King County

Law and Justice Committee

STAFF REPORT

Agenda Item:	6	**Name:**	Clifton Curry
Item No.:	2017-B0028	**Date:**	February 28, 2017

SUBJECT

Briefing on King County Immigration Policies for the Department of Adult and Juvenile Detention and Recent Changes in Federal Policy.

SUMMARY

King County has established a variety of policies that guide how County agencies interact with immigrants and, in turn, how the County will interact with the federal agencies that enforce immigration law. The County has established policies that restrict what types of information about citizen status agencies can request or record and the County also has restrictions on how criminal justice agencies will cooperate with federal immigration enforcement efforts. For example, the Superior Court allows for restrictions on enforcement actions in its courtrooms, the Sheriff's Office limits how deputies interact with individuals concerning immigration status, and the jail restricts what types of detention requests it will honor for federal immigration officers. This briefing will describe the County's immigration enforcement-related policies and also briefly describe recent federal changes in immigration policy and enforcement priorities.

BACKGROUND

Enforcing America's immigration laws is a federal responsibility. Since the 1980s, the federal government has been apprehending undocumented individuals arrested and detained by state and local criminal justice systems through numerous enforcement operations, primarily the Criminal Alien Program. Under this program, federal agents used booking and other information provided by local law enforcement agencies to target individuals in local custody and then submitted administrative immigration detainer requests that could result in an individual's direct transfer upon release from local custody into federal custody for initiation of removal proceedings (deportation). [1] Under federal law, local jurisdictions cannot prohibit the sharing of immigration/citizenship information nor can a local jurisdiction prohibit federal agencies from carrying out their immigration enforcement related duties (United States Code Title 8, Section 1373).

[1] U.S. Department of Homeland Security, Immigration and Customs Enforcement, https://www.ice.gov/es/criminal-alien-program

Under the Homeland Security Act of 2002,[2] the responsibility for enforcing immigration laws was placed with the Department of Homeland Security (DHS), specifically U.S. Immigration and Customs Enforcement (ICE). The Department of Homeland Security, with ICE as the responsible agency, created the Secure Communities program[3] to complement its efforts under the Criminal Alien Program initiative. The key component of the Secure Communities program is automated information sharing between the Department of Homeland Security and the Federal Bureau of Investigation, primarily the sharing of fingerprint data collected from local jails for identifying individuals to be investigated for immigration law violations. Like the Criminal Alien Program, individuals identified through the Secure Communities program, and targeted for Immigration and Customs Enforcement apprehension, can be subjected to placement of a detainer request while in custody of local jail officials. The detainer is a "request" to the state or local detention facility to hold the individual for up to 48 hours (excluding weekends and holidays) beyond the time they would normally be released from custody (8 CFR 287.7).The use of fingerprint information for the Secure Communities program in Washington was fully deployed in April 2012.

ICE Enforcement Processes ICE is responsible for the detection, investigation, and apprehension of those violating immigration laws. One of ICE's means of identifying and apprehending violators is the use of detainers. The primary method for issuing a detainer results from when there is a match of data that identifies a person of interest from local jails and DHS databases. Based on that match, an ICE agent then determines what, if any, immigration enforcement action may be appropriate for the individual. If ICE officers determine that an individual identified at a local jail may be removable, a detainer may be issued for that individual. A detainer will only be honored once all local legal proceedings have concluded and the individual is ordered to be released from jail custody. The detainer is not equivalent to a judicial arrest warrant; rather, it is simply an administrative request to hold an individual for investigation by ICE, removal proceedings, or for removal. The detainer, unlike a warrant, does not require ICE to provide a judge with evidence of probable cause prior to it being issued to the jail. It should be noted that Secure Communities, along with federal immigration laws, do not authorize local law enforcement agencies to enforce immigration law or task them with any additional responsibilities—however, federal law allows local law enforcement agencies to enter into agreements with ICE to participate in immigration enforcement actions.

When an ICE agent takes an individual into custody, they may or may not be transferred to a federal detention facility. According to discussions with ICE representatives in the Seattle Region and data from other sources, not every detainer results in detention.[4] ICE agents may or may not use the detainer to take custody of an individual when released from jail. If ICE agents do take the individual into custody, the individual's

[2] Homeland Security Act (HSA) of 2002, (Pub.L. 107–296, 116 Stat. 2135, enacted November 25, 2002)
[3] U.S. Department of Homeland security, Immigration and Customs Enforcement https://www.ice.gov/secure-communities
[4] Transactional Records Access Clearinghouse--Immigration, Syracuse University, http://trac.syr.edu/immigration/

case is reviewed using several federal policies. The individual can be simply released, released on their own recognizance into the community pending further hearings, released with a bond, released to alternatives to secure detention, or held in federal detention facilities.

The majority of federal immigration proceedings are civil, not criminal. According to the Supreme Court ruling Arizona v. U.S., 132 S.Ct. at 2505, "(a)s a general rule, it is not a crime for a removable alien to remain present in the United States." Civil immigration proceedings are conducted in a United States Department of Justice Immigration Court, not in a United States District Court. Therefore, unless an arrestee is being federally prosecuted for a criminal immigration violation, ICE is not a party to a federal court proceeding, and these officials would not ordinarily have access to a federal magistrate or judge for the issuance of judicial warrant. Consequently there is generally no judicial review of probable cause associated with ICE detainers.

Adult and Juvenile Detention Policies Related to Noncitizens.

In 2009, the County adopted a policy in Ordinance 16692 to ensure that all of the county's residents have access to necessary services and benefits essential for upholding the County's commitment to fair and equal access for all residents. To further this policy, the Council established in King County Code Sec. 2.15.010 the requirement that a County office, department, employee, agency or agent shall not condition the provision of County services on the citizenship or immigration status of any individual. This includes the Department of Adult and Juvenile Detention. Further, the Council adopted the requirement that sheriff's office personnel shall not request specific documents relating to a person's civil immigration status for the sole purpose of determining whether the individual has violated federal civil immigration laws. This ordinance is intended to be consistent with federal laws regarding communications between local jurisdictions and federal immigration authorities, including but not limited to United States Code Title 8, Section 1373.

In accordance with code requirements, the Department of Adult Juvenile Detention (DAJD) does not attempt to determine the immigration status of any individual held in County detention. However, the department does receive funding from the federal State Criminal Alien Assistance Program (SCAAP) which reimburses state and local governments for the costs of incarcerating noncitizens. Originally authorized by the Immigration Reform and Control Act of 1986, the program was not funded until the Violent Crime Control and Law Enforcement Act of 1994. The county currently receives just over $700,000 from this grant program based on the federally-estimated number of noncitizens incarcerated in the county-run jail facilities. The Bureau of Justice Assistance administers SCAAP, in conjunction with the U.S. Department of Homeland Security. SCAAP provides federal payments to states and localities that incurred correctional officer salary costs for incarcerating “undocumented criminal aliens” who have at least one felony or two misdemeanor convictions for violations of state or local law, and who are incarcerated for at least four consecutive days during the reporting

period (payments are based on federal estimates of the number of undocumented individuals, not on data provided by the County).[5]

Changing Jail Detainer Policies. In 2013, the Metropolitan King County Council held multiple meetings to discuss the policy of honoring civil immigration holds/detainers for those detained in DAJD facilities and developed policy that restricted which detainers requests it would honor. Ordinance 17706, enacted on December 2, 2013, placed in County Code the policy that the Department of Adult and Juvenile Detention would only honor federal civil immigration holds if an inmate had been convicted of a violent, serious offense, or had a finding in federal immigration court that the inmate is an inadmissible alien due to commission of crimes or activities threatening security or human rights. In order to honor a detainer for an individual that met this criteria, federal agents had to submit written documentation and case identifying information establishing the individual's qualifying criminal history.

After the county's adoption of its restrictions on ICE detainers, the U.S. Court of Appeals, Third Circuit, issued a decision in Galarza v. Szalczyk, holding that a federal detainer alone does not shield local municipalities from liability when detaining individuals. In its decision, the court held that when a municipality holds an inmate on an ICE detainer but there was no probable cause to support the detainer, the municipality can be liable for damages.

Other federal trial courts have also adopted the Galarza ruling: Maria Miranda-Olivares v. Clackamas County (District of Oregon); Morales v. Chadbourne (District of Rhode Island), and Villars v. Kubiatowski (Northern District of Illinois). These cases resembled Galarza, where individuals were entitled to release on their underlying state charges but were held in jail on ICE detainers for which ICE lacked probable cause. As in Galarza, the respective courts ruled that a local jail's decision to honor an ICE detainer is discretionary, not mandatory. Also, as in Galarza, these courts ruled that the local jurisdictions had violated the inmate's constitutional Fourth Amendment rights against illegal seizure; and the detentions were unlawful.

Galarza and its progeny also established that local jurisdictions that honor detainers can be liable for damages to the inmate if ICE lacked probable cause for the detention. As a result of these rulings, an ICE detainer was determined to not shield the jurisdictions from liability as does a judicial arrest warrant.

As a consequence of these decisions, and following the advice of the Prosecuting Attorney's Office, the Council adopted Ordinance 17886 in April 2014 which established that the County would only honor ICE detainers that are accompanied by a federal judicial warrant and removed the other instances when the county would honor a detainer. The County's change in policy does not affect ICE access to inmate information or access to detention facilities.

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[5] U.S. Department of Justice, Bureau of Justice Assistance, State Criminal Alien Assistance Program https://www.bja.gov/ProgramDetails.aspx?Program_ID=86

Current DAJD Practices According to the DAJD, officers at the county's jail facilities do not ask any questions related to the immigration status of inmates, and as a consequence, DAJD has no immigration-related information to share with ICE or other federal representatives. Nevertheless, the County has not changed any of its policies related to accessing inmate information or the sharing of fingerprints. Any individual or agency with computer access can use the County's website to determine whether an individual is currently in detention. In addition, when a person is booked into jail, his or her fingerprints are recorded and shared with state and federal systems. As noted above, ICE has access to the federal systems.

Since the adoption of the County's restrictions, the County has honored a total of three detainers (one in 2015 and two in 2016)—where the detainers were accompanied by a warrant from a federal magistrate. DAJD staff note that, while allowed to do so, ICE agents do not come to interview inmates while they are being held in county facilities. DAJD staff also noted that the jail does not transfer any inmates to ICE agents upon their release from jail for transfer to federal detention facilities, unless accompanied by a federal judicial warrant. While the County continues to honor detainers with warrants, and sets no specific restrictions on ICE access to the County's jails, King County is listed in ICE's "Declined Detainer Outcome Report (December 2, 2014)."

Federal Policy Changes On January 25, 2017, the new administration issued two Presidential Executive Orders on immigration.[6] These orders encouraged federal and state cooperation in immigration enforcement, but also threatened "sanctuary jurisdictions" with cuts in federal funding.

The Executive Order "Enhancing Public Safety in the Interior of the United States" includes the following statement:

> "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."

The Order goes on to state that "it is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373."[7]

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[6] "Executive Order: Enhancing Public Safety in the Interior of the United States," and "Executive Order: Border Security and Immigration Enforcement Improvements." In addition, on February 9, 2017, the administration released another order related to immigration enforcement activities: "Executive Order on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking" which includes the policy statement that federal law enforcement agencies shall give a high priority to "interdict, disrupt, and dismantle transnational criminal organizations…[and] the swift removal from the United States of foreign nationals who are members of such organizations." Sec. 2 (b).

[7] "Executive Order: Enhancing Public Safety in the Interior of the United States," Sec. 1, Para. 2.

The Executive Order is very broad. The Order not only directs the Attorney General to take action "against any entity that violates 8 U.S.C. 1373" but also any entity "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." The Order not only directs the Attorney General to take action "against any entity that violates 8 U.S.C. 1373" but also any entity "which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law." Further, the Order is not limited to funding related to immigration or law enforcement, but includes a threat to cut all "Federal grants." [8]

There are questions about the ability of the administration to tie compliance with immigration law enforcement to federal grants (see Attachment 3, for a legal analysis of the Executive Order prepared for cities in California). The timing and mechanisms for the enforcement of this order are unknown at this time.

In addition to the President's Executive Orders, on February 20, 2017, the Director of the Department of Homeland Security issued two memoranda to implement the new policies (see Attachments 4 and 5). These documents include descriptions of the changes in the department's enforcement priorities.

The DHS director states that the "department no longer will exempt classes or categories of removable aliens from potential enforcement." In addition, ICE will prioritize the removal of the following types of individuals:

> "those who (a) have been convicted of any criminal offense; (b) have been charged with any criminal offense that has not been resolved; (c) have committed acts that constitute a chargeable criminal offense; (d) have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency; (e) have abused any program related to receipt of public benefits; (f) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (g) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security**."**[9]

Unlike policies from the previous administration, ICE will now give enforcement priority not only to those convicted of a serious crime, but also to those who have been charged, but not convicted or have committed "acts that constitute a chargeable criminal offense," which could include being in the country without documentation. In addition, ICE now has the ability to prioritize those who "in the judgement of an immigration officer" would pose a risk to public safety for removal; the memorandum has no guidance on what would constitute a risk to public safety. The new priorities are expected to lead to more removal actions/deportations.

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[8] Ibid., Sec. 9.

[9] Department of Homeland Security, Director Memorandum, "Enforcement of the Immigration Laws to Serve the National Interest," February 20, 2017, "A. The Department's Priorities."

The new policies also foresee a "surge" that would involve the hiring of thousands more immigration officers and judges; expedited deportation in many more cases (not just those of people apprehended near the border, newly arrived in the country, but also of people who have been anywhere in the United States for as long as two years); and more plans for the proposed U.S.-Mexico Border Wall. It also includes an effort to enlist local police officers in deportation efforts. The new policies also call for more immigration detention centers. Finally, they also remove privacy-law protections for undocumented people.[10] [11]

ATTACHMENTS:

1. "Executive Order: Enhancing Public Safety in the Interior of the United States," Office of President, January 25, 2017.
2. "Executive Order: Border Security and Immigration Enforcement Improvements." Office of President, January 25, 2017.
3. "Can the President Defund Sanctuary Cities?" Renne, Sloan, Holtzman, Sakai Public Law Group
4. Department of Homeland Security, Director Memorandum, "Enforcement of the Immigration Laws to Serve the National Interest," February 20, 2017.
5. Department of Homeland Security, Director Memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvement Policies," February 20, 2017.

INVITED:

- William Hayes, Director, Department of Adult and Juvenile Detention
- Gail Stone, Criminal Justice Policy Advisor, Executive's Office

[10] Ibid, "B. Strengthening Programs to Facilitate the Efficient and Faithful Execution of the Immigration Laws of the United States."

[11] Department of Homeland Security, Director Memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvement Policies," February 20, 2017.