



ICE DETAINERS ARE ILLEGAL – SO WHAT DOES THAT REALLY MEAN?

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I. Background

Immigration and Customs Enforcement (ICE) is the primary federal entity in charge of arresting people in the United States for alleged immigration violations. ICE has built its enforcement operations to depend on the resources and assistance of state and local governments. In fact, most ICE arrests happen through the aid from state, county, or city law enforcement officers.¹ People who are stopped or arrested by local officers are often funneled directly to ICE, where they then face deportation.

The main way for ICE to initiate this transfer from the criminal legal system to the immigration system is to send an **ICE detainer request** (“**ICE detainer**”) to a state or local jail.² This ICE detainer provides a notice of ICE’s intent to arrest an individual who is currently detained by local officers. The detainer request is written on the **Form I-247A**³ and asks the state or local jail to: 1) notify ICE of the person’s release date, as far in advance as possible, and/or 2) maintain custody of the person ICE is trying to arrest for up to 48 hours after the person is eligible for release under state or local law, to give ICE time to arrive and take custody.

Over the years, various courts throughout the country have agreed that prolonging custody of a person solely based on an ICE detainer request is unlawful for numerous reasons. As a result of these lawsuits and the advocacy efforts to have localities disengage from involvement in immigration enforcement, many localities have stopped holding people on ICE detainers (i.e. maintaining custody of the person because ICE submitted a detainer request). Still, a majority of localities across the country continue to hold people for ICE.

This practice advisory provides a summary of the court decisions related to ICE detainers and the arguments to challenge localities that continue to detain people for ICE.

II. What ICE Can and Cannot Do

A. ICE Must Have Probable Cause to Issue Detainers

The Fourth Amendment of the U.S. Constitution requires that arrests, such as prolonged detentions on ICE detainers, be based on probable cause.⁴ But ICE detainers may not meet this standard. In a case in Rhode Island, after a state court ordered a woman released from a local jail on personal recognizance, the jail continued to hold her on an ICE detainer. The ICE detainer claimed that “an investigation ha[d] been initiated” into her, but did not provide further reasons to detain her.⁵ She sued ICE and the jail for unlawful detention,

and the court found that ICE is required to have probable cause before seeking to arrest and detain persons.⁶ In this case, the court found that ICE did not have probable cause because it failed to sufficiently investigate her immigration status before issuing the ICE detainer.⁷ In fact, she was a naturalized U.S. citizen.

ICE subsequently changed its detainer form from stating that it was initiating an investigation to claiming that it had probable cause. Nevertheless, this change failed to significantly change ICE's behavior as it continued to issue detainers without real justification.⁸

Recently, a federal court in Los Angeles blocked ICE from issuing detainers based only on information from database searches.⁹ The court found that ICE's electronic databases are too unreliable to support probable cause for detainers. The court reasoned that ICE must have further information beyond the database results to establish probable cause, such as a prior removal order or an admission of facts from the person themselves. The court further found that ICE violates the Fourth Amendment when they issue a detainer to a state where state law does not expressly provide authority for that arrest.¹⁰ It found that the detainer itself does not provide legal authority for arrest, and thus ICE is causing unlawful arrests to occur unless state law specifically authorizes such seizures.¹¹

B. In Order to Issue a Detainer, ICE Must Either Have a Warrant, or Determine that the Person is Likely to Escape Before a Warrant Can be Obtained

Federal law allows immigration officers to arrest a person and detain them while they are in removal proceedings.¹² By federal statute, ICE officers must have a warrant for arrest, unless the immigration officer has reason to believe that the person is likely to escape before the warrant can be obtained.¹³ In 2016, a federal court found that ICE's policy to issue ICE detainers without a warrant and without making individualized assessments that a person was likely to escape went beyond this statutory authority.¹⁴ Since then, ICE has changed its policy by requiring ICE officers to attach administrative warrants to all ICE detainers it issues.¹⁵

III. What Local Officers Can and Cannot Do

A. Courts Agree that ICE Detainers are Not Mandatory

Local officers are free to ignore ICE detainers.¹⁶ This was determined in a case where local officers detained a person even though he was eligible for release from custody after paying bail.¹⁷ The jail tried to argue that it was obligated to continue maintaining custody of the person because of the ICE detainer. The court disagreed and held that ICE detainers are not mandatory, but are simply requests.¹⁸ The court found that not only are local officers free to disregard ICE detainers, but that they may be held liable for unlawful detention resulting from a detainer.¹⁹ Subsequently, ICE has agreed that ICE detainers are voluntary requests rather than mandatory orders.²⁰

B. Local Officers Who Hold Individuals on ICE Detainers are Making a New Arrest Subject to the Fourth Amendment

Courts agree that continuing to detain a person after they have been ordered released from custody constitutes a new arrest, which must be based on new probable cause.²¹ In other words, although the local

agency had probable cause to arrest the person on the original criminal charges, the continued detention based on the ICE detainer was a new arrest that required a new probable cause analysis.²²

C. Local Officers Can be Liable for Violating the Fourth Amendment by Holding People on ICE Detainers

Federal courts have found that local officers who hold individuals on ICE detainers after they would otherwise have been released from custody may violate the Fourth Amendment.²³ In an important case in Oregon, a person was arrested by local officers on criminal charges but was eligible for release.²⁴ However, instead of releasing her, the jail continued to hold her because ICE filed a detainer against her.²⁵ The court found that the local officers were in violation of the Fourth Amendment because they did not have probable cause for the new arrest. The court then awarded damages for unlawful detention to the plaintiff.²⁶

D. Local Officers May Not Have Federal or State Law Authority to Detain People for Civil Immigration Violations

Generally, local officers derive their powers to arrest persons from state law.²⁷ Under federal immigration laws, local officers have no authority to make civil immigration arrests, but certain federal statutes allow for local officers to have a limited role in assisting with immigration enforcement.²⁸ But the arrest authority of local officers is primarily defined by state laws, which also usually do not authorize immigration arrests. In several cases, state courts found that there is no state law that provides local officers with the authority to hold individuals based on ICE detainers.²⁹ Therefore, when local officers comply with an ICE detainer in those states, they are unlawfully detaining the person because they are doing so without state law authority. Additionally, several federal courts have agreed that lack of state authority for arrest can be a Fourth Amendment violation.³⁰

Note, however, that in other states two federal courts have found that new state laws—one in Florida and the other in Texas—created authority for their local officers to hold people on immigration detainers and upheld the legality of those statutes.³¹

E. Local Officers May Not Have Federal or State Law Authority to Detain People for Civil Immigration Violations

When ICE requests local officers to detain someone with an ICE detainer, it is asking local officers to detain them in order to try to initiate removal proceedings, which is a federal civil proceeding. However, most local law enforcement agencies are generally created under state criminal law authority, and are authorized to enforce criminal laws, not federal civil laws. Some courts have found that the Fourth Amendment authorizes local officers to arrest people only if there is probable cause of a *criminal* offense, and thus local officers who detain persons for civil immigration violations pursuant to an ICE detainer are in violation of the Fourth Amendment.³²

IV. Conclusion

ICE continues to change tactics and arguments as the courts criticize and constrain its use of detainers. The cases discussed here illustrate some of the detailed arguments that are developing over what the Fourth Amendment requires and what is authorized or not authorized by federal and state laws. The rules can apply

differently to ICE in issuing detainers than to local officers in determining the legality of complying with ICE requests. And even if an act complies with the Fourth Amendment, it might still fall short of the requirements of state or federal law. As a practical matter, however, it is essential to remember that ICE detainers are merely requests, and unless state or local law requires otherwise, it is fully within the discretion of local law enforcement agencies to ignore them.

End Notes

¹ Tracking Over 2 Million ICE Arrests: A First Look, Transactional Records Access Clearinghouse (Sept. 25, 2018) <https://trac.syr.edu/immigration/reports/529/>.

² For information on how ICE is informed about the presence of immigrants in local custody, see *Dangerous Merger: Corrupting the criminal justice system for immigration enforcement*, Immigrant Justice Network, available at <http://uncoverthetruth.org/wp-content/uploads/2010/04/IJN-Dangerous-Merger-Primer.pdf>.

³ As a result of some of the court decisions highlighted in this practice advisory, ICE has changed the form number of their ICE detainers over the years. Form I-247A – Immigration Detainer – Notice of Action was introduced by the Trump administration in 2017.

⁴ *Morales v. Chadbourne*, 793 F.3d 208, 223 (1st Cir. 2015) (an ICE agent must have probable cause to issue an immigration detainer).

⁵ *Id.* at 221.

⁶ *Id.* at 215-16 (finding that it is clearly established law that an ICE agent must have probable cause to issue an immigration detainer).

⁷ *Morales v. Chadbourne*, 235 F. Supp. 3d 388, 397-398 (D.R.I. 2017) (emphasizing its prior finding that foreign birth combined with a lack of information in immigration databases is insufficient for probable cause). See also *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363, at *29 (C.D. Cal. Feb. 4, 2010) (holding that a person's admission to being a foreign national and an officer's inability

to find the person's name in a database is not enough for probable cause to believe someone is an alien who has entered the country unlawfully).

⁸ ICE's policy now prohibits them from issuing detainers based solely on information that a person is foreign-born but has no other records in immigration databases. ICE Policy Number 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, p.2.6 (March 24, 2017), available at <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.

⁹ *Gonzalez v. Immigration & Customs Enf't*, 416 F. Supp. 3d 995 (C.D. Cal. 2019) (finding that ICE detainers issued based only on federal database checks – the third box on the I-247A form – violate the Fourth Amendment because they lack sufficient probable cause for arrest).

¹⁰ *Id.* at 1015.

¹¹ *Id.* (“ICE violates the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not expressly authorize civil immigration arrests on detainers in state statute”).

¹² 8 U.S.C. § 1226 (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”).

¹³ 8 U.S.C. § 1357(a)(2).

¹⁴ *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1006 (N.D. Ill. 2016) (ICE's practice of issuing immigration detainers without first obtaining an arrest warrant was a violation of 8 U.S.C. § 1226(a)).

¹⁵ Imm. Customs & Enf't Policy Number 10074.2, *Issuance of Immigration Detainers by ICE Immigration Officers* (Mar. 24, 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>. Note that these references are to administrative warrants that are issued by DHS and its subcomponent agencies like ICE. ICE's administrative warrants are different from criminal warrants that are subject to review by a judge or a magistrate. For more information about ICE administrative warrants, see https://www.ilrc.org/sites/default/files/resources/ice_warrants_summary.pdf.

¹⁶ *Galarza v. Szalczyk*, 745 F.3d 642, 645 (3d Cir. 2014) (finding that federal law and regulations do not compel local officers to comply with ICE detainers). However, since that decision, a few states have enacted state laws that require local officers to hold people ICE detainers. See, e.g. Tex. Code Crim. Proc. art. 2.251; Iowa Code § 27A; Fla. Stat. § 908. See also *City of El Cenizo v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018) (concluding that Texas' S.B. 4 provision requiring local officers to comply with detainer requests is not facially unconstitutional).

¹⁷ *Galarza*, 745 F.3d at 636.

¹⁸ *Id.* at 642.

¹⁹ *Id.* at 645. See also *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST at *11 (D. Or. Apr. 11, 2014) (finding that the county violated the plaintiff's Fourth Amendment for acting on an ICE detainer and detaining plaintiff without probable cause when the county refused to release her when she was eligible for bail and after resolution of her state charges).

²⁰ *Galarza*, 745 F.3d at 639 (finding that several policy statements made by ICE and the former INS since 1994 have consistently construed detainers as requests rather than orders).

²¹ *Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. Feb. 4, 2010); *Roy v. Cty. of Los Angeles*, No. CV1209012ABFFMX, 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237 (E.D. Wash. July 31, 2017); *Lunn v. Commonwealth*, 78 N.E.3d 1143 (2017); *Cisneros v. Elder*, No. 18CV30549 (D. Colo., El Paso Cty. Dec. 6, 2018); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018).

²² *Id.*

²³ *Miranda-Olivares*, No. 3:12-CV-02317-ST at *10; *Morales v. Chadbourne*, 235 F. Supp. 3d 388 (D.R.I. 2017). *But see Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 801 (W.D. Mich. 2018) (finding that when states or localities seize persons based solely on an ICE detainer or solely on an administrative warrant, they may violate the Fourth Amendment, but not when the seizure is based on both the detainer and an administrative warrant).

²⁴ *Miranda-Olivares*, No. 3:12-CV-02317-ST at *10 (D. Or. Apr. 11, 2014) (finding the county liable for unlawful detention for holding the plaintiff beyond her date for release on the basis of an ICE detainer).

²⁵ *Id.*

²⁶ *Id.* at 33. See also *Morales v. Chadbourne*, 793 F.3d at 213; *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363, at *29 (C.D. Cal. Feb. 4, 2010). See also *Galarza*, 745 F.3d at 645 (County cannot shield itself from liability by blaming ICE for the detainer).

²⁷ See *United States v. Di Re*, 332 U.S. 581, 589-90 (1948) (finding that in absence of an applicable federal statute the law of the state where an arrest takes place determines its validity).

²⁸ *Arizona v. United States*, 567 U.S. 387, 390 (2012) (federal law specifies limited circumstances in which state officers may perform an immigration officer's functions, but otherwise local law enforcement officers are preempted from civil making immigration arrests on their own).

²⁹ *Lunn v. Commonwealth*, 477 Mass. 517, 526, 78 N.E.3d 1143, 1152 (2017) (state and local officers have no authority under Massachusetts law to make civil immigration arrests based on ICE detainers); *Cisneros v. Elder*, No. 18CV30549 (D. Colo., El Paso Cty. Dec. 6, 2018) (finding that Colorado law did not give local officers the authority to continue detaining people based on ICE detainers); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 529 (N.Y. App. Div. 2018) (finding that New York statutes do not authorize state and local law enforcement to effectuate warrantless arrests for civil immigration law violations); *Esparza v. Nobles County*, No. 53-CV-18-751, 2018 WL 6263254, at *10 (Minn. Dist.Ct. Oct. 19, 2018) (finding that there does not exist within Minnesota Statutes the power for Minnesota peace officers to arrest a person for a federal civil offense at the request of ICE officers); *Ramon v. Short*, 2020 MT 69 (Mont. 2020) (finding that neither federal or Montana law provide law enforcement officers with authority to arrest individuals based on federal civil immigration violations); *C.F.C. v. Miami-Dade Cty.*, 349 F. Supp. 3d 1236, 1262 (S.D. Fla. 2018) (noting that Florida law did not give local officers the authority to arrest for civil immigration violations); *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1304 (S.D. Fla. 2018) (plaintiff's arrest by the County for an alleged immigration violation fell outside the scope of permissible

“cooperation” under federal law Section 1357(g) and Florida state law). Both *Creedle and C.F.C.* decisions were issued prior to enactment of a Florida state law, Fla. Stat. § 908.101, mandating compliance with ICE detainers, and thus there was no state arrest authority for civil immigration violations at the time of those decisions.

³⁰ *Gonzalez v. ICE*, No. 2:12-cv-09012 (C.D. Cal. Sept. 27, 2019) (finding that ICE violates the Fourth Amendment when issuing detainers to local law enforcement that do not expressly authorize civil immigration arrests under state law); *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1304 (S.D. Fla. 2018) (“Mr. Creedle has plausibly alleged that his Fourth Amendment rights were violated when the County arrested him pursuant to a detainer because the County was not authorized under either state or federal law to effectuate an arrest without a warrant or probable cause that he had committed a crime”); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1259 (E.D. Wash. 2017) (agreeing with plaintiff that local officers’ reliance on an administrative warrant to place an immigration hold likely violated plaintiff’s Fourth Amendment rights) (vacated as moot by Ninth Circuit); *C.F.C. v. Miami-Dade Cty.*, 349 F. Supp. 3d 1236, 1263 (S.D. Fla. 2018) (Fourth Amendment rights were violated when county “was not authorized under either state or federal law to effectuate an arrest without a warrant or probable cause” of a crime).

³¹ *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) (distinguishing these cases in that Texas did pass a state law authorizing its local officers to honor ICE detainers); *City of S. Miami v. Desantis*, 408 F. Supp. 3d 1266, 1301 (S.D. Fla. 2019) (finding that Florida’s SB168’s provision requiring local officers to arrest pursuant to ICE detainers was not preempted).

³² *Buquer v. City of Indianapolis*, No. 1:11-cv-00708, at *35 (S.D. Ind. Mar. 28, 2013) (“[B]ecause [§ 20 of Indiana’s 2011 S.E.A. 590] authorizes state and local law enforcement officers to effect warrantless arrests for matters that are not crimes, it runs afoul of the Fourth Amendment, and thus, is unconstitutional on those grounds.”). Accord.; *Lopez-Aguilar v. Marion Cty. Sheriff’s Dep’t*, No. 1:16-cv-02457, 296 F. Supp. 3d 959, (S.D. Ind. Nov. 7, 2017) (“seizures by [local law enforcement] of any person based solely on detention requests from [ICE], in whatever form, or on removal orders from an immigration court, violate the Fourth Amendment, unless ICE supplies, or [local law enforcement] otherwise possess, probable cause to believe that the individual to be detained has committed a criminal offense”); *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1306-07 (S.D. Fla. Nov. 9, 2018) (finding that local officers violated plaintiff’s Fourth Amendment rights when they arrested him based on a detainer and without probable cause that he had committed a crime); *C.F.C. v. Miami-Dade Cty.*, 349 F. Supp. 3d 1236, 1263 (S.D. Fla. 2018) (same). *But see Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1066 (D. AZ 2018) (disagreeing that Fourth Amendment requires local officers to have probable cause of a crime, as opposed to removability).



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