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Perspectives

The Faulty Legal Arguments Behind Immigration Detainers

by Christopher Lasch, Esq.

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ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

ABOUT THE AUTHOR

Christopher Lasch is Assistant Professor at the University of Denver Sturm College of Law. Professor Lasch's scholarship focuses generally on the intersection of immigration and criminal law, and particularly on the legal validity of immigration detainer practices. This paper is adapted with permission from *Federal Immigration Detainers After* Arizona v. United States, 46 Loy. L.A. L. Rev. 629 (forthcoming 2013). Other works by the author on immigration detainers include *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers,* 35 William Mitchell L. Rev. 164 (2008) (invited symposium), *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 Wake Forest J. L. & Pol'y 281 (2013); *Rendition Resistance,* 92 N.C. L. Rev. 101 (forthcoming 2013); and *Litigating Immigration Detainer Issues,* chapter in COLORADO BAR ASSOCIATION, IMMIGRATION LAW FOR THE COLORADO PRACTITIONER (2012).

ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational conversation on immigration and immigrant integration. Through research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serve as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.

Introduction

In late June 2012, the Supreme Court struck down three provisions of Arizona's SB 1070 and left a fourth vulnerable to future legal challenge. As has been well documented, the Court's rejection of SB 1070 tipped the balance in favor of federal enforcement and away from state and local enforcement of the immigration laws. But this essay explores a less obvious consequence of the Court's decision: its implications for the viability of a critical federal enforcement mechanism: the immigration "detainer."

An immigration detainer is a piece of paper that federal immigration officials send to state and local jails requesting that they continue holding an individual for up to 48 business hours *after* he or she would otherwise be released, so that agents of U.S. Immigration and Customs Enforcement (ICE) can investigate the person's status and assume custody if necessary. Also known as immigration "holds," detainers are the key enforcement mechanism behind federal enforcement initiatives like the Criminal Alien Program and Secure Communities.

There has been considerable confusion as to whether a detainer is a mere request that ICE be notified of a suspected immigration violator's impending release, or a command by ICE that state or local officials hold a prisoner for ICE beyond the time the prisoner would otherwise be released.[1] Independent of that question, however, the Court's decision in *Arizona v. United States* identifies a more fundamental problem: that detainers may violate the Constitution and federal statutes even when honored on a voluntary basis.

Indeed, detainers are invalid in many instances for the same reason the Supreme Court struck down numerous parts of SB 1070—they permit law enforcement action inconsistent with laws enacted by Congress. Moreover, as Justice Anthony Kennedy's majority opinion also makes clear, the use of immigration detainers raises serious problems under the Fourth Amendment, which requires state and local law enforcement officials to have "probable cause" that a person has violated the law before placing him or her under arrest or extending the period of custody. Ironically, then, even as the *Arizona* decision trumpeted the supremacy of the federal government over immigration enforcement, it also cast doubt on the validity of ICE's central mechanism for obtaining custody of individuals targeted for removal proceedings.

Due to these underlying legal problems, many of the "anti-detainer" measures enacted around the country are well founded. For example, numerous municipalities—including Chicago, New York, and San Francisco—now prevent local jails from honoring immigration detainers unless an arrestee has been charged with or convicted of certain criminal offenses. However, to the extent jurisdictions believe they can selectively honor immigration detainers, they may yet be exposed to civil liability. While legally sound in resisting the notion that the federal government can impose any binding obligation on state and local officials,[2] even selective enforcement of detainers may violate the Constitution and the Immigration and Nationality Act (INA).

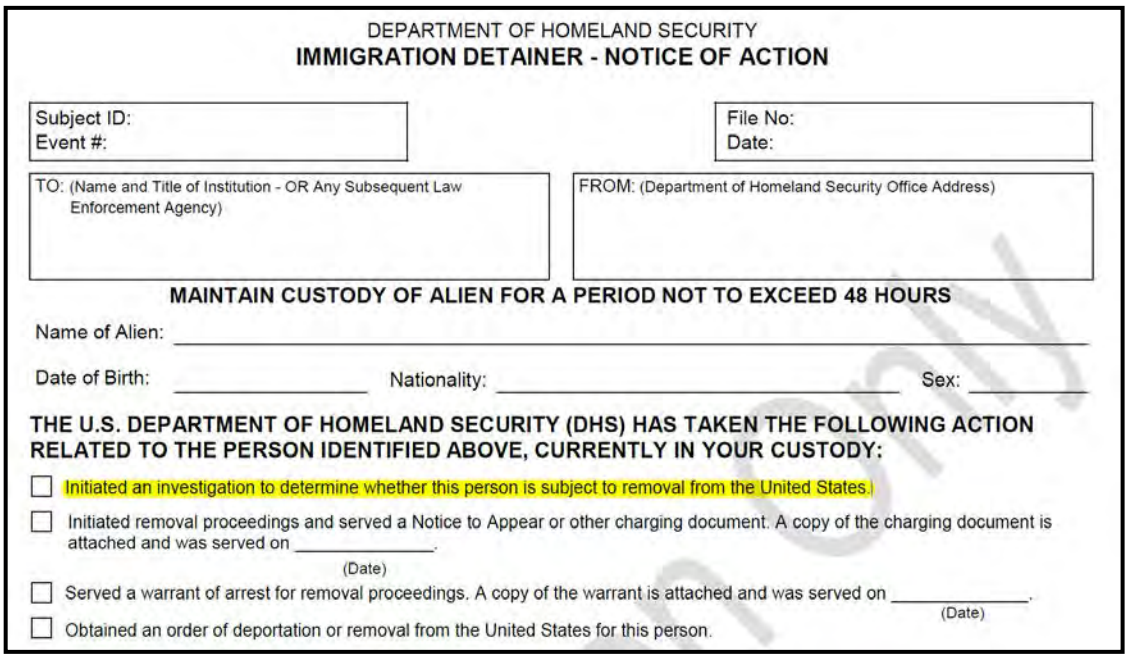
Jurisdictions can avoid legal liability by following the lead of Cook County, Illinois, which does not honor immigration detainers under any circumstances. Alternatively, jurisdictions can attempt to enact detainer polices crafted to avoid the aforementioned legal problems, such as requiring probable cause that the subject of a detainer has committed a federal crime. Selective enforcement policies, however, could be preempted as efforts to hijack federal enforcement discretion.[3]

Background

How Immigration Detainers Work

Immigration detainers are the principle mechanism for ICE to obtain custody of suspected immigration violators who are initially arrested by state or local law enforcement officials. When ICE learns a suspected immigration violator is in a state prison or local jail, the agency sends a detainer—or "Form I-247"—requesting that the individual be held in custody for an additional 48 hours after he or she would otherwise be released, excluding weekends and holidays.[4] Thus, once suspected immigration violators are entitled to release (e.g. after posting bail or being acquitted of the charges against them), local agencies that choose to honor detainers continue to hold them in custody.

Unlike criminal arrest warrants, which are based upon probable cause and must be issued by a neutral magistrate, detainers can be issued by virtually any ICE officer and without any proof that an inmate is removable from the country. For years, the Form I-247 itself (see excerpt of December 2011 Form I-247 below) allowed federal immigration officials to issue a detainer after merely "[i]nitiat[ing] an investigation" into whether an arrestee is removable.[5] A complaint alleging detainer illegalities in Los Angeles estimated that 78% of detainers issued to the Los Angeles County Sheriff's Department had the "[i]nitiated an investigation" box checked.[6] (As discussed below, ICE issued revised detainer guidance, accompanied by a new detainer form, following the *Arizona* decision.)



DEPARTMENT OF HOMELAND SECURITY

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

☐ Initiated an investigation to determine whether this person is subject to removal from the United States.

☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____. (Date)

☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____. (Date)

☐ Obtained an order of deportation or removal from the United States for this person.

Although detainers have been issued for decades, their use has become increasingly common since 2008 due to the launch and expansion of the Secure Communities program, which routes to ICE all fingerprints taken by local police. When the fingerprints of a local arrestee generate a "match" in federal databases, ICE determines whether to send a detainer to the arresting agency. From less than 15,000 detainers issued in fiscal year 2007, after the implementation of Secure Communities, immigration officials now issue some 250,000 detainers each year.[7]

As the Secure Communities program has expanded across the country, detainers have become the mechanism by which people arrested for minor offenses—such as traffic violations—are held for

transfer to ICE agents. As a result, concerns have been raised that the detainer "tail" will wag the street-level enforcement "dog," encouraging profiling by police.[8] In addition, due to flawed databases on which ICE agents rely, U.S. citizens have been mistakenly held on immigration detainers.[9] And, although the detainer form only purports to authorize continued detention for 48 hours (excluding weekends and holidays), numerous lawsuits have been filed by arrestees who have been detained beyond this period.

The Supreme Court's Decision in *Arizona v. United States*

The law known as Arizona SB 1070 was enacted and signed by Gov. Jan Brewer in April 2010. Its legality was quickly challenged in federal court, first by a coalition of civil and immigrants' rights groups, and later by the Obama administration. The administration's challenge eventually made its way to the Supreme Court, which agreed to consider whether four provisions of SB 1070 were in conflict with—and therefore "preempted" by—federal immigration laws.

Of the four provisions the Supreme Court agreed to review, two have particular relevance to the validity of federal immigration detainers: Section 2(B), which was upheld by the Court, and Section 6, which was struck down. Although the Court reached different conclusions about their legality, the discussion of each provision revolved around a common theme: namely, that law enforcement officers are constrained by Congress's enactments and the Constitution when detaining and arresting suspected immigration law violators.

Section 2(B) of SB 1070

Section 2(B), also known as the "show me your papers" provision, imposes two distinct obligations on Arizona law enforcement officers. First, it requires officers to attempt to determine the immigration status of any person they have stopped or detained if "reasonable suspicion" exists that the person is unlawfully present in the United States.[10] Second, it requires officers to determine the immigration status of all persons arrested before they are released, regardless of whether they are suspected of being in the country unlawfully.[11] In both circumstances, officers are required to contact federal immigration authorities to determine whether a person is unlawfully present, not make their own determination.[12]

In upholding Section 2(B), the Court emphasized that on its face, the provision required nothing more than communication between state and federal officials, which it described as "an important feature of the immigration system."[13] In practice, however, Justice Kennedy recognized that Section 2(B) could potentially result in persons being detained "for no reason other than to verify their immigration status."[14] If officers subjected arrestees to "prolonged detention"[15] to determine their immigration status, the majority made clear that such detentions would violate the Fourth Amendment, which prohibits law enforcement officers from arresting individuals unless they have probable cause to believe they have broken the law. The Court thus left open the door to future legal challenges to Section 2(B) based on how it is applied in practice.[16]

Section (6) of SB 1070

Meanwhile, Section 6 would have authorized Arizona officers to arrest immigrants *without* a warrant if probable cause existed that they had committed a public offense making them removable from the United States.[17] In other words, the provision would have authorized Arizona officers to make warrantless arrests based solely on the suspicion of a civil immigration violation.

In striking down Section 6, the Court held that the provision exceeded the careful statutory structure put in place by Congress in the INA, and was therefore preempted. That statutory structure, the Court observed, included explicit allocation of civil immigration arrest authority to state officials—but in carefully limited circumstances. The Court noted that Congress has authorized "287(g)" agreements whereby state and local officers may be authorized to make civil immigration arrests, but only after adequate training in immigration enforcement.

The Court found that not only did Section 6 exceed the specific civil enforcement ability conferred by Congress upon state and local officers, but also the enforcement ability conferred by Congress on *federal* immigration agents to make warrantless arrests. As Justice Kennedy explained in the majority opinion, the INA generally requires immigration officers to obtain an administrative warrant before making an arrest,[18] unless they have reason to believe a suspected immigration violator is "likely to escape before a warrant can be obtained."[19] Because Section 6 would have given Arizona officers more authority to make immigration arrests than Congress granted even federal agents, the Supreme Court found it to be inconsistent with the system Congress created, and struck Section 6 down as preempted.[20]

The Effect of *Arizona v. United States* on Federal Immigration Detainers

Although the Supreme Court's ruling in *Arizona v. United States* did not directly address the legality of detainers, the majority opinion nonetheless makes clear that honoring immigration detainers often violates both the Constitution and the INA. Like Section 6 of SB 1070, detainers are inconsistent with the statutory enactments of Congress. And like Section 2(B), detainers raise substantial Fourth Amendment concerns because of the possibility of prolonged detention based on suspected civil immigration violations. Detainers raise additional constitutional concerns not discussed in the *Arizona* decision because they cause individuals to be held in custody for more than 48 hours without an independent probable cause determination, which is a separate violation of the Fourth Amendment.

How Immigration Detainers Violate Federal Immigration Law

Immigration detainers are inconsistent with the statutory system Congress enacted for immigration enforcement. As noted above, the Court in striking down Section 6 of SB 1070 found that Congress had carefully delineated the civil arrest powers of state and local officers, and of federal immigration officials. Today, federal immigration officials often issue detainers in a manner that exceeds Congress's grant of arrest authority.

As the *Arizona* Court discussed, federal immigration officials may take persons into custody either (1) pursuant to an immigration arrest warrant or (2) when the person is "likely to escape before a warrant can be obtained."[21] Although holding an individual in custody solely because of an immigration detainer amounts to a warrantless arrest,[22] federal officials frequently issue detainers without regard to the individual's likelihood of escape. Indeed, ICE's practice has included filing immigration detainers that are not accompanied by arrest warrants against individuals who are not scheduled to be released for days, weeks, or even months.

Some might argue that persons in the custody of a law enforcement agency should be presumed flight risks, and therefore likely to escape before a warrant can be obtained. While this argument might have force in a particular case, it sweeps too broadly to justify the issuance of detainers in circumstances where immigration officials clearly *can* obtain a warrant before the prisoner's release. Indeed, a strong case can be made for the opposite presumption, because individuals who are already in the custody of

law enforcement officials are much less likely to be able to flee than those who have not yet been arrested.

Additionally, the issuance of a detainer results in prolonged detention not by federal officials, but by state and local officials. Congress has not authorized state and local officials to arrest suspected immigration violators, except in the narrow circumstances the Court noted in *Arizona.* Just as Section 6 purported to authorize state and local officials to effectuate civil immigration arrests beyond any power Congress had delegated to them or even to federal immigration officials, the issuance of immigration detainers exceeds Congress's carefully crafted statutory structure.

How Immigration Detainers Raise Substantial Constitutional Questions

Under the Fourth Amendment, state and local law enforcement officials generally cannot take a person into custody without probable cause to believe he or she has committed a crime. As importantly, a person subjected to a warrantless arrest is entitled to a reasonably prompt hearing—generally within 48 hours—before a neutral magistrate.

The Supreme Court's discussion of Section 2(B) makes clear that holding a prisoner under the sole authority of an immigration detainer implicates the Fourth Amendment's probable cause requirement. It must be noted that Section 2(B), like an immigration detainer, applies generally to circumstances in which the prisoner is already lawfully in state custody. The Fourth Amendment concern is triggered in both instances when it is proposed that state officials prolong detention on the basis of a suspected civil immigration violation. As noted above, in the case of Section 2(B) the *Arizona* Court avoided this constitutional concern by construing Section 2(B) as requiring an inquiry into immigration status only "during the course of an authorized, lawful detention or after a detainee has been released." With this construction of Section 2(B), the Court found it need not even consider whether prolonged detention would be justifiable if state officials had reasonable suspicion (or probable cause) to believe an immigration *crime* had occurred.

Like Section 2(B), immigration detainers call for prolonged detention by state and local officials even in the absence of proof that an individual is removable. While DHS's most recent detainer guidance states that immigration officials "should" place a detainer only where there is "reason to believe" an individual is subject to removal,[23] this guidance cannot eliminate the substantial Fourth Amendment concern. First, the guidance is expressed not as a legal position of DHS, but as an enforcement priority. The guidance contains an express disclaimer stating that it does not "limit the legal authority of ICE or its personnel" and does not "create any right … enforceable at law by any party …." The guidance also excludes U.S. Customs and Border Protection (CBP) from its ambit, further emphasizing the document's function as an enforcement priority policy position as opposed to a legal position. The guidance also calls for a six-month review, whereupon "ICE will consider whether modifications, if any, are needed."

There is no guarantee, in other words, that ICE will not continue its practice over the past three decades of issuing detainers based upon nothing more than an *initiated investigation* into whether an individual is subject to removal. Notwithstanding the new detainer guidance, detainers allow state and local officials to do precisely what the Supreme Court said Arizona officers could not do when enforcing Section 2(B): subject individuals to "prolonged detention" solely to determine their immigration status.[24]

A second reason the detainer guidance cannot cure this Fourth Amendment problem is that it requires only "reason to believe" the target of a detainer is removable. Because there is no requirement of reasonable suspicion or probable cause that a *crime* has been committed, the detainer guidance

continues to put state and local officials in the position of enforcing federal *civil* immigration law. Blocking Indiana's SB 1070 "copycat" legislation, a federal district court held Indiana's law, authorizing its law enforcement officials to arrest and detain persons subject to immigration detainers, likely violated the Fourth Amendment because it "authorizes the warrantless arrest of persons for matters and conduct that are not crimes."[25] (The *Arizona* decision additionally makes clear that unlawful presence itself is not a crime, and state officials cannot enforce civil immigration law except in the narrow circumstances Congress has authorized.)

Furthermore, even aside from the Fourth Amendment's probable cause requirement, continued custody under the authority of an immigration detainer may violate the Fourth Amendment for a separate reason. The Fourth Amendment requires the subject of a warrantless arrest to be brought before a neutral magistrate within 48 hours of the arrest—*including* weekends and holidays—for an independent probable cause determination.[26] By contrast, the detainer regulation flatly contradicts this requirement, authorizing prolonged detention for longer than 48 hours (indeed, up to five days over a holiday weekend) without any provision whatsoever for an independent probable cause determination by a neutral magistrate.[27]

Detainer Resistance and its Limitations

In recent years, some jurisdictions have sought to indirectly "opt out" of Secure Communities by limiting the circumstances in which local jails may honor immigration detainers.[28] The foregoing discussion demonstrates the legal validity of this resistance; detainers often exceed Congress's grant of authority,[29] raise substantial constitutional questions, and provide no legal authority for state and local officials to prolong detention of suspected immigration violators. But the majority of anti-detainer ordinances enacted around the country appear to have been motivated not by the legal issues, but by civil rights concerns stemming from the expansion of Secure Communities. Contrary to its stated purpose,[30] Secure Communities does not focus on the removal of noncitizens who have committed serious crimes.[31] Opponents of Secure Communities argue that the program instead encourages racial profiling, diverts local resources from crime control, and makes communities less safe by discouraging immigrants from reporting crimes or cooperating with police.[32]

Resistance to detainers was rooted in these criticisms. For example, years before California adopted statewide legislation limiting detainer compliance, the Santa Clara County, California Board of Supervisors passed a resolution urging the disentanglement of local law enforcement from federal immigration enforcement.[33] The resolution indicated a clear concern for the civil rights of immigrants in Santa Clara County. Its opening paragraph described the county as "home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world." The resolution also expressed the belief of the Board of Supervisors that "laws like Arizona's SB 1070 … subject individuals to racial profiling" and affirmed the county's commitment to protect all of its residents from "discrimination, abuse, violence, and exploitation …"[34]

Ultimately, the county adopted a measure prohibiting jails from honoring detainers unless the federal government agreed to pay the costs of detention, and then only if the arrestee was convicted of a felony classified as violent or serious under California law.[35] Likewise, the District of Columbia adopted an ordinance that, among other things, would only allow jails to honor detainers filed against arrestees convicted of dangerous and violent crimes.[36] Similar measures or policies have been enacted in Amherst, Berkeley, Chicago, Los Angeles, New Orleans, New York, and San Francisco, and in several counties as well, such as King County, Washington. On the state level, resistance has occurred in Connecticut and California,[37] and has been proposed in Florida, Massachusetts, and Washington.

The civil rights roots of detainer resistance were rendered visible in Cook County, Illinois, which voted in September 2011 to stop complying with detainers altogether.[38] The ordinance in question appeared to be legally rooted in the Constitution's "unfunded mandate" doctrine, allowing the sheriff to honor detainers only if the federal government agreed to reimburse the county for all associated costs.[39] Yet, when ICE Director John Morton offered to reimburse the county for any costs associated with honoring immigration detainers,[40] County Board President Toni Preckwinkle told the press: "Equal justice before the law is more important to me than the budgetary considerations."[41]

Unlike Cook County, which honors no detainers,[42] other jurisdictions that have resisted wholesale compliance with detainers have claimed discretion to honor some detainers and not others. Santa Clara County and the District of Columbia are examples of jurisdictions that have indicated they may honor detainers when they target serious criminal offenders. In December 2012, California's Attorney General Kamala D. Harris issued guidance to law enforcement agencies stating: "Immigration detainer requests are not mandatory, and each agency may make its own decision about whether or not to honor an individual request."[43] Subsequently, California's TRUST Act ratified the idea that California officials have discretion to honor immigration detainers, while limiting the exercise of that discretion.

But jurisdictions that claim a power to honor detainers selectively still confront many of the same legal problems that render immigration detainers invalid under federal law. Local officers honoring detainers are making what amount to civil immigration arrests, in circumstances beyond those specifically authorized by Congress. Even where there is an administrative arrest warrant, state or federal law may be violated by, for example, reliance upon a warrant that is not issued by a judge and not issued upon oath or affirmation.[44] Further, local officers honoring detainers may violate the Fourth Amendment, by prolonging detention without probable cause of a crime having been committed,[45] and by failing to provide prompt judicial review.[46]

To avoid incurring legal liability, jurisdictions can follow the lead of Cook County by declining to honor immigration detainers in all circumstances. Alternatively, state and local jurisdictions can attempt to craft policies preventing local jails from honoring detainers unless authorized by Congress and in compliance with the Fourth Amendment and local law. Selective enforcement policies, however, may be subject to preemption if they interfere with federal immigration enforcement policy.[47]

Conclusion

In *Arizona v. United States*, the Supreme Court made clear that states may not enforce civil immigration law unless explicitly authorized by Congress. But while generally providing a ringing endorsement of federal power, *Arizona* also limits the power of the federal executive to pursue immigration enforcement objectives. The executive branch, like the states, has an obligation to implement "the system Congress created" and none other. The *Arizona* opinion leaves little doubt that immigration detainers do not comport with the system Congress created.

Detainers also raise substantial constitutional questions, including the Fourth Amendment issue raised by prolonged detention—the precise concern raised by the justices concerning implementation of Section 2(B) of SB 1070. It is clear that such detention must comply with the Fourth Amendment; it must be supported by probable cause and meet the independent requirement of prompt neutral review.

Federal immigration detainers cannot support prolonged detention. Those jurisdictions that have resisted immigration detainers have done so with sound legal justification. But some of these

jurisdictions simultaneously assert a power to selectively comply with detainers. Given the legal problems attendant to the use of detainers, jurisdictions wanting to honor immigration detainers in some cases must do more than focus on the seriousness of the offense of which arrestees are accused. At a minimum, they must be sure that honoring a detainer in a particular case complies not only with "the system Congress created" for immigration enforcement, but also with state and federal constitutional requirements. By honoring immigration detainers that do not meet these threshold legal requirements, local officials and localities risk civil liability.

ENDNOTES

[1] *See generally,* Kate M. Manuel, Immigration Detainers: Legal Issues 11-14 (Congressional Research Service, Aug. 31, 2012) (detailing authorities in support of position that detainer is a request and authorities in support of position that detainer is a command); *Rios-Quiroz v. Williamson County*, Slip Copy, 2012 WL 3945354 at *4 (M.D. Tenn.) (holding that use of "shall" in 8 CFR § 287.7(d) renders the regulation mandatory). The Third Circuit appears poised to become the first federal court of appeal to decide the question of whether immigration detainers can be mandatory on state officials, in *Ernesto Galarza v. County of Lehigh*, No. 12-3991, which was argued on October 10, 2013. The plaintiff in *Galarza,* a United States citizen, sued the County of Lehigh, Pennsylvania for detaining him based on an immigration detainer. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020, at *1–2 (E.D. Pa. Mar. 30, 2012). The district court held the county could not be held liable because the county's policy of honoring all immigration detainers was "consistent with" the federal regulation stating that a local law enforcement agency "shall" prolong detention pursuant to a detainer. *Id.* at *18–19 (citing 8 CFR § 287.7(d)).

[2] For a thorough discussion of the anti-commandeering argument, *see generally* Brief of Law Professors as Amici Curiae in Support of Appellant & in Support of Reversal, *Galarza v. Cnty. of Lehigh*, No. 12-3991 (filed March 26, 2013), available at http://portfolio.du.edu/downloadItem/252013; Lasch, *Rendition Resistance,* 92 N.C. L. REV. 101 (forthcoming 2013).

[3] Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States,* 3 WAKE FOREST J. L. & POL'Y 281, 301-11 (2013).

[4] The form detainer has been in existence since at least 1983. Immigration Forms, 54 Fed. Reg. 39336-02, 39337 (Sept. 26, 1989) (to be codified at 8 C.F.R. pt. 299) (referring to Form I-247 with date of Mar. 1, 1983); Form I-247 (March 1, 1983) (on file with the author). Historically, federal immigration officials would also lodge a copy of the immigration charging documents with jail or prison officials, and these documents would be considered the equivalent of a detainer. *E.g.*, *Fernandez-Collado v. I.N.S.*, 644 F. Supp. 741, 742 (D. Conn. 1986); *see* Jonathan E. Stempel, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers over Imprisoned Aliens*, 14 FORDHAM INT'L L.J. 741, 742 n.11 (1990–1991).

[5] Form I-247 (March 1, 1983); Form I-247 (April 1997); Form I-247 (August 2010); Form I-247 (June 2011) (all on file with the author).

[6] Complaint, *Roy v. County of Los Angeles et al.,* No. CV12-9012, Complaint ¶¶ 25-26.

[7] ICE placed 14,803 immigration detainers in fiscal year 2007 and 20,339 in fiscal year 2008. United States Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2008* at 36, available at http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf; United States Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2009* at 35, available at http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf. In fiscal years 2009 and 2010, ICE issued 234,939 and 239,523 detainers respectively, or approximately 20,000 per month – through its Criminal Alien Program alone. United States Department of Homeland Security, *FY11 Budget in Brief* at 63, available at http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf; United States Department of Homeland Security, *FY12 Budget in Brief* at 79, available at http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf. Other ICE programs may make the number of detainers issued even greater. *See* Complaint, *Jimenez Moreno v. Napolitano,* No. 1:2011cv05452 (N.D. Ill., filed Aug. 11, 2011) at ¶ 28 (alleging 270,988 detainers were issued in fiscal year 2009).

[8] *See* Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Sept. 2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (observing correlation between issuance of detainers and profiling of Latinos in Irving, Texas).

[9] *See* Molly F. Franck, *Unlawful Arrests and Over-Detention of America's Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers*, 9 HASTINGS RACE & POVERTY L. J. 55, 65 (2011) (reporting 5 percent of individuals targeted for immigration enforcement through the "Secure Communities" program between October 2008 and October 2009 were U.S. citizens); Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, at A20; *see also* Brian Bennett, *Fingerprinting Program Ensnares U.S. Citizen; He's Suing the FBI and Homeland Security After Being Flagged as an Illegal Immigrant and Held in Prison,* L.A. TIMES, July 6, 2012, at A9 (describing U.S. citizen's claim that he was wrongfully detained for two months due to database error); Complaint, *Vohra v. United States*, No. SA CV 04-00972 DSF (RZx) (C.D. Cal. Feb. 4, 2010) (alleging plaintiff to be a U.S. citizen held pursuant to immigration detainer); *Henry v. Chertoff*, 317 F. App'x 178, 179 (3d Cir. 2009) (discussing habeas petition alleging prisoner subject to immigration detainer was a U.S. citizen).

[10] ARIZ. REV. STAT. ANN. § 11-1051(B) (2011) (West).

[11] *Id.*

[12] ARIZ. REV. STAT. ANN. § 11-1051(E) (2011) (West).

[13] *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012). (citing INA § 287(g)(10), 8 U.S.C. § 1357(g)(10))

[14] *Id.* Although Justice Kennedy referred only to "constitutional concerns," the cases cited in support of the argument dealt with the Fourth Amendment. In particular, Justice Kennedy quoted the Court's previous decision in *Illinois v. Caballes*, 543 U. S. 405, 407 (2005), which stated that a traffic stop "that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." In their dissenting opinions, Justice Scalia and Justice Alito also recognized that prolonged detention of individuals while their immigration status was under investigation would raise Fourth Amendment concerns.

[15] *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

[16] *Id.* 2492, 2510 (2012) ("This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.").

[17] ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011) (West).

[18] *Arizona v. United States*, 132 S. Ct. 2492, 2505-06 (2012) (citing INA § 236, 8 U.S.C. § 1226(a)). The administrative arrest warrants authorized by INA § 236 are not the equivalent of criminal arrest warrants. The statute sets forth no standard for the issuance of such warrants. Nor is there any requirement that such warrants be based upon sworn testimony, or issued by a neutral magistrate.

[19] *Id.* 2492, 2506 (2012) (citing INA § 287(a)(2), 8 U.S.C. § 1357(a)(2)).

[20] *Id*.

[21] *Id.* (quoting INA § 287(a)(2), 8 U.S.C. § 1357(a)(2)). The Court did not explicitly note the other important requirement of § 287(a)(2)—that an immigration official making a warrantless arrest have "reason to believe" the arrestee has violated federal immigration law. *See id.* Courts have construed the "reason to believe" requirement as importing a probable cause requirement in order to satisfy the Fourth Amendment's prohibition against unreasonable seizures. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1608 & n.229 (2010).

[22] *See Cervantez v. Whitfield*, 776 F.2d 556, 560 (5th Cir. 1985) (former Immigration and Naturalization Service stipulating to proposition that "[a]n immigration hold is an arrest without warrant made pursuant to 8 U.S.C. § 1357(a)(2). As such, an immigration hold may only be authorized by an officer of the INS and only when the officer has determined that there is probable cause to believe that the person to be held (a) is an alien, (b) is in the United States in violation of the immigration laws, and (c) is likely to escape before a warrant can be obtained for his arrest.").

[23] Simultaneous with its December 2012 guidance, DHS released a new version of the Form I-247 detainer, which eliminates the "initiated an investigation" checkbox and replaces it with a checkbox indicating DHS has "reason to believe" the target of the detainer is "an alien subject to removal." Form I-247 (Dec. 2012) (on file with author).

[24] *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

[25] *Buquer v. City of Indianapolis,* 797 F.Supp.2d 905, 919 (S.D. Ind. 2011).

[26] *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

[27] 8 C.F.R. § 287.7(d).

[28] *See generally* Lasch, *Rendition Resistance,* 92 N.C. L. REV. 101 (forthcoming 2013).
[29] The federal detainer regulation exceeds Congress's limitations on immigration arrests and is therefore *ultra vires. See generally* Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629 (forthcoming 2013). Compliance with detainers by state and local officials exceeds Congress's limitations as well and is therefore preempted. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States,* 3 WAKE FOREST J. L. & POL'Y 281 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253001.
[30] Press Release, Dep't of Homeland Sec., *ICE unveils sweeping new plan to target criminal aliens in jails nationwide: Initiative aims to identify and remove criminal aliens from all U.S. jails and prisons*, ICE (Mar. 28, 2008), available at http://www.ice.gov/news/releases/0803/080328washington.htm.
[31] National Day Laborer Organizing Network, et al., *Briefing Guide to "Secure Communities" – ICE's Controversial Immigration Enforcement Program – New Statistics and Information Reveal Disturbing Trends and Leave Crucial Questions Unanswered* at 2*,* available at http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON_FOIA_Briefing%20guide.final.pdf (reporting 79% of people apprehended through Secure Communities were "non-criminals or were picked up for low-level offenses …."); *see also* Transactional Records Access Clearinghouse, Few ICE Detainers Target Serious Criminals (Sept. 17, 2013), available at http://trac.syr.edu/immigration/reports/330 (noting that during the 16-month period under study, "no more than 14 percent of the 'detainers' issued … met the agency's stated goal of targeting individuals who pose a serious threat to public safety or national security" and nearly half targeted people with no criminal conviction whatsoever, not even a minor traffic conviction).
[32] E.g., Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011); Secure Communities, NAT'L IMMIGRATION FORUM (2009), http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf; More Questions than Answers about Secure Communities, NAT'L IMMIGR. L. CTR. (Mar. 2009), http://v2011.nilc.org/immlawpolicy/LocalLaw/securecommunities-2009-03-23.pdf.
[33] Resolution No. 2010-316 (enacted June 22, 2010), available at http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=10621.
[34] *Id.*
[35] Santa Clara County Board of Supervisors Policy Manual, available at http://www.sccgov.org/sites/bos/legislation/bos-policy-manual/documents/bospolicychap3.pdf.
[36] Hearing Notice on Immigration Detainer Compliance Amendment, available at http://www.dccouncil.us/hearing-notices/immigration-detainer-compliance-amendment.
[37] Perhaps responding to litigation, see Petition for Writ of Habeas Corpus, *Brizuela v. Feliciano*, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012), the Connecticut Department of Correction limited its compliance with detainers to instances in which the Department determines the prisoner's release would pose an "unacceptable risk to public safety." CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3: INMATE ADMISSIONS, TRANSFERS AND DISCHARGES ¶ 9–10 (2012), available at http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0903.pdf. In June 2013, the Connecticut General Assembly passed and the governor signed into law a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. Act of June 25, 2013, 2013 Conn. Acts 13-155, available at http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf (concerning civil immigration detainers). The California "TRUST (Transparency and Responsibility Using State Tools) Act," aimed at limiting the state's compliance with federal immigration detainers, was signed into law by the California governor on October 5, 2013. *See* Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB4 (bill history) and http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130624_amended_sen_v97.pdf (text of bill).
[38] Cook County Ordinance 11-O-73, available at http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501.
[39] *See* Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524."

[40] Letter from John Morton, Director, U.S. Immigration and Customs Enforcement, to Toni Preckwinkle, President, Cook County Board of Supervisors, February 13, 2012, available at http://www.immigrationpolicy.org/sites/default/files/docs/Morton-Letter-to-Preckwinkle-02-13-12.pdf.

[41] Hal Dardick, *Preckwinkle Ices ICE proposal: Rejects Call For Working Group to Resolve Issues*, CHI. TRIB., (April 10, 2012), available at http://articles.chicagotribune.com/2012-04-10/news/ct-met-tonipreckwinkle-0411-20120411_1_preckwinkle-detainersimmigration-status.

[42] Champaign County, Illinois also refuses to honor any immigration detainers. *See* Letter from Champaign County Sheriff Dan Walsh to U.S. Immigration and Customs Enforcement, March 8, 2012, available at http://d3n8a8pro7vhmx.cloudfront.net/progressivemajorityaction/pages/92/attachments/original/1369418919/Champaign__IL_Policy_Letter.pdf?1369418919 ("This office will not hold inmates based on a routine detainer.").

[43] Information Bulletin 2012-DLE-01, "Responsibilities of Local Law Enforcement Agencies under Secure Communities" at 3 (Dec. 4, 2012), available at https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf.

[44] *See State v. Rodriguez,* 317 Or. 27, 854 P.2d 399 (1993) (suggesting that administrative warrant issued by federal immigration officials did not satisfy state constitutional analogue to the Fourth Amendment).

[45] *See Buquer, supra.*

[46] *See County of Riverside, supra.*

[47] A DHS memorandum relied on by the *Arizona* Court insists that "DHS must have exclusive authority to set enforcement priorities," and insists that state and local officials must "conform to and effectuate" those priorities. Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 8 (2011), online at http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf , *cited in Arizona* at 2507. On DHS's view, a locality's "mandatory set of directives to implement the [jurisdiction]'s own enforcement policies … would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies …" *Id.*