

December 12, 2007

VIA U.S. MAIL

James E. Tilton, Secretary
California Department of Corrections and Rehabilitation
1515 S. St. Room 113 South
Sacramento CA 94283

Re: Out-of-state inmate transfers

Dear Secretary Tilton:

The American Civil Liberties Union of Northern California ("ACLU-NC") has been contacted by numerous California inmates and the families of inmates who have recently been recommended for transfer to prisons in other states. We are writing to express our concern regarding the California Department of Corrections and Rehabilitation ("CDCR") program, practice and procedure of involuntarily transferring California inmates to prisons outside of California. The program raises federal and state equal protection issues because the transfer criteria involve alienage classifications. In addition, the state's apparent failure to establish adequate procedures for determining who is subject to transfer violates California due process protections. We are also concerned that the CDCR is implementing these transfers based on a policy memorandum, rather than on properly promulgated regulations. Finally, we have several questions which are set forth in the final section of this letter.

Factual Background

On October 4, 2006, Governor Schwarzenegger issued an Emergency Proclamation regarding overcrowding in California's prisons and instructing the CDCR to begin transferring adult prisoners to out-of-state facilities, by exhausting all voluntary transfers and then implementing involuntary transfers. The proclamation directs the CDCR to prioritize involuntary transfers according to the following criteria: The first category of people targeted for involuntary transfer are "Inmates who: (a) have been previously deported by the federal government and are criminal aliens subject to immediate deportation; or (b) have committed an aggravated felony as defined by federal statute and are subject to deportation." The subsequent categories established by the Governor include inmates who are paroling outside of California, inmates who have limited family ties in California, inmates who have family ties in other states and other inmates as seen fit by the CDCR.

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In May 2007, the legislature passed Assembly Bill 900, which amended Penal Code § 11191 to allow the CDCR to transfer inmates to other states both voluntarily and involuntarily. The statute gives inmates the right to consult with an attorney to explain the inmates' rights and obligations under § 11191. Section 11191 prohibits the involuntary transfer of inmates who have a serious medical or mental health condition, or who receive mental health treatment at the level of "enhanced outpatient" or higher.

The ACLU-NC sent a Public Records Act request to the CDCR on August 24, 2007 to investigate the criteria being used to identify prisoners for transfer and the procedure being followed in effectuating the transfers. In response to this request, we received an internal CDCR memo, dated February 2, 2007 that expands on the selection criteria laid out in the Governor's proclamation.¹ It states that the "potential pool of eligible inmates who meet the criteria as set by the Governor's Emergency Proclamation shall be prioritized as follows:" and lists four categories of people in descending order, each with four sub-factors relating to frequency of family visits and other considerations. The four main categories are: 1) inmates with ICE holds, 2) inmates who have a potential ICE hold and have a conviction for an aggravated felony, 3) inmates who have a potential ICE hold and do not have a conviction for an aggravated felony, 4) inmates who were born in the United States or inmates who are naturalized citizens. The memorandum allows inmates who are dissatisfied with the CDCR's transfer decision to appeal that decision before being transferred.² The appeals decisions must be returned to the inmate stating the issue on appeal and the reasons for the decision.

Legal Analysis

I. Equal Protection

The involuntary inmate transfer program implicates the right to equal protection under the federal and state constitutions because the selection criteria for making the transfers rely on an alienage classification, U.S. Const. Amd. XIV, Cal. Const. Art. 1, Sec. 7; *Torao Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (holding prohibition of fishing licenses based on alienage unconstitutional). The prioritization criteria established by the Governor and CDCR treat inmates who are not U.S. citizens differently than other similarly situated individuals. The disparate impact of out-of-state transfers on inmates in these groups is intentional. Indeed, these inmates were presumably proactively targeted to be first in line for transfer by the State. The memorandum thus determines who is subject to involuntary transfer based on the inmate's alienage status.

Classifications based on alienage are "inherently suspect" because "aliens as a class are a prime example or a 'discrete and insular' minority." *Graham v. Richardson*, 403 U.S. 365 (1971). These classifications are therefore subject to heightened judicial scrutiny, usually a

¹ The subject line of the memo reads: "California Out-of-state Correctional Facility Program, Phase III."

² According to the memo, the first level of appeal will be waived and the CDCR must complete a response to the second level appeal within 5 working days. If the inmate is unsatisfied with that response, the appellant may appeal at the third level of review. However, the CDCR may transfer the inmate before the third appeal is completed and then return the inmate if the appeal is granted.

version of the strict scrutiny test. *Toraō Takahashi, supra*, 33 U.S. 410; *Rafaelli v. Committee of Bar Examiners*, 7 Cal.3d 288, 292 (holding that classifications based on alienage are subject to a strict standard of judicial review). To pass muster under strict scrutiny, the government regulation must 1) serve a compelling government interest, 2) be narrowly tailored to achieve that interest, and 3) be the least restrictive means of achieving that interest. See *Bernal v. Fainter*, 467 U.S. 216, 220 (1984) ("As a general matter, a state law that discriminates on the basis of alienage can be sustained only if it can withstand strict judicial scrutiny. In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.").

The criteria laid out in the Governor's proclamation prioritize for involuntary transfer inmates who have either been "previously deported and are criminal aliens subject to immediate deportation" or "have committed an aggravated felony as defined by federal statute and are subject to deportation." We take it that the Governor's proclamation was intended to ensure that the CDCR prioritize for transfer those inmates least likely to reenter California society.³ But the criteria established are not themselves sufficient to achieve this end because the Proclamation does not specify how the CDCR will determine who has committed an aggravated felony or is subject to deportation. Given the complexities of immigration law, it is difficult to imagine the state making these determinations with a sufficient degree of accuracy. This classification therefore raises doubts under the strict scrutiny test because it is unclear that this alienage classification is tailored to serve a compelling state interest.

Apparently recognizing that the proclamation's general criteria do not provide sufficient guidance for determining which inmates are subject to involuntary transfer, the CDCR has established a more detailed set of criteria in its February 2 memorandum. But these criteria are not narrowly tailored enough to survive strict scrutiny. For example, the memorandum instructs staff to identify and transfer inmates to out-of-state facilities based on a priority list that relies on the far less reliable status of "ICE holds" and "potential ICE holds." But having an ICE hold does not directly correlate with being deportable. When ICE requests a "hold" be placed on an inmate, no immigration judge has yet determined his true immigration status, or whether or not that individual will be deported. Many individuals have been mistakenly placed under ICE holds and, even those for whom an ICE hold is proper may have relief from deportation based on their individual circumstances.⁴ Therefore, the classification of those with "ICE holds" is not a reliable proxy for inmates who will be deported upon release. It fails the narrowly tailored part of the strict scrutiny test.⁵

³ The Governor's list also includes other categories of people who are similarly unlikely to reenter California society (such as inmates paroling into another state or whose family network is all out-of-state).

⁴ See enclosed August 23, 2006 Joint Letter to Governor Schwarzenegger from The Latino Legislative Caucus, the Asian Pacific Islander Legislative Caucus and the Legislative Black Caucus.

⁵ Whereas "inmates with detainers" has been held a valid basis for excluding inmates from certain treatment programs, this is because "appellants faile[ed] to show that the detainer exclusion, either on its face or in the manner of enforcement, results in aliens as a group being treated differently from other persons," in part because other agencies besides the (then) INS have authority to lodge detainers against inmates for non-alienage related reasons. Therefore, the rational basis test was applied and the classification withheld judicial review. *McLean v. Crabtree*, 173 F.3d 1176, 1185-1186 (9th Cir. 1999). In this instance, the "ICE holds" classification has a precise nexus with alienage and thus the detainer cases do not control. In addition, the *McLean* court found that individuals with

The categories focusing on "potential ICE hold" are even more suspect. It is unclear how the CDCR is determining that someone has a "potential ICE hold," but presumably the "potential" for an ICE hold is based on alienage. A "potential ICE hold" is a vague classification open to discriminatory enforcement and inmates without aggravated felony convictions are eligible for various forms of relief from deportation. It fails to establish a lawful basis to distinguish inmates identified through this criterion from the last category on the CDCR's list: U.S. citizens and naturalized citizens. These CDCR categories are therefore an unconstitutional government classification based on alienage and must be corrected.

II. California Due Process (Cal. Const. Art. 1 § 7)

In addition, the CDCR's procedure for determining which inmates will be transferred violates the California Constitution. Unlike its federal counterpart, our state's Due Process Clause protects much more broadly against arbitrary government action: "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty." *Salisbury v. State Bar*, 39 Cal.3d 547, 565 (1985) (quoting *People v. Ramirez*, 25 Cal. 3d 260 (1979)). See *Doe v. Saenz*, 140 Cal.App.4th 960, 994 (2006); cf. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). California inmates have an obvious interest in not being transferred to a prison hundreds or thousands of miles from their homes and families and thus being deprived of the possibility of visits from them. And California constitutional, statutory, and regulatory law all recognize and protect the rights of prisoners to maintain contact with their families. See *In re Smith*, 112 Cal.App.3d 956, 968-69 (1980); Cal. Penal Code § 5068 ¶ 2; 15 Cal. Code Reg. § 3170. Given the importance of these interests -- and the legal protections our laws accord them -- due process requires that the CDCR implement procedures so that it, "having elected to exercise the discretion conferred upon it by the Legislature, will exercise that discretion in a nonarbitrary, nondiscriminatory fashion." *Salisbury*, 39 Cal.3d at 535. Inmates thus have a right to have the procedures established to regulate the transfer program followed in an accurate and meaningful manner.

The CDCR's failure to adhere to proscribed procedures for involuntary transfers in a meaningful way constitutes a violation of state due process. For instance, we have heard that, during attorney consultations, inmates have been inappropriately counseled based on the prior version of § 11191 and have not been given information about how their individual circumstances and immigration status might provide relief from involuntary transfer. We have been informed that the attorney "consultations" currently being provided are cursory, consisting of only 5-10 minutes with an attorney who is unable to answer relevant questions about the transfer scheme. Inmates have a right to legal advice regarding all the grounds that could exempt them from an involuntary transfer, including the relevance of medical and mental health needs, the extent and frequency of family connections, and arguments regarding relief from deportation. See *Gresher v. Anderson*, 127 Cal.App.4th 88, 104-108 (2005) (holding that, in order to be on notice and ensure a fair proceeding, individuals have a right to know the specific

detainers posed a flight risk from a treatment program and there was therefore a rational basis to exclude them. No such rational connection exists here.

convictions they must address in order to get exemption from laws governing employment eligibility). This is particularly vital to ensuring that inmates can make informed appeals of erroneous transfer decisions. The CDCR is obligated to provide a more meaningful process to inmates before making a decision that will impact the lives of inmates and their families so greatly.

III. Administrative Procedure Act

Finally, we are concerned that the transfer memorandum and criteria constitute an illegal "underground regulation." Like other state agencies, the CDCR must promulgate regulations if it creates a rule or procedure that applies generally to inmates. See *Faunce v. Denton*, 167 Cal.App.3d 191 (1985); *Stoneham v. Rushen*, 137 Cal.App.3d 729 (1982); 2007 California Office of Administrative Law Determination No. 3 (OAL FILE # CTU 06-0628-01). The February 2 memorandum that the CDCR is presently using to classify inmates as subject to involuntary transfer is just such a rule. In fact, it is legally indistinguishable from the "administrative bulletin" that the CDCR was using to classify inmates for the purposes determining where they would be housed until the *Stoneham* court struck it down as violating our Administrative Procedure Act. See 137 Cal.App.3d at 731, 736-37. In the absence of an exception to the APA requirements that applies to this memorandum, it suffers from the same infirmities as did the *Stoneham* bulletin.

Recommendations and Request for Additional Information

Obviously, the problem of prison overcrowding demands the attention of the state. And although the ACLU-NC does not believe that involuntarily transferring prisoners to out-of-state institutions is an appropriate solution to this problem, we acknowledge that the California legislature has temporarily authorized the CDCR to implement such transfers. But neither A.B. 900 nor the emergency proclamation that proceeded it authorizes the CDCR to violate the rights of inmates subject to the program. We therefore urge the CDCR to take immediate steps to remedy the violations discussed above. These steps should, at a minimum, include the following:

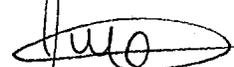
- Provide inmates with properly trained attorneys who can provide accurate and thorough information during pre-transfer consultations, based on the facts and circumstances of each inmate's case;
- Inform each inmate, in writing, of why he or she has been selected for involuntary transfer;
- Give inmates an opportunity to consult with an immigration attorney who can provide information regarding relief from deportation;
- Process all appeals before effectuating transfer;
- Stop using "ICE Holds" and "Potential ICE Holds" as the basis for selecting inmates for transfer; and
- Promulgate regulations to govern the process.

Finally, in order to allow us to continue our evaluation of the program, please provide answers to the questions that follow.

- 1) Please describe the process by which individual inmates are selected for transfer out of state.
- 2) How many prisoners have been involuntarily transferred out of state to date?
 - a. Of these, how many have had ICE holds?
 - b. How many have had "potential ICE holds"?
 - c. How many have not had ICE holds?
- 3) Please provide all disaggregated data on the race, ethnicity and national origin of all involuntary transferees for each of the separate categories above ("ICE holds", "potential ICE holds" and "no ICE holds").
- 4) How do you determine who has "potential ICE holds"?
- 5) Are there any factors that would prevent an inmate from being involuntarily transferred?
- 6) To date, has anyone successfully appealed a recommendation for transfer? If so, on what grounds?
- 7) Please provide copies of all training materials provided to attorneys who provide attorney consultations and any other information provided at such consults.
- 8) Do you have a mechanism for prisoners to transfer back into California once the overcrowding is abated?
- 9) Does the CDCR believe that any exception to the Administrative Procedures Act applies to the February 2, 2007, memorandum?

Thank you for your attention to this matter. We look forward to your prompt response.

Sincerely Yours,



Juniper Lesnik
Civil Liberties Fellow
Julia Harumi Mass
Staff Attorney
Michael T. Risher
Staff Attorney

cc: Terri McDonald, Chief Deputy Administrator,
California Out-of-State Correctional Facilities Unit
Governor Arnold Schwarzenegger
ACLU Immigrant Rights' Project
Gloria Romero, Senate Majority Leader, Chair of the Assembly Public Safety
Committee
Jose Solorio, Chair of the Assembly Public Safety Committee

encl.

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Bcc: Raha Jorjani, University of Davis School of Law, Immigration Law Clinic

CALIFORNIA LEGISLATURE

STATE CAPITOL
SACRAMENTO, CALIFORNIA
95814

August 23, 2006

The Honorable Arnold Schwarzenegger
Governor, State of California
State Capitol Building
Sacramento, CA 95814

**RE: Proposal to Transfer Inmates with ICE Holds
Out-of-State**

Dear Governor Schwarzenegger:

On behalf of the Latino, Asian Pacific Islander, and Legislative Black Caucuses, we write to express our serious concerns with your proposal to transfer foreign-born inmates in our state prison system to detention facilities outside the state of California.

As part of your package of proposals to reform the ailing state prison system in California, your administration proposes to transfer some 5000 inmates who have a "hold" on them requested by the federal Immigration and Customs Enforcement (ICE) agency to public and private penal institutions scattered around the country.

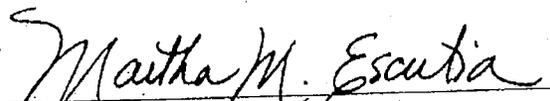
A common misconception, and one unfortunately spread by your administration in recent legislative hearings, is that inmates with ICE holds are "undocumented." That is not the case. In fact, at the time that ICE requests that a "hold" be placed on an inmate, no immigration judge has yet determined their true immigration status, and even whether or not that individual will be deported. Those who have ICE holds on them may be long-term, lawfully present American residents, they may be undocumented, and they may even be U.S. citizens who have been mistakenly identified as deportable. Many also have close family connections here in California, including children and spouses who are U.S. citizens.

We are also concerned that your proposal to single out only foreign-born inmates for involuntary transfer outside the state of California raises serious issues of equal protection and due process, fundamental touchstones of the Constitution. The Supreme Court has determined that, just as our government cannot single out any racial or ethnic group for unequal treatment, the government cannot target foreign nationals for differential treatment without surviving the strictest of scrutiny by our courts. Moreover, because many immigrant inmates may be in need of specialized counsel for immigration proceedings, the non-consensual transfer of such prisoners to scattered out-of-state facilities creates particular concerns regarding the inmates' access to competent legal counsel, and may exacerbate due process violations and erroneous deportation orders that occur when an individual is not represented by immigration counsel.

The grave problem of overcrowding in our state prisons merits serious, effective solutions that will not be vulnerable to legal challenge. If the administration seeks to transfer some inmates out of state, a better approach is to pursue voluntary transfer options that do not target only one group of inmates based on their race, ethnicity, or nationality. Penal Code section 11191, which governs the state's ability to consensually transfer inmates to facilities in other states, provides a good starting point. In addition, foreign nationals in our state prison system may request transfer to their countries of origin where they may serve their sentences pursuant to state, federal, and international laws and treaties.

We strongly urge you to reconsider your proposal targeting immigrants for involuntary transfer. In this time of vigorous debate and heated rhetoric on reforming the nation's immigration laws, immigrants may present an easy scapegoat. But the severity of the problems with our state prison system deserves better solutions.

Sincerely,



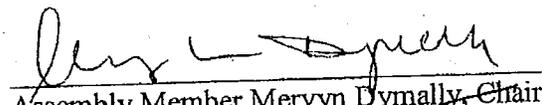
Senator Martha Escutia, Chair
Latino Legislative Caucus



Assembly Member Joe Coto, Vice Chair
Latino Legislative Caucus



Assembly Member Alberto Torrico, Chair
Asian Pacific Islander Legislative Caucus



Assembly Member Mervyn Dymally, Chair
Legislative Black Caucus

cc: The Honorable Don Perata, Senate President pro Tem
The Honorable Fabian Núñez, Assembly Speaker
The Honorable James E. Tilton, Secretary, California Dept. of Corrections and
Rehabilitation