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August 27, 2014

The Honorable Gregg Hershberger
Department of Public Safety and Correctional Services
300 E. Joppa Road, Suite 1000
Towson, MD 21286

Dear Secretary Hershberger:

In the last few months, decisions by the federal courts have raised questions regarding the ability of State and local corrections agencies to detain individuals pursuant to U.S. Immigration and Customs Enforcement (ICE) detainer requests in compliance with the Fourth Amendment. Responding to a request for advice from the Washington County Sheriff's Office, the Office of the Attorney General of Maryland has issued an opinion, which concludes that "if a local law enforcement officer does not have probable cause to extend custody over the subject of an ICE detainer, the continued detention likely constitutes a violation of the Fourth Amendment." The opinion is enclosed. Pursuant to this advice, I am hereby confirming that the Department of Public Safety and Correctional Services, in its role as administrator of Central Booking in Baltimore City, shall only comply with ICE detainer requests when the requests have adequate support for a finding of probable cause under the Fourth Amendment.

As a State, we stand ready and willing to cooperate with ICE detainers—subject to the limitations described in my April 18, 2014 letter—when ICE provides sufficient information to ensure that Fourth Amendment requirements are satisfied. You should consult legal counsel in the Office of the Attorney General regarding the procedure by which ICE detainer requests are evaluated to determine whether they comply with the Fourth Amendment and may be honored without risk of liability.

Sincerely,

A handwritten signature in cursive script, appearing to read "Martin O'Malley".

Governor

Enclosure

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August 14, 2014

The Honorable Douglas W. Mullendore
Washington County Sheriff
Office of the Sheriff
500 Western Maryland Parkway
Hagerstown, Maryland 21740-5199

Dear Sheriff Mullendore,

This letter is in response to your request for advice concerning a letter sent by the ACLU of Maryland to various sheriffs' offices urging them to discontinue their practice of complying with immigration detainers issued by U.S. Immigration and Customs Enforcement ("ICE"). Specifically, you ask whether your policy of keeping individuals in custody for up to 48 hours past their State release date in response to ICE detainers exposes the Sheriff's Office and Washington County to liability.

As discussed in greater detail below, I conclude that, under prevailing federal court jurisprudence, the receipt of an ICE detainer, by itself, does not mandate or authorize the continued detention of someone beyond the time at which they would be released under State law. Consequently, the issuance of an ICE detainer likely does not provide a defense to any liability that might attach for an unconstitutional detention. Instead, the liability of local officials will depend on whether local officials have probable cause to believe the subject has committed a crime under State or federal law.¹ The information in the ICE detainer, depending on which boxes are checked, may provide probable cause for local officials to hold a detainee beyond their scheduled release date. However, the law in this area is evolving and no court has yet addressed how changes to the ICE detainer form made in December 2012 might affect the liability of local officials who rely on it. As a result, the only sure way to avoid the potential liability you inquire about is to decline to detain individuals beyond their regularly-

¹ Liability will also depend, of course, on the applicability of other legal principles that govern the tort liability of State and local officials under 42 U.S.C. § 1983 and the State and local tort claims acts. Those issues, however, are beyond the reach of this analysis.

scheduled release date when the sole basis for extending the detention is the receipt of an ICE detainer. That is not to say, however, that, when circumstances dictate, you may not hold individuals on the basis of an ICE detainer request.

Background

U.S. Immigration and Customs Enforcement is the agency within the Department of Homeland Security ("DHS") with primary responsibility for enforcing the immigration laws. When ICE learns that a local law enforcement agency has custody of an alien who might be in the country illegally, it issues an "immigration detainer"—often referred to as "DHS Form I-247"—which "advise[s] another law enforcement agency that [DHS] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). The current version of DHS Form I-247 (attached) allows ICE officials to notify local law enforcement agencies that DHS has taken one or more of four removal actions in relation to the person identified on the detainer:

- "Determined that there is reason to believe the individual is an alien subject to removal from the United States" for one or more reasons listed on the form (*e.g.*, charged or convicted of certain crimes; committed immigration fraud; "poses a significant risk to national security, border security, or public safety");
- "Initiated removal proceedings and served a Notice to Appear or other charging document";
- "Served a warrant of arrest for removal proceedings"; or
- "Obtained an order of deportation or removal from the United States."²

The form advises that DHS's action with respect to a detainee "does not limit [the local law enforcement agency's] discretion to make decisions related to this person's custody

² Form I-247 has been in its current form since December 2012. Before then, the first category of actions described by Form I-247 did not specify the basis for the subject's removability; instead, it stated only that ICE had "[i]nitiating an investigation to determine whether this person is subject to removal from the United States." As discussed below, the change in wording of the form might affect the potential liability of local law enforcement agencies that honor the detainers.

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classification, work, quarter assignments, or other matters.” The form states further that “DHS discourages dismissing criminal charges based on the existence of a detainer.” The form then provides a check-box list of potential actions that the local official is “request[ed]” to take. One of those actions is to “[m]aintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject.” (capitalization omitted).³

ICE and its predecessor agency, the Immigration and Naturalization Service (“INS”), have long used immigration detainers as a means of taking custody of undocumented aliens who were already in the criminal justice system. See Kate M. Manuel, Cong. Research Serv., R42690, *Immigration Detainers: Legal Issues* 1 (2014), available at <http://fas.org/sgp/crs/homsec/R42690.pdf> (“CRS Report”). In 2008, the practice expanded with the implementation of DHS’s Secure Communities program. Under that program, the FBI, as mandated by statute, automatically sends to DHS the fingerprints that local law enforcement agencies collect from arrestees. DHS then checks the fingerprints against its immigration databases to identify aliens who may be removable.⁴ As a result, ICE has issued “more detainers for persons at earlier stages in criminal proceedings than was the practice previously.” CRS Report at 9. As the detainers became more common and were increasingly used to detain people who had not already been convicted of a crime, questions arose about the legal status of ICE detainers and about how local law enforcement agencies should respond to them.

According to your request for advice, the Washington County Sheriff’s Office has responded to ICE detainers by holding the individuals for whom detainers had been issued for up to 48 hours past their State release date to allow DHS to take custody. The ACLU of Maryland recently sent a letter to all county detention centers and the Baltimore City Detention Center “urg[ing]” them to “seriously reconsider” their practice of detaining individuals past their state release date in response to ICE detainers, “since they may run afoul of detainees’ Fourth Amendment and procedural due process rights and

³ The other options available are not relevant to the issue you raise, but include such things as “[n]otify” ICE if the detainee is about to be released, has died, or has been transferred to another institution. I note, however, that providing ICE with advance notice of a detainee’s release date might enable ICE officials to assume custody of the detainee without the need for local officials to continue their detention beyond the limits of what is allowed under State law.

⁴ *Secure Communities*, IMMIGRATION AND CUSTOMS ENFORCEMENT, www.ice.gov/secure_communities/ (last visited July 17, 2014).

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may expose [their agencies] to significant liability.”⁵ You have asked us to evaluate the potential liability created by the practice of honoring ICE detainees.

Analysis

The extent to which the practice of honoring ICE detainees exposes the local law enforcement agencies to liability hinges on two considerations. The first consideration is the extent to which that practice can result in a violation of the Fourth Amendment. The second consideration is the extent to which compliance with ICE detainees is mandatory under federal law and thus provides local law enforcement agencies with a defense to liability for such a violation. I will address these two considerations in turn.⁶

A. Whether Honoring an ICE Detainer Constitutes a Violation of the Fourth Amendment

The Fourth Amendment requires that seizures be objectively reasonable in light of the facts and circumstances. *See, e.g., Graham v. Connor*, 490 U.S. 386, 397 (1989). “[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.” *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). As a result, the “[p]rolonged detention” of the subject of an ICE detainer, “such as full custodial confinement without a warrant, must be based on probable cause.” *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340, at *32 (D. Or. Apr. 11, 2014). Although local law enforcement officials might well have had lawful custody of the detainee to begin with, their continued detention of the detainee beyond the point at which the person would ordinarily be released from custody will generally be deemed a new seizure that must be

⁵ Pursuant to a gubernatorial policy directive issued on April 18, 2014, the Baltimore City Detention Center—the only such local facility operated by the State—will honor only those ICE detainees that specify that the detainee (1) “has a prior a felony conviction or has been charged with a felony offense”; (2) “has three or more prior misdemeanor convictions”; (3) “has a prior misdemeanor conviction or has been charged with a misdemeanor for an offense that involves [certain aggravating circumstances]”; “poses a significant risk to national security, border security, or public safety”; or (5) is the subject of “an order of deportation or removal from the United States.”

⁶ For purposes of my analysis I will assume that the detainer was validly issued under federal law. I do not address arguments that ICE detainees are statutorily authorized only when issued for violations of controlled substances laws, and do not speculate as to whether specific detainees have been issued in compliance with the governing regulation. *See generally* CRS Report at 22.

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supported by a new, “independent” finding of probable cause. *Id.* at *27, 31-32. Thus, if a local law enforcement officer does not have probable cause to *extend* custody over the subject of an ICE detainer, the continued detention likely constitutes a violation of the Fourth Amendment.

A Maryland law enforcement official, upon probable cause, may arrest a suspect for any criminal offense, whether federal or State. *Department of Pub. Safety & Correctional Servs. v. Berg*, 342 Md. 126, 139 (1996) (concluding that “state and local law enforcement officials may appropriately enforce federal law”). When a local officer makes a warrantless arrest on the basis of a violation of federal law, however, “the lawfulness of the arrest . . . is to be determined by reference to state law.” *Miller v. United States*, 357 U.S. 301, 305 (1958).

Under Maryland law, “[p]robable cause exists where the facts and circumstances within the knowledge of the officer at the time of the arrest, or of which the officer has reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the suspect had committed or was committing a criminal offense.” *Haley v. State*, 398 Md. 106, 133 (2007). Although a local law enforcement officer might have no personal information that would provide probable cause to believe that a detainee has committed a crime, information received from an official source can furnish an officer with probable cause. *See Thompson v. State*, 15 Md. App. 335, 343-44 (1972) (police department’s broadcast to be on the “lookout” for a suspect provided probable cause); *see also Walker v. State*, 237 Md. 516, 519 (1964) (holding that a phone call and letter from the FBI connecting the defendant with a robbery was “information, coming from a responsible official source, [which] constituted in itself probable cause and reasonable grounds to arrest the appellant”). As a result, the information provided on the ICE detainer may provide probable cause for a local official to extend custody over a detainee in accordance with State-law criminal process.

1. Whether the Information on the ICE Detainer Form is Sufficient to Provide Probable Cause for Continued Detention

The extent to which the information on an ICE detainer form may provide probable cause is complicated by the fact that all of the cases that have addressed the issue have involved the *prior* version of Form I-247 and circumstances where the only box checked was the one indicating that DHS had “[i]nitiating an investigation to determine whether this person is subject to removal from the United States.” Under those circumstances, the courts have had little difficulty concluding that the fact that a federal “investigation” was pending, by itself, did not constitute probable cause that the detainee had committed a crime. *See, e.g., Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at

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*32-33; *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084, at *17 (D.R.I. Feb. 12, 2014); see also *Arizona v. United States*, 132 S. Ct. at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”).

It is less clear whether an ICE detainer that has any of the other boxes checked—those that indicate that DHS has initiated “removal proceedings” and served a Notice to Appear or charging document, has “[s]erved a warrant of arrest for removal proceedings,” or otherwise has “[o]btained an order of deportation or removal”—would provide probable cause for continued detention of the subject. Some of the courts holding that the pendency of a federal immigration investigation was not enough to justify a local arrest went on to note the fact that these other boxes had *not* been checked in the cases before them, which suggests that a different outcome might follow if those boxes had been checked. For example, in *Miranda-Olivares*, the court observed that the second, third, and fourth boxes on the Form I-247 had not been checked, 2014 U.S. Dist. LEXIS 50340, at *4 n.2, and that the detainee “was not charged with a federal crime and was not subject to a warrant for arrest or order of removal or deportation by ICE.” *Id.* at *32. Under the circumstances, “it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the [one] box [that had been] checked on the ICE detainer.” *Id.* at *33.

It is my view that the boxes indicating that DHS has “[i]nitiating removal proceedings and served a Notice to Appear or other charging document” or has “[s]erved a warrant of arrest for removal proceedings” are not a sufficient basis on which to detain the subject of the detainer. The Supreme Court, in *Arizona v. United States*, made clear that, “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States.” 132 S. Ct. at 2505. As a result, “[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” *Id.* The same is true with respect to the issuance of a Notice to Appear: “The form does not authorize an arrest.” *Id.* Finally, even the issuance of a warrant for removal proceedings is likely not enough. Although federal law authorizes the issuance of a warrant “if an alien is ordered removed after a hearing,” *Arizona v. United States*, 132 S. Ct. at 2505 (citing 8 C.F.R. § 241.2(a)(1)), the underlying infraction—being in the country illegally—is typically a *civil* infraction. Local officials may make arrests based on civil infractions of federal immigration law only when they have been trained and “deputized” to perform federal immigration functions pursuant to an agreement with DHS under 8 U.S.C. § 1357(g)(1). See *Santos v. Frederick County Bd. of Comm’rs*, 725 F.3d 451, 463-64 (4th Cir. 2013). In the absence of such an agreement, local officials likely may

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only “investigate, detain, and arrest individuals for *criminal* violations of federal immigration law.” *Id.* at 464 (emphasis in original).⁷

The last box—indicating that DHS has “[o]btained an order of deportation or removal”—is a closer call. In *Santos*, the Fourth Circuit suggested strongly that an active, “outstanding ICE warrant for ‘immediate deportation’” would have been sufficient to justify an arrest if the local officer had learned that the warrant was active *before* he had made the arrest. 725 F.3d at 466. Although the local officer’s subsequent discovery of the active warrant did not “cleanse the unlawful seizure,” *id.*, the implication of the court’s analysis is that the arrest would have been constitutional had the local officer acted *after* having learned of the active warrant. Still, the Fourth Circuit did not have before it an “order of deportation or removal,” and did not hold that such an order—which, after all, is the result of a *civil* proceeding—would suffice to justify an arrest by a local officer. In the absence of any case law holding that a local officer is authorized to make an arrest of the basis of an order of deportation or removal, I cannot say that that course of action would not give rise to potential liability.

2. The New ICE Detainer Form

I also see significant questions about the extent to which the *new* ICE detainer form provides probable cause when the box is checked indicating that ICE has “reason to

⁷ There are some grounds to believe that another provision of federal law, 8 U.S.C. § 1357(g)(10), might provide authority for local officials to arrest aliens for civil immigration violations when requested to do so by federal immigration officials. That provision states that the absence of a federal-state agreement under subsection (g)(1) does not impair a local official’s authority to “cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” Although the Supreme Court has made clear that this provision does not give local officials the authority to make a “unilateral decision” to arrest an alien for removability or other civil offenses, *see Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012), the Fourth Circuit in *Santos* has suggested that “direction or authorization by federal officials” might provide such authority. *See* 725 F.3d at 466 (stating that “*Arizona v. United States* makes clear that under Section 1357(g)(10) local law enforcement officers cannot arrest aliens for civil immigration violations absent, at a minimum, direction or authorization by federal officials”). The Fourth Circuit did not have occasion to address whether an ICE detainer might provide the necessary federal “direction or authorization,” but I cannot rule out the possibility that subsequent decisions within the Fourth Circuit might conclude that an ICE detainer, if supported by probable cause, provides sufficient authority for local officials to arrest someone for *civil* immigration violations. However, in the absence of existing case law so concluding, I cannot advise you that you have the authority to make arrests based on civil immigration violations.

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believe the individual is an alien subject to removal from the United States” by virtue of his having been charged with or convicted of certain crimes, or having committed immigration fraud, or because he “poses a significant risk to national security, border security, or public safety.” First of all, that ICE has a “reason to believe” that a detainee has committed crimes does not necessarily give local law enforcement officials “probable cause” to believe the same. Given the talismanic significance of “probable cause,” it would seem meaningful—if not dispositive—that the current Form I-247 does not use the term.⁸ Second, it is not clear from the form whether the official completing it has “reason to believe” that the subject is an “alien,” is “subject to removal,” or has committed one of the acts described in the check-boxes that follow. This ambiguity is significant because a local official who makes a warrantless arrest bears the burden of establishing the “affirmative evidence” that justified the arrest. *Santos*, 725 F.3d at 467. When that evidence is ambiguous, “the seizure violates the Fourth Amendment.” *Id.* As a result, I do not believe that any of the information provided on the form, by itself, provides probable cause to detain the subject of the detainer. If you wish to assist the federal government in its efforts in this area, I recommend that you contact ICE to obtain additional information that might establish probable cause before detaining a subject beyond his or her State-law release date.⁹

⁸ The CRS Report appears to equate the two standards, stating that “[r]eason to believe’ an alien is in the United States in violation of immigration law has generally been construed to mean that there is probable cause to believe that the alien is in the country in violation of the law.” CRS Report at 22. The cases the CRS Report cites, however, address the meaning of the “has reason to believe” standard in statutory provisions that authorize the warrantless arrest of undocumented aliens. *See, e.g., Tejada-Mata v. INS*, 626 F.2d 721, 724-25 (9th Cir. 1980) (stating that the phrase “has reason to believe” in 8 U.S.C. § 287(a)(2) “has been equated with the constitutional requirement of probable cause”). These cases interpret the statutory language to determine what is *required* of ICE officials as a matter of law. They do not stand for the factual proposition that whenever an ICE official uses the phrase “reason to believe” he actually means “probable cause.”

⁹ I also recommend that you regularize the process of clarifying the grounds on which ICE issued the detainer such that only a limited number of officers are responsible for making the inquiry. This will help those officers develop expertise in the subject matter and ensure that probable cause determinations are informed and consistent. And, if possible, I would recommend that you ask ICE to provide the additional information in writing, either by re-faxing the detainer form with additional information supplied or by providing the documentation supporting the detainer form.

Some of the boxes set forth in the ICE detainer form would provide a basis for further detention if a local official were to contact ICE and obtain information establishing probable cause. Those boxes are:

- The detainee “has illegally re-entered the country after a previous removal or return.” Pursuant to 8 U.S.C. § 1326, any alien who “has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter . . . enters, attempts to enter, or is at any time found in, the United States,” with few exceptions, is subject to criminal fines and imprisonment. Because illegal re-entry is a crime, this box, if checked and supported by probable cause, might provide a basis for further detention.
- The detainee “has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud.” Because immigration fraud is a crime under 18 U.S.C. § 1546, the information provided by this box, when checked and supported by probable cause, might also allow for further detention. *See Santos*, 725 F.3d at 466 (describing *United States v. Guijon-Ortiz*, 660 F.3d 757, 763 n.3 (4th Cir. 2011), as a case in which an arrest was proper because the local officer had “reasonable suspicion that the defendant violated a criminal provision of federal immigration law—knowingly using a false or fraudulent immigration identification card in violation of 18 U.S.C. § 1546(a)”).
- The detainee “has been convicted of illegal entry pursuant to 8 U.S.C. § 1325.” Section 1325 makes it a crime to “enter[] or attempt[] to enter the United States” either at “any time or place other than as designated by immigration officers,” by “eluding” inspection officers, or by willful “representation or . . . concealment of a material fact.” However, the mere fact that someone has previously been convicted of a crime does not provide probable cause to believe he or she has committed a *new* crime. Assuming that this box does not refer to a *prior* conviction—as do some of the other boxes—I think it could provide a basis for detention if based on probable cause.

Other boxes include within them criminal activity that could potentially qualify as a basis for further detention but, because they also include activity that would not so qualify, the local official would have to contact ICE about both the existence of probable cause and the specific grounds for removal:

- The detainee “has a prior a felony conviction or has been charged with a felony offense.” This box does not provide sufficient information to conclude that the subject has committed a new crime. Although the fact that someone has been charged with a crime may well provide probable cause to arrest, the fact that someone has a prior felony conviction does not. Given that the form does not specify on which basis the detainer is issued, local officials may not rely it as the sole grounds on which to detain the subject of the detainer.
- The detainee “has three or more prior misdemeanor convictions.” As discussed above, the fact that an individual has prior convictions—for misdemeanors or felonies—does not provide probable cause to believe that he or she has committed a new crime. As a result, local officials may not rely on this as the sole grounds on which to detain the subject of the detainer.
- The detainee “has a prior misdemeanor conviction or has been charged with a misdemeanor for an offense that involves violence, threats, or assaults; sexual abuse or exploitation; driving under the influence of alcohol or a controlled substance; unlawful flight from the scene of an accident; the unlawful possession or use of a firearm or other deadly weapon, the distribution or trafficking of a controlled substance; or other significant threat to public safety.” This information suffers from the same defects as the first of this group discussed above: It does not specify whether the subject of the detainer is wanted for a *new* crime or simply because he or she has a prior conviction.

Finally, the last two boxes do not, on their face, provide any basis for the continued detention of the subject. As a result, any grounds for an arrest would require additional information from ICE:

- The detainee “otherwise poses a significant risk to national security, border security, or public safety.” Inasmuch as it is not a crime to pose a “risk” to any of these interests, the mere fact that this box is checked would not provide probable cause to detain the subject of a detainer. However, guidance issued by ICE indicates that this category of detainees covers circumstances that could justify a custodial arrest (*e.g.*, the detainee is the subject of an outstanding felony arrest warrant) and those that probably could not (*e.g.*, the detainer “is issued in furtherance of an ongoing felony criminal or national security investigation”). See John Morton, Director, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems, at 2 n.4 (Dec. 21, 2012), available at www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf (last visited

Aug. 12, 2014). Before detaining someone because this box has been checked, a local official should contact ICE to ascertain whether the local official has probable cause to believe that the subject is engaged in criminal activity.

- ICE seeks the detainee for “other” reasons. Again, depending on what information is provided by way of specifics, this box could provide information sufficient to give the local officer probable cause to detain.

In sum, whether local law enforcement has probable cause to detain an individual beyond his or her State release date will depend on the detainee’s circumstances. I can safely say that an ICE detainer issued solely on the grounds that DHS has “[i]nitiating an investigation” will not suffice by itself. I also believe that a detainer issued on the grounds that DHS has initiated “removal proceedings” or has “[o]btained an order of deportation or removal,” probably would not provide probable cause to support continued detention of the subject. By contrast, a local officer may detain the subject of an ICE detainer if the information on the detainer form provides the officer with probable cause to believe that the subject has committed a criminal violation of federal immigration law or some other crime. Between these two ends of the spectrum, however, lie various scenarios that may or may not form the basis of a valid arrest. I have tried to identify those portions of the detainer form that are most likely to provide probable cause, but, in the absence of any case law addressing the effect of the new Form I-247, I cannot say that local law enforcement officials do not run the risk of liability when honoring an immigration detainer that has *any* of these boxes checked. I turn next to whether compliance with an ICE detainer provides local law enforcement officials with a defense to liability for such a violation.

B. Whether Compliance with ICE Detainers is Mandatory

Whether local law enforcement agencies are exposed to liability for detaining an individual in response to an immigration detainer hinges to some extent on whether immigration detainers are mandatory, or whether local law enforcement officials can make their own decisions about how to respond. *See, e.g., Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at *10-12. Every court holding that immigration detainers are *not* mandatory has found local law enforcement potentially liable for any violation of constitutional rights that occurred as a result of choosing to detain individuals past their State release dates. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014). Conversely, every court holding that ICE detainers *are* mandatory has concluded that local law enforcement officials are not liable for complying with the detainers. *See, e.g., Ramirez-Mendoza v. Maury County*, 2013 U.S. Dist. LEXIS 10533, at *20 (M.D. Tenn.

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Jan. 25, 2013). There is disagreement, however, about whether immigration detainers are voluntary or mandatory.

The disagreement among the courts arises from an ambiguity in the regulation that authorizes ICE to issue the detainers. Although the regulation states that a law enforcement agency receiving an immigration detainer “shall maintain custody of the alien for a period not to exceed 48 hours,” 8 C.F.R. § 287.7(d) (emphasis added), it also states that “[t]he detainer is a *request* that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.” 8 C.F.R. § 287.7(a) (emphasis added). The courts that conclude that detainers are mandatory emphasize the fact that the regulation states that local agencies “shall” honor the detainers. For example, in *Rios-Quiroz v. Williamson County*, 2012 U.S. Dist. LEXIS 128237 (M.D. Tenn. Sept. 10, 2012), the court reasoned that “[t]he subsection says ‘shall maintain,’ which indicates an obligation to maintain custody.” *Id.* at *11; see also *Ramirez-Mendoza*, 2013 U.S. Dist. LEXIS 10533, at *20 (same); *Davila v. N. Reg’l Joint Police Bd.*, No. 13-cv-000702013, U.S. Dist. LEXIS 150672, at *47-48 (W.D. Pa. Oct. 21, 2013) (same).

The courts that have concluded that compliance with the detainers is voluntary emphasize the fact that the detainers, and the regulation authorizing them, specify that the detainers are “requests.” For example, in *Galarza*—the only federal appellate court to address the issue—the court interpreted the “shall maintain” language in § 287.7(d) in the context of the regulation as a whole and reasoned that “it is hard to read the use of the word ‘shall’ in the timing section”—*i.e.*, the section limiting the detention to 48 hours—“to change the nature of the entire regulation.” 745 F.3d at 640. The court also noted that policy statements made by ICE and its precursor INS also construed immigration detainers as requests. *Id.* at 641.¹⁰ Finally, the court stated that interpreting ICE detainers as mandatory would raise Tenth Amendment concerns because “the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.” *Id.* at 643. The court therefore concluded that the defendant county was “free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of [the plaintiff’s] constitutional

¹⁰ For example, “[i]n 1994, when responding to comments provided in the process of administrative ‘Notice and Comment’ before a ‘Final Rule’ change amending 8 C.F.R. § 287.7, the INS wrote that, ‘A detainer is the mechanism by which the Service requests that the detaining agency notify the Service of the date, time, or place of release of an alien who has been arrested or convicted under federal, state, or local law.’” *Galarza*, 745 F.3d at 641 (quoting 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994)).

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rights.”¹¹ *Id.* at 645. Other courts have similarly concluded that ICE detainers are not mandatory and do not insulate local law enforcement agencies from liability for constitutional violations that may result from the continued detentions. *See Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084, at *50-51 (D.R.I. Feb. 12, 2014); *Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at *23-24, *Villars v. Kubiowski*, 2014 U.S. Dist. LEXIS 61697, at *18-20 (N.D. Ill. May 5, 2014).

Although the matter is not free from doubt, the clear trend of the cases—including the only appellate court decision—supports the conclusion that ICE detainers are not mandatory. This is consistent with the prior advice of this office. *See* Letter from Kathryn M. Rowe to Sen. Victor R. Ramirez (Oct. 31, 2013). Because the detainers are not mandatory, local law enforcement officials’ reliance on them will not provide a blanket defense to liability for detaining someone beyond the point at which, under State law, he or she ought to have been released. Rather, the extent of a local official’s liability for an extended detention will depend on whether the information that ICE provides on the Form I-247 gives local officials independent grounds on which to hold the subject. Information clearly indicating that the subject of the detainer has committed a crime might, if supported by probable cause, provide grounds for continued detention, while those boxes that indicate only civil infractions or prior convictions likely do not. But because no court has yet addressed how the various bases for detention affect the liability of local law enforcement officials, the only sure way to avoid such liability is not to detain individuals beyond their regularly-scheduled release date when the sole basis for doing so is the receipt of an ICE detainer.

Although this is not an opinion of the Attorney General, I nevertheless hope that you find it helpful.

Sincerely,



Adam D. Snyder
Chief Counsel, Opinions & Advice

cc: Jason Levine, Asst. Atty. Gen.

¹¹ *Galarza* was a 2-1 decision, with the dissenting judge expressing her “deep[] concern[]” that the court was resolving important issues of immigration law without briefing from the United States. 745 F.3d at 645-46 (Barry, J. dissenting). The dissenting judge also expressed concern that giving states and localities discretion as to whether to honor immigration detainers could put them in the difficult position of having to “determine if, in the first instance, ICE had probable cause to issue the detainer.” *Id.* at 646.

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:

- Determined that there is reason to believe the individual is an alien subject to removal from the United States. The individual (*check all that apply*):
 - has a prior a felony conviction or has been charged with a felony offense;
 - has three or more prior misdemeanor convictions;
 - has a prior misdemeanor conviction or has been charged with a misdemeanor for an offense that involves violence, threats, or assaults; sexual abuse or exploitation; driving under the influence of alcohol or a controlled substance; unlawful flight from the scene of an accident; the unlawful possession or use of a firearm or other deadly weapon, the distribution or trafficking of a controlled substance; or other significant threat to public safety;
 - has been convicted of illegal entry pursuant to 8 U.S.C. § 1325;
 - has illegally re-entered the country after a previous removal or return;
 - has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud;
 - otherwise poses a significant risk to national security, border security, or public safety; and/or
 - other (specify): _____
- 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.

This action does not limit your discretion to make decisions related to this person's custody classification, work, quarter assignments, or other matters. DHS discourages dismissing criminal charges based on the existence of a detainer.

IT IS REQUESTED THAT YOU:

- Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request derives from federal regulation 8 C.F.R. § 287.7. For purposes of this immigration detainer, **you are not authorized to hold the subject beyond these 48 hours**. As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a DHS Official at these numbers, please contact the ICE Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020
- Provide a copy to the subject of this detainer.
- Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.
- Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.
- Consider this request for a detainer operative only upon the subject's conviction.
- Cancel the detainer previously placed by this Office on _____ (date).

(Name and title of Immigration Officer)

(Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS using the envelope enclosed for your convenience or by faxing a copy to _____. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking/Inmate #: _____ Latest criminal charge/conviction: _____ (date) Estimated release: _____ (date)

Last criminal charge/conviction: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

(Name and title of Officer)

(Signature of Officer)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice from DHS informing law enforcement agencies that DHS intends to assume custody of you after you otherwise would be released from custody. DHS has requested that the law enforcement agency which is currently detaining you maintain custody of you for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) beyond the time when you would have been released by the state or local law enforcement authorities based on your criminal charges or convictions. **If DHS does not take you into custody during that additional 48 hour period, not counting weekends or holidays, you should contact your custodian (the law enforcement agency or other entity that is holding you now) to inquire about your release from state or local custody. If you have a complaint regarding this detainer or related to violations of civil rights or civil liberties connected to DHS activities, please contact the ICE Joint Intake Center at 1-877-2INTAKE (877-246-8253). If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) de EE. UU. ha emitido una orden de detención migratoria en su contra. Mediante esta orden, se notifica a los organismos policiales que el DHS pretende arrestarlo cuando usted cumpla su reclusión actual. El DHS ha solicitado que el organismo policial local o estatal a cargo de su actual detención lo mantenga en custodia por un periodo no mayor a 48 horas (excluyendo sábados, domingos y días festivos) tras el cese de su reclusión penal. **Si el DHS no procede con su arresto migratorio durante este periodo adicional de 48 horas, excluyendo los fines de semana o días festivos, usted debe comunicarse con la autoridad estatal o local que lo tiene detenido (el organismo policial u otra entidad a cargo de su custodia actual) para obtener mayores detalles sobre el cese de su reclusión. Si tiene alguna queja que se relacione con esta orden de detención o con posibles infracciones a los derechos o libertades civiles en conexión con las actividades del DHS, comuníquese con el Joint Intake Center (Centro de Admisión) del ICE (Servicio de Inmigración y Control de Aduanas) llamando al 1-877-2INTAKE (877-246-8253). Si usted cree que es ciudadano de los Estados Unidos o que ha sido víctima de un delito, infórmeselo al DHS llamando al Centro de Apoyo a los Organismos Policiales (Law Enforcement Support Center) del ICE, teléfono (855) 448-6903 (llamada gratuita).**

Avis au détenu

Le département de la Sécurité Intérieure [Department of Homeland Security (DHS)] a émis, à votre rencontre, un ordre d'incarcération pour des raisons d'immigration. Un ordre d'incarcération pour des raisons d'immigration est un avis du DHS informant les agences des forces de l'ordre que le DHS a l'intention de vous détenir après la date normale de votre remise en liberté. Le DHS a requis que l'agence des forces de l'ordre, qui vous détient actuellement, vous garde en détention pour une période maximum de 48 heures (excluant les samedis, dimanches et jours fériés) au-delà de la période à la fin de laquelle vous auriez été remis en liberté par les autorités policières de l'État ou locales en fonction des inculpations ou condamnations pénales à votre rencontre. **Si le DHS ne vous détient pas durant cette période supplémentaire de 48 heures, sans compter les fins de semaines et les jours fériés, vous devez contacter votre gardien (l'agence des forces de l'ordre qui vous détient actuellement) pour vous renseigner à propos de votre libération par l'État ou l'autorité locale. Si vous avez une plainte à formuler au sujet de cet ordre d'incarcération ou en rapport avec des violations de vos droits civils liées à des activités du DHS, veuillez contacter le centre commun d'admissions du Service de l'Immigration et des Douanes [ICE - Immigration and Customs Enforcement] [ICE Joint Intake Center] au 1-877-2INTAKE (877-246-8253). Si vous croyez être un citoyen des États-Unis ou la victime d'un crime, veuillez en aviser le DHS en appelant le centre d'assistance des forces de l'ordre de l'ICE [ICE Law Enforcement Support Center] au numéro gratuit (855) 448-6903.**

AVISO AO DETENTO

O Departamento de Segurança Nacional (DHS) emitiu uma ordem de custódia migratória em seu nome. Este documento é um aviso enviado às agências de imposição da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja liberado. O DHS pediu que a agência de imposição da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas (excluindo-se sábados, domingos e feriados) após o período em que seria liberado pelas autoridades estaduais ou municipais de imposição da lei, de acordo com as respectivas acusações e penas criminais. **Se o DHS não assumir a sua custódia durante essas 48 horas adicionais, excluindo-se os fins de semana e feriados, você deverá entrar em contato com o seu custodiante (a agência de imposição da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua liberação da custódia estadual ou municipal. Caso você tenha alguma reclamação a fazer sobre esta ordem de custódia migratória ou relacionada a violações dos seus direitos ou liberdades civis decorrente das atividades do DHS, entre em contato com o Centro de Entrada Conjunta da Agência de Controle de Imigração e Alfândega (ICE) pelo telefone 1-877-246-8253. Se você acreditar que é um cidadão dos EUA ou está sendo vítima de um crime, informe o DHS ligando para o Centro de Apoio à Imposição da Lei do ICE pelo telefone de ligação gratuita (855) 448-6903**

THÔNG BÁO CHO NGƯỜI BỊ GIAM GIỮ

Bộ Quốc Phòng (DHS) đã có lệnh giam giữ quý vị vì lý do di trú. Lệnh giam giữ vì lý do di trú là thông báo của DHS cho các cơ quan thi hành luật pháp là DHS có ý định tạm giữ quý vị sau khi quý vị được thả. DHS đã yêu cầu cơ quan thi hành luật pháp hiện đang giữ quý vị phải tiếp tục tạm giữ quý vị trong không quá 48 giờ đồng hồ (không kể thứ Bảy, Chủ nhật, và các ngày nghỉ lễ) ngoài thời gian mà lẽ ra quý vị sẽ được cơ quan thi hành luật pháp của tiểu bang hoặc địa phương thả ra dựa trên các bản án và tội hình sự của quý vị. Nếu DHS không tạm giam quý vị trong thời gian 48 giờ bổ sung đó, không tính các ngày cuối tuần hoặc ngày lễ, quý vị nên liên lạc với bên giam giữ quý vị (cơ quan thi hành luật pháp hoặc tổ chức khác hiện đang giam giữ quý vị) để hỏi về việc cơ quan địa phương hoặc liên bang thả quý vị ra. Nếu quý vị có khiếu nại về lệnh giam giữ này hoặc liên quan tới các trường hợp vi phạm dân quyền hoặc tự do công dân liên quan tới các hoạt động của DHS, vui lòng liên lạc với ICE Joint Intake Center tại số 1-877-2INTAKE (877-246-8253). Nếu quý vị tin rằng quý vị là công dân Hoa Kỳ hoặc nạn nhân tội phạm, vui lòng báo cho DHS biết bằng cách gọi ICE Law Enforcement Support Center tại số điện thoại miễn phí (855) 448-6903.

对被拘留者的通告

美国国土安全部 (DHS) 已发出对你的移民监禁令。移民监禁令是美国国土安全部用来通告执法当局, 表示美国国土安全部意图在你可能从当前的拘留被释放以后继续拘留你的通知单。美国国土安全部已经向当前拘留你的执法当局要求, 根据对你的刑事起诉或判罪的基础, 在本当由州或地方执法当局释放你时, 继续拘留你, 为期不超过 48 小时 (星期六、星期天和假日除外)。如果美国国土安全部未在不计周末或假日的额外 48 小时期限内将你拘留, 你应该联系你的监管单位 (现在拘留你的执法当局或其他单位), 询问关于你从州或地方执法单位被释放的事宜。如果你对于这项拘留或关于美国国土安全部的行动所涉及的违反民权或公民自由权有任何投诉, 请联系美国移民及海关执法局联合接纳中心 (ICE Joint Intake Center), 电话号码是 1-877-2INTAKE (877-246-8253)。如果你相信你是美国公民或犯罪被害人, 请联系美国移民及海关执法局的执法支援中心 (ICE Law Enforcement Support Center), 告知美国国土安全部。该执法支援中心的免费电话号码是 (855) 448-6903。