the statute provides only for the issuance of detainers in cases of noncitizens charged with controlled substance violations and at the request of the local law enforcement agency that arrested and now has custody of the alleged noncitizen. The implementing regulations at 8 C.F.R. 287.7 provide for issuance of a detainer by ICE without a request from an LLEA and on any matter, not only cases involving an arrest for a controlled substances violation. [39] Although presently the subject of significant litigation, ICE

[35] *See* 8 U.S.C. § 1357, 8 C.F.R. § 287.7 (authorizing detainers).
[36] *See* 8 C.F.R. § 287.7. Note that form I-247 requests that jail authorities notify ICE upon release or provide 30 days or "as far in advance as possible" advance notice of release.
[37] *See State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009) (holding presence of ICE detainer did not toll defendant's speedy trial clock.); *State v. Sanchez*, 110 Ohio St. 3d 274 (2006) (same.)
[38] ICE asserts authority to issue detainers also pursuant to its general authority to detain under 8 U.S.C. § 1226 and its general authority to administer and enforce immigration laws under 8 U.S.C. § 1003.
[39] The extension of the use of ICE detainers beyond controlled substances violations is currently being challenged as *ultra vires* in several lawsuits across the country. *See, e.g.*, *Brizuela v. Feliciano*, No. 3:12CV00226 (D. Conn. filed Feb. 13, 2012) *available at* http://lgdata.s3-website-us-east-

asserts that it also derives authority for issuance of detainers pursuant to several additional provisions of the immigration statute related to general enforcement of immigration laws.[40]

B. The New ICE Detainer Form and Guidance

In 2010, the ICE Director issued an interim policy addressing the issuance of ICE hold requests. **See Appendix G to view the Memo Regarding Interim Detainer Guidance**. In December 2012, the ICE Director issued a new immigration detainer form I-247 and additional guidance[41] outlining enforcement priorities for the placement of detainers on noncitizens in criminal custody. **See Appendix F for the current ICE detainer form and Appendix H for this updated guidance.** ICE's stated purpose in making these changes is to limit "the use of detainers to individuals who meet the department's enforcement priorities and restricts the use of detainers against individuals arrested for minor misdemeanor offenses such as traffic offenses and other petty crimes, helping to ensure that available resources are focused on apprehending felons, repeat offenders and other ICE priorities."[42]

- **What Has Changed?**

Though not definitively providing the basis for the issuance of an ICE hold request, the new form I-247 provides more detail than the previous version. While the vast majority of ICE hold requests using the previous form stated only that ICE has "[i]nitiated an investigation" to determine whether a person was removable from the U.S., the new form replaces this language by stating that ICE has "[d]etermined that there is reason to believe that the individual is an alien subject to removal from the United States." This statement is followed by seven boxes which ICE may check to provide the basis for its reason to believe that the person is removable. These seven boxes include various criminal charges and convictions, certain civil immigration violations, and catch-all public safety and "other" options. These boxes presumably clarify the basis for the placement of the detainer.

Additionally, the new guidance and form I-247 states that ICE detainers are requests.[43] Most recent guidance limits the noncitizens who should be the subject of ICE detainers to only those whom ICE has reason to believe are subject to removal from the U.S. and to whom one or more of the following conditions apply:

1.amazonaws.com/docs/213/410590/Brizuela_Petition_for_Writ_of_HC_and_Complaint__Feb._13__2012_.pdf; *Jimenez Moreno v. Napolitano*, 11CV05452 (N.D. Ill. filed Aug. 11, 2011) *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Complaint.pdf.

[40] *See* Kate M. Manuel, *Immigration Detainers: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE R42690 (Aug. 31, 20120), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf.

[41] John Morton, Director of ICE, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, ICE MEMORANDUM (December 21, 2012) *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[42] Immigration and Customs Enforcement, News Release, *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources* (December 21, 2012), *available at* http://www.ice.gov/news/releases/1212/121221washingtondc2.htm.

[43] While the prior form used the word request, it also provided contradictory language that "… a law enforcement agency '*shall* maintain custody of an alien' once a detainer has been issued." The new form omits this language, leaving only the "requests" statement. *See* Department of Homeland Security, Immigration Detainer Notice of Action, Form I-247, issued December 2011.

- The individual has a prior felony conviction or has been charged with a felony offense;
- The individual has three or more prior misdemeanor convictions (not including three or more "minor traffic misdemeanors or other relatively minor misdemeanors");
- The individual has a prior conviction for or has been charged with a misdemeanor involving:
    - Violence, threats, or assault;
    - Sexual abuse or exploitation;
    - DUI;
    - Unlawful flight from the scene of an accident;
    - Unlawful possession of a firearm or other deadly weapon;
    - Trafficking in a controlled substance; or
    - Another significant threat to public safety (defined as "one which poses a significant risk of harm or injury to a person or property");
- The individual has been convicted of the federal crime of illegal entry under 8 USC § 1325;
- The individual has illegally re-entered the country after a previous deportation or return at the border;
- The individual has an outstanding final order of deportation;
- The individual has been found by an immigration officer or immigration judge to have knowingly committed immigration fraud; or
- The individual poses a significant risk to national security, border security, or public safety (listed examples include: suspected terrorists, known gang members, and subjects of outstanding felony arrest warrants).[44]

- **Defendants Who Should No Longer Receive ICE Detainers**

The new guidance and form I-247 should exclude certain groups of people who previously would have been subject to an ICE hold request. Though the catch-all categories may be used to circumvent ICE's stated enforcement priorities, the following categories of defendants should no longer be subject to ICE detainers:

- Defendants (whether undocumented or with lawful immigration status) with no prior convictions who have been arrested for the following non-priority offenses: misdemeanor theft, PSP3, patronizing a prostitute, malicious mischief 3 and other property destruction offenses, obstructing, DWLS, negligent or reckless driving, disorderly conduct, criminal trespass, attempted forgery or other gross misdemeanor fraud crime such as gross misdemeanor UIBC, or any gross misdemeanor identity theft, false statement, or obstructing offense.
- Defendants (whether undocumented or with lawful immigration status) who have been arrested for one of the above offenses EVEN IF they have one or two (and possibly three or more) prior convictions for the above non-priority offenses.

Note, however, that defendants with no prior convictions are still likely to receive an immigration detainer under the new guidance and form if they have been charged with any

[44] *See* December 21, 2012 Memorandum, *supra*.

felony or any misdemeanor involving violence, harassment, sexual abuse, DUI, hit and run, unlawful possession of a firearm or other weapon, trafficking in a controlled substance, or any "other significant threat to public safety."

C. Limitations on Detainers: The 48 Hour Rule

Where a jurisdiction chooses to honor an ICE detainer, federal regulations expressly limit the post-release period for which an individual may be held to no more than 48 hours (excluding weekends and holidays).[45] An immigration detainer is triggered when the jail's lawful authority to detain the individual expires. Thus, an immigration detainer is triggered if:

- The case is pending and the court orders release and, where imposed, defendant posts bail;
- The case is dismissed and the person is to be released; or
- A conviction is entered and the defendant completes his or her sentence.

The 48 Hour Rule. Once the jail's lawful authority to detain the person expires, the 48 hour clock starts. Federal regulations provide that a law enforcement agency can hold a noncitizen on a detainer ***no more than 48 hours*** past the time when he or she otherwise would have been released, excluding weekends and holidays.[46] State and local law enforcement officers have no independent authority to detain an alleged noncitizen beyond the 48 hour period after release.[47] Once the 48 hour period has lapsed, the jail is required to release the individual if ICE has not taken custody.

D. ICE Detainers Are Enforced at the Discretion of Local Jurisdictions

The official position of ICE is that detainers are requests that are honored at the discretion of local jurisdictions. This position is consistent with the legal conclusions of courts and state and local officials who have addressed the issue.

In *Printz v. United States*,[48] the Supreme Court considered the use of local law enforcement officers to implement a federal gun control program. The Court held the program unconstitutional for violating the Tenth Amendment, because Congress tried to require local officers to conduct background checks against a federal database.[49] Similarly, compliance with detainers requires the expenditure of resources and time of local and state officials on behalf of the federal government.[50] It requires reporting to the federal government, and bearing the costs of additional detention time on behalf of the federal government. In light of the anti-

[45] 8 C.F.R. § 287.7(d).
[46] 8 CFR § 287.7(d). Form I-247 indicates that "holidays" means federal holidays.
[47] 8 C.F.R. § 287.7(d).
[48] *Printz v. United States*, 521 U.S. 898, 927 (1996) (holding that Congress is without the authority to "compel the States to enact or enforce a federal regulatory program" or circumvent that prohibition by conscripting the State's officers directly).
[49] *Id*. At 927-35.
[50] The federal government provides only limited reimbursement for some local expenditures related to the costs associated with detaining noncitizens in the criminal justice system through the State Criminal Alien Assistance Program (SCAAP). *See State Criminal Alien Assistance Program*, BUREAU OF JUSTICE ASSISTANCE, *available at* https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.

commandeering doctrine set by *Printz*, the federal government has not imposed mandatory requirements on state law enforcement agencies to identify suspected noncitizens and/or comply with ICE hold requests.[51]

The issue of whether the immigration statutes and regulations can and/or do require local jurisdictions to comply with ICE detainers is presently the subject of significant litigation and remains unresolved in the courts.[52]

However, a recent information bulletin clarified what many jurisdictions have already recognized, that compliance with ICE hold requests are not mandatory. Thus, localities have the discretion to enforce ICE hold requests only in certain circumstances or to not enforce them at all, as some counties have chosen to do. According to the Attorney General, "[s]everal local law enforcement agencies appear to treat immigration detainers, sometimes called "ICE holds," as mandatory orders. But immigration detainers are not compulsory. Instead, they are merely requests enforceable *at the discretion of the agency* holding the individual arrestee."[53] According to notes from a Congressional Briefing for the Congressional Hispanic Caucus, ICE stated that "local LE [law enforcement] are not mandated to honor a detainer, and in some jurisdictions they do not."[54]

E. Controversy Surrounding Immigration Detainers

Local jurisdictions have raised questions regarding the fiscal burdens, community costs and criminal justice system impacts that flow from the use of local government resources to honor ICE detainers. In response to these concerns, numerous communities across the country have passed detainer discretion laws and policies, limiting the community's cooperation with ICE detainer requests.[55]

A 2013 report by the University of Washington studied immigration detainer data from King County for 2011. The study's findings indicated the following:

- ICE detainer requests significantly extend jail stays (nearly 30 days on average);
- ICE detainers do not primarily target serious criminals;

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[51] *See, e.g.*, 8 U.S.C. § 1357(g)(9).
[52] *Cf. Buquer v. City of Indianapolis*, 797 F.Supp.2d 905 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency 'advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.'[§ 287.7(a)]."); *Galarza v. Szalczyk*, 2012 U.S. Dist. LEXIS 47023 (E.D. Pa., March 30, 2012) ("[O]nce the immigration detainer is issued, the local, state or federal agency then holding the individual 'shall' maintain custody…").
[53] *Id*. (emphasis in original).
[54] *Detainers are Voluntary*, TURNING THE TIDE (2011), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.020612.pdf.
[55] The County of Santa Clara, California; the City and County of San Francisco; the Counties of San Miguel and Taos, New Mexico; Cook County, Illinois (Chicago); the District of Columbia; Milwaukee, Wisconsin; New York City; and the State of Connecticut have all passed such laws. These laws range from honoring only a subset detainer requests based on the type of offense and other individual factors, to not honoring any detainer requests unless the federal government agrees to fully reimburse the locality for the costs associated with the detainers. A suggested standard in California was conviction of a serious or violent felony. A.B. 1081, 2011 Cal. Assembly, 2011–12 Sess. (Ca. 2011) ("TRUST Act") (passed by the California legislature, but vetoed by Governor Brown on Sept. 30, 2012).

- ICE detainers have a pronounced impact on the county's Latino population;
- ICE detainers consume significant government resources.[56]

F. Immigration Detainers Are Not Reliable Indicators of a Person's Immigration Status or Whether They Will Be Removed

As a general rule, an ICE detainer is not indicative of a person's immigration status, and no legal determination of the individual's removability is made at the time that the detainer is issued. As the detainer Form I-247 indicates, the presence of an ICE detainer means that ICE believes that the person is a noncitizen. The detainer Form I-247 makes no mention of the person's specific immigration status. Nor is the presence of a detainer determinative of whether or not a person will in fact be removed. An ICE hold generally leads to charges of removability, allegations that must be vetted by several bodies within ICE and, in many cases, a federal immigration court. Some noncitizens may not be removable at all, or may have a basis to contest their removal and request relief in immigration court. In many cases, such noncitizens will re-enter their communities.[57]

G. Immigration Detainers & Speedy Trial Issues

As a general rule, state courts that have considered the issues have held that an immigration detainer is not "custody" for speedy trial purposes; nor does the mere presence of an immigration detainer impact speedy trial calculations.[58] The Ninth Circuit, as well as other circuits, have recognized the importance of guarding against "cases of collusion between [immigration] officials and criminal authorities, where the civil [immigration] detention is merely a ruse to avoid the requirements of the Speedy Trial Act."[59]

In *State v. Chavez-Romero*[60], the Washington State Court of Appeals addressed the impact of an immigration detainer on a defendant's speedy trial rights under CrR 3.3. One week before the expiration of the 60-day time for trial date, the State asked the court to release the defendant on his own recognizance and to reset the trial date within the 90-day time for trial period under CrR 3.3(b)(3). The defendant objected to his release because he was subject to an immigration detainer and, upon release, would be taken into ICE custody and unlikely to appear for future hearings.

The court released the defendant. The defendant was taken into custody by ICE and missed the next court date. The trial court reset the case for trial. The jury convicted the defendant.

On appeal, the court held the State had the authority under CrR 3.3 to request the release of the defendant and extend the time for trial for 90 days. But the defendant's objection put the

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[56] K. Beckett and H. Evans, *Immigration Detainer Requests In King County Washington: Costs and Consequences,* University of Washington, March 2013.
[57] *See* §1.5(E) for an overview of available avenues of relief from removal.
[58] *State v. Montes- Mata*, 41 Kan.App.2d 1078, 208 P.3d 770 (Kan. App. 2009); *State v. Sanchez*, 110 Ohio St. 3d 274, 853 N.E.2d 283 (2006).
[59] *Cepeda-Luna*, 989 F.2d 353, 355-56 (9th Cir.1993).
[60] 170 Wn. App. 568, 285 P.3d 195 (2012).

court on notice that he would be taken into federal custody. Consequently, the time in federal detention was excluded from the time for trial calculation. The court states that the decision to release defendant left the State with two options:

- Obtain the defendant from federal custody, or
- Allow the time for trial to toll.

The court held the trial court erred in resetting the trial rather than allowing the time for trial to toll.

H. Immigration Detainers & Custody Determinations

Article 1 § 20 of the Washington State Constitution provides, "All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."[61] The right to bail is implemented by CrR 3.2. The rule specifies that, in noncapital cases, there is a presumption in favor of release on personal recognizance without the posting of any sureties at all.[62] If conditions must be imposed in order to assure the defendant's appearance at trial, the trial court must release the accused on the "least restrictive" of conditions that will reasonably assure the defendant's presence at future hearings.[63]

The court rule provides a list of nine factors the court must consider in order to evaluate flight potential.[64] None of the mandatory flight-risk factors reference the defendant's immigration status.[65] The Washington Supreme Court has not amended the court rule to make citizenship and/or immigration status a factor in the bail determination process. Some of the flight-risk factors implicitly overlap with immigration status, including "[t]he length of the accused's residence in the community"[66] and the catch-all provision covering "any other factors indicating the accused's ties to the community."[67] However, these factors are not the same as a citizenship inquiry. A person's ties to the community are not dependent on her nationality or even on the lawfulness or unlawfulness of her immigration status. Many undocumented people have resided in their communities for many years, and are married, raising families, gainfully employed and otherwise engaged community members.

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[61] WA. CONST. art. I, § 20.

[62] CrR 3.2(a), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CrR.

[63] CrR 3.2(b). Custody determinations pursuant to CrR 3.2 also contemplate imposition of conditions to address issues of the defendant's apparent dangerousness to the community. *See* CrR 32(a)(2). The impact of the defendant's dangerousness on custody determinations is tangential to the issues presented by the presence of an ICE detainer and beyond the scope of this guide.

[64] CrR 3.2(c).

[65] Some states do direct courts to consider alienage, as does the federal government. *See, e.g.*, 725 ILCS 5/110-5(a) (Illinois statute providing, among dozens of other factors listed, that a court should consider "whether the individual is currently subject to deportation or exclusion under the immigration laws of the United States"); 18 U.S.C. § 3142(d)(1)(B) (federal statute providing for detention of noncitizen criminal defendants pending a decision by immigration officials on whether they will assume immediate custody of the individual).

[66] CrR 3.2(c)(5).

[67] CrR 3.2(c)(9).

In most cases, ICE has discretion to not assume custody of a noncitizen where the criminal court orders release on conditions (e.g., posting a bail amount) that are met, even where ICE chooses to simultaneously pursue removal proceedings.[68] Federal regulations also provide for the issuance of a "departure-control order" that will ensure that ICE does not remove a defendant in a pending criminal proceeding without the consent of the (state or federal) prosecutor.[69]

[68] However, 8 U.S.C. § 1226(c) requires mandatory detention for the commission of certain listed offenses, which, in most cases, require a conviction.
[69] *See* 8 C.F.R. § 215.2.