



June 25, 2014



RE: Immigration Detainers

Dear Sir or Madam:

On behalf of the ACLU OF KENTUCKY, we write to notify you of the possible constitutional rights violations (and civil liability) that may result from detaining individuals based upon U.S. Immigrations and Customs Enforcement (“ICE”) detainers (Form I-247). Specifically, recent federal court decisions have clarified that ICE detainer requests are non-mandatory requests by the federal government that do not compel local officials to act.¹ Thus, if local officials choose to honor ICE detainer requests by detaining individuals based solely upon such requests (*e.g.*, when an individual’s sentence is complete or when an individual posts bond on the underlying charge), local officials assume liability for any illegal detentions that may result. This is particularly important given that a federal court recently concluded that ICE detainers *provide no independent legal authority to detain individuals*.² As is more fully explained below, we urge you to revise your policies and procedures to ensure that individuals are not detained solely on the basis of ICE detainers, and we offer our assistance should you and your counsel wish to consult with us in formulating those policies.

¹ *Galarza v. Szalcyk*, 745 F.3d 634, 645 (3rd Cir. Mar. 4, 2014) (“... 8 C.F.R. § 287.7 *does not compel* state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as *requests* to local LEAs.”) (emphasis added). *See also Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *Morales v. Chadbourne*, CA 12-301-M, 2014 WL 554478 *15 (D.R.I. Feb. 12, 2014) (denying Rhode Island Department of Corrections’ motion to dismiss in which RIDOC asserted that it was required to comply with immigration detainers and thus not liable for any unlawful detention that resulted); *Printz v. United States*, 521 U.S. 898, 925-35 (1997) (Tenth Amendment bars the federal government from commanding state officers to do federal business).

² *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

Because ICE detainer requests do not provide independent legal authority to detain an individual, counties that honor them are exposed to liability.

ICE detainers do not provide independent legal authority to justify detaining an individual. Absent probable cause that a person committed a crime, the imprisonment of a person for any amount of time, even 48 hours, raises serious Fourth Amendment concerns. As such, any policy that detains individuals without a judicial finding of probable cause likely violates detainees' fundamental constitutional rights and may give rise to a claim for damages pursuant to 42 U.S.C. §1983.

In *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014), the federal judge found that "the continued detention [pursuant to an immigration detainer] exceeded the scope of the Jail's lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment." The court further held that the ICE detainer on its own merely stated that an investigation was underway and did not amount to probable cause. As such, the detention was unlawful because it violated the Fourth Amendment thus making the county liable for damages. As a result, the court granted the plaintiff's motion for partial summary judgment and ordered a trial to determine the amount of damages.

Implementing a constitutional policy that ensures that individuals are not held in custody under ICE detainers (absent an independent judicial finding of probable cause) will protect your agency from incurring this kind of liability.

Even if ICE detainers provided an independent basis for detention, the detention authority contains strict legal limits.

While the constitutionality of a 48-hour detention pursuant to an ICE detainer is, at best, questionable, a person absolutely may not be detained for more than 48-hours, excluding weekends and federal holidays. *See* C.F.R. § 287.7(d). The new I-247 states clearly in several places that local law enforcement should retain custody for a period *not to exceed 48 hours* (excluding weekends and holidays). If ICE does not take custody within that time period, the detainer automatically lapses and the person *must* be immediately released from custody. There is no exception to this rule; failure to release a prisoner promptly upon the expiration of the 48-hour time period may subject your agency to a habeas corpus action for release from confinement and may further expose the agency to civil liability for false imprisonment. That liability would be incurred *in addition to* any liability that may arise within the 48-hour period in the absence of probable cause.

An individual may post bond on state or local charges even if ICE has issued an immigration detainer. Thus, law enforcement should never tell an individual that bond is not available or inadvisable because of an ICE detainer.

Conclusion

Because of the obvious implications for civil liberties in the Commonwealth, we write to notify you of these developments and request that you review your policies and procedures in light of this recent authority. As noted above, we also offer our services in assisting you with revising your existing policies (or crafting new policies) regarding immigration detainees. Should you decide to accept our offer, you or your counsel may contact the undersigned at the contact information provided.

Thank you in advance for your attention to this very important matter.

Sincerely,

William E. Sharp, Staff Attorney
Enid Trucios-Haynes, Board President
Kate Miller, Program Director
ACLU OF KENTUCKY
315 Guthrie Street, Suite 300
Louisville, KY 40202
(502) 581-9746