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**ENFORCING THE LIMITS OF THE EXECUTIVE’S  
AUTHORITY TO ISSUE IMMIGRATION DETAINERS**

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Federal immigration authorities have placed among their highest priorities the apprehension and expulsion of non-citizens convicted of one or more criminal offenses—so-called “criminal aliens.” For the last twenty years, with varying levels of success, the

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Executive branch has attempted to secure the cooperation in this endeavor of state and local governments and law enforcement officials across the country. One key tool in the Executive branch's toolkit has been the immigration detainer.

The Executive branch uses immigration detainers to control the release of non-citizens from state prisons and local jails. When federal immigration officials learn that a state or local law enforcement agency has custody of a non-citizen targeted for immigration proceedings or investigation, they issue a detainer to give notice to state or local officials that the federal government intends to take custody of the non-citizen upon release. The form detainer notice issued by federal immigration officials directs the recipient that federal regulations *require* the recipient agency to detain the non-citizen for a brief period of time after the non-citizen would otherwise be released from custody.<sup>1</sup> Absent the ability to issue detainers, immigration enforcement officials would have to be present at the gates of the state or local detention facility to apprehend the non-citizen upon release.

The Executive's detainer practices have not yet attracted much scholarly attention. I hope with this essay to begin a discussion of current detainer practices and their legality.

I begin with the broad view, examining the recent history of immigration enforcement efforts targeting criminal aliens,<sup>2</sup> and then focus more narrowly on the Executive's current detainer practices.<sup>3</sup> I then examine Congress's grant of detainer authority to federal immigration officials and consider how the Executive branch has attempted to expand that authority by implementing regulations.<sup>4</sup> After reviewing the actual authority for the issuance of immigration detainers, I conclude that the Executive branch has broadly exceeded its mission in the placing of detainers,<sup>5</sup> which aim to transfer local, state, and federal prisoners to Department of Homeland Security<sup>6</sup> (DHS) custody for "removal"<sup>7</sup> proceedings.

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1. A sample form detainer notice, Form I-247, is available on PACER. Public Access to Court Electronic Records, <http://pacer.psc.uscourts.gov/uspci.html> (last visited Dec. 16, 2008). The sample was filed as an exhibit in *Sattani v. United States*, Complaint at Ex. A, No. 3:05-CV-0655-H, 2005 U.S. Dist. LEXIS 14196 (N.D. Tex. July 15, 2005) (No. 1).

2. *See infra* Part I.

3. *See infra* Part II.

4. *See infra* Part III.

5. *See infra* Part IV.

6. After passage of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2003), the functions of the Immigration and Naturalization Service

Administrative regulations concerning detainees exceed the authority bestowed upon federal immigration authorities by Congress. In closing, I briefly consider the various procedural avenues by which ICE's abusive detainer practices may be challenged.<sup>8</sup>

I. A BRIEF HISTORY OF RECENT IMMIGRATION ENFORCEMENT  
EFFORTS TARGETING CRIMINAL ALIENS

To understand how important detainees are in the current efforts to identify, apprehend, and deport criminal aliens, it is necessary to briefly trace the Executive's recent history of targeting criminal aliens for deportation. Deporting criminal aliens has been a priority since at least 1986,<sup>9</sup> but the Executive branch has been largely unsuccessful in discharging this priority. Non-cooperation between local and federal government agencies appears to be at the heart of this malfunction.

Following the passage of the Anti-Drug Abuse Act<sup>10</sup> and the Immigration Reform and Control Act of 1986,<sup>11</sup> the INS (and later DHS) prioritized the apprehension of "criminal aliens" through a variety of enforcement programs. The Alien Criminal Apprehension Program (ACAP) was implemented as a pilot project in four cities—Chicago, Miami, Los Angeles, and New York—in December 1986 to investigate, apprehend, and deport criminal aliens.<sup>12</sup> With ACAP, the INS sought to remedy the failures of past

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(INS) were transferred to the Department of Homeland Security in March 2003. The Bureau of Immigration and Customs Enforcement (ICE) assumed detention and removal operations.

7. Historically, proceedings to oust an unauthorized immigrant from the country were known as "deportation" proceedings. This terminology was replaced in 1997, when the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) took effect, and now all proceedings to expel immigrants from the country or prevent them from entering, are labeled "removal" proceedings. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). By replacing a word ("deport") that requires a human object with another ("remove") that is usually applied to an inanimate object, Congress opted for sanitizing language that embodies an attitude toward unauthorized migration fully consistent with rhetoric that describes unauthorized immigrants as "illegal." I indicate my dissatisfaction with this dehumanizing terminology by avoiding it where possible and by using quotation marks elsewhere to indicate it is not my terminology.

8. *See infra* Part V.

9. *See infra* notes 10-12 and accompanying text.

10. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

11. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

12. *Criminal Aliens: INS Enforcement: Hearing Before the H. Subcomm. on*

programs under which the INS would not begin deportation proceedings against a criminal alien until after the alien was sentenced and delivered to prison.<sup>13</sup> Under ACAP, the INS was called upon to work closely with state and local law enforcement officials to “help identify and process aliens involved in crimes at the earliest stages [presumably arrest and arraignment] of the criminal justice system.”<sup>14</sup>

ACAP also called for immigration judges to conduct proceedings for incarcerated aliens as expeditiously as possible “to ensure their immediate removal from the country upon their release.”<sup>15</sup> In 1988, the INS launched its “Institutional Hearing Program” (IHP), a program later subsumed by the “Institutional Removal Program” (IRP).<sup>16</sup> The objective of the IHP (and later the IRP) was to establish procedures “to complete the judicial and administrative review proceedings prior to completion of aliens’ sentences, thereby eliminating the need for further detention by the INS.”<sup>17</sup> The IRP and ACAP were ultimately consolidated under the aegis of DHS’s “Criminal Alien Program.”<sup>18</sup>

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*Immigration, Refugees and International Law*, 101st Cong. 7–8 (1989) (statement of Lowell Dodge, Director, Administration of Justice Issues, General Government Division), available at <http://archive.gao.gov/d48t13/139869.pdf>.

13. *Id.* at 5–6.

14. *Id.* at 8.

15. *Id.*

16. *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Continue to Need Improvement: Hearing Before the H. Subcomm. on Immigration and Claims*, 106th Cong. 2 (1999) [hereinafter *1999 GAO Report*] (statement of Norman J. Rabkin, Director, Administration of Justice Issues, General Government Division, U.S. General Accounting Office), available at <http://ftp.fas.org/irp/gao/ggd-99-047.htm>.

17. OFFICE OF THE INSPECTOR GEN., AUDIT DIV., U.S. DEPT. OF JUSTICE, , No. 02-41, AUDIT REPORT: IMMIGRATION AND NATURALIZATION SERVICE INSTITUTIONAL REMOVAL PROGRAM (2002) at 1, available at <http://www.usdoj.gov/oig/reports/INS/a0241/final.pdf> [hereinafter 2002 OIG AUDIT REPORT]. With the passage of IRCA, Congress amended the Immigration and Nationality Act (INA) in 1986 to require the Attorney General to begin deportation proceedings for criminal aliens “as expeditiously as possible after the date of the conviction.” Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3345 (amending INA § 242, 8 U.S.C. § 1252). In the Anti-Drug Abuse Act of 1988, Congress mandated that the Attorney General “provide for the initiation and, to the extent possible, the completion of deportation proceedings, and any administrative appeals thereof, in the case of any alien convicted of an aggravated felony before the alien’s release from incarceration for the underlying aggravated felony.” Pub. L. No. 100-690, § 7347(a), 102 Stat. 4181, 4471 (adding INA § 242A, 8 U.S.C. § 1252a).

18. See U.S. Immigration and Customs Enforcement, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* (March 28, 2008) [hereinafter *Secure Communities*], available at <http://www.ice.gov/pi/news/>

The ambitious goals of the Executive's programs for deporting "criminal aliens" were hardly realized, however. Scathing criticism dogged the INS's programs and revealed underlying state-federal tensions.<sup>19</sup> The General Accounting Office, in 1997 and again in 1999, criticized the ineffectiveness of the IHP/IRP and pointed to millions of dollars spent on detaining aliens for whom immigration proceedings were not concluded during their state prison sentences.<sup>20</sup> An audit by the Office of Inspector General (OIG) in 2002 likewise concluded "the INS ha[d] not effectively managed the IRP,"<sup>21</sup> and suggested the blame lay in part on state-federal non-cooperation.<sup>22</sup>

The 2002 OIG audit, after noting past criticism of the INS's management of the IRP,<sup>23</sup> pointed out that Congress had broadened the universe of deportable criminal aliens<sup>24</sup> such that "the county jails became a large source of potentially deportable candidates."<sup>25</sup> Yet the ability of the INS to apprise itself of the presence of criminal aliens in local jails was found to be "minimal at best," and the Service's monitoring of state prisons appeared to be in decline.<sup>26</sup> Failures in administration of the IRP meant

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factsheets/secure\_communities.htm.

19. See H.R. REP. NO. 107-807, at 319 (2003) ("INS's record in removing criminal aliens from the United States has also been uneven, at best. GAO has identified criminal alien removal as 'one of INS's long-standing challenges.' The INS's experience with its Institutional Hearing Program is indicative of its inconsistent performance in identifying and removing criminal aliens."); see also H.R. REP. NO. 105-636, at 35 (1998) (rejecting the Administration's proposal to expand the IRP, in light of the INS's failure to meet program goals despite having received increased resources for the IRP; noting "less than 30 percent of eligible prisoners complete IRP processing before they leave prison, and an even smaller percentage actually are deported."); H.R. CONF. REP. NO. 106-479 (1999) (directing the INS to demonstrate to the Committees on Appropriations that the IRP gives "priority to aliens imprisoned for serious violent felonies or drug trafficking," or "to explain why and to outline the steps [the INS] will take to focus IRP efforts on the most dangerous incarcerated aliens.").

20. 1999 GAO Report, *supra* note 16.

21. 2002 OIG AUDIT REPORT, *supra* note 17, at ii.

22. *Id.* at 7 ("The whole IRP process is predicated on the cooperation of the institutions in which criminal aliens are incarcerated. Without that cooperation, the IRP cannot function effectively.").

23. *Id.* at 4-5.

24. The report notes that in 1996, IIRIRA "greatly expanded" the definition of "aggravated felony," making more aliens deportable on that basis. *Id.* at 6; see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 321, 110 Stat. 3009 (codified at 8 U.S.C. § 1101(a)(43) (2000)).

25. 2002 OIG AUDIT REPORT, *supra* note 17, at 6.

26. *Id.* at 8, 13-14.

criminal aliens, whether in county jails or state prisons, were being released prior to processing by INS.<sup>27</sup> The costs to the Service of incarcerating such aliens after their release from state custody were believed to be as high as \$200 million annually.<sup>28</sup>

The 2002 OIG audit and a second OIG audit conducted in 2007 provided some insight into the shortcomings of the IRP.<sup>29</sup> The 2002 audit reported that the IRP's failings were partially attributable "to a lack of cooperation on the part of some state and local governments, despite the fact that they may receive substantial funding from the federal government in the form of State Criminal Alien Assistance Program (SCAAP) grants."<sup>30</sup> (Since 1994, the federal government has issued SCAAP funds to reimburse states for the costs of incarcerating deportable aliens.<sup>31</sup> SCAAP has been grossly underfunded, however, with states typically receiving less than a quarter of the compensation to which the program would entitle them.<sup>32</sup>)

The 2002 OIG audit recommended explicitly conditioning SCAAP funding on state cooperation in enforcing federal immigration law.<sup>33</sup> But SCAAP funds are payments, not grants,<sup>34</sup> and the OIG recognized this additional counterargument to its proposal: "SCAAP funds represent a reimbursement of costs borne by state and local governments to incarcerate illegal aliens due to the federal government's failure to enforce its immigration laws, and therefore grant conditions would be inappropriate."<sup>35</sup> Efforts to enact legislation to expand the IRP by conditioning SCAAP payments on state cooperation with federal immigration enforcement efforts have failed,<sup>36</sup> and SCAAP funding remains

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27. *Id.* at 7.

28. *Id.* at 21.

29. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES (2007), available at <http://www.usdoj.gov/oig/reports/OJP/a0707/final.pdf> [hereinafter 2007 OIG AUDIT REPORT].

30. 2002 OIG AUDIT REPORT, *supra* note 17, at 17.

31. 2007 OIG AUDIT REPORT, *supra* note 29, at i-ii.

32. *Id.* at ii-iii.

33. 2002 OIG AUDIT REPORT, *supra* note 17, at 17-19.

34. 2007 OIG AUDIT REPORT, *supra* note 29, at 2.

35. 2002 OIG AUDIT REPORT, *supra* note 17, at 19.

36. *E.g.*, H.R. 6789 § 911, 110th Cong. (2008) (proposing to expand the IRP to all states, and condition SCAAP payments on a state's (1) cooperation with IRP officials; (2) expeditious and systematic identification of criminal aliens in state prisons and jails; and (3) prompt notification of criminal aliens to IRP officials); H.R. 4065 § 222, 110th Cong. (2007); H.R. 6306 § 621, 109th Cong. (2006); H.R.

largely unconditional.

The 2007 OIG audit, in addition to conducting a rough survey of a number of state and local jurisdictions, closely examined the level of cooperation between federal immigration officials and law enforcement officials in seven jurisdictions in states receiving SCAAP funds.<sup>37</sup> Not surprisingly, the level of cooperation was found to vary widely from one jurisdiction to the next.

At one extreme is the “sanctuary city,” the product of resistance on the local level to federal immigration enforcement policy.<sup>38</sup> Reflecting the “deep ideological divisions” on the immigration issue, localities have adopted various policies and programs to “promote a self-conception as immigrant-friendly” even despite federal immigration policy.<sup>39</sup> Of particular importance to the success or failure of the IRP, some cities have adopted policies or ordinances discouraging or limiting local participation in immigration enforcement.<sup>40</sup> New Haven, Connecticut and San Francisco, California are leading examples of the “sanctuary city” concept.<sup>41</sup> In the 2007 OIG audit, San Francisco was singled out as the single most non-cooperative jurisdiction of the seven visited:

According to an agent working at ICE headquarters, the

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4437 § 223, 109th Cong. (2005).

37. 2007 OIG AUDIT REPORT, *supra* note 29, at 9–10.

38. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 60 (2007) (noting that “the evidence strongly suggests that the largest immigrant-receiving states, as well as some [other] states, are in fact consistently more generous to immigrants, even including undocumented ones, than is Congress”); Max Pfeffer, *The Underpinnings of Immigration and the Limits of Immigration Policy*, 41 CORNELL INT’L L.J. 83, 99–100 (2008) (“Because current national policies are ineffective and national immigration policy reform is absent, local policies that address immigration issues are likely to become more common and more important to effectively include immigrants in society.”).

39. Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 596–605 (2008).

40. *Id.* at 600–05.

41. Both cities have adopted municipal identification card programs that allow participation without regard for immigration status. Jennifer Medina, *New Haven Approves Program to Issue Illegal Immigrants IDs*, N.Y. TIMES, June 5, 2007, available at <http://www.nytimes.com/2007/06/05/nyregion/05haven.html>; Jeff Holtz, *This Summer’s Surprise Hit: An Elm City ID*, N.Y. TIMES, Sept. 16, 2007, available at <http://www.nytimes.com/2007/09/16/nyregion/nyregionspecial2/16peoplelect.html>; Javier Erik Olivera, *S.F. to Issue ID Cards to Illegal Immigrants: City Becomes Only the Second in Nation after New Haven, Conn.*, SAN JOSE MERCURY NEWS, Nov. 21, 2007, available at [http://www.mercurynews.com/valley/ci\\_7522078](http://www.mercurynews.com/valley/ci_7522078). The most recent Congressional bid to expand the IRP also includes a section entitled “ELIMINATING SANCTURY CITIES.” H.R. 6789 § 921.

San Francisco County Jail and its administration appear to have implemented a “bare minimum of cooperation with ICE and the [Criminal Alien Program] to ensure they are compliant with state rules and the SCAAP regulations.” Agents employed by ICE are not permitted to access jail records without the authorization and approval of the Sheriff. ICE agents are authorized to enter the jails to interview prisoners and to access the “all-jail alphabetical list” of inmates. However, ICE agents do not have the authorization to access booking cards, housing cards or other jail records, including computers.<sup>42</sup>

At the other end of the spectrum is the state or local government that has partnered with the federal government by means of a “287(g) agreement” between local law enforcement agencies and ICE.<sup>43</sup> These agreements are named after section 287(g) of the Immigration and Nationality Act<sup>44</sup> and authorize DHS to train local law enforcement officials in enforcement of the civil immigration laws.<sup>45</sup> With such an agreement in place, local law enforcement officials can carry out the IRP directly. Some ICE officials have suggested that SCAAP payments to states should be linked to local participation in 287(g) agreements.<sup>46</sup>

Most jurisdictions lie between the two extremes of the

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42. 2007 OIG AUDIT REPORT, *supra* note 29, at 10, 18–19 (describing ICE relationship with San Francisco Sheriff’s Department as “unfriendly and marked by ‘much animosity’”).

43. Section 287(g) was added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 133, 110 Stat. 3009 (codified at 8 U.S.C. § 1357(g) (2000)). In the twelve years since, only sixty-three agreements have been put in place. See U.S. IMMIGRATION AND CUSTOMS, DELEGATION OF IMMIGRATION AUTHORITY, SECTION 287(G), IMMIGRATION AND NATIONALITY ACT (2008), [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) [hereinafter DELEGATION OF IMMIGRATION AUTHORITY]. The program’s popularity, however, may be on the rise—the vast majority of 287(g) agreements came into being in 2007 or 2008. *Id.*

44. Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006).

45. In 2006, DHS received \$50 million in supplemental funding to pursue 287(g) programs. 2007 State of the Union: President Bush’s Plan for Comprehensive Immigration Reform, <http://www.whitehouse.gov/stateoftheunion/2007/initiatives/immigration.html>. According to ICE, the number of 287(g) programs is on the rise, having expanded from thirty-five to sixty-three already this year. DELEGATION OF IMMIGRATION AUTHORITY, *supra* note 43. The Administration reports it is proposing an increase in funding for 287(g) programs in 2009. Immigration: Border Security and Immigration Reform, <http://www.whitehouse.gov/infocus/immigration/>.

46. 2007 OIG AUDIT REPORT, *supra* note 29, at 8.

sanctuary city and the 287(g) participant, and exhibit varying levels of cooperation with the federal IRP. The 2007 OIG audit surveyed 164 state and local jurisdictions receiving SCAAP funding.<sup>47</sup> Some jurisdictions reported actively inquiring into an arrestee's immigration status; a significant minority did not inquire.<sup>48</sup> Most jurisdictions would, upon developing reason to believe an arrestee is undocumented, report that fact to ICE, though some jurisdictions would not.<sup>49</sup> Most would not transport a prisoner to an ICE field office.<sup>50</sup>

These findings do not point to a single characteristic local response to the IRP. OIG broadly reported that "many state, county, and local law enforcement agencies are unwilling to initiate immigration enforcement but have policies that suggest they are willing to cooperate with ICE when they arrest individuals on state or local charges and learn that those individuals may be criminal aliens."<sup>51</sup> Funding is obviously a significant factor—local law enforcement must "balance any decision to enforce immigration laws with their daily mission of protecting and serving diverse communities" by taking into account, among other factors, limited resources.<sup>52</sup> Insufficient SCAAP funding might certainly cause state and local governments to be less than enthusiastic about cooperating more fully in the federal government's immigration enforcement efforts. In addition to underfunding SCAAP, the federal government has, at times, appeared uncommitted to the IRP by not responding to local law enforcement reports of criminal aliens.<sup>53</sup> Several local jurisdictions cited federal non-responsiveness as a reason that the local jurisdiction did not cooperate more fully with the IRP.<sup>54</sup>

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47. *Id.* at 11. Ninety-nine of the 164 jurisdictions surveyed responded to the survey. *Id.*

48. *Id.* at 10–11. Fifty-nine jurisdictions responded "Yes," and thirty-four responded "No". *Id.*

49. *Id.* at 13–14. Seventy-eight jurisdictions responded "Yes," and only seventeen responded "No". *Id.*

50. *Id.* at 16–17. Only twenty-three jurisdictions responded "Yes" they would transport, and seventy responded "No". *Id.*

51. *Id.* at 22–23; *see id.*, app. at 66 (Major Cities Chiefs of Police Statement) (citing *M.C.C. Immigration Committee Recommendations*, June 2006).

52. *Id.* at 22.

53. *See id.* at 12–13.

54. *Id.* at 12. One jurisdiction reported inquiring into an arrestee's immigration status "[o]nly on domestic battery and felonies, because on other charges ICE does not respond . . . anymore." *Id.*; *see id.* at 14 (detailing responses indicating ICE's frequent failure to pick up identified criminal aliens).

In March 2008, DHS unveiled its latest program targeting criminal aliens: “Secure Communities.”<sup>55</sup> Although ICE touts an increase of state and local partnership as the “cornerstone” of the “Secure Communities” program, it appears that the real innovation of the program is an effort to increase information sharing between the FBI and DHS:

Leveraging integration technology that shares law enforcement data between federal, state, and local law enforcement agencies, ICE is now able to expand coverage nationwide in a cost effective manner. Interoperability between the Federal Bureau of Investigation’s (FBI’s) Integrated Automated Fingerprint Identification System (IAFIS) and DHS’ Automated Biometric Identification System (IDENT) will help ICE and local law enforcement officers positively identify criminal aliens in prisons and jails.

...

Currently, as part of the routine booking process, local officers submit an arrested person’s fingerprints through FBI databases to access that individual’s criminal history. With interoperability, those fingerprints will also automatically be checked against DHS databases to access immigration history information. The automated process would also notify ICE when fingerprints match those of an immigration violator. ICE officers would conduct follow up interviews and take appropriate action.<sup>56</sup>

Having failed, for some of the reasons mentioned above, to obtain more than ten percent coverage for the IRP in county jails across the country,<sup>57</sup> it appears that ICE will rely on a technological solution that links the FBI and ICE biometric databases rather than on voluntary information sharing between state and federal authorities.<sup>58</sup>

## II. DETAINERS IN PRACTICE

Although the failures of the federal government’s Criminal Alien Program have been attributed to some extent to state–federal non-cooperation, one area in which there appears to have been

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55. *Secure Communities*, *supra* note 18.

56. *Id.*

57. *Id.*

58. *See id.*

general cooperation between state and federal officials is in the processing of immigration detainees.<sup>59</sup> The 2007 OIG survey “disclosed a widespread willingness to accept detainees from ICE,”<sup>60</sup> and to notify ICE before releasing undocumented aliens from custody.<sup>61</sup> Officials in all seven of the local jurisdictions interviewed by the OIG indicated they accept ICE detainees and notify ICE before releasing undocumented aliens.<sup>62</sup> ICE officials similarly reported compliance in the processing of detainees in those seven jurisdictions—even in San Francisco.<sup>63</sup>

To test the subjective reports of state and federal officials, the OIG reviewed the files of seventy-six criminal aliens discharged from state custody in the seven jurisdictions studied, and found overwhelming state compliance with federal immigration detainees.<sup>64</sup> In every instance, state officials timely notified ICE that the alien was in custody and accepted an ICE detainer.<sup>65</sup> In seventy cases, the alien was transferred to ICE custody upon release.<sup>66</sup>

Resistance by state officials to participate in federal immigration enforcement, then, is entirely absent where it concerns the receipt of immigration detainees and notification to ICE prior to release. This is of critical importance for two reasons. First, state cooperation in processing detainees is the *sine qua non* for the Executive’s implementation of its Criminal Alien Program. Second, state nonresistance has allowed the Executive branch to far exceed its congressional authorization for issuing detainees.

Detainers are, by and large, the key mechanism for implementing the federal Criminal Alien Program. In many cases,

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59. See 2007 OIG AUDIT REPORT, *supra* note 29, at 15.

60. *Id.* “Ninety-four of the 99 [jurisdictions responding] reported that they accept such detainees and the 3 that responded negatively added comments indicating that they may have misinterpreted the question as asking about the lodging of ICE prisoners.” *Id.*

61. *Id.* at 15–16. Seventy-eight of ninety-nine jurisdictions responding to the survey indicated they would notify ICE before releasing an undocumented alien from custody. *Id.* Of the jurisdictions that responded negatively to the survey question, it appears at least one would notify ICE if a detainer were placed on the alien. *Id.* at 16 (noting negative response to question of notification, qualified with “unless ICE asks us to”).

62. *Id.* at 19.

63. *Id.* at 18–19.

64. See *id.* at 21.

65. *Id.*

66. *Id.* Of the six aliens not released to ICE custody, five were released to the custody of other jurisdictions, and the sixth was a Cuban who was paroled into the country in lieu of repatriation. *Id.*

the absence of a functioning detainer process would mean criminal aliens would be released from state custody to freedom after serving their sentences. Without detainers, then, ICE would be to a great extent back to square one with respect to apprehension and detention of criminal aliens. There are certainly other mechanisms available to assist in implementing the federal apprehension of criminal aliens. For example, 287(g) agreements permit local officials to make civil immigration arrests of criminal aliens upon their release and transport those aliens to ICE detention centers,<sup>67</sup> and thousands of criminal aliens have reportedly been identified in this way.<sup>68</sup> In addition, under “inter-governmental service agreements” (IGSAs), local jails or prisons can be authorized to house prisoners on behalf of DHS.<sup>69</sup> In some 350 IGSA facilities around the country, transfer of criminal aliens from state custody to DHS custody can be effectuated simply by lodging a form I-203 (order to detain) indicating the transfer of custody.<sup>70</sup> Yet, IGSA

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67. Eleanor Stables, *State, Local Police Slowly Warming to Immigration Enforcement*, AM. RENAISSANCE, Nov. 7, 2007, available at [http://www.amren.com/mt/news/archives/2007/11/state\\_local\\_pol.php](http://www.amren.com/mt/news/archives/2007/11/state_local_pol.php) [hereinafter *State, Local Police*] (“[B]efore releasing inmates at the end of their sentence, 287(g)-authorized officers confirm inmates are illegal immigrants, issue them a court date, and ensure they are not released when their regular prison term ends.”); see also Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 127–29 (2007) (discussing 287(g) agreements with local jails).

68. Arnold, *supra* note 67, at 129 (reporting that in the first eight months of a 287(g) agreement, officials in Los Angeles County placed nearly 3,000 detainees on criminal aliens); see also *State, Local Police*, *supra* note 67 (reporting some 30,000 criminal aliens were identified through 287(g) programs in FY 2006); Eleanor Stables, *ICE Looks to Expand Program That Deports Criminal Illegal Immigrants*, CQ POLITICS, Sept. 14, 2007, available at <http://www.cqpolitics.com/wmspage.cfm?docID=hsnews-000002584744> (reporting 25,000 identifications in fiscal years 2006 and 2007). ICE credits the 287(g) program with “identifying more than 70,000 (since January 2006) individuals, mostly in jails, who are suspected of being in the country illegally.” DELEGATION OF IMMIGRATION AUTHORITY, *supra* note 43.

69. HUMAN RIGHTS WATCH, *LOCKED AWAY: IMMIGRATION DETAINEES IN JAILS IN THE UNITED STATES* 10, *Summary and Recommendations* ch. I (1998), available at <http://www.hrw.org/reports98/us-immig/Ins989-02.htm> (finding, in 1998, that 60 percent of immigration detainees were housed in local jails pursuant to IGSAs); see Aaron Terrazas, *Immigration Enforcement in the United States*, MIGRATION POLICY INSTITUTE, Oct. 2008, available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=697> (reporting IGSAs between DHS and over 350 state and local jails, housing some 65 percent of the detained alien population).

70. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *ICE/DRO DETENTION STANDARD: ADMISSION AND RELEASE § V(E)* (2008), available at [http://www.ice.gov/doclib/PBNDs/pdf/admission\\_and\\_release.pdf](http://www.ice.gov/doclib/PBNDs/pdf/admission_and_release.pdf). The process has been described as follows:

facilities account for only slightly more than ten percent of the local jails and prisons around the country.<sup>71</sup>

If, in the future, DHS can in fact take advantage of technological improvements (“interoperability” with the FBI databases routinely consulted upon booking by local law enforcement officers across the country) to screen every arrest nationwide,<sup>72</sup> then the cooperation of local law enforcement in the *detection* of criminal aliens will be rendered irrelevant. The only need for local cooperation will be in the processing of detainers to allow DHS to *apprehend* and detain criminal aliens in state or local custody.<sup>73</sup>

The acquiescence of state and local officials to the detainer process is thus a prerequisite to the effectiveness of the federal Criminal Alien Program. That state and local officials do not appear prepared to interpose any significant resistance to immigration detainers—in contrast to varying levels of “cooperation” demonstrated with respect to other areas of state–federal interaction on immigration enforcement—is also important because it has given DHS *carte blanche* with respect to detainers.<sup>74</sup> Broadly speaking, what DHS requests, the states will deliver. While this would ordinarily be consistent with the notion that the federal government has plenary power over immigration enforcement,<sup>75</sup> it

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Lieutenant Robert Manley, who supervises intake and release at the Palm Beach County Sheriff's Office, explained the relationship between the federal government and the sheriff's office with respect to ICE holds. When subjects arrive at the jail, federal agents from ICE place in the jail record a form I-247, which is considered a detainer. This document requires the recipient to detain an alien for forty-eight hours after the alien ceases to be in custody on state charges. If a form I-203 is filed, and the alien has been released from state custody, the alien continues to be held and is considered to be in federal custody pending deportation proceedings. At that time, the alien remains in jail as a federal detainee until ICE takes custody of the alien from the sheriff. The jail receives monetary consideration pursuant to a contract with the federal government for holding federal prisoners, which consideration begins to run after the detainee is booked pursuant to the form I-203.

Ricketts v. Palm Beach County Sheriff, 985 So.2d 591, 592 (Fla. Dist. Ct. App. 2008).

71. See *Secure Communities*, *supra* note 18 (reporting that there are about 3,100 local jails around the country where criminal aliens might be found).

72. See *id.* “ICE estimates that it may take up to two years to develop an automated process to search and prioritize leads from Interoperability based on the levels of criminality.” *Id.*

73. See *id.*

74. See *id.*; 2007 OIG AUDIT REPORT, *supra* note 29, at 21.

75. See generally, Michael J. Wishnie, *Immigrants and the Right to Petition*, 78

has troubling implications here where the Executive branch wrongly insists upon a “general authority . . . to detain any individual subject to exclusion or deportation proceedings.”<sup>76</sup>

Before examining the flaws in this legal position, it is important to see how DHS uses detainers in practice. It appears the detainer practice is widespread and is rapidly expanding as ICE seeks to widen its Criminal Alien Program.<sup>77</sup>

A. *Who initiates the detainer process?*

DHS describes the Criminal Alien Program as consisting of teams which “respond to local law enforcement agencies’ requests to determine the alienage of individuals arrested for crimes and other immigration violators as resources permit.”<sup>78</sup> But it appears DHS initiates the placing of a detainer in certain instances, and is not limited solely to responding to local law enforcement agencies’ requests.<sup>79</sup> ICE agents routinely “screen” state prison and local jail populations for criminal aliens<sup>80</sup> in a manner that does not appear to be responsive to local law enforcement requests concerning specific individuals.<sup>81</sup> Some agencies surveyed in the 2007 OIG

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N.Y.U. L. REV. 667, 739–41 (2003) (discussing plenary power doctrine).

76. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406-01 (Aug. 17, 1994) (to be codified at 8 C.F.R. pts. 242 and 287).

77. See *Secure Communities*, *supra* note 18 (noting ICE Criminal Alien Program teams identified 67,000 more incarcerated criminal aliens in FY 2007 than in FY 2006); see also Brandon Formby, *Irving Thrust into U.S. Spotlight by Many ICE Arrests: Mayor Calls it “Example” for Others; Opponents See Racial Profiling*, DALLAS MORNING NEWS, Oct. 12, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/101307dnmetirvspotlight.2d72e60.html> (reporting “[a] recent spike in the number of detainers placed on Irving [Texas] arrestees” after local law enforcement began participating in ICE Criminal Alien Program); Brandon Formby & Scott Farwell, *Opposing Groups Rally in Irving over Criminal Alien Program Deportations*, DALLAS MORNING NEWS, Oct. 14, 2007, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/101407dnmetirvrally.168b5d56f.html> (noting rise in ICE detainers nationwide, with 7,138 detainers reported in October 2006 and 18,628 in August 2007); Michelle Pirraglia, *Suffolk’s Criminal Alien Program Nets Results*, SUFFOLK LIFE, Feb. 7, 2007, available at <http://www.freerepublic.com/focus/f-news/1781151/posts> (reporting rise in aliens “handed over to ICE” from Suffolk County, New York—from 141 in 2005, to 376 in 2006, and 42 in January 2007 alone).

78. See *Secure Communities*, *supra* note 18.

79. See *id.*

80. *Id.*

81. See, e.g., *State v. Reyes-Armenta*, No. M2004-00419-CCA-R3-CD, 2004 WL 2804898, at \*2 (Tenn. Crim. App. 2004) (stating that “[t]he codefendants were then taken to the Sumner County Jail for processing. The officers had made no attempt to contact federal immigration officials; however, Agent Robert Kinghorn,

audit accordingly indicated they do *not* inform ICE when they believe they have an undocumented alien in custody, because “ICE agents come to the state or local institution to review files, which . . . obviate[s] the need to inform ICE.”<sup>82</sup>

*B. When are detainees placed?*

Given the Executive’s goal of identifying criminal aliens at the earliest possible stages of the criminal process and adjudicating immigration status before the expiration of a criminal alien’s state prison or jail sentence,<sup>83</sup> it is not surprising that DHS’s practice appears to be to place a detainer as soon as DHS learns of a potentially deportable prisoner—in many cases *before* conviction, close in time to the alien’s arrest.

Reported practices in Suffolk County, a jurisdiction that willingly cooperates with DHS’s Criminal Alien Program,<sup>84</sup> are likely typical.<sup>85</sup> Local law enforcement officials attempt to obtain immigration status information immediately after arrest and during

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an immigration officer, happened to be at the Sumner County jail and issued detainees on the defendants.”).

82. 2007 OIG AUDIT REPORT, *supra* note 29, at vi. An example of a jurisdiction in which detainees are not initiated by a request from local law enforcement is Yamhill County, Oregon. Although ICE “asked [Yamhill County officials] to fax them every time a foreign-born person was booked in [the] jail,” Yamhill County declined the invitation, apparently because of a local policy which would prevent the sheriff’s office from notifying ICE. Amanda Newman, *Immigration and Law Enforcement: Who’s Illegal?*, NEWBURG GRAPHIC, Sept. 19, 2007, available at <http://www.newberg-graphic.com/news/NewsStory2.htm>. Nonetheless, ICE agents “routinely search inmate rosters throughout the country, running names and numbers against a database to identify possible illegal aliens” and, despite the absence of a request from local officials, visit the Yamhill County Jail “one or two days per week to conduct interviews and follow-up interviews as needed . . . .” *Id.* ICE detainees were reported to have been placed on three inmates at the time of the article. *Id.*; see also Lou Kilzer, *Feds to Check City Jail List: Immigration Agency Will Look for Illegals Arrested in Denver*, ROCKY MOUNTAIN NEWS, May 20, 2005, (reporting similar procedures in place in Denver, Colorado).

83. See *supra* note 18 and accompanying text.

84. Pirraglia, *Suffolk’s Criminal Alien Program Nets Results*, *supra* note 77.

85. Reported judicial decisions are not particularly likely to disclose detainer practices, but cases can certainly be found that indicate DHS’s practice of issuing detainees before conviction. See, e.g., *State v. Sanchez*, 853 N.E.2d 283, 285 (Ohio 2006); *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591, 592 (Fla. Dist. Ct. App. 2008); *People v. Sanduvac*, No. C149212, 2007 WL 3054372, at \*5 n.4 (Cal. Ct. App. Oct. 19, 2007); *In re Weems*, No. M2006-00652-CCA-R3-CD, 2007 WL 2164150, at \*1 (Tenn. Crim. App. Jan. 6, 2007); *City of Xenia v. Diaz*, No. 2003-CA-25, 2003 WL 22972039, at \*1 (Ohio Ct. App. Dec. 19, 2003); *People v. Gonzales*, 745 P.2d 263, 264 (Colo. Ct. App. 1987).

the booking process.<sup>86</sup> After further investigation, local officials submit a list of names to ICE, which issues detainers, typically within hours or days before the alien has seen a judge or had bail set on the criminal charges.<sup>87</sup>

*C. In what cases are detainers placed?*

It appears ICE lodges detainers indiscriminately, regardless of the criminal charges an alien is facing.<sup>88</sup> ICE practices in Irving, Texas are emblematic of the current administration's widespread use of its purported immigration detainer authority. In September 2006, local officials took up ICE's invitation to participate in the Criminal Alien Program, and commenced a "24/7 Criminal Alien Program," which permitted ICE to conduct "routine" telephone interviews with inmates of the local jail to determine their immigration status.<sup>89</sup> Over a thirteen-month period, some 1,638 immigration holds were placed in Irving. The vast majority of these cases involved misdemeanor charges,<sup>90</sup> and a significant number of the cases did not involve controlled substance offenses.<sup>91</sup>

*D. When does ICE obtain custody of those held on detainers?*

Whether ICE routinely takes custody of aliens under detainer within the period set forth in regulations is a question that calls for further empirical study. In *Ochoa v. Bass*,<sup>92</sup> the Oklahoma Court of Criminal Appeals discussed the issue. The case involved two men

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86. Michelle Pirraglia, *Criminal Alien Program Launched*, SUFFOLK LIFE, Nov. 22, 2006.

87. *Id.*

88. Save for *In re Weems*, each of the cases cited in note 86, *supra*, involved a detainer placed on an alien *not* facing controlled substance charges. This is significant because, as is discussed below, *see* Part IV, *infra*, statutory authority for immigration detainers is limited to cases involving controlled substance arrests. *See infra* note 104 and accompanying text.

89. Sergio Chapa, *Irving Illegal Immigrants' Charges are mostly Misdemeanors*, AL DIA (Dallas), Oct. 11, 2007, [http://www.dallasnews.com/sharedcontent/dws/news/local\\_news/stories/101107dnmetirimmig.31ec7c4.html](http://www.dallasnews.com/sharedcontent/dws/news/local_news/stories/101107dnmetirimmig.31ec7c4.html)

90. Only nine percent of those held on detainers were charged with felonies. *Id.*

91. Over ten percent of the aliens held on detainers were arrested for driving without a license or with a suspended or invalid license, and over 16 percent were held for drunk driving or public intoxication. Chapa, *supra* note 89. Over 60 percent were held for various misdemeanors, a group defined to include both drug offenses and non-drug offenses. *Id.*

92. 181 P.3d 727 (Okla. Crim. App. 2008).

who appeared before state District Judge Jerry D. Bass on November 9, 2007, in separate criminal matters. Judge Bass disposed of each criminal case by imposing a suspended sentence of imprisonment, but nonetheless remanded the men to the custody of the local sheriff “as being illegal aliens,” and directed the sheriff to contact immigration authorities.<sup>93</sup> ICE filed detainers for the two men but failed to pick them up within the time limit imposed by regulations, and apparently *never* obtained custody.<sup>94</sup> The Oklahoma Court of Criminal Appeals ordered the release of the two men on February 7, 2008, after some three months of illegal detention.<sup>95</sup> The court ultimately held: “Once the forty-eight (48) hour period granted to ICE, by 8 C.F.R. § 287.7(d) (2007), for assumption of custody had lapsed without ICE taking any action on its detainers, the State no longer had authority to continue to hold Petitioners.”<sup>96</sup>

Aside from *Ochoa*, there is a dearth of reported cases concerning the time limits of section 287.7. While it is tempting to speculate that this signifies ICE’s widespread compliance with those time limits,<sup>97</sup> this may not be so, because in the typical case involving detention in excess of the 48-hour limit set by the regulation, an enforcement action will quickly be rendered moot and there will be no reported decision.<sup>98</sup>

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93. *Id.* at 729.

94. *Id.* at 730.

95. *Id.* at 734 n.14.

96. *Id.* at 733.

97. The 2007 OIG AUDIT REPORT, *supra* note 29. The report documents ICE’s timely assumption of custody of aliens under detainer and provides some evidence of ICE’s compliance with regulatory time limits. *Id.* at 21–22.

98. *Ochoa* was an unusual case, in that the criminal judge initiated the immigration enforcement action—the judge directly ordered the sheriff to take the two aliens into custody and contact immigration. *Ochoa*, 181 P.3d at 729–30. Even after ICE failed to take custody of the two men, the local sheriff acted out of a sense of duty to the local judge, “refus[ing] to release Petitioners due solely to Judge Bass’s detention orders.” *Id.* at 730.

A more usual case might have been presented had ICE issued detainers for the two men while their criminal charges were pending, and then failed to take custody of the men after Judge Bass ordered suspended sentences for the two men, thereby otherwise releasing them from state custody on the criminal matters. In such circumstances, filing a petition for writ of habeas corpus would likely produce one of two outcomes.

First, ICE might take custody promptly upon the filing of the petitions, if ICE were truly interested in pursuing immigration proceedings. This is exactly what happened in *Baez v. Hamilton County, Ohio*, where the petitioner finished serving his state sentence on September 28, 2007, remained in the custody of the local sheriff pursuant to an ICE detainer, and filed a petition for writ of habeas

The tension that arises between state and federal officials with respect to detainers may be one reason the 48-hour rule is violated in practice. Where state or local officials and federal immigration officers each have an interest in an alien, financial interests cause each agency to attempt to divest itself of custody over the alien. Federal immigration authorities, for example, have long sought to enhance the Institutional Hearing Program to provide for the *completion* of immigration proceedings before the alien ever leaves state or local custody.<sup>99</sup> Meanwhile, state and local officials, who receive SCAAP reimbursements of pennies on the dollar for funds spent incarcerating immigration violators, will make every effort to arrange for the release of aliens to DHS.<sup>100</sup> The contest between state and federal officials to see who can avoid paying detention costs for criminal aliens may well result in DHS not timely assuming custody over detainees.<sup>101</sup> But whether detainers are being timely

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corpus on October 2, 2007. No. 1:07cv821, 2008 WL 161240, at \*1 (S.D. Ohio Jan. 15, 2008). He was released later that afternoon to the custody of ICE. *Id.*

Second, ICE might decline custody, and the local sheriff (having no other authority than the immigration detainer for holding the men) would release the petitioners. This *may* be what happened in *Lopez-Santos v. State of Arkansas and Benton County Sheriff's Department*, where the petitioner sought release from the local jail, alleging he was being illegally detained on a putative ICE "hold." Petition for Writ of Habeas Corpus of Petitioner at 2, *Lopez-Santos v. State of Arkansas*, No. 5:08-CV-05030-JLH (W.D. Ark. 2008). The district court dismissed the case because "the Petitioner does not appear to be detained in the Benton County Detention Center at this time." Order at 1, *Lopez-Santos v. Arkansas*, No. 5:08-CV-05030-JLH (W.D. Ark. 2008). While this might be another case where ICE assumed custody, it might also be that the local jail simply released the petitioner.

In either event the case would likely be dismissed as moot. *See Baez*, 2008 WL 161240, at \*1, \*4 (dismissing as moot); *see also Lopez-Santos*, Order at 1 (dismissing as moot).

99. *See supra* notes 16-17 and accompanying text.

100. One local sheriff said: "We don't want them sitting in jail for a minor charge, waiting for their court date." Pirraglia, *Criminal Alien Program Launched*, *supra* note 86.

The sheriff also noted that, once the accused goes before the judge, deals could be made to expedite the process even further, "Maybe the judge can give him time served, so we can get him out of our system immediately." Setting low bail would also be another way to get illegals to ICE quickly. "Once they post bail, and the feds have a detainer on him, we can call the feds immediately and hold onto the guy," he noted. *Id.*

101. The incentives may be complicated by other factors. In Frederick County, Maryland, for example, there is a 287(g) agreement in place along with an Intergovernmental Service Agreement (IGSA) whereby immigration detainees are housed in the local detention facility. Nicholas C. Stern, *Sheriff updates county on ICE action*, THE FREDERICK NEWS-POST, Oct. 17, 2008, available at [http://www.fredericknewspost.com/sections/storyTools/print\\_story.htm?storyID=81545&cameFromSection=news](http://www.fredericknewspost.com/sections/storyTools/print_story.htm?storyID=81545&cameFromSection=news) The Sheriff reports it costs about \$7 a day to house an

processed by DHS is a question ripe for empirical study.

### III. AUTHORITY TO ISSUE IMMIGRATION DETAINERS – ACTUAL AND IMAGINED

Congress's statutory grant of authority to issue detainers in immigration matters is closely linked to America's "War on Drugs." In a subtitle of the Anti-Drug Abuse Act of 1986 titled the "Narcotics Traffickers Deportation Act,"<sup>102</sup> Congress granted its only explicit authorization for immigration detainers. The statute provides:

*Detainer of aliens for violation of controlled substances laws.*

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—

- (1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
- (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
- (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer.

If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.<sup>103</sup>

Curiously, the practice of the Executive branch issuing immigration detainers long predates Congress's explicit grant of statutory authority. In cases as far back as 1950, the subjects of INS detainers have raised questions concerning this restraint on liberty.<sup>104</sup> The INS's form detainer (Form I-247 "Immigration

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immigration detainee; under the IGSA, they get paid about \$95 a day. *Id.* Thus, local immigration enforcement and detention is a profitable business—as described by the Sheriff, "the kind of thing we need in a tight economy." *Id.*

102. Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207 (1986).

103. Immigration and Nationality Act § 287(d), 8 U.S.C. § 1357(d) (2006).

104. *E.g.*, Slavik v. Miller, 89 F. Supp. 575 (W.D. Pa. 1950), *aff'd* 184 F.2d 575

Detainer–Notice of Action”) dates back at least to 1983, years before congressional authorization for immigration detainers.<sup>105</sup> The INS also appears to have engaged in the practice of simply serving a copy of the “Order to Show Cause”—then the charging document in an immigration proceeding—on the prison warden where the alleged undocumented immigrant was housed.<sup>106</sup>

The Anti-Drug Abuse Act (ADAA) of 1986 thus posed a problem for the INS—despite the Service’s longstanding assertion (through its practices) of a broad authority to issue detainers, the 1986 Act seemed clearly to narrow any grant of detainer authority. The INS’s response was ultimately to promulgate regulations consistent with its historical practice, and far in excess of Congress’s authorization.

Shortly after passage of the ADAA of 1986, the INS put in place interim regulations addressing the procedure for issuing detainers. With these regulations, the INS purported to implement not only the ADAA’s provisions but also provisions of the Immigration Reform and Control Act (IRCA) of 1986.<sup>107</sup> IRCA, however, did not specifically authorize the INS to issue detainers. Nonetheless, the INS proceeded from IRCA’s command “that the Attorney General must expeditiously commence deportation proceedings against an alien upon conviction of an offense for which he or she is rendered amenable to deportation from the United States,”<sup>108</sup> and responded with regulations that authorized

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(3d Cir. 1950), *cert. denied*, 340 U.S. 955 (1951); *Chung Young Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962); *In re Lehder*, 15 I. & N. Dec. 159 (BIA 1975). The legality of immigration detainers as a general matter does not appear to have been decided. In *Slavik* and *Chung Young Chew*, the courts held, as a procedural matter, that individuals against whom an immigration detainer was placed while serving a state prison sentence were in the technical custody of INS. *Slavik*, 89 F. Supp. at 576; *Chung Young Chew*, 309 F.2d at 861. *Lehder* presents the current prevailing view—before expiration of the criminal sentence under which an alien is held, immigration authorities do not have custody for purposes of a habeas corpus proceeding. *In re Lehder*, 15 I. & N. Dec. at 161; *see also Zolicoffer v. U.S. Dep’t of Justice*, 315 F.3d 538 (5th Cir. 2003).

105. Immigration Forms, 54 Fed. Reg. 39336-02, 39337 (Sept. 26, 1989) (to be codified at 8 C.F.R. pt. 299) (referring to Form I-247 with date of Mar. 1, 1983); Jonathan E. Stempel, Note, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers over Imprisoned Aliens*, 14 FORDHAM INT’L L.J. 741, 742 n.10 (1990/1991) (including a copy of the Form I-247 reproduced at Appendix A of the Note).

106. *E.g.*, *Fernandez-Collado v. I.N.S.*, 644 F. Supp. 741, 742 (D. Conn. 1986); *see Stempel, supra* note 105, at 742 n.11.

107. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

108. Immigration and Naturalization Service, 52 Fed. Reg. 16370-01, 16371

the filing of detainers “against any alien amenable to proceedings under any provision of the law.”<sup>109</sup>

The regulations purportedly implementing IRCA were lodged in part 242 of title 8. Meanwhile, in part 287, the INS placed regulations implementing the ADAA’s statutory detainer scheme. In contrast to the sweeping grant of detainer authority embodied in part 242’s regulations, those in part 287 more carefully tied the detainer authority to Congress’s grant of authority in the ADAA.<sup>110</sup>

In putting in place these interim regulations following the ADAA of 1986 and IRCA, the INS professed a desire to “ensure that Service operations are conducted in a manner consistent with the Congressional intent of both Acts.”<sup>111</sup> Certainly, the regulations in part 242 track IRCA’s command to “expeditiously commence deportation proceedings against an alien upon conviction.”<sup>112</sup> Though finding detainer authority where none was granted, the authority embodied in the part 242 regulations could be reasonably read as limited to cases of convicted aliens. Additionally, the regulations in part 287 hew closely to the ADAA.<sup>113</sup> In short order, however, the differences between the two parts dissolved and the regulations came to embody the generally unbound detainer practice the INS had enjoyed before the ADAA.

In the final version of the regulations, specific references to the enabling statutes were removed, and the language of the detainer regulations in part 242 was identical to that used in part 287.<sup>114</sup> The INS described the regulations of part 242 as a

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(May 5, 1987) (to be codified at 8 C.F.R. pt. 242) (quoting Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3359 (1986)).

109. 8 C.F.R. § 242.2(a)(2) (1987).

110. 8 C.F.R. § 287.7(b)(1) (1987) (“In complying with the provisions of section 287(d)(3) of the Act, an officer of the Service shall not issue a detainer against an alien unless the alien is amenable to deportation proceedings under any provision of law at the time the detainer is issued.”).

111. Immigration and Naturalization Service, 52 Fed. Reg. 16370-01, 16370 (May 5, 1987) (to be codified at 8 C.F.R. pt. 242).

112. The regulations specified what would constitute a “conviction” and what would amount to “commenc[ing] [deportation] proceedings.” 8 C.F.R. § 242.2(g) (1987). Additionally, the regulations specifically referred to IRCA’s amendments by referencing section 242(i) of the Immigration and Nationality Act. 8 C.F.R. § 242.2(a)(3) (1988).

113. The regulations defined the terms “arrested,” “law enforcement official (or another official),” and “controlled substance,” all of which are found in the ADAA. 8 C.F.R. § 287.1 (1988). The regulations also specifically referred to the ADAA by referencing section 287(d)(3) of the Immigration and Nationality Act. 8 C.F.R. § 287.7(c) (1987).

114. Immigration and Naturalization Service, 53 Fed. Reg. 9281-01 (Mar. 22,

“codif[ication of] the authority of the Service to issue detainers.”<sup>115</sup> In 1994, responding to comments that the regulations went far beyond the limited statutory authority for issuing immigration detainers—that embodied in the Anti-Drug Abuse Act of 1986—the INS made clear that the regulations in parts 242 and 287 were meant to embody the general detainer practice of the pre-ADAA era:

The commenters stated that the authority for issuance of detainers in §§ 242.2(a)(1) and 287.7(a)(1) of the proposed rule was overly broad because the authority to issue detainers is limited by section 287(d) of the Act to persons arrested for controlled substances offenses. This comment overlooked the general authority of the Service to detain any individual subject to exclusion or deportation proceedings. See 8 U.S.C. 1225(b), 1252(a)(1). *The detainer authority of these sections of the proposed rule were promulgated pursuant to this general authority.* The statutory provision cited by the commenters places special requirements on the Service regarding the detention of individuals arrested for controlled substance offenses, but does not delimit the general detainer authority of the Service.<sup>116</sup>

The INS thus rewrote history, ignoring the ancestry of the detainer regulations in parts 242 and 287—the ADAA and IRCA of 1986. Having eliminated any differences between the two parts, the INS removed part 242 in 1997 and reserved it for future use.<sup>117</sup> Part 287—originally tied to the ADAA—now stands as the sole set of regulations on detainers, and in the INS’s view codifies the pre-ADAA “general detainer authority of the Service.”<sup>118</sup>

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1988) (to be codified at 8 C.F.R. pt. 242).

115. *Id.* at 9282.

116. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42,406, 42,411 (Aug. 17, 1994) (to be codified at 8 C.F.R. pt. 242) (emphasis added).

117. Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312-01 (Mar. 6, 1997) (to be codified in scattered sections of 8 C.F.R.).

118. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406-01 (Aug. 17, 1994) (to be codified at 8 C.F.R. pts. 242 and 287).

#### IV. DHS GROSSLY EXCEEDS THE LIMITS OF ITS AUTHORITY TO ISSUE DETAINERS

DHS routinely exceeds Congress's explicit grant of authority in two ways—by lodging immigration detainees without an initiating request from local law enforcement officials, and by placing detainees on persons who have not been arrested for controlled substance offenses.<sup>119</sup>

*A. DHS exceeds Congress's statutory grant of detainer authority by initiating the detainer process rather than waiting for local law enforcement officials to request a detainer.*

The plain language of the Narcotics Traffickers Deportation Act (NTDA)—that portion of the ADAA of 1986 in which Congress authorized the issuance of immigration detainees—requires the immigration detainer process to be initiated from outside DHS. The two necessary steps for the issuance of a detainer are: first, a “Federal, State, or local law enforcement official,” makes an arrest for a controlled substance offense; and second, “*the* official (or another official) . . . requests the Service to determine promptly whether or not to issue a detainer. . . .”<sup>120</sup>

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119. Further claims may arise with respect to the “48-hour” rule embodied in the regulation concerning detainees. First, as noted above, it is not clear whether DHS regularly complies with the timing provisions of the detainer regulation. Second, the regulation may be infirm in that it allows for prolonged detention without a determination of probable cause. Commentators have persuasively argued that regulations establishing procedures following warrantless arrests by the immigration authorities fail the Fourth Amendment's requirement of prompt review to establish probable cause by a neutral examiner. Shirley Huey et al., *Administrative Comment – Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 402–11 (2000-01); *but see* Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663, at \*46 (E.D.N.Y. June 14, 2006) (“[T]he application of *County of Riverside's* 48-hour rule to this context is certainly not clearly established”). The regulations on detainees do not require DHS to establish probable cause *before* issuing a detainer. 8 C.F.R. § 287.7(a) (2002) (“Any authorized Service officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency.”); *but see* 8 C.F.R. § 287.7(c) (2002) (requiring state or local law enforcement agencies to provide documentation to DHS “[i]n order for the Service to accurately determine the propriety of issuing a detainer”). The regulations allow for a period of 48 hours, *not including weekends and holidays*, before ICE must assume custody of an alien held by state or local officials. 8 C.F.R. § 287.7(d). The exclusion of weekends and holidays from the 48 hours for probable cause hearings was held presumptively unreasonable in *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

120. INA § 287(d) (2008), 8 U.S.C. § 1357(d) (2006) (emphasis added).

The regulation, however, ignores the statutory language specifying how detainers are initiated, instead giving broad authority to DHS: “Any authorized Service officer may at any time issue a Form I-247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency.”<sup>121</sup>

It might conceivably be argued that “authorized immigration officers” under the regulation enjoy statutory authority to initiate detainers because the statute allows detainers to be initiated not only by the arresting official, but also by “another official.” This argument fails for three reasons.

First, the phrase “another official” must be construed, under ordinary canons of statutory interpretation, to mean another official similar to the arresting official. The principle of *ejusdem generis* means that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”<sup>122</sup> To read “the official (or another official)” as broadly permitting *any* official to initiate the detainer process would require reading the words “another official” so broadly as to render the words “the official” surplusage.<sup>123</sup> Congress might as well have written the statute to allow “any official” to initiate the detainer process. Instead, Congress likely recognized that as a practical matter it might make sense for a law enforcement official other than the arresting officer—another officer on the same police force, for example, or a booking officer at the local jail—to initiate the detainer process.

Second, the structure of the NTDA makes clear that the “official” who must initiate the detainer request is *outside* DHS. The

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121. 8 C.F.R. § 287.7(a) (2002).

122. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (quoting 2A NORMAN J. SINGER, *SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION* § 47.17 (1991)).

123. In *Circuit City Stores*, the Court considered section 1 of the Federal Arbitration Act, which excludes from the Act’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2006). The Court rejected a broad reading of the last clause: “Construing the residual phrase to exclude all employment contracts fails to give independent effect to the statute’s enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases ‘seamen’ and ‘railroad employees’ if those same classes of workers were subsumed within the meaning of the ‘engaged in . . . commerce’ residual clause.” *Circuit City Stores*, 532 U.S. at 114. The same logic applies here.

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initiating *official* must “expeditiously inform[] an appropriate *officer or employee* of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien.”<sup>124</sup> The distinction between federal, state and local law enforcement *officials* and *officers or employees* of the INS is maintained throughout the statute. Congress clearly intended the initiation of detainers to begin with the arresting law enforcement agency.

There are substantial reasons why Congress may have structured the NTDA to authorize state and local law enforcement agencies—and not DHS officers or employees—to initiate the detainer process.

First, Congress may have allocated control over the initiation of immigration detainers to local law enforcement agencies to draw on those agencies’ expertise in criminal matters. The NTDA was passed to further the “War on Drugs,” and it makes sense that Congress delegated enforcement priorities to the soldiers on the front lines—law enforcement officers making controlled substance arrests. The NTDA grants discretion to law enforcement agents to request an immigration detainer, indicating a practical recognition that it is simply not possible to deport all non-citizens charged with drug offenses. Law enforcement agents making drug arrests are in a better position than federal immigration officials to evaluate the seriousness of the criminal conduct and exercise sensible discretion as to which drug arrestees ought to be selected for immigration enforcement.

Second, Congress may have given state and local officials the authority to initiate the detainer process as a matter of comity. Congress provided for reimbursement to states under SCAAP, recognizing the burdens on states caused by the federal government’s immigration enforcement failures.<sup>125</sup> Similarly, Congress may have recognized that processing immigration detainers imposed a burden on the states, and accordingly left the decision to initiate detainers on state and local officials, to allow them some control over the burdens of participation in immigration enforcement.

Third, Congress likely allocated the authority to initiate the detainer process to state and local officials because there is a

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124. INA § 287(d), 8 U.S.C. § 1357(d) (2006) (emphasis added).

125. See *supra* notes 30-36 and accompanying text. See also H.R. REP. NO. 103-645 (1994). Of course, the NTDA predated Congress’s implementation of SCAAP.

substantial question—deserving of further study—as to whether Congress could lawfully authorize a federal administrative agency to unilaterally issue detainers for state prisoners.

In federal criminal cases, the court may obtain the presence of a state prisoner in either of two ways—via the Interstate Agreement on Detainers (IAD),<sup>126</sup> or by means of a writ of habeas corpus *ad prosequendum*.<sup>127</sup> The two procedures are quite different.<sup>128</sup> The writ of habeas corpus commands the state custodian to immediately produce the prisoner in federal court, while a detainer merely serves as a “notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction.”<sup>129</sup> The IAD, however, additionally includes provisions intended to facilitate expeditious processing of detainers before expiration of a prisoner’s sentence.

Neither procedure would ordinarily be available to an administrative agency such as DHS, and it is uncertain whether Congress could give DHS such power. The IAD is an interstate compact to which Congress has, with its approval, lent the force of federal law,<sup>130</sup> but which does not, by its terms, apply to DHS civil immigration proceedings.<sup>131</sup> The IAD is a multi-jurisdictional agreement that requires the participating states to grant certain privileges to all other participants (such as the ability to obtain a prisoner’s presence for adjudication of a criminal case) in exchange for receiving reciprocal privileges from those other participants.<sup>132</sup> Congress could not unilaterally grant to a single jurisdiction the powers vested in the IAD, and it is unlikely

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126. 18 U.S.C. app. § 2.

127. See *United States v. Mauro*, 436 U.S. 340 (1978) (discussing both Interstate Agreement on Detainers and writ of habeas corpus *ad prosequendum*).

128. *Id.* at 358 (“The role and functioning of the *ad prosequendum* writ are rooted in history, and they bear little resemblance to the typical detainer which activates the provisions of the [Interstate] Agreement.”).

129. *Id.* at 359 (citation omitted).

130. See Leslie W. Abramson, *The Interstate Agreement on Detainers: Narrowing its Availability and Applications*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 5–6 (1995).

131. See *United States v. Gonzalez-Mendoza*, 985 F.2d 1014, 1016 (9th Cir. 1993) (holding that the IAD applies only to pending *criminal* charges in another jurisdiction and that “the courts have declined to treat deportation as a criminal proceeding”).

132. See Note, *The Compact Clause and the Regional Greenhouse Gas Initiative*, 120 HARV. L. REV. 1958, 1969–71 (2007) (discussing the nature of interstate compacts).

Congress could unilaterally grant detainer power to DHS for the same reason.<sup>133</sup>

The power to issue a writ of habeas corpus *ad prosequendum* is bestowed upon the federal district courts by Congress.<sup>134</sup> Whether Congress could bestow a like power upon an administrative agency is a question worthy of study. By the language of the NTDA, however, it is apparent that Congress did not intend to give DHS the power to issue writs of habeas corpus *ad prosequendum*, but rather to give DHS the ability to secure the presence of an alien through a detainer similar to those employed in criminal matters under the IAD. The state and local governments affected by DHS detainees have not, of course, joined a compact which would assure them mutual privileges and obligations. Accordingly, Congress drafted the NTDA to require state and local law enforcement to *consent* to the placing of each detainer, by initiating the detainer process.<sup>135</sup>

DHS's practice of screening jail and prison rosters and *sua sponte* issuing detainees, without the request of a local law enforcement agency, is contrary to the NTDA. To the extent the detainer regulation purports to empower immigration officers to issue detainees "at any time," without prompting by state or local officials,<sup>136</sup> the regulation exceeds the authority granted by Congress.

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133. To the extent a detainer serves as nothing more than notification of DHS's desire to take custody of a state prisoner at the conclusion of her sentence, it does not appear to impinge upon the rights of the state. But the regulations implementing the NTDA state that "for an alien not otherwise detained" by a local agency, "such agency *shall* maintain custody of the alien . . . in order to permit assumption of custody by the Department." 8 C.F.R. § 287.7(d) (2002) (emphasis added).

134. See generally *Carbo v. United States*, 364 U.S. 611 (1961). The Suspension Clause of the Constitution pertains not to the writ of habeas corpus *ad prosequendum*, but rather to the writ of habeas corpus *ad subjiciendum*, which is the writ that tests the validity of a prisoner's restraint. *Id.* at 614–15.

135. In 2005, Representative Charles Norwood (R-Georgia) proposed an expansion of the IRP which would include authorization for *state and local* law-enforcement officers to "issue a detainer that would allow aliens who have served a State prison sentence to be detained by the State prison until personnel from U.S. Immigration and Customs Enforcement can take the alien into custody." H.R. REP. NO. 109-350 at 27 (2005) (proposed amendment to H.R. 4437 § 214). It is noteworthy that Representative Norwood did not suggest DHS be authorized to issue a detainer binding upon state and local entities.

136. 8 C.F.R. § 287.7(a) (2008).

*B. DHS exceeds Congress's statutory grant of detainer authority by placing detainees on individuals who have not been arrested for controlled substance offenses.*

Although DHS's statutory grant of authority for issuing detainees is strictly limited to aliens arrested for controlled substance offenses, DHS routinely places detainees against aliens who were *not* arrested for controlled substance offenses. It does so pursuant to regulations initially passed to implement the NTDA, but subsequently interpreted by the INS to have been a codification of a hitherto unspecified "general authority of the Service to detain any individual subject to exclusion or deportation proceedings."<sup>137</sup> These regulations exceed the statutory authorization of Congress and are *ultra vires*.

The notion that DHS's "general authority" to detain supports an expansive power to issue detainees is fatally flawed. Similar logic would lead to the conclusion that immigration judges have the power to issue writs of habeas corpus ad prosequendum, by virtue of their authority to adjudicate—but even federal district judges lack such authority absent a statutory grant by Congress.<sup>138</sup> Similar logic would also lead to the conclusion that DHS has unlimited subpoena power, by virtue of its broad investigatory powers—yet it is clear that DHS's subpoena power derives from Congress and not from any inherent investigatory powers.<sup>139</sup> As with these other procedural mechanisms for compelling the presence of witnesses, the authority to issue detainees must flow from a statutory grant of authority.<sup>140</sup>

Were the Executive branch empowered to issue detainees pursuant to a "general authority" to detain, the NTDA's explicit grant of authority to issue detainees for aliens arrested for

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137. Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406-01 (Aug. 17, 1994) (to be codified at 8 C.F.R. pt. 242, 287).

138. See *United States v. Mauro*, 436 U.S. 340, 360 (1978).

139. See *United States v. Minker*, 350 U.S. 179, 183 (1956) (Congress's grant of power to INS to subpoena "witnesses" did not extend to include respondents in denaturalization proceedings); *Peters v. United States*, 853 F.2d 692, 696 (9th Cir. 1988) (stating "[t]he authority of an administrative agency to issue subpoenas for investigatory purposes is created solely by statute.").

140. As is shown above, see *supra* note 134 and accompanying text, it is unlikely that Congress could have authorized DHS to exercise unilateral detainer power over the States.

controlled substance offenses would be superfluous. Even assuming the correctness of the proposition that Congress granting the Executive branch “general authority” to detain also implicitly authorized the issuance of detainers to effectuate that “general authority,” that broad implicit authorization could not survive the NTDA, in which Congress granted a specific, narrow detainer authority.<sup>141</sup>

The decision by Congress to limit detainers to cases involving controlled substance offenses was a reasoned policy decision. Because Congress had not previously authorized the issuance of immigration detainers, it made sense for Congress to begin by granting limited authority. Furthermore, given the scope of the criminal alien “problem,” and the limited resources available for immigration enforcement, it would have been appropriate for Congress to set priorities—and to attempt to limit the burden on state and local agencies that would be occasioned by an unlimited use of detainers. It also was typical of the times that Congress—in the midst of a national “War on Drugs”—should have singled out drug offenders as the most appropriate targets of enforcement efforts.

The Executive’s assertion of a broad authority to issue detainers, then, does not square with Congress’s limited statutory grant of authority, and is in fact inconsistent with Congress’s policy decisions. Furthermore, the regulations do not appear to support the Executive’s assertion of authority.

The argument that the present regulations authorizing detainers implement a “general authority” to detain is inconsistent with the history of the regulations. There were no regulations authorizing the INS to issue immigration detainers prior to the

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141. As the Court wrote in *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000):

At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” *United States v. Fausto*, 484 U.S. 439, 453 (1988). This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.” 523 U.S. 517, 530–531 (1998).

passage of the ADAA and IRCA in 1986. Following those enactments, regulations were added authorizing the issuance of detainees—part 287 pursuant to ADAA, and part 242 pursuant to IRCA.<sup>142</sup> The INS was quite clear that the regulations were meant to implement the ADAA and IRCA.<sup>143</sup> Only after receiving comments complaining that the regulations went far beyond the statutory authorization did the Executive branch claim that those regulations specifically enacted to implement the NTDA were in fact enacted to implement the Executive’s “general authority” to detain. The claim is disingenuous and completely devoid of historical support.

DHS’s routine practice of placing detainees on persons not arrested for controlled substance offenses is unsupported by statutory authority. Even if one assumes: (a) the validity of the regulations of the now withdrawn part 242, purporting to authorize detainees pursuant to IRCA’s command “that the Attorney General must expeditiously commence deportation proceedings against an alien upon conviction of an offense for which he or she is rendered amenable to deportation from the United States,”<sup>144</sup> and (b) that those regulations were somehow incorporated in part 287 before they were withdrawn; such a scheme would only authorize the placing of a detainee “upon conviction”—whereas DHS commonly places detainees against persons who have yet to be convicted of anything.

For all these reasons, the regulations authorizing detainees are *ultra vires*, and DHS’s detainee practices are unauthorized, except in cases of controlled substance arrests where the detainee process is initiated by the arresting officer or similar official.

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142. Because Congress did not mention detainees in IRCA, the regulations in Part 242 were patently *ultra vires*. Congress demonstrated in the ADAA of 1986 that it knew how to grant the power to issue detainees when it wished to do so, and the absence of detainees from IRCA indicates Congress did not wish IRCA’s provisions to be enforced by means of detainees. *See, e.g., Lehman v. Nakshian*, 453 U.S. 156, 162 (1981) (“Section 15 contrasts with § 7(c) . . . which *expressly* provides for jury trials. Congress accordingly demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so . . . . But in § 15 it failed explicitly to do so.”). At any rate, the regulations authorizing detainees pursuant to IRCA were later withdrawn. *See supra* note 117 and accompanying text.

143. *See supra* note 107 and accompanying text.

144. Documentary Requirements: Nonimmigrants, 52 Fed. Reg. 16370-01 (May 5, 1987) (to be codified at 8 C.F.R. pt. 212, 241, 224, 278) (quoting Pub. L. 99-603, Title VII, § 701 (1986)).

## V. CONCLUSION

This essay seeks to inspire others to undertake further empirical and legal analysis of the Executive's current detainer practices. It is possible, however, despite the brevity of this investigation, to see there are serious flaws in the Executive's argument that it possesses a broad general authority to issue immigration detainers. Myriad legal strategies may be invoked to challenge the issuance of detainers beyond Congress's authorization and the detention of individuals beyond the 48-hour period. Such strategies might include:<sup>145</sup> informal advocacy with state or federal officials;<sup>146</sup> a motion to the local criminal court responsible for sentencing the non-citizen;<sup>147</sup> a motion in immigration court to suppress evidence<sup>148</sup> or terminate the proceedings,<sup>149</sup> or to be released from mandatory no-bond

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145. My list is not intended to be exhaustive.

146. For example, in Mahawa Conde's case, Ms. Conde was serving a federal sentence and an immigration detainer had been lodged. Advocates, including law student interns from the Yale Law School's Jerome N. Frank Legal Services Organization, prevailed upon ICE to take into account the unique circumstances of the case, and ICE agreed to temporary release. Ms. Conde was not taken into custody on the detainer. Lucy Nalpathanchil, *Yale Law Students Request Temporary Release of Pregnant Immigrant*, (WNPR-Connecticut Public Radio May 5, 2008) available at <http://www.cpb.org/yale-law-students-request-temporary-release-pregnant-immigrant>; Danny Jacobs, *Immigrant Mother Gets 3-Month Reprieve*, THE DAILY NEWS (Baltimore), May 12, 2008.

147. A local judge who has just ordered the release of a defendant on bond, or sentenced a defendant to probation, for example, might well be receptive to the argument that an ICE detainer preventing execution of the judge's order or sentence is invalid. Just as the local judge's order to detain the two men in *Ochoa v. Bass* was obeyed by the local sheriff, one can expect that a local judge's order directing the release of an inmate notwithstanding an ICE detainer would be followed. See 181 P.3d 727, 729.

148. See generally, *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that suppression of evidence is available in immigration proceedings where Fourth Amendment violations are "egregious" or "widespread"). See also *United States v. Fullerton*, 187 F.3d 587, 590-92 (6th Cir. 1999) (remedy for violation of *County of Riverside* is either application of the exclusionary rule or a *Bivens* action), cert. denied, 528 U.S. 1127 (2000); cf. *Fernandez-Perez v. Gonzales*, 226 F.App'x 737, 739 (9th Cir. 2007) (denying suppression remedy for violation of 48-hour rule of 8 C.F.R. section 287.7 where statements sought to be suppressed preceded rule violation). Empirical study of DHS's detainer practice is particularly important because "widespread" violations are a ground for suppression under *Lopez-Mendoza*. See 468 U.S. at 1050.

149. See, e.g., *Waldron v. I.N.S.*, 17 F.3d 511, 517-18 (2d Cir. 1994) ("When a regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute, and the Immigration and Naturalization Service fails to adhere to it, the challenged deportation proceeding is invalid."); NATIONAL

detention;<sup>150</sup> a petition for writ of habeas corpus;<sup>151</sup> or a civil

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LAWYERS GUILD, IMMIGR. LAW & CRIMES § 8:7 (2008) (suggesting violation of the 48-hour rule of 8 C.F.R. section 287.7 would support termination).

150. The Immigration and Nationality Act requires DHS (with very limited exceptions) to hold without bond those who are placed in immigration proceedings who have been convicted of a “crime involving moral turpitude” for which a sentence of at least one year was imposed, multiple crimes involving moral turpitude, an “aggravated felony,” a controlled substance offense, or one of certain enumerated offenses involving firearms or implicating national security. INA § 226(c), 8 U.S.C. § 1226(c) (2006). To avail itself of the no-bond provisions of the INA, however, DHS must take an immigration respondent into custody “when the alien is released . . .” INA § 226(c)(1), 8 U.S.C. § 1226(c)(1) (2006). The Board of Immigration Appeals (BIA) has recently interpreted the “when released” provision as unconnected to the criminal offenses which form the basis for no-bond detention; thus, an alien jailed briefly for an unpaid parking ticket may be subject to no-bond detention “when released” from jail, on the basis of a controlled substance offense occurring many years prior. *In re Saysana*, 24 I. & N. Dec. 602 (BIA 2008). The validity of this interpretation has been called into question, however. The respondent in *In re Saysana* obtained habeas corpus relief, with the federal district court finding the Board’s interpretation erroneous and holding *Saysana* entitled to an individualized bond determination. *Saysana v. Gillen*, No. 1:08-cv-11749-RGS (D. Mass. Dec. 1, 2008) (No. 17, Order on Petitioner’s Emergency Motion for Issuance of a Writ of Habeas Corpus).

Importantly, *In re Saysana* suggests that mandatory no-bond detention pursuant to the “when released” provision may not be available to DHS if it is obtained by DHS unlawfully placing a detainer on the alien. The BIA did note that “Congress could reasonably expect that many aliens falling within the ambit of section 236(c)(1) would be immediately taken into DHS custody through detainees or similar arrangements following their incarceration or arrest by State or Federal authorities.” *In re Saysana*, at n.6. The BIA, however, pointedly reserved the question whether the “when released” requirement for no-bond detention is satisfied “when an alien shows that an arrest was unlawful and the release from an unlawful detention has triggered the mandatory detention provisions of the Act.” *Id.* at n.7. It appears, therefore, that in cases where DHS obtains custody of the respondent through a detainer and then invokes the mandatory no-bond detention provisions of INA § 226(c), the legality of the detainer may be challenged in immigration proceedings, or in federal habeas corpus proceedings such as took place in *Saysana*’s case. *See Saysana v. Gillen*, at 3, n.3 (noting that “the BIA’s opinion gives no guidance as to the forum in which a person situated similarly to the petitioner would have the opportunity to litigate the lawfulness of his arrest.”).

151. The timing of a habeas action is a matter of some delicacy. If brought before expiration of the state or local sentence, the existence of an immigration detainer does not necessarily serve to place the prisoner in the custody of DHS for purposes of habeas corpus. *See, e.g., Zolicofer v. U.S. Dep’t of Justice*, 315 F.3d 538, 539–40 (5th Cir. 2003). After expiration of the sentence, when the prisoner is held in state or local custody solely pursuant to the detainer, it would seem a habeas petition should be available to test the legality of the detainer. *See Perez-Garcia v. Vill. of Mundelein*, No. 04 C 7216, 2005 WL 991783, at \*6 (N.D. Ill. 2005) (noting that after expiration of the criminal sentence, local officials are *required* to maintain custody of the alien pursuant to 8 C.F.R. § 287.7(d)), but there is a question of who the proper respondent would be. *See also Kendall v. I.N.S.*, 261 F.

damages action.<sup>152</sup>

In setting limits on the Executive's authority to issue detainers, Congress expressed its enforcement priorities, and may have considered the burdens of widespread detainer practices on state prisons and local jails. DHS, not content to limit its use of detainers to cases involving controlled substance arrests, has used detainers to implement an enforcement strategy broader than that shared by Congress, and is acting illegally in an attempt to achieve its own enforcement goals.

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Supp. 2d 296, 301 n.1 (S.D.N.Y. 2003) ("As the Second Circuit has indicated, the INS might have 'technical custody' prior to the assumption of physical custody, but only in cases where deportation proceedings have already resulted in 'determinations of deportability' and the detainers 'require [] the deportees to be turned over to INS custody for deportation . . . .'" (citations omitted). Furthermore, if the petitioner is then actually transferred to DHS custody, a habeas petition based on the detainer may become moot. *Guzman v. Conn. Dept. of Corr.*, No. 3:03CV1532, 2005 WL 368038 (D. Conn. 2005); see *Baez*, *supra* note 98.

152. See *Comm'n for Immigrant Rights of Sonoma County v. County of Sonoma*, No. 3:08-cv-04220-PJH (N.D. Cal.) (docket entry 1, Complaint, ¶¶ 67–68, 76–81) (complaint for damages based on violation of INA section 287, 8 U.S.C. § 1357 and injunctive relief and a declaration that 8 C.F.R. section 287.7 is *ultra vires* and invalid); see *Fullerton*, *supra* note 148 (suggesting *Bivens* damages action is remedy for *County of Riverside* violation).