Immigration & Local Law Enforcement

AN UPDATE ON THE LAW

October 2017

ISSUE BRIEF

Immigration and Local Law Enforcement: An Update on the Law

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I. Introduction

Local law enforcement agencies are essential to protect and serve all Michigan residents, including our immigrant communities. Yet when immigrants perceive that local law enforcement agencies are helping to enforce federal immigration law, rather than prioritizing public safety in their communities, they may be less likely to reach out to police or sheriff's departments when they are witnesses to or victims of a crime, because they fear that they or their loved ones might end up detained and deported. Local law enforcement involvement in federal immigration enforcement can also expose local police or sheriff's departments to civil liability, and ultimately create massive costs to taxpayers.

In response to these concerns, the American Civil Liberties Union (ACLU) of Michigan and the Michigan Immigrant Rights Center (MIRC) have developed this Issue Brief to answer common questions that local law enforcement agencies face in their relationships with immigrant communities.

II. Why Police Should Care About Relationships with Immigrant Communities

Local law enforcement involvement in federal immigration enforcement harms public safety. The Major Cities Chiefs Association,[1] the Presidential Task Force on 21st Century Policing,[2] and Attorneys General from New York, Oregon, California, Washington, Rhode Island, and the District of Columbia[3] have all adopted positions or policies opposing such entanglement on the grounds that it harms public safety.

Police know from experience that trust between immigrant communities and police is undermined when police are believed to be working with federal immigration officials. Immigrant witnesses and victims, whether or not they themselves are lawfully present, are less likely to report crimes and helpful intelligence for fear that they or their family members will be questioned, detained, or deported.

Additionally, federal immigration law is among the most complex bodies of law in the United States. The training that would be required for local law enforcement officers to understand it would be extremely costly and take time from the work of keeping their communities safe.

Immigrants who come into contact with law enforcement through traffic stops or other routine matters have often been living and working peacefully in the United States, sometimes for years. Immigrants understand that any encounter with the police—whether it's a traffic stop, participation in an

[1] *See* Major Cities Chiefs Association, "Immigration Policy" (2013), available at https://www.majorcitieschiefs.com/pdf/news/2013_immigration_policy.pdf.
[2] See President's Task Force on 21st Century Policing, "Final Report of the President's Task Force on 21st Century Policing" (May 2015) at 18 (Action Item 1.9.1), available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.
[3] See "Setting the Record Straight on Local Involvement in Federal Civil Immigration Enforcement: The Facts and the Laws" (May 2017), available at https://ag.ny.gov/sites/default/files/setting_the_record_straight.pdf.

investigation, or requesting help from the police—can lead to immigration enforcement against themselves or family and friends. It is no surprise, then, that many people in immigrant communities are afraid to call the police because they fear immigration consequences for themselves or their family members. For example, a 2013 study confirmed that many Latinos, regardless of their immigration or citizenship status, fear even minimal contact with the police, with almost half expressing reluctance to report a crime OR voluntarily offer information about a crime.[4]

When immigrants fear the police, harms public safety for everyone. The Major Cities Chiefs Association has explained:

> Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes.[5]

This chilling effect is particularly troubling in the case of crime victims, who, when reporting to police, must overcome not only their fear of the perpetrator, but also the additional fear that reporting the crime could lead to immigration consequences for the victim or their family.

The crackdown on immigrants under the current administration has made immigrants and Latinos even more fearful to report crimes. A recent study by the Houston Police Department found that the sexual assault incidents reported by Latinos in 2017 were down nearly 43 percent when compared to the same period 2016. [6] The study also reported a 12 percent decrease in the number of Latino-reported aggravated assaults and robberies.[7] Similarly, the Los Angeles Police Department reported a 25 percent drop in reports of sexual assault from Latino residents and a 10 percent drop in reports of domestic violence from Latino residents in 2017.[8] In neither case were similar drops in reporting observed in other communities.

In order to prevent such distrust from your community and constituents, your department should avoid becoming entangled in federal civil immigration enforcement. We therefore encourage you to focus on building relationships with immigrant communities that make everyone safer, rather than sowing fear

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[4] *See* Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, University of Illinois at Chicago (May 2013), *available at*: https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

[5] Major Cities Chiefs Immigration Committee, Recommendations for Enforcement of Immigration Law by Local Police Agencies, at 6 (adopted by Major Cities Chiefs, June 2006), *available at:* http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

[6] *See* John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' On Crime Reporting*, NPR (May 25, 2017), *available at*: http://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting.

[7] *Id*.

[8] James Queally, *Latinos Are Reporting Fewer Sexual Assaults Amid a Climate of Fear in Immigrant Communities, LAPD Says*, Los Angeles Times (Mar. 21, 2017), *available at* http://www.latimes.com/local/lanow/la-me-ln-immigrant-crime-reporting-drops-20170321-story.html.

that any contact with police could lead to deportation. A more detailed discussion of these best practices is included at the end of this brief.[9]

III. Why Police Should Leave Immigration Enforcement to the Federal Government

Immigration law is extremely complex, and local and state police can easily run afoul of the law if they take actions based on speculation regarding an individual's legal status. Given the complexity of immigration law, and the danger that local law enforcement officers who are untrained in those complexities will impermissibly rely on race, religion or national origin when investigating immigration status, law enforcement agencies can best reduce their risk of liability by avoiding involvement in immigration matters and leaving enforcement of federal immigration law to federal immigration officials.[10]

The ACLU and MIRC have received numerous complaints about local police agencies that have allegedly violated the law by attempting to engage in immigration enforcement. Those complaints typically involve targeting drivers of color for minor traffic violations and then turning the vehicle's occupants over to immigration authorities; making stops based solely on suspicion that a person is undocumented; and prolonging otherwise legal stops to investigate a person's immigration status. All of those practices are illegal.

A. RACIAL PROFILING AND PRETEXTUAL STOPS

Racial profiling by law enforcement is unconstitutional because targeting minorities on account of race or (perceived) national origin deprives these individuals of equal protection under the laws within the meaning of the Fourteenth Amendment to the U.S. Constitution. For example, targeting drivers of color (e.g., Latinos or Arabs) based on their race, even if a citation or arrest would otherwise be supported by probable cause, violates the rights of those drivers to equal protection and is therefore against the law.[11]

[9] *See* Section IV.C below.

[10] For a detailed discussion of the law in this area, see Immigrant Legal Resource Center, *Immigration Enforcement Authority for Local Law Enforcement Agents* (2015), *available at:* http://www.ilrc.org/files/documents/lea_immig_faqs_post_announce.pdf.

[11] *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002) ("[U]nequal treatment based upon [] race or ethnicity during the course of an otherwise lawful traffic stop [is] sufficient to demonstrate a violation of the Equal Protection Clause."); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Latino ancestry alone cannot create reasonable belief that a person is in the United States unlawfully).

B. STOPS MAY NOT BE BASED ON SUSPICION OF UNLAWFUL IMMIGRATION STATUS

In 2012, the Supreme Court reaffirmed the longstanding principle that immigration violations are civil infractions that fall primarily under the purview of the federal government. The Supreme Court wrote "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[12] Lack of proper immigration status is a violation of *civil* immigration law and does not constitute a criminal offense. Moreover, many people who are present without authorized immigration status may in fact be eligible to obtain lawful status, and some may even have obtained lawful status without being aware of this status change.[13]

Ordinarily, local and state law enforcement can only make a stop or arrest for criminal violations. As the Supreme Court has explained, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[14] Because police must have reasonable suspicion of a crime to make a stop, and because unlawful presence is not a crime, local law enforcement officers generally cannot detain, much less arrest, someone simply because they believe the person is in the United States unlawfully.[15] The responsibility for making civil immigration arrests lies with federal agents.

C. STOPS MAY NOT BE EXTENDED TO ASK ABOUT IMMIGRATION STATUS

Suspecting or even knowing of immigration status violations is also insufficient to justify extending a stop or detention.[16] A stop is only lawful so long as inquiries unrelated to justification for the stop "do

[12] *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). *See also United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015) ("unlawful presence in the country is not, without more, a crime"); *Carcamo v. Holder*, 713 F.3d 916, 922 n.5 (8th Cir. 2013) (quoting *Arizona v. United States* that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("mere unauthorized presence in the United States is not a crime").

[13] For example, an individual may have derived citizenship when he or she was a minor from a parent who naturalized, or may have been born abroad to U.S. citizen parent(s) and unknowingly acquired citizenship.

[14] *Arizona v. United States*, 132 S. Ct. at 2505. Lower federal courts have interpreted *Arizona* as precluding local law enforcement officers from arresting individuals solely based on known or suspected *civil* immigration violations. *See, e.g., Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013), cert. denied, 134 S. Ct. 1541, 188 L. Ed. 2d 557 (2014) (emphasis added).

[15] The Supreme Court specifically struck down a law that authorized state law enforcement to arrest of individuals who they believed to be removable. *Arizona v. United States*, 132 S. Ct. at 2506 (finding "authorizing state officers to decide whether an alien should be detained for being removable . . . violates the principle that the removal process is entrusted to the discretion of the Federal Government").

[16] *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 976 (D. Ariz. 2011) aff'd sub nom. *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (finding the practice of holding individuals on the basis on suspected immigration status violated the Fourth Amendment); *Ortega-Melendres v. Arpaio*, 989 F. Supp. 2d 822, 906 (D. Ariz. 2013) adhered to, No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), modified by and clarified by *de Jesus Ortega Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2014 U.S. Dist. LEXIS 60435 (D. Ariz. Apr. 29, 2014) (finding "detaining a [vehicle's] passenger while running his or her identification through [] database is not 'reasonably related in scope' to the traffic infraction and therefore requires independent reasonable suspicion"); and *United States v. Alvarado*, 989 F. Supp. 2d 505,

not measurably extend" its duration.[17] The Supreme Court has explained that extending a state-law based detention for purposes of awaiting federal verification of immigration status "would raise constitutional concerns."[18] The U.S. Court of Appeals for the Sixth Circuit has also found that suspicion of unlawful immigration status is not a valid basis to continue custody because such status is not a crime.[19]

IV. How ICE Detainers Have Changed Under the New Administration and How Police Should Respond

Immigration arrests have spiked in 2017 across the country, due to several factors: new executive orders and guidance on immigration enforcement;[20] more aggressive operations by U.S. Immigration and Customs Enforcement (ICE) and an increased willingness to make "collateral arrests";[21] and closer cooperation between ICE and some local police departments.[22] However, not all of these changes stand on sturdy legal ground, particularly in regards to the use of detainer requests. Several federal courts have found that counties can be held liable if they hold an individual on an immigration detainer request in violation of the Fourth Amendment.[23] Recent changes to the detainer program are outlined here, along with relevant court decisions that local law enforcement should heed in order to not be held liable.

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522 (S.D. Miss. 2013), appeal dismissed (Apr. 4, 2014) (holding that a prolonged traffic stop based on an officer's "hunch" that passengers in the car were in the country illegally violated the plaintiff's Fourth Amendment rights).

[17] *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015).

[18] *Arizona v. United States*, 132 S. Ct. at 2509.

[19] *See United States v. Urrieta*, 520 F.3d 569, 578 (6th Cir. 2008) ("Under the Fourth Amendment, even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity.").

[20] *See* Caitlin Dickerson, "Immigration Arrests Rise Sharply as a Trump Mandate Is Carried Out," *The New York Times* (May 17, 2017): "The rapid increase in arrests was primarily the result of one of Mr. Trump's first significant immigration moves, rescinding rules laid down by former President Barack Obama that prioritized the arrest of people with criminal convictions and recent border crossers. More than half of the increase in arrests were of immigrants who had violated no law other than being in the country without permission." *Available at*: https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html.

[21] *See* Jennifer Medina and Miriam Jordan, "A Broader Sweep," *The New York Times* (July 21, 2017) *available at* https://www.nytimes.com/interactive/2017/07/21/us/immigration-enforcement-california-trump.html ([A]cross the country, agents now make more 'collateral' arrests — undocumented people they come across while looking for someone else.")

[22] See *Donald Trump's Plan to Outsource Immigration Enforcement to Local Cops*, The Atlantic (February 18, 2017), *available at*: https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071/. *See also* Michelle Mark, *ICE is partnering with 18 more sheriff's departments to ramp up its deportation machine*, Business Insider (August 1, 2017) available at: http://www.businessinsider.com/ice-announces-18-texas-287g-agreements-deportation-immigration-news-2017-8. For more information on the 287(g) program, visit: https://www.americanimmigrationcouncil.org/research/287g-program-immigration.

[23] For example, in *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014), a federal court in Oregon held that the county had violated the constitutional rights of Ms. Miranda-Olivares and was liable for damages because the county detained her without probable cause when it chose to hold her based on an ICE detainer. In light of *Miranda-Olivares* and similar decisions, any law enforcement agency that holds an individual beyond his or her release date without a judicially administered warrant demonstrating probable cause that the individual is eligible for removal exposes the agency to liability for violating the Fourth Amendment. *See also Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"), *aff'd in part, dismissed in part on other grounds*, 793 F.3d 208 (1st Cir. 2015); *Moreno v. Napolitano*, 2014 U.S. Dist. LEXIS 136965 (N.D. Ill. Sept 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807 (N.D. Ill.

A. UPDATES REGARDING ICE DETAINER POLICIES

The current administration has taken an active role in restructuring the immigration detainer system. On January 25, 2017, the White House issued an Executive order titled "Enhancing Public Safety in the Interior of the United States" (hereafter "Executive Order"), which – among other changes – reinstituted the immigration program Secure Communities.[24] Two months later ICE issued a directive revising the agency's immigration detainer request policies (hereafter "Policy Directive").[25] The changes included in these pronouncements are detailed below.

- **There are no more "priority" cases.** The January 25 Executive Order dismantled the Priority Enforcement Program (PEP), which targeted individuals with certain criminal convictions for deportation, which had previously been used by ICE. Under the new ICE policy, all non-citizens are now subject to the same detainer policies, regardless of criminal background. Although the administration publicly describes its immigration enforcement program as designed to remove dangerous criminals, it has used internal memos to instruct ICE officers to "take enforcement action against all removable aliens encountered in their duties."[26] Local law enforcement should be aware that not everyone for whom DHS issues a detainer will have been convicted of or even suspected of a serious crime.

- **ICE has reinstituted Secure Communities.** The Executive Order, among other things, also ordered ICE to reinstitute the Secure Communities program, wherein DHS automatically receives biometric data submitted to the FBI during bookings by state and local law enforcement agencies and determines whether to take enforcement actions against individuals who may be removable.[27] The use of this database means that a non-citizen arrestee will be at risk of being swept up into the deportation system following *any* arrest by local law enforcement where fingerprints are taken. In such instances, ICE neither gives consideration to the individual's ties to the community nor do they conduct any assessment of the threat that individual may pose to

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2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Uroza v. Salt Lake City*, 2013 U.S. Dist. LEXIS 24640, at *17-20 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on immigration detainer without probable cause), 2014 U.S. Dist. LEXIS 127110 at *16-24 (D. Utah Sept. 10, 2014) (denying federal government defendants' motion for summary judgment, finding plaintiff's claim for declaratory judgment as to whether ICE's issuance of 'hold requests' in the absence of probable cause, "in particular merely to investigate a person's immigration status…violates the Fourth and Fifth Amendments" is not moot, despite no longer being subject to an ICE hold); *Makowski v. United States*, 27 F. Supp. 3d 901, 918 (N.D. Ill. 2014) (concluding that plaintiff states a plausible false imprisonment claim against the U.S. where he was held on a detainer without probable cause).

[24] Enhancing Public Safety in the Interior of the United States, Executive Order no. 13768 (Jan. 25, 2017) (hereinafter "Executive Order"), *available at* https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[25] Issuance of Immigration Detainers by ICE Immigration Officers, Policy Directive no. 10074.2 (March 24, 2017) (hereinafter "Policy Directive"), *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf

[26] *See* Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, ProPublica (July 7, 2017), *available at*: https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty.

[27] Executive Order, *supra* note 21, at Sec. 10.

public safety. During its last implementation, Secure Communities significantly eroded trust between local law enforcement and the community they serve.[28]

- **ICE has created new immigration detainer request forms.** As of April 2, 2017, ICE rescinded all previously used detainer request forms and replaced them with a consolidated detainer request form I-247A.[29] As with prior immigration detainer request forms, form I-247A requests that local law enforcement agencies (a) notify ICE of a pending release during the time that the person is otherwise in custody under state or local authority and (b) hold an individual for up to 48 hours beyond the point at which they would otherwise be released.[30] Local law enforcement should remember that all ICE immigration detainer requests are voluntary. Nothing requires localities to respond to ICE's requests for detention. In fact, requiring local law enforcement to comply with a detainer would violate the "anti-commandeering" doctrine of the Tenth Amendment to the United States Constitution.[31] Moreover, holding someone pursuant to an ICE detainer without probable cause violates the Fourth Amendment. Police departments may face liability if they do so. The updated detainer request form does not cure the constitutional and statutory deficiencies of the previous immigration detainer forms.

- **ICE detainer requests will now be accompanied by either Form I-200 or Form I-205.** In the Policy Directive, ICE Acting Director Thomas Homan directed ICE officers to submit either form I-200 (Warrant for Arrest of Alien) or I-205 (Warrant of Removal/Deportation) with all immigration detainer requests.[32] This policy change was likely taken in an attempt to address growing concerns that local authorities are detaining individuals who would otherwise be released in what would effectively constitute warrantless arrests with no probable cause.[33] Nevertheless, while forms I-200 and I-205 are named "warrants," they do not qualify as warrants under the Fourth Amendment. And, while they claim probable cause exists, they offer almost no information about the basis for ICE's assertion of probable cause, and in fact errors are frequent.[34]

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[28] Nik Theodore, *Communities Change When Local Police Enforce Immigration Laws*, Roll Call (Oct. 30, 2013), *available at* http://www.rollcall.com/news/communities_change_when_local_police_enforce_immigration_laws_commentary-227898-1.html.

[29] DHS Form I-247A replaced all prior detainer forms used by the agency, including forms I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien), and Form I-247X (Request for Voluntary Transfer). These earlier forms may no longer be issued. Policy Directive, *supra* note 22, at 2.1. Sample I-247A forms. Sample Form I-247A are available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[30] *See* Form I-247A are available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[31] *Galarza v. Szalczyk* 745 F.3d 634, 644 (3d Cir. 2014) (finding that it "would violate the anti-commandeering doctrine of the Tenth Amendment" if "a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government").

[32] Policy Directive, *supra* note 22, at 2.4, 5.2.

[33] *See, e.g., Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (slip op.) (noting that prolonged detention based on an immigration detainer "constituted a new arrest, and must be analyzed under the Fourth Amendment.").

[34] *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRAC Immigration, *available at* http://trac.syr.edu/immigration/reports/311/ (detailing the number of ICE detainer requests that had been placed on U.S. citizens and legal permanent residents between FY 2008 and FY 2012. Detainers had been placed on 834 U.S. Citizens and 28,489 legal permanent during that period)

B. RECENT COURT RULINGS REGARDING ICE DETAINERS

Courts in recent years have experienced an increase in litigation challenging immigration detainer requests. As a result of this increased activity, federal courts have begun striking down key aspects of ICE's detainer system as unconstitutional and in violation of federal statutes. A summary of key developments and relevant court decisions is included below.

a. **Compliance with ICE detainers is voluntary.** Local law enforcement sometimes wrongly treats ICE detainer requests as mandatory. In *Galarza v. Szalczyk* (2014), the Third Circuit Court of Appeals ruled that law enforcement officers are not required to enforce an ICE detainer because it was voluntary.[35] Other courts have similarly found that the text of the federal regulations authorizing immigration detainers only request *voluntary* compliance in detaining suspected aliens.[36] These rulings are in accord with ICE's longstanding litigation position that detainers are requests and not commands.[37] Moreover, requiring local law enforcement to comply with a detainer would violate the 10th Amendment to the United States Constitution.[38]

b. **Prolonging an individual's detention pursuant to an immigration detainer request constitutes a new arrest requiring probable cause.** Continuing to hold individuals pursuant to ICE detainers constitute a new arrest that requires probable cause, which ICE often does not provide. In *Morales v. Chadbourne* (2015), the First Circuit Court of Appeals found that detaining someone beyond their release date is an arrest under the Fourth Amendment, requiring probable cause and denied officers' claims of qualified immunity.[39] Over the course of 2017, federal courts in Washington, Minnesota, Oregon, and Texas have found that detention pursuant to immigration detainer requests qualify as seizures under the U.S. Constitution and therefore must be supported by either probable cause or a warrant that complies with the Fourth Amendment. [40]

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[35] 745 F.3d 634 (3d Cir. 2014).

[36] *See* e.*g. Mercado v. Dallas Cty., Texas*, 229 F. Supp. 3d 501, 513 (N.D. Tex. 2017) (discussing the language of 8 C.F.R. § 287.7).

[37] *See e.g. Vargas v. Swan*, 854 F.2d 1028, 1030 (7th Cir. 1988) ("The INS [precursor to DHS] argues that the "detainer" here really is not a detainer but merely serves to advise the Waupun correctional facility that the INS may find Vargas excludable and requests that the institution inform the INS of Vargas's expected release date thirty days beforehand.")

[38] *Galarza v. Szalczyk* 745 F.3d 634, 644 (3d Cir. 2014) (finding that it "would violate the anti-commandeering doctrine of the Tenth Amendment" if "a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government").

[39] 793 F.3d 208 (1st Cir. 2015); *see also Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting that DHS conceded that detention pursuant to an immigration detainer request constitutes a warrantless arrest)

[40] *Ochoa v. Campbell*, No. 1:17-CV-03124-SMJ, 2017 WL 3476777, at *7 (E.D. Wash. July 31, 2017); *Trujillo Santoyo v. United States, et al.*, 5:16–cv–855–OLG, 2017 WL 2896021, at *6 (W.D. Tex. June 5, 2017) ("[D]etention pursuant to an ICE detainer request is a Fourth Amendment seizure that must be supported by probable cause or a warrant."); *Mercado v. Dallas Cty., Texas*, 229 F. Supp. 3d 501, 511 (N.D. Tex. 2017) ("The parties appear to agree that, under Fourth Amendment jurisprudence, absent 'probable cause,' Dallas County was not permitted to detain the plaintiffs after they were otherwise eligible for release."); *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017) (concluding that plaintiff's continued detention constituted a warrantless arrest, which is reasonable under the Fourth Amendment only when supported by probable cause); *City of El Cenizo v. State*, No. SA-17-CV-404-OLG, 2017 WL 3763098, at *33 (W.D. Tex. Aug. 30, 2017) (noting that no provisions of state or federal law authorized local officials to arrest and detain individuals for civil

c. **ICE detainer requests do not allow local officers to make immigration arrests.** The Fourth Amendment requires that law enforcement have probable cause in order to continue to detain an individual; immigration detainer requests do not themselves establish probable cause for the arrest. In *Miranda-Olivares v. Clackamas County* (2014), the Federal District Court in Oregon ruled that the ICE detainer at issue in the case did not establish probable cause and therefore the subsequent new arrest was unjustified.[41] Moreover, in 2016, the Northern District Court of Illinois found in *Jimenez-Moreno v. Napolitano* (2016) that ICE frequently placed detainers on individuals without the requisite probable cause or adequate investigation.[42] More generally, the Northern District Court of Texas explained that because immigration infractions constitute only a civil offense, the Constitution does not permit local officers to arrest based on immigration detainers.[43] While the language of the immigration detainer request form has changed slightly in form I-247A, the revised form still does not supply probable cause for a new detention.

d. **Immigration Forms I-200 and I-205 do not satisfy the Fourth Amendment.** When issuing a warrant, the Fourth Amendment requires that an independent magistrate, not law enforcement officer, determine whether probable cause for the issuance of a warrant exists.[44] However, forms I-200 and I-205 are not reviewed or authorized by a neutral magistrate nor do they include any particularized statement of probable cause; instead, these forms are signed only by ICE officers.[45] Accordingly, in July 2017, the federal district court in *Ochoa v. Campbell* held that law enforcement could not rely on the I-200 form as a substitute for probable cause.[46] Moreover, the lack of oversight in the issuance of I-200 and I-205 forms has resulted in several instances of ICE erroneously issuing detainer requests for U.S. citizens and other individuals not subject to deportation.[47]

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immigration violations or to assess probable cause of an individual's removability). *See also Miranda–Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014) (holding that continuation of detention pursuant to an ICE detainer constituted a new seizure independent of plaintiff's detention on state charges).

[41] No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014) ("[T]he County no longer ha[d] legal authority based only on an ICE detainer which provides no probable cause for detention. That custom and practice violated Miranda–Olivares's Fourth Amendment rights by detaining her without probable cause both after she was eligible for pre-trial release upon posting bail and after her release from state charges.").

[42] *Moreno v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016)

[43] *Mercado v. Dallas Cty., Texas*, 229 F. Supp. 3d 501, 511 (N.D. Tex. 2017)

[44] *Gerstein v. Pugh*, 420 U.S. 103, 117–18 (1975) (internal citation omitted); *see also* *Ochoa v. Campbell*, No. 1:17-CV-03124-SMJ, 2017 WL 3476777, at *7 (E.D. Wash. July 31, 2017) ("In short, pretrial detention is 'unlawful unless a judge (or grand jury) first makes a reliable finding of probable cause.'") (quoting *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 917 (2017)).

[45] *See* Sample Form I-200, *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF; Sample Form I-205, *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF.

[46] No. 1:17-CV-03124-SMJ, 2017 WL 3476777, at *9-15 (E.D. Wash. July 31, 2017).

[47] *See Davila v. United States*, No. 2:13-CV-00070, 2017 WL 1162912, at *1 (W.D. Pa. Mar. 28, 2017) (ICE asked local officer to first arrest plaintiff Angelica Davila, a naturalized U.S. citizen, and then issued an erroneous immigration detainer request for her detention); *Moreno v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016) (ICE issued erroneous immigration detainer requests for plaintiffs Jose Jimenez Moreno [U.S. citizen] and Maria Jose Lopez [Lawful permanent resident]); *Morales v. Chadbourne*, 793 F.3d 208, 212 (1st Cir. 2015) (ICE issued an erroneous detainer requests for plaintiff Ada Morales, a naturalized U.S. citizen and long-time resident of Rhode Island, on two separate incidents); *Galarza v. Szalczyk*,

C. RECOMMENDATIONS FOR LOCAL POLICE RESPONSES TO ICE DETAINER AND NOTIFICATION REQUESTS

In light of these and other court decisions, state and local law enforcement agencies that hold people based solely on ICE detainer requests are violating the Constitution, not to mention undermining community trust and public safety. To this end, we have included a brief list of recommendations that your office can take to limit its liability and ensure continued collaboration with its constituents.

1. **Localities should not prolong detention based on immigration detainer requests.** The safest course for local law enforcement agencies is to never rely on ICE detainers as a basis for prolonging an individual's detention past the normal release date. Given the spate of court decisions striking down various aspects of the immigration detainer request system, numerous counties in Michigan have adopted policies of refusing to honor immigration detainer requests. In April of this year, Sheriff Napoleon of Wayne County issued a memorandum declaring that his department would not honor immigration detainer requests unless they were accompanied by either judicial determinations of probable cause or a warrant issued by a judicial officer.[48] Three months later, the Ingham Sheriff's Office similarly issued a General Order to its officers instructing them to require a Judicial Warrant in order to honor immigration detainer requests.[49]

2. **Localities should not treat individuals with immigration detainer requests differently.** Individuals who have an immigration detainer request should be treated exactly like other individuals within your department's custody for the purposes of release, bail, work assignments, diversion, custody classifications, etc. For example, jail staff should never tell a person that bond is not available because the individual has an ICE detainer.

3. **Localities should refrain from responding to ICE notification requests or do so in very limited circumstances.** Immigrant communities will continue to fear the police if every law enforcement contact could result in notification to ICE and subsequent deportation. Localities have no legal obligation to respond to notification requests,[50] and refraining from doing so furthers community policing efforts, advances public safety, and strengthens ties between law enforcement and immigrant communities.

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745 F.3d 634, 636 (3d Cir. 2014) (despite providing a driver's license, social security card and repeatedly indicating that he was born in New Jersey, ICE officials issued a detainer request for plaintiff Ernesto Galarza).

[48] Memorandum, Benny N. Napoleon, Immigration Detainer-Notice of Action (Apr. 28, 2017), *available at* http://justiceandpeaceadvocacy.org/wp-content/uploads/2017/05/DIRECTIVE-COJAC-17-04.-Immigration-Detainer-Notice-of-Action.pdf).

[49] Ingham County Sheriff's Office General Order No. 268 (July 19, 2017).

[50] Federal law only prohibits local law enforcement from establishing policies that limit sharing information with ICE about an individual's immigration or citizenship status. It does not require local law enforcement to take affirmative actions in response to ICE requests. See *Steinle v. City and County of San Francisco*, No. 3:16-cv-02859 (N.D. Cal. filed Jan. 6, 2017) ("[N]o plausible reading of [the statute] encompasses the release date of an undocumented inmate."); *Sturgeon v. Bratton*, 95 Cal.Rptr.3d 718 (Cal.App.4th 2009) (upholding Los Angeles policy against initiating any police action on the basis of suspected immigration violations).

4. **Police should use appearance tickets where appropriate, rather than booking individuals on minor offenses.** A major reason that immigrants and their families fear police is that the most minor infraction can result in deportation. When police arrest, book, and fingerprint a person, the individual's fingerprints will automatically be sent to immigration authorities. By using appearance tickets rather than making arrests for offenses like driving without a license, local police can help ensure that they are not seen as proxy deportation agents.