AMERICAN CIVIL LIBERTIES UNION of COLORADO
ACLU FOUNDATION

Cathryn L. Hazouri, Executive Director • Mark Silverstein, Legal Director

December 20, 2007

Kevin L. Lundy, Inspector
Department of Homeland Security
Federal Protective Service
1961 Stout Street, 4th Floor
Denver, Colorado 80294
VIA FACSIMILE: 303-844-1947

Re: Federal Protective Service Seizures of Persons Without Photo I.D.

Dear Mr. Lundy:

We have received complaints that the Federal Protective Service ("FPS") is seizing persons who do not have photo identification at the Rogers Federal Building, detaining them in order to search their name for warrants in criminal databases, and contacting local law enforcement when FPS believes the name of the detained person matches that on an active criminal warrant. [1] We write on behalf of the ACLU of Colorado and the Colorado Chapter of the American Immigration Lawyers Association to bring these allegations to your attention, and to request your response.

There is no question that stopping and detaining a person, for even a brief period, is a seizure within the meaning of the Fourth Amendment and Article II Section 7 of the Colorado Constitution. *See Terry v. Ohio,* 392 U.S. 1, 17 (1968). In *Terry* and its progeny, the Supreme Court made clear that such an "investigatory stop" is only permissible under the Fourth Amendment if (1) the officer has a reasonable suspicion that a crime has occurred, is occurring, or is about to occur; (2) the purpose of the stop is reasonable; and (3) the scope and character of the detention is reasonable when considered in light of its purpose. *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983); *see also People v. Altman*, 938 P.2d 142, 144 (Colo. 1997) (adopting *Terry*).

We fail to see how any FPS officer or other law enforcement officer acting under the alleged policy could meet the even the first, prerequisite, *Terry* requirement. The fact that a person has no picture identification supports no suspicion, let alone a reasonable one, that a crime has occurred or is occurring. *E.g. United States v.*

[1] In addition to FPS officers seizing persons without I.D., some complainants also allege that Denver Police Department officers have also been inside the federal building engaged in the same practice. Whether the seizure is done by FPS officers, local law enforcement officers, contract government personnel, or some combination thereof, the Fourth Amendment analysis is the same.

Welker, 689 F.2d 167, 169 (10th Cir. 1982) (holding failure to produce identification by itself is not evidence of a crime).

In fact, because the federal building contains the immigration court, it seems very likely that the number of persons who enter the building without photo identification would be disproportionately high compared to the general population, further increasing the unreasonableness of attaching any suspicion of criminal activity to a lack of photo identification. Colorado, like many states, has recently made state photo identification even more difficult to obtain for persons born outside this country. Therefore, many perfectly law-abiding foreign-born citizens, persons with legal status, asylum applicants and others seeking legal status through pending immigration cases may be unable to obtain state identification either as a legal or practical matter. There are no legitimate grounds for suspecting that a lack of photo identification has any relation to criminal activity.[2] In lieu of an articulated and reasonable individualized suspicion of criminal activity, we believe seizing and detaining persons based solely on a lack of photo identification would be unconstitutional.

The fact that the federal building houses the immigration court raises additional constitutional concerns. Requiring a photo identification to enter a courthouse, of course, interferes with the Fifth Amendment due process rights of those with pending immigration cases, which includes the right to an open hearing. *See Habbad v. Achcroft*, 221 F.Supp.2d 199 (E.D. Mich. 2002). The photo identification requirement also impinges on the First Amendment rights of the press and the public to attend immigration proceedings. *See U.S. v. Smith*, 426 F.3d 567 (2nd Cir. 2005).

In *Habbad*, the court considered the application of a directive by then Chief Immigration Judge Michael Creppy ("Creppy directive") that all United States Immigration Judges mandate that they close immigration proceedings to the press and public. The Creppy directive was later struck down as unconstitutional. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th 2002). In considering how the closure of Habbad's hearing under that directive affected his rights, the court noted that it was well established that persons in immigration proceedings had due process rights, and that those rights included a meaningful opportunity to be heard and the right to an open hearing. *Habbad*, 221 F.Supp.2d at 805.

A requirement that all persons show photo identification before entering immigration court, and a policy of seizing and detaining all persons unwilling or unable to produce such identification, would clearly interfere with the First Amendment rights of the public and press attempting to attend such hearings, and may also "chill" the First Amendment rights of potential spectators. Moreover,

[2] Some complainants allege that persons *with* foreign photo identification have been seized and detained in certain instances. There are no legitimate grounds for suspecting criminal activity because someone produces foreign photo identification, and such a policy would also raise concerns under the Equal Protection Clause of the Fourteenth Amendment.

such a policy would interfere with the due process rights of the person in the immigration proceeding to have an open hearing, the ability to attend that hearing, and the right to present witnesses and testimony. This potential for interference with the last of these due process rights seems especially grave in the context of immigration proceedings, where witnesses whose testimony is critical to either side of an immigration case may lack the requisite identification and thus be subject to seizure.

U.S. v. Smith is also particularly instructive. In that case, the defendant challenged a decision by the Marshals Service to require photo identification as a condition of entering a federal courthouse. The court found that the Marshals Service decision to require photo identification clearly amounted to a "partial closure" of the courtroom, implicating his right to an open trial. *Smith*, 426 F.3d at 572. In holding the partial closure in that instance justified by the DHS "national alert level," the court noted of particular import here:

> While the Marshals Service and Secretary of DHS are charged by Congress with protecting the federal courts…the Supreme Court has made clear that courtroom and courthouse premises are subject to the control of the court.[3]
>
> . . .
>
> Control by the courts is essential, because the judiciary is uniquely attuned to the delicate balance between…rights to public trial, the public and press's First Amendment rights to courtroom access, and the overarching security considerations that are unique to the federal facilities containing courtrooms. Because of these factors, special concerns arise when security measures that seem obvious or commonplace in some settings are transferred to the door of such facilities. The judiciary is uniquely competent to strike the proper balance. *It is especially important that the judiciary maintain control of security measures that may affect those having business before the courts, because of the danger that litigants could be excluded from the courtroom and procedurally penalized for their absence through no fault of their own and without the knowledge of the court*. For these reasons, we expect the Marshals Service to consult with the courts before implementing general security measures that significantly affect court access. Such restrictions should then be approved by the judiciary through, for example, their relevant court security committees.

[3] Citing *Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966); *see also Westmoreland v. CBS, Inc*., 752 F.2d 16, 24 n. 13 (2d Cir. 1984) ("the judiciary . . . has always had control over the courtrooms"); *Brewster v. Bordenkircher*, 745 F.2d 913, 916 (4th Cir. 1984) ("It is [the district judge] who is best equipped to decide the extent to which security measures should be adopted").

United States v. Smith, 426 F.3d at 576 (emphasis added)(internal citations and quotations omitted). The alleged policy here appears to be a magnitude of degree beyond that considered by the court in *Smith*: FPS officers are not just checking photo identification as was the case in *Smith*, but are also allegedly seizing and detaining persons unable or unwilling to produce that identification. Such an additional, significant intrusion would obviously heighten the need for careful judicial balancing of the constitutional rights such a policy would implicate.

In sum, a policy of summarily seizing and detaining any person unable or unwilling to provide photo identification, without any individualized suspicion of criminal activity, is not permissible under the Fourth Amendment. In addition, such a policy would interfere with the Fifth Amendment rights of the person in the immigration hearing, as well as the First Amendment rights of the press and the public to attend such hearings.

We look forward to your response at your earliest convenience regarding these allegations. If such a policy exists in any form, we request the details of that policy and any record of judicial sanction that has been given to that policy. If you have any questions or if we can provide any additional information, please do not hesitate to contact us.

Sincerely,

Taylor Pendergrass
Staff Attorney
ACLU of Colorado

David Harston
Chair, Colorado Chapter
American Immigration Lawyers Association

cc: Victor L. Nettles
Department of Homeland Security
Federal Protective Service, Region 8-Denver, Colorado
Denver Federal Center, Building 41 Room 258
Denver, Colorado 80225-0546
VIA FACSIMILE: 303-236-7965

The Honorable David L. Neal, Chief Immigration Judge
Office of the Chief Immigration Judge
5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

Alec Revelle, Court Administrator
Department of Justice
Executive Office for Immigration Review

1961 Stout Street, Room 1403
Denver, Colorado 80294

The Honorable Daivd J. Cordova, Immigration Judge
Department of Justice
Executive Office for Immigration Review
1961 Stout Street, Room 1403
Denver, Colorado 80294

The Honorable Donn L. Livingston, Immigration Judge
Department of Justice
Executive Office for Immigration Review
1961 Stout Street, Room 1403
Denver, Colorado 80294

Corina E. Almeida, Chief Counsel
Department of Homeland Security
U.S. Immigration and Customs Enforcement
4730 Paris Street
Denver, Colorado 80239
VIA FACSIMILE: 303-721-3313