



AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA
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Dear Sheriff,

We understand that many local law enforcement agencies in Georgia engage in the practice of detaining individuals based upon “immigration detainers” issued by U.S. Immigration and Customs Enforcement (“ICE”). This practice, exercised without lawful basis for arrest or detention, violates individuals’ basic rights. In addition, section 8 of HB 87—which allows for, but does not require, an inquiry into immigration status—prohibits the consideration of race, color, or national origin.

We urge your local offices to consult with counsel in light of the legal authorities set forth in this letter. If you are currently engaging in unlawful practices, we further urge you to immediately cease and desist. Failure to do so will expose your office to significant liability. Below are some of the ways that Georgia’s local law enforcement detention practices may be violating individuals’ constitutional rights.

Georgia Law Enforcement Agencies Have Ultimate Discretion in Enforcement Practices¹

Local law enforcement is in the best position to determine the allocation of personnel and the safety needs of local communities. It is *not* up to the federal government to demand that Georgia law enforcement arrest or detain anyone in the state. On the contrary, ICE detainers are mere requests. Constitutionally, your local law enforcement offices are shielded and supported by the right to set protocol under the Tenth Amendment, which prohibits federal commandeering of state officers by the federal government. See *Printz v. United States*, 521 U.S. 898, 925-35 (1997). Both procedure and the Constitution provide you with the legal responsibility to determine whether federal ICE “holds” (as they are sometimes referred to) are proper.

You Cannot Treat ICE Detainers As Typical Arrest Warrants

ICE detainers are issued by immigration enforcement officials and do not resemble typical arrest warrants. In fact, an ICE detainer does not even have the force of ICE internal administrative “arrest warrants,” which may be based on suspicion of a civil, not criminal, immigration violation. Compare Form I-200 (Warrant of Arrest) with Form I-247 (Immigration Detainer – Notice of Action). Further, typical arrest warrants provide the safeguards of judicial approval for their issuance, whereas ICE detainers are only issued by a law enforcement agent authorized to do so.

¹ State Departments of Justice are beginning to collaborate with law enforcement to promote stronger statewide discretion to reject the unilateral and unquestioned reliance on ICE detainers. California, for example, is one such state. The California Attorney General recently explained that the “federal government neither indemnifies nor reimburses local law enforcement agencies for complying with immigration detainers. See 8 C.F.R. Section 287.7(e).” See California Department of Justice, “Responsibilities of Local Law Enforcement Agencies under Secure Communities,” <http://www.scribd.com/doc/115637516/Responsibilities-of-Local-Law-Enforcement-Agencies-under-Secure-Communities>.

ICE detainees also differ from criminal detainees, even if they evoke similar notions in name. Criminal detainees pertain to *pending charges* and are subject to extensive procedural and substantive requirements not applied to ICE detainees.² With this in mind, law enforcement departments have issued statements about the problems with ICE detainees, elaborating that they “do not fall within the clear criminal enforcement authority of local police agencies and in fact lay a trap for unwary officers who believe them to be valid criminal warrants or detainees.”³

ICE Detainers Cannot Substitute Probable Cause For Warrantless Arrests

Under the U.S. and Georgia Constitutions, you may not arrest or detain a person without, *at a minimum*, ensuring that you have probable cause to believe that the person has committed a crime. It is a basic right under the Fourth Amendment that law enforcement develop separate and independent probable cause to seek an arrest warrant. Therefore, even if your local law enforcement agency took custody of an individual for a state criminal charge, the individual has the right to post bond or otherwise resolve that charge with the constitutionally-protected assurance that the original custody cannot be a basis for detention. See *Cf. Smith v. State*, 281 Ga. 185, 187 (Ga. 2006).

In addition to the constitutional limitations on your authority to arrest and detain, Official Code of Georgia Annotated § 17-4-20 further restricts the basis on which a law enforcement officer in this state may make warrantless arrests. Mere presence in the United States, even unlawful, is not a crime.⁴ And the detention of an individual on that basis cannot legitimate probable cause for future investigation. Rather, arresting a person on suspicion alone is “foreign to our system.” See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

ICE Detainers Exceed Statutory Authority

Federal statutes only authorize the issuance of an immigration detainer “[i]n the case of an alien who is arrested by a . . . State[] or local law enforcement official for a violation of any law *relating to controlled substances*,” and do not provide for an additional detention period even in such cases. 8 U.S.C. § 1357(d) (emphasis added).⁵ *Accord* Christopher Lasch, *Enforcing The Limits Of The Executive’s Authority To Issue Immigration Detainers*, 34 William Mitchell L. Rev. 164, 186-93 & n.119 (finding that “DHS grossly exceeds the limits of its [statutory] authority to issue detainers”). In contrast, we understand that ICE routinely issues detainers for individuals who have not been arrested for any controlled substances violation. This practice is not authorized by federal statutory law.

ICE Detainer Practices Violate Due Process Rights

Detaining a person on the basis of the arbitrary, unilateral administrative decision reflected in an ICE detainer violates due process rights. The Fifth and Fourteenth Amendments of the United States Constitution impose substantive and procedural limitations on your ability to deprive persons of their

² Criminal detainees require judicial approval. See O.C.G.A. § 42-6-20 (Interstate Agreement on Detainers).

³ See the “Major Cities Chiefs Immigration Committee Recommendations”

http://www.houstontx.gov/police/pdfs/mcc_position.pdf, at 8.

⁴ Congressional Research Service, *Immigration Enforcement Within the United States*, states “Being illegally present in the U.S. has always been a civil, not criminal, violation.” See www.fas.org/sgp/crs/misc/RL33351.pdf, at CRS-8.

⁵ No other provision of the immigration code addresses or authorizes immigration detainers. Instead, Congress has carefully delineated the circumstances under which even ICE agents may make immigration arrests, *see* 8 U.S.C. §§ 1226(a), 1357(a)(2), and has provided state and local police with arrest authority only in particular narrow circumstances, *see* 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c), 1357(g). The use of detainers in non-controlled-substances cases contravenes this statutory scheme.

liberty. See *United States v. Salerno*, 481 U.S. 739, 749-52 (1987) (approving pretrial detention in “narrow circumstances” where suspect is arrested for an “extremely serious” offense and holding that government must demonstrate before a neutral decision-maker in a “full-blown adversary hearing” probable cause and that no release conditions can reasonably assure safety of others).

If you fail to provide concrete evidence showing legitimate and compelling interest for the detention of an individual, you violate due process rights of that person under the U.S. Constitution. It is their right to have the opportunity to contest a detainer – an impossible opportunity if they are denied even notice of issuance of the detainer in the first place. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

ICE Detainers Expire After 48 Hours

Federal government authority restricts the amount of time you may keep an individual in custody under the authority of an ICE “detainer.” Federal regulations from Citizenship and Immigration Services states that “[u]pon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.” See USCIS, Detainer Provisions under §287.7(d).

Holding an individual longer than 48 hours can expose you to additional liability. Such actions would be in violation of the clear language of § 287.7(d).⁶ Litigation on this matter should caution you that local agencies do not have authority to detain an individual exclusively under the authority of I-247 past 48 hours. See, e.g., *Ochoa v. Bass*, 181 P.3d 727, 733 (Okla. Crim. App. 2008) (the court ordered the release of detainees from state custody after 48-hour period of detention after Immigration Detainer lapsed). In May 2011, Jefferson County, Colorado paid \$40,000 to settle a lawsuit against Sheriff Ted Mink filed in connection with the wrongful detention of an immigrant for 47 days on the purported authority of an ICE detainer. See *Quezada v. Mink*, No. 10-CV-00879; see also <http://aclu-co.org/news/jeffco-sheriff-to-pay-40k-to-settle-claim-of-illegally-imprisoning-colorado-resident>.

Section 8 of H.B. 87 Prohibits Consideration of Race, Color, or National Origin

Section 8 of H.B. 87 would enable Georgia law enforcement to investigate the immigration status of an individual when the officer has probable cause to believe the individual has committed a crime.

Based on the decision of the Supreme Court in *Arizona v. United States*, 132 S.Ct. 2492 (2012), the Eleventh Circuit recently ruled on challenges to Sections 7 and 8 of the Illegal Immigration Reform and Enforcement Act of 2011. The court held that if probable cause for a crime exists, the officer *may* conduct an inquiry into an individual’s immigration status. However, initiating an inquiry is not mandatory. See *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 2012 WL 3553612 (2012).

You should be aware of three areas of limitation for officers who may investigate the immigration status of an individual. These limitations are significant, as the recent circuit ruling explicitly stated there is no

⁶ ICE detainer forms state in bold lettering, “You are not authorized to hold the subject beyond these 48 hours.” See DHS Form I-247, “Immigration Detainer – Notice of Action,” <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

barrier to future challenges to the law if it is implemented impermissibly.⁷ Law enforcement officers must understand:

- First, the production of certain identification creates the presumption of lawful presence and the inquiry can go no further.
- Second, officers *cannot* consider race, color, or national origin when implementing this provision.
- Third, officers must implement the provision in a manner consistent with federal laws governing immigration and civil rights.

Conclusions

For these reasons, if your office is currently enforcing immigration detainer requests in a way that violates state law or the U.S. Constitution, it should immediately cease doing so and ensure compliance with constraints provided in the law itself as well as avoid unconstitutional applications.

As I am sure you are aware, the statutory protections and assurances under 42 U.S.C. § 1983 provide ample means for individuals who have been unlawfully arrested or detained to seek recovery from your municipality and individual law enforcement officers.

If you wish to discuss this matter further, please contact me at ashahshahani@acluga.org, or 770-313-8111.

Sincerely,



Azadeh N. Shahshahani, Esq.
National Security/Immigrants' Rights Project Director

⁷ Referencing *Arizona v United States*, the 11th Circuit noted that there are “potential problems with a state statute that would permit detention ‘solely to verify [an individual’s] immigration status’” amounting to prolonged and unconstitutional detention.