



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
CRIMINAL COURTS COMMITTEE,
IMMIGRATION & NATIONALITY LAW COMMITTEE,
AND CORRECTIONS COMMITTEE**

Int. 656-2011

A Local Law to amend the administrative code of the city of New York, in relation to persons not to be detained.

THIS BILL IS APPROVED

The New York City Bar Association's Criminal Courts Committee, Immigration and Nationality Law Committee and Corrections Committee support this bill, which would prohibit the use of New York City Department of Corrections' (DOC) resources to honor a civil immigration detainer provided that the subject of the detainer (i) has never been convicted of a misdemeanor or felony; (ii) is not a defendant in a pending criminal case; (iii) has no outstanding warrants; (iv) is not and has not previously been subject to a final order of removal; and (v) is not identified as a confirmed match in the terrorist screening database.

This bill marks an important first step in the City's imposing some limits on DOC's collaboration with U.S. Immigration and Customs Enforcement (ICE). DOC's current policy of unlimited collaboration costs the City millions of dollars every year, imposing a tremendous financial burden on the City's limited resources. The policy also causes significant harm to the City's residents while creating substantial roadblocks in the criminal justice system. The bill would result in significant cost-saving, as well as some reasonable restraints on DOC's practices in the holding of immigrants under ICE detainees.

This Bill is Timely and Justified

ICE's placement of immigration detainees against individuals at DOC facilities comprises the single largest means by which New Yorkers end up in immigration detention; each year 3,000-4,000 New Yorkers are transferred from DOC to ICE custody.¹ Given the overall immigration

¹ See ICE FOIA Response Letter to Prof. Nancy Morawetz, New York University School of Law, dated Dec. 12, 2008.

enforcement goals of the federal government, these numbers will likely increase if DOC continues to accede to every ICE detainer request.²

Many New York City immigrants have valid and strong defenses against deportation when placed in removal proceedings. Many immigrants are lawful permanent residents, refugees, and other immigrants who may be eligible for waivers of deportation. Even undocumented immigrants may also have strong defenses against removal. For example, undocumented immigrants may have a current or foreseeable basis to obtain lawful permanent residence through a family member. They may have been victims of trafficking or other crimes that provide a basis for their obtaining special visas designed to protect them. They may have legitimate asylum claims based on their fear of persecution if returned to their home countries. In addition, their criminal case may result in a dismissal or other disposition that does not block the availability of these defenses. Nevertheless, if they spend any time at Rikers Island and an immigration detainer is lodged against them, these individuals end up trying to fight their deportation cases from detention facilities as remote as Louisiana and Texas, far away from family and access to adequate legal counsel; as a result they are often unable to defend themselves against their removal charges.³

If left unrestrained, DOC's extensive collaboration with ICE would remain inconsistent with New York City's interests in protecting the due-process rights and other rights of its immigrant residents. As elaborated below, ongoing and unlimited collaboration also raises economic and public safety concerns.

This Bill Would Save Valuable City Resources

Preliminary findings by Justice Strategies indicate that noncitizens at Rikers Island with an immigration detainer spend an average of *73 days longer in jail* before being discharged than people without an ICE detainer.⁴ The unreimbursed cost to the City of this prolonged detention, if the cost of DOC personnel and facilities necessary to hold these thousands of immigrant New Yorkers each year is included, surely runs to the tens of millions of dollars.⁵ The unreimbursed

² The City Bar, through its Civil Rights Committee, is urging New York State to rescind its May 10, 2010 memorandum of agreement with ICE to participate in the federal Secure Communities program. This June Governor Andrew Cuomo announced that New York would suspend its participation in this program, which would permit ICE to access the fingerprints of individuals in local law enforcement custody and compare those prints with ICE's own database. The federal government, however, more recently announced that state and local officials cannot opt out of the Secure Communities program.

³ See, e.g., Human Rights Watch. *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (Dec. 2, 2009); Office of Inspector General, Dep't of Homeland Security, *Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers*, OIG 10-13 (Nov. 2009); *Report on the Right to Counsel for Detained Individuals in Removal Proceedings*, New York City Bar Association (August 2009).

⁴ Justice Strategies, *New York City Enforcement of Immigration Detainers, Preliminary Findings* (October 2010).

⁵ See City of New York, Office of the Mayor, *Mayor's Management Report* (September 2010) at 150, which indicates average cost per inmate per year to be more than \$76,229 in FY 2010. Based on that figure, the average cost per inmate per day is \$208, which multiplied by 73 days comes to a cost of more than \$15,000 per each of the 3,000-4,000 New Yorkers transferred from DOC to ICE custody every year.

cost to the City is millions of dollars more if the costs of delayed justice are factored into the equation. Because the immigration detainer complicates a plea bargaining resolution that would otherwise be straightforward, practical, and just, these costs of delayed justice include the costs to the City for transportation of detainees to and from court, as well as extended case processing costs for the District Attorneys' offices, the public defense providers, and the courts. By creating a category of individuals who shall not be held under ICE detainers, this bill would reduce the amount of wasted and unreimbursed City resources.

The City Has Authority to Pass this Legislation

As ICE publicly recognizes, its civil detainers are *requests* - not mandates - to local law enforcement agencies to detain named individuals for up to forty-eight hours after they would otherwise be released from criminal custody, to allow ICE the opportunity to take these individuals into immigration custody.⁶ New York City and DOC, therefore, are not legally obligated to collaborate with federal immigration detention requests.

Nevertheless, DOC currently collaborates extensively with ICE toward its enforcement policy. DOC (i) allows ICE agents to maintain a presence at DOC's facilities; (ii) allows ICE agents to interview DOC detainees and sentenced inmates at DOC's facilities; (iii) shares DOC inmate database information with ICE, including whether or not a DOC inmate is foreign-born; and (iv) detains people at DOC facilities on civil immigration detainers issued by ICE for up to 48 hours after they would otherwise been released from DOC facilities.⁷ DOC engages in this collaboration with ICE as a matter of course without any apparent exercise of discretion, against immigrant New Yorkers *before* they have been convicted of any crime, and whether or not they have been in the United States for many years. Current DOC practice even allows for immigration detainers to issue against teenagers and other young people under 21 years old, victims of trafficking and other crimes, the physically and mentally disabled, primary caretakers of children, and people with U.S. citizen immediate relatives.

This bill imposes some limits on the scope and nature of DOC's collaboration with ICE, and creates a framework for the collaboration that would allow some immigrant New Yorkers to face

DOC receives some federal money every year under the State Criminal Alien Assistance Program ("SCAAP"), a program that provides federal payments to localities to cover a fraction of the costs incurred for incarcerating certain pre-trial, undocumented immigrants (those with one felony or two misdemeanor convictions and who have been incarcerated for at least four consecutive days). This SCAAP funding is not, however, dependent on DOC's holding people under ICE detainers. DOC's receipt of SCAAP funding should therefore remain unaffected by anything proposed in this letter. In any event, any possible reduction in SCAAP funding as a result of legislation proposed in this letter (to the extent such legislation reduces pre-trial incarceration of qualified immigrants) would be offset by a much greater reduction in DOC's overall costs of holding immigrants under ICE detainers.

⁶ See, e.g., Letter from David Venturella, Assistant Director of ICE, to Miguel Martinez, County Counsel, County of Santa Clara, California, in or about September 2010.

⁷ NYC Council FY 2011 Preliminary Budget Hearing, March 10, 2010; NYC Council FY 2011 Executive Budget Hearing, June 1, 2010.

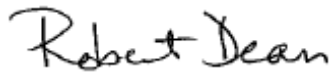
deportation charges here in New York, rather than in remote places far away from supportive family members and available *pro bono* or otherwise affordable legal counsel.

Current DOC Collaboration with ICE Undermines Public Safety for All New Yorkers

The perception that a criminal arrest will automatically lead to immigration detention and deportation undermines the trust of the immigrant and ethnic communities in local law enforcement. This perception, and DOC’s contribution to it through its extensive collaboration with ICE, can have a chilling effect on immigrant New Yorkers who may wish to report a crime for fear that any interaction with police and the courts will result in the deportation of their immigrant family member or loved one. As a matter of public safety, the City’s police and prosecutors have cultivated a relationship of trust with the immigrant communities.⁸ Immigrant fear of coming forward to report a crime will result in a less safe New York. One example of this is in the domestic violence context where victims of domestic violence may be reluctant to come forward to report abuse or to press charges if they fear that doing so will lead to their abuser’s deportation, particularly if the abuser is the family’s primary or sole provider or if there are children involved. Indeed, in other criminal contexts as well, if someone in a position to report a crime knows that DOC collaboration with ICE will result in an immigration detainer against the perpetrator, there is a good chance that he or she will not want to get the police involved. This directly contravenes efforts by the City to encourage its residents to report crime and work with law enforcement officers to make communities safer.

Conclusion

We support this bill. In the ways described above, the City would save valuable resources for which it is not reimbursed by the federal government, while ensuring that there are at least some restraints in place that protect immigrant New Yorkers from a federal immigration enforcement policy that does not serve the ends of justice.



Robert Dean, Chair
Criminal Courts Committee
Committee



Mark Von Sternberg, Chair
Immigration & Nationality Committee



Sara Manaugh, Chair
Corrections

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⁸ As part of this effort, for example, District Attorney offices make no distinction between crime victims who are citizens and those who are not (except when they may assist undocumented crime victims to achieve certain immigration protections).