
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: AB 2792 **Hearing Date:** June 28, 2016
Author: Bonta
Version: June 22, 2016
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Local Law Enforcement Agencies: Federal Immigration Policy Enforcement*

HISTORY

Source: ACLU of California
Asian Americans Advancing Justice
California Immigrant Policy Center
Immigrant Legal Resource Center
MALDEF
National Day Laborer Organizing Network

Prior Legislation: AB 4 (Ammiano) – Chapter 570, Stats. 2013
AB 524 (Mullin) – Chapter 572, Stats. 2013

Support: African Advocacy Network; Alliance San Diego; American Friends Service Committee; Asian Pacific Islander Legal Outreach; Asian Students Promoting Immigrant Rights through Education; California Attorneys for Criminal Justice; California Immigrant Youth Justice Alliance; California Partnership to End Domestic Violence; California Public Defenders Association; CARECEN-LA; Centro Legal de la Raza; Community Health for Asian Americans; Community Initiatives for Visiting Immigrants in Confinement; Community United Against Violence; Congregations Building Community; Courage Campaign; Dolores Street Community Services; Dream Team Los Angeles; East Bay Immigrant Youth Coalition; East Bay Organizing Committee; Ella Baker Center; Filipino Advocates for Justice; Immigrant Youth Coalition; Immigration Action Group; Inland Coalition for Immigrant Justice; Inland Empire Immigrant Youth Coalition; Inland Empire Rapid Response Network; Institute of Popular Education of Southern California; Interfaith Coalition for Immigrant Rights; Lawyers Committee for Civil Rights; Legal Services for Prisoners with Children; Los Angeles County Supervisor, District 3, Sheila Kuehl; Los Angeles Immigrant Youth Coalition; Mixteco/Indigena Community Organizing Project; Mujeres Unidas y Activas; National Immigration Law Center; National Lawyers Guild Los Angeles Chapter; North Bay Immigrant Youth Union; Orange County Immigrant Youth United; Pangea Legal Services; PICO California; Pomona Economic Opportunity Center; Prison Policy Initiative; RAIZ; Sacramento Immigration Alliance; San Diego Immigrant rights Consortium; San Fernando Dream Team; San Fernando Valley Immigrant Youth Coalition; San Joaquin Immigrant Youth Collective; SEIU; Street Level Health Project; Thai Community Development Center; Vital Immigrant Defense Advocacy and Services

Opposition: California State Sheriffs' Association; California Police Chiefs Association

Assembly Floor Vote: 44 - 29

PURPOSE

The purpose of this bill is to authorize a local law enforcement agency to participate in a federal Immigration and Customs Enforcement (ICE) immigration enforcement program only if it enters into an MOU with the governing body or the governing body adopts a policy.

Existing federal law provides that any authorized immigration officer may at any time issue Immigration Detainer-Notice of Action, to any other federal, state, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department of Homeland Security (DHS) seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the DHS, prior to release of the alien, in order for the DHS to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible. (8 CFR Section 287.7(a).)

Existing federal law states that upon a determination by the DHS to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the DHS. (8 CFR Section 287.7(d).)

Existing federal law authorizes the Secretary of Homeland Security under the 287(g) program to enter into agreements that delegate immigration powers to local police. The negotiated agreements between ICE and the local police are documented in memorandum of agreements (MOAs). (8 U.S.C. Section 1357(g).)

Existing federal law provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. 14th Amend.)

Existing law defines "immigration hold" as "an immigration detainer issued by an authorized immigration officer, pursuant to specified regulations, that requests that the law enforcement official to maintain custody of the individual for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, and to advise the authorized immigration officer prior to the release of that individual." (Government Code, § 7282 (c).)

Existing law states that a law enforcement official shall have discretion to cooperate with federal immigration officials by detaining an individual on the basis of an immigration hold after that individual becomes eligible for release from custody only if the continued detention of the individual on the basis of the immigration hold would not violate any federal, state, or local law, or any local policy, and only under the following circumstances:

- a) The individual has been convicted of a serious or violent felony;
- b) The individual has been convicted of a felony punishable by imprisonment in the state prison;

- c) The individual has been convicted within the past five years of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony, or has been convicted at any time of a specified felony;
- d) The individual is a current registrant on the California Sex and Arson Registry;
- e) The individual is arrested and taken before a magistrate on a charge involving a serious or violent felony, a felony punishable by imprisonment in state prison, or other specified felonies, and the magistrate makes a finding of probable cause as to that charge after a preliminary hearing; and
- f) The individual has been convicted of a federal crime that meets the definition of an aggravated felony as specified, or is identified by the United States Department of Homeland Security's Immigration and Customs Enforcement as the subject of an outstanding federal felony arrest warrant. (Government Code, § 7282.5(a))

Existing law states that if none of the conditions listed above is satisfied, an individual shall not be detained on the basis of an immigration hold after the individual becomes eligible for release from custody. (Government Code, § 7282.5 (b).)

This bill provides that a local law enforcement agency may participate in an ICE immigration enforcement program only if the law enforcement agency and the governing body of a the political subdivision in which the law enforcement agency is located enter into a memorandum of understanding (MOU) in the case of a local law enforcement agency headed by an elected official, or the governing body adopts a binding policy directive (Policy) in the case of a local law enforcement agency headed by an employee of the political subdivision hired and fired by the governing board that describes the terms and conditions pursuant to which local law enforcement agency will participate in the immigration enforcement program. The MOU or policy shall only take effect 30 days after ratification of the MOU or policy by vote of the governing body of the political subdivision in which the law enforcement agency is located.

This bill provides that the MOU or policy and any records related to the development of the MOU including, but not limited to, records communication with ICE, shall be public records for the purposes of the California Public Records Act.

This bill provides an MOU or policy enacted under this chapter shall be valid for a period not exceeding three years. Renewal of an MOU or policy requires compliance with all of the provision of this chapter, including the public input process and an evaluation.

This bill provides that an MOU or policy may be renewed for a period not exceeding three years.

This bill provides that an MOU or policy may remain in effect for a period not exceeding six months following the three year period if the renewal process began at least three months before the expiration of the initial three year period.

This bill provides that before entering into an MOU or policy the local governing body shall hold at least three community forums that are open to the public and with at least 30 days notice, except that the local governing body of a small city shall be required to hold only one such forum.

This bill provides that an MOU or policy enacted under this chapter shall incorporated into any contract for the operation of a government-owned detention facility entered into by a local law

enforcement agency or the governing body of the political subdivision in which the law enforcement agency is located.

This bill provides that a MOU or policy entered into under this bill shall include all of the following:

- A provision requiring compliance with the TRUST Act.
- A prohibition on law enforcement responses to ICE notification or transfer requests except in those situations in which a law enforcement official would have discretion to detain an individual on the basis of an immigration hold pursuant to the TRUST Act.
- A provision requiring compliance with any local ordinance or policy that limits law enforcement responses to ICE notifications, or detainer or transfer requests.
- A plan to ensure that ICE does not have access to an individual protected from continued detention under the TRUST Act, including but not limited to, notification in advance of the public that the individual is being or will be released on a certain date and time through data sharing or otherwise, the ability to interview the individual, and access nonpublicly available personal identifying information, including work or home addresses of the individual.
- A plan to ensure that any individual not protected from continued detention under the TRUST Act is served with a copy of any ICE detainer, transfer, or notification request issued for him or her and is provided a written consent form in advance of any interview with ICE that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present.

This bill provides that unless otherwise prohibited by a local ordinance, law enforcement policy or an MOU or policy, nothing shall prohibit a local law enforcement agency from responding to an ICE notification or transfer request if a law enforcement official would have discretion to detain an individual on the basis of an immigration hold under the TRUST Act.

This bill defines specified terms for the purpose of this bill.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed

capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015.” (Defendants’ December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State’s 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants’ December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the “durable solution” to prison overcrowding “consistently demanded” by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants’ Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee’s consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

California’s TRUST Act— AB 4 (Ammiano) of 2013— was instrumental in preventing the separation of thousands of families. This law limits immigration “hold” or detainer requests, triggered by deeply controversial deportation programs like the program formerly known as “Secure Communities” or S-Comm. The requests, found unconstitutional by a federal court in 2014, caused immigrants to be detained for extra time, at local expense, merely for deportation purposes.

On November 20, 2014, The Obama administration acknowledged the failure of S-Comm and announced a reboot of the program. However, ICE’s reboot – named the Priority Enforcement Program or PEP – contains the same fundamental flaws. In fact, identical to S-Comm, PEP continues to check the immigration status of *all* individuals by reviewing fingerprints obtained by local police at the point of booking, without any due process whatsoever.

While PEP relies more on requests to local law enforcement to *notify* ICE when an individual is released, **the end result is the same**. ICE requests notification of release time so that they can detain the person at the point of release, leading to unconstitutional detentions at local jails and separating Californian families. PEP, just like its predecessor, is overburdening local law enforcement's resources and further undercutting the confidence that the TRUST Act had started to build between the community and law enforcement.

Aside from ICE notification requests, since passage of the TRUST Act, ICE has utilized other troubling tactics to burden local law enforcement with deportations. This includes racially profiling individuals for interrogations in jail about their immigration status, while denying them access to counsel. ICE is also reviewing inmate logs and searching jail computers to gather addresses and telephone numbers to conduct home raids or courthouse raids, traumatizing family members and invoking fear in immigrant communities

The recent case of a San Francisco father who sought police's help in locating his stolen car, only to end up detained by ICE for more than 50 days, illustrates how ICE's new tactics hurt families and further damage confidence in law enforcement.

2. Federal Immigration Programs

California's TRUST Act was enacted in 2013. (AB 4 (Ammiano), Chapter 570, Statutes of 2013.) The TRUST Act limits immigration "hold" or detainer requests, triggered by deportation programs like the program formerly known as "Secure Communities" or S-Comm. The requests caused immigrants to be detained for extra time for deportation purposes.

On November 20, 2014, the Obama administration stopped S-Comm and put in place a new program, the Priority Enforcement Program (PEP). PEP is similar to S-Comm, in that it continues to check the immigration status of all individuals by reviewing fingerprints obtained by local police at the point of booking. PEP begins at the state and local level when an individual is arrested and booked by a law enforcement officer for a criminal violation and his or her fingerprints are submitted to the FBI for criminal history and warrant checks. This same biometric data is also sent to U.S. Immigration and Customs Enforcement (ICE) so that ICE can determine whether the individual is a priority for removal, consistent with the DHS enforcement priorities. Under PEP, ICE will seek the transfer of a removable individual when that individual has been convicted of an offense listed under the DHS civil immigration enforcement priorities, has intentionally participated in an organized criminal gang to further the illegal activity of the gang, or poses a danger to national security.

(https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf)

Under PEP, ICE will only seek transfer of individuals in state and local custody in specific, limited circumstances. ICE will only issue a detainer where an individual fits within DHS's narrower enforcement priorities and ICE has probable cause that the individual is removable. In many cases, rather than issue a detainer, ICE will instead request notification (at least 48 hours, if possible) of when an individual is to be released. ICE will use this time to determine whether there is probable cause to conclude that the individual is removable. (Id.)

Although PEP relies more on requests to local law enforcement to notify ICE when an individual is released than hold requests, concerns have been raised that the requests for notifications of release have resulted in delays in release to allow ICE time to detain the individual.

3. MOU or Policy Required

In order to participate in an ICE immigration enforcement action, this bill would require a law enforcement agency to either to have an MOU or a policy adopted by the local governing body that describes the terms and conditions to which the local agency will participate in the ICE program. This bill also prescribes some of the things that must be included in the MOU or policy. The MOU or policy will need to be renewed every three years.

4. Support

MALDEF one of the sponsors of this bill states in support:

Passage of California's TRUST Act (AB 4 -Ammiano) in 2013 was instrumental in preventing the separation of thousands of families. This law limits immigration "hold" or detainer requests, triggered by deeply controversial deportation programs like the program formerly known as "Secure Communities" or S-Comm. These ICE hold requests, found unconstitutional by a federal court in 2014, caused immigrants to be detained for extra time, at local expense, merely for deportation purposes.

On November 20, 2014, the Department of Homeland Security acknowledged the failure of the S-Comm Program and announced a reboot of the program. However, ICE's reboot – named the Priority Enforcement Program or PEP – contains the same fundamental flaws. Like S-Comm, PEP has been shrouded in secrecy since its beginning with little information available to the public about which jurisdictions it is active in and how it is operating in these jurisdictions.

Like its predecessor S-Comm, PEP continues to check the immigration status of all individuals by reviewing fingerprints taken by local police at the point of arrest, prior to the individual receiving any due process. In addition to continuing to rely on ICE hold requests, PEP also relies on notification requests, which are requests to local law enforcement to *notify* ICE when an individual is released. The end result of responding to a notification request is the same as with an ICE hold. ICE requests notification of release time so that they can detain the person at the point of release, leading to unconstitutional detentions at local jails and separating Californian families.

In addition to continuing to rely on ICE hold requests, PEP also relies on notification requests, which are requests to local law enforcement to *notify* ICE when an individual is released. The end result of responding to a notification request is the same as with an ICE hold. ICE requests notification of release time so that they can detain the person at the point of release, leading to unconstitutional detentions at local jails and separating Californian families. Aside from ICE notification requests, since passage of the TRUST Act, ICE has utilized other troubling tactics to burden local law enforcement with deportations. This includes racially profiling individuals for interrogations in jail about their immigration

status, while denying them access to counsel. ICE is also reviewing inmate logs and searching jail computers to gather addresses and telephone numbers to conduct raids, traumatizing family members and invoking fear in immigrant communities.

The TRUTH Act would bring transparency to participation in federal immigration enforcement by requiring the local government and local law enforcement agency to enter into a Memorandum of Understanding before participating in ICE programs. The bill requires public meetings vetting such an agreement, as well as a public vote by the local government, allowing for the public's voice to be heard. The TRUTH Act also prevents separation of immigrant families by requiring local governments to abide by the protections of the TRUST Act for ICE notification requests.

5. Opposition

The California State Sheriffs' Association opposes this bill stating:

AB 2792 unduly burdens law enforcement by requiring an agency to enter into a memorandum of understanding (MOU) with its governing body if the law enforcement agency intends to cooperate with federal authorities on issues related to immigration, particularly detention and notification. As long as law enforcement actions comport with local, state, and federal law, agencies should not be limited by this MOU process. Additionally, a proposed MOU would be the subject of at least three different public forums and the MOU would have to be renewed every two years. We oppose this unwieldy process as it will impede law enforcement's ability to keep our communities safe by requiring agencies to negotiate unnecessary hurdles to simply work with our federal partners.

Additionally, this bill attempts to preclude law enforcement from responding to federal requests for notification when a jail houses someone who might be the subject of an immigration hold. State law, the TRUST Act, already governs when and how a local entity may detain a person subject to an immigration hold. That said, we believe it is inappropriate for the state to tell a local agency that it cannot respond to a request for information from the federal government unless the local entity has the authority itself to detain the individual.

-- END --